UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40614**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Keegan L. LOVELL	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 22 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 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 23d day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **28 September 2024**.

Each request for an enlargement of time will be considered on its merits. 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.

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 (FIRST)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614
	)	22 July 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, Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for the first enlargement of time to file his assignments of error. SrA Lovell requests an enlargement for a period of 60 days, which will end on **28 September 2024**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, SrA Lovell respectfully requests that 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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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 22 July 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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23 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 23 July 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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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. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614
	)	18 September 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for a second enlargement of time to file his assignments of error. SrA Lovell requests an enlargement for a period of 30 days, which will end on **28 October 2024**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 13 March 2024, consistent with his pleas, a general court-martial composed of a military judge sitting alone convicted SrA Lovell of possessing, viewing, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and soliciting another to distribute child pornography, in violation of Article 82, UCMJ, 10 U.S.C. § 882.[1] R. at 14, 65; Charge Sheet. The military judge sentenced him to 30 months' confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at 84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

[1] All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

Through no fault of SrA Lovell, 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. SrA Lovell was (1) advised of his right to a timely appeal, (2) updated on the status of undersigned counsel's progress on his case, and (3) advised of undersigned counsel's request for an enlargement of time. He asserts his right to a timely appeal, but recognizing undersigned counsel's workload, he (4) agrees with the request for an enlargement of time.

WHEREFORE, SrA Lovell respectfully requests that 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 18 September 2024.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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(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 18 September 2024.

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614
	)	17 October 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for a third enlargement of time to file his assignments of error. SrA Lovell requests an enlargement for a period of 30 days, which will end on **27 November 2024**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 13 March 2024, consistent with his pleas, a general court-martial composed of a military judge sitting alone convicted SrA Lovell of possessing, viewing, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and soliciting another to distribute child pornography, in violation of Article 82, UCMJ, 10 U.S.C. § 882.[1] R. at 14, 65; Charge Sheet. The military judge sentenced him to 30 months' confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at 84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

[1] All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

Through no fault of SrA Lovell, 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. SrA Lovell was (1) advised of his right to a timely appeal, (2) updated on the status of undersigned counsel's progress on his case, and (3) advised of undersigned counsel's request for an enlargement of time. He asserts his right to a timely appeal, but recognizing undersigned counsel's workload, he (4) agrees with the request for an enlargement of time.

WHEREFORE, SrA Lovell respectfully requests 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 17 October 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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21 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 21 October 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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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. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614
	)	13 November 2024

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

Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for a fourth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(2) and 23.3(m)(6). SrA Lovell requests an enlargement for a period of 30 days, which will end on **27 December 2024**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 166 days have elapsed. On the date requested, 210 days will have elapsed.

On 13 March 2024, consistent with his pleas, a general court-martial composed of a military judge sitting alone convicted SrA Lovell of possessing, viewing, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and soliciting another to distribute child pornography, in violation of Article 82, UCMJ, 10 U.S.C. § 882. R. at 14, 65; Charge Sheet. The military judge sentenced him to 30 months' confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at 84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

Through no fault of SrA Lovell, 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. SrA Lovell was (1) advised of his right to a timely appeal, (2) updated on the status of undersigned counsel's progress on his case, and (3) advised of undersigned counsel's request for an enlargement of time. He asserts his right to a timely appeal, but recognizing undersigned counsel's workload, he (4) agrees with the request for an enlargement of time.

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. Seven cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial includes 19 prosecution exhibits, 4 defense exhibits, 65 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 14 December 2023. Undersigned counsel is reviewing and identifying potential issues. *United States v. George*, *Jr.*, discussed below, will interrupt undersigned counsel's completion of the appellant's assignments of error from 14 November 2024-10 December 2024.
2. *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – 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.

3. *United States v. Dawson*, No. ACM 24041 – The record of trial includes 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, 41 appellate exhibits, and 761 transcript pages. The appellant is not confined. Undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023. This Court and undersigned counsel received the verbatim transcript on 9 August 2024.
4. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.
5. *United States v. Blair*, No. ACM S32778 – The record of trial includes 7 prosecution exhibits, 22 defense exhibits, 6 appellate exhibits, and 187 transcript pages. The appellant is not confined, and his case was docketed on 22 April 2024.
6. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024.
7. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.

In addition to the above-listed priorities, undersigned counsel anticipates filing CAAF petitions and supplements in three cases: *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).

WHEREFORE, SrA Lovell respectfully requests 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 13 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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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. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614
	)	16 December 2024

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

Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for a fifth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Lovell requests an enlargement for a period of 30 days, which will end on **26 January 2025**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 13 March 2024, consistent with his pleas, a general court-martial composed of a military judge sitting alone convicted SrA Lovell of possessing, viewing, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and soliciting another to distribute child pornography, in violation of Article 82, UCMJ, 10 U.S.C. § 882. R. at 14, 65; Charge Sheet. The military judge sentenced him to 30 months' confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at 84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

Through no fault of SrA Lovell, 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. SrA Lovell was (1) advised of his right to a timely appeal, (2) updated on the status of undersigned counsel's progress on his case, and (3) advised of undersigned counsel's request for an enlargement of time. He asserts his right to a timely appeal, but recognizing undersigned counsel's workload, he (4) agrees with the request for an enlargement of time.

Undersigned counsel also provides the following information: undersigned counsel currently represents 22 clients and is presently assigned 10 cases pending initial brief before this Court. Five cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial includes 19 prosecution exhibits, 4 defense exhibits, 65 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 14 December 2023. Undersigned counsel is reviewing the appellant's record and anticipates filing the appellant's brief by 7 January 2025.
2. *United States v. Dawson*, No. ACM 24041 – The record of trial includes 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, 41 appellate exhibits, and 761 transcript pages. The appellant is not confined. Undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023. This Court and undersigned counsel received the verbatim transcript on 9 August 2024.
3. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total,

the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.

4. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024.

5. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.

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

Respectfully submitted,

[redacted]

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 16 December 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
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17 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 December 2024.

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614
	)	15 January 2025

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

Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for a sixth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Lovell requests an enlargement for a period of 30 days, which will end on **25 February 2025**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 229 days have elapsed. On the date requested, 270 days will have elapsed.

On 13 March 2024, consistent with his pleas, a general court-martial composed of a military judge sitting alone convicted SrA Lovell of possessing, viewing, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and soliciting another to distribute child pornography, in violation of Article 82, UCMJ, 10 U.S.C. § 882. R. at 14, 65; Charge Sheet. The military judge sentenced him to 30 months' confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at 84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

Through no fault of SrA Lovell, 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. SrA Lovell was (1) advised of his right to a timely appeal, (2) updated on the status of undersigned counsel's progress on his case, and (3) advised of undersigned counsel's request for an enlargement of time. He asserts his right to a timely appeal, but recognizing undersigned counsel's workload, he (4) agrees with the request for an enlargement of time.

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. Four cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial includes 19 prosecution exhibits, 4 defense exhibits, 65 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 14 December 2023. Undersigned counsel requested and received a 10-day enlargement of time to allow for sufficient time to complete the appellant's brief (given the complexity of the case and issues) and receive required peer and leadership reviews. Undersigned counsel is finalizing the appellant's brief, which is due 17 January 2025.
2. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.
3. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and

1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024.

4. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.

WHEREFORE, SrA Lovell respectfully requests that 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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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 15 January 2025.

Respectfully submitted,

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15 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

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

[redacted]
JO USAF
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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 15 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH) – OUT OF TIME**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force,	)	No. ACM 40614
Appellant.	)	19 February 2025

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

Senior Airman (SrA) Keegan L. Lovell, Appellant, hereby moves for a seventh enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Lovell requests an enlargement for a period of 30 days, which will end on **27 March 2025**. The record of trial was docketed with this Court on 31 May 2024. From the date of docketing to the present date, 264 days have elapsed. On the date requested, 300 days will have elapsed. This motion being filed one day out of time was an unintentional oversight by undersigned counsel. This oversight was counsel's fault alone and due to no fault of Appellant. Because this error was not due to Appellant, there is good cause to grant this enlargement of time out of time.

On 13 March 2024, consistent with his pleas, a general court-martial composed of a military judge sitting alone convicted SrA Lovell of possessing, viewing, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and soliciting another to distribute child pornography, in violation of Article 82, UCMJ, 10 U.S.C. § 882. R. at 14, 65; Charge Sheet. The military judge sentenced him to 30 months' confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at

84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Lovell was (1) advised of his right to a timely appeal, (2) updated on the status of undersigned counsel's progress on his case, and (3) advised of undersigned counsel's request for an enlargement of time. He asserts his right to a timely appeal, but recognizing undersigned counsel's workload, he (4) agrees with the 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 is currently assigned 6 cases. Six cases are pending before this Court (6 cases are pending AOEs). No cases have priority over the present case.

Major Golseth currently represents 19 clients and is presently assigned 7 cases pending initial brief before this Court. Four cases currently have priority over the present case:

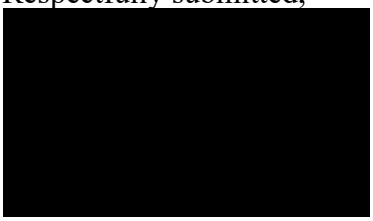
1. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.

2. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024. Mr. Dwight Sullivan has been detailed to this case as lead counsel.

3. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.

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

Respectfully submitted,



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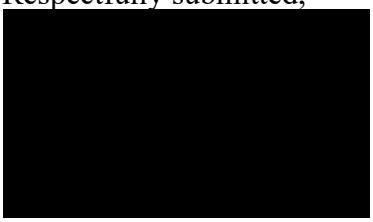
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 February 2025.

Respectfully submitted,



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20 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40614 Panel No. 1

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

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

The United States respectfully maintains that, short of a death penalty case or other extraordinary circumstance, 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.

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

[redacted]
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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 20 February 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Senior Airman (E-4) **KEEGAN L. LOVELL,** United States Air Force, *Appellant.*	)	No. ACM 40614 27 February 2025

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

Undersigned counsel, Major (Maj) Samantha Golseth, moves to withdraw her appearance as appellate defense counsel in the above-captioned case. JT. CT. CRIM. APP. R. 12(b), 23; A.F. CT. CRIM. APP. R. 12.4, 23.3(h). Senior Airman (SrA) Keegan Lovell, Appellant, consents to Maj Golseth's withdrawal as appellate defense counsel. Lieutenant Colonel (Lt Col) Luke Wilson, has been detailed to represent SrA Lovell and provided notice of his appearance in Appellant's Motion for Enlargement of Time (Seventh) – Out of Time, filed on 19 February 2025. A thorough turnover of the record between counsel was completed prior to that filing. The reason for Maj Golseth's withdrawal is because Lt Col Wilson is available to review SrA Lovell's record of trial sooner than Maj Golseth. A copy of this motion will be sent to SrA Lovell simultaneous to its filing.

WHEREFORE, undersigned counsel respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 February 2025.

Respectfully submitted,

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IN THE AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

KEEGAN L. LOVELL,
Senior Airman (E-4),
United States Air Force,
Appellant.

ACM 40614

BRIEF ON BEHALF OF APPELLANT

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Counsel for Appellant

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IN THE UNTED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	ASSIGNMENT OF ERRORS
	)	
Appellee,	)	Before Panel No. 1
	)	
v.	)	ACM 40614
	)	
Senior Airman (E-4)	)	
KEEGAN L. LOVELL,	)	11 March 2025
United States Air Force,	)	
	)	
Appellant.	)	

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

Assignments of Error

I.

THE SPECIFICATIONS UNDER CHARGE I IMPLICATED BOTH CRIMINAL AND CONSTITUTIONALLY PROTECTED CONDUCT. DESPITE THIS, THE COLLOQUY BETWEEN THE MILITARY JUDGE AND APPELLANT FAILED TO CONTAIN AN APPROPRIATE DISCUSSION AND ACKNOWLEDGMENT ON THE PART OF APPELLANT OF THE CRITICAL DISTINCTION BETWEEN PERMISSIBLE AND PROHIBITED BEHAVIOR. DID THIS FAILURE RESULT IN AN IMPROVIDENT PLEA?

II.

DID THE MILITARY TRIAL JUDGE FAIL TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE OF CHARGE II?

III.

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

Summary of Proceedings

Appellant was tried by a general court-martial composed of military judge alone at Travis Air Force Base, CA, on 13 March 2024. The Charges and Specifications on which he was arraigned, his pleas, and the findings of the court-martial are as follows:

Charge	UCMJ Art	Spec	Summary of Offense	Plea	Finding
I	134			G	G
		1	Did b/o/a 1 Jan 2021 and o/a 31 October 2022, knowingly and wrongfully possess child pornography, to wit: digital images and videos of minors, or what appears to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.	G	G
		2	Did, on divers occasions, b/o/a 1 Jan 2021 and o/a 31 October 2022, knowingly and wrongfully view child pornography, to wit: digital images and videos of minors, or what appears to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.	G	G
		3	Did, on divers occasions, b/o/a 1 Jan 2021 and o/a 31 October 2022, knowingly and wrongfully receive child pornography, to wit: digital images and videos of minors, or what appears to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.	G	G
II	82			G	G
			Did, on divers occasions, b/o/a 1 Jan 2021 and o/a 31 October 2022, knowingly and wrongfully solicit another to distribute child pornography, to wit: requesting online users on the website "imgsrc.ru" send him nude images and videos of minors, or what appears to be minors, engaging in sexually explicit conduct, and that such conduct was of a nature to bring discredit upon the armed forces.	G	G

The military judge sentenced Appellant to thirty months of confinement, a dishonorable discharge, reduction to the pay grade of E-1, and a reprimand. R. at 84. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

Statement of Facts

A. Regarding Issue I:

Appellant pled guilty to all the charges and specifications brought against him. R. at 14. Pursuant to this plea, the military trial judge engaged in a colloquy to establish a factual basis for the plea. R. at 21-49.

Dring the colloquy, the military trial judge defined "child pornography" as follows:

> Child pornography means material that contains a visual depiction of an actual minor engaging in sexually explicit conduct. Child pornography also means material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct. Such a depiction need not involve an actual minor, but only what appears to be a minor.

R. at 23. The military trial judge explained to Appellant that this same definition applied to specifications 2 and 3 of Charge I as well. R. at 33 and 36.

Appellant stated that he did possess, view, and receive "child pornography" as that phrase was defined to him. R. 26, 33, 38. He specifically said, "The images I viewed were minors or what appeared to be minors." R. at 26. Appellant also agreed with the military trial judge that the twenty-five computer files referenced in the stipulation of fact were child pornography as defined. R. at 30.

At one point, the military trial judge asked, "Do you know or have any reason to believe that the visual depictions you possessed contained actual minors?" R. at 29. Appellant responded, "I had no way of actually knowing, but they did depict minors or what seemed to be minors." R. at 30.

The military trial judge asked Appellant where he was when he viewed and possessed the images for which he pled guilty. R. at 34. Appellant stated that he was "in [his] dorm room on Travis Air Force Base." *Id*. Later, the military trial judge asked if Appellant was in his Travis Air Force Base dorm room when he received the images, as well. R. at 38. Appellant responded in the affirmative. *Id*. No further facts were elicited regarding the location of the conduct.

B. Regarding Charge II.

With regard to Charge II, the military trial judge explained the elements of solicitation to Appellant in the following way:

> One, that […] you solicited online users on the website IMGSRC.RU to send you nude images and videos of minors or what appears to be minors engaging in sexually explicit conduct, in violation of Article 134 of the UCMJ.
>
> And two that you specifically intended the online users on the website IMGSRC.RU commit the offense of sending you nude images and videos of minors or what appears to be minors engaging in sexually explicit conduct, also known as distribution of child pornography in violation of Article 134 of the Uniform Code of Military Justice.

R. at 40.

The military trial judge went on, saying, "You must have intended that the online users on the website IMGSRC.RU commit every element of the [the Article 134 offense of] distribution of child pornography." R. at 41. He then described those elements as follows:

> One that […] online users knowingly and wrongfully distributed child pornography […] to [Appellant].
>
> And two that under the circumstances, the conduct of the accused [i.e. the "online users"] was of a nature to bring discredit upon the armed forces or to the prejudicial (*sic*) good order discipline (*sic*) in the armed forces.

R. at 41.

The military trial judge never asked for facts regarding whether Appellant had the specific intent that the online users conduct bring discredit to the armed forces. *See generally* R.

at 40-49. Neither did the military trial judge inquire as to whether the online users would appreciate the criminality of the act Appellant requested of them. *Id*. Nor did Appellant offer any such facts. *Id*.

The military trial judge did, however, state,

> And I want to make crystal clear, there's a slight difference in this offense before is that you have to actually specifically intended, it's not that they actually send it to you although that can be a circumstantial facts that we can consider, but you specifically intended that those online users at that website IMGSRC.RU commit this [Article 134] offense[.]

(*sic*). R. at 45.

Argument

I.

THE SPECIFICATIONS UNDER CHARGE I IMPLICATED BOTH CRIMINAL AND CONSTITUTIONALLY PROTECTED CONDUCT. DESPITE THIS, THE COLLOQUY BETWEEN THE MILITARY JUDGE AND APPELLANT FAILED TO CONTAIN AN APPROPRIATE DISCUSSION AND ACKNOWLEDGMENT ON THE PART OF APPELLANT OF THE CRITICAL DISTINCTION BETWEEN PERMISSIBLE AND PROHIBITED BEHAVIOR. THIS FAILURE RESULTED IN APPELLANT'S PLEA BEING IMPROVIDENT.

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014).

Law and Analysis

Charges that implicate criminal as well as constitutionally protected conduct require a military trial judge to conduct a heightened providence inquiry; the failure to do so renders a guilty plea void. Specifications 1 and 2 under Charge I implicate constitutionally protected

conduct, namely the possession and viewing of obscene matters in the privacy of Appellant's home. Despite this, the military trial judge failed to conduct the necessary heightened inquiry. Appellant's pleas to specification 1 and 2 of Charge I are, therefore, void.

If an accused's guilty plea is not voluntary and knowing, "it has been obtained in violation of due process and is therefore void." *United States v. Care*, 40 C.M.R. 247, 251 (C.M.A. 1969). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citations omitted). When a charge implicates both criminal and constitutionally protected conduct, one of the aspects of the law the accused must understand is the "critical distinction between permissible and prohibited behavior." *United States v. Hartman,* 69 M.J. 467, 468 (C.A.A.F. 2011). In order to understand the "critical distinction between permissible and prohibited behavior," the "colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused." *Id*. Thus, the lack of an appropriate discussion renders the guilty plea void.

As discussed below, the specifications under Charge I implicated both criminal and constitutionally protected conduct, namely private possession and viewing of potentially obscene images. Despite this, the military trial judge held no appropriate discussion with Appellant regarding the distinction between permissible and prohibited behavior. Because of this, Appellant's plea was not voluntary and knowing.

A. Appellant's alleged offenses of possessing and viewing "Child Pornography" under Article 134, UCMJ, implicate both criminal and constitutionally protected conduct.

In *Ashcroft v. Free Speech Coalition*, the Supreme Court reiterated that speech that is neither obscene nor the product of child sexual abuse maintains constitutional protection. 535

U.S. 234, 251 (2002). Thus, a law that seeks to criminalize speech that was neither obscene nor made with actual children violated the constitution. *Ashcroft*, 535 U.S. 234.

Essentially, since *Ashcroft v. Free Speech Coalition*, the Federal *civilian* criminal code has split images involving sexually explicit media of *actual* minors into a separate offense from those involving sexually explicit media of *what appears to be* minors. *Compare Ashcroft*, 535 U.S. 234, *with* 18 U.S.C. §§ 1466A, 2256. Offenses under 18 U.S.C. § 1466A do not require actual minors to be depicted in the media, but do require the element of "obscenity" for the offense to be constitutionally sufficient. Offenses under 18 U.S.C. § 2256, on the other hand, do not require an obscenity element, but do require actual minors to be depicted in the media in order to be constitutionally sufficient.

1. Article 134, UCMJ, collapses conduct involving sexually explicit media of *actual* minors into the same offense and definition as obscene sexually explicit media of *what appears to be* minors.

Unlike our Federal civilian criminal code, the Uniform Code of Military Justice collapses these two types of offenses into a single Article 134, UCMJ, offense. *See Manual for Courts-Martial, United States*, (2024 ed.) (*MCM*), pt. IV, ¶ 95. Indeed, beyond collapsing the two into a single offense, the *Manual for Courts-Martial* goes a step further and collapses both offenses into the single definition of the phrase "child pornography." *Id*. "Child pornography means material that contains *either* an obscene visual depiction of a minor engaging in sexually explicit conduct *or* a visual depiction of an actual minor engaging in sexually explicit conduct." *MCM*, ¶ 95(c)(4) (emphasis added). This, in effect, makes the phrase "child pornography" an umbrella term that encompasses two very different types of offenses, two types of offenses that the Federal civilian criminal code split into separate code provisions in order to pass constitutional muster.

Under the *MCM*'s definition, every charge sheet purporting to charge "child pornography" via a clause one or clause two Article 134 offense potentially charges either (1) obscene visual depictions of what appear to be minors engaging in sexually explicit conduct, or (2) visual depictions of actual minors engaging in sexually explicit conduct. Obviously, Appellant's charge sheet is no different; the language of each of Appellant's specifications under Charge I explicitly charges both types of offense. *See* Charge Sheet stating "digital images and videos of minors, or what appears to be minors, engaging in sexually explicit conduct[.]"

2. *Stanley v Georgia*: Mere possession and viewing of obscene materials in the privacy of one's own home is constitutionally protected.

Although Article 134 collapses offenses involving both actual minors and what appears to be minors into the same definition and offense, the two types of offenses are treated very differently under the Constitution. While the privacy of one's home will not protect an individual from criminal liability for the possession and viewing of a "visual depiction of an actual minor engaging in sexually explicit conduct," the same cannot be said for an "obscene visual depiction of a minor engaging in sexually explicit."

In *Stanley v. Georgia*, the Supreme Court held that a statute prohibiting the possession and viewing of obscene material within the privacy of one's home was unconstitutional. 394 U.S. 557, 568 (1969). In doing so, the Court said, "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565.

Thus, the *MCM*'s definition of child pornography sets up a situation where all possession/viewing of "child pornography" outside the home is unlawful, some possession/viewing of "child pornography" inside the home is also unlawful, while other possession/viewing of "child pornography" inside the home is constitutionally protected.

3. The language of Appellant's charge implicated constitutionally protected conduct.

As discussed below, courts look to the language of a charge to determine if a charge implicates constitutionally protected conduct; looking to the facts of a case as those facts were elicited on the record is not required. However, under either viewpoint Appellant's charge and/or conduct implicate constitutionally protected conduct.

i. Appellant's Charge implicates constitutionally protected conduct

By looking to the wording of the specifications of Charge I, it is clear that constitutionally protected conduct was implicated.

a. Look to the charge to determine implication of constitutionally protected conduct, not to the facts of the case.

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." *Hartman*, 69 M.J. at 468 (quotations omitted). Although the Court of Appeals for the Armed Forces (C.A.A.F.) has not explicitly articulated what it takes for a "charge to implicate both criminal and constitutionally protected conduct," a review of the applicable caselaw makes it clear that if the language of the charged specification could be construed as encompassing constitutionally protected conduct, then that charge implicates constitutionally protected conduct, and a heightened providence inquiry is required. No further inquiry into the underlying facts is required.

For example, in *Hartman*, C.A.A.F. looked only to the language of the specification without looking at the facts that were elicited during the providence inquiry to determine that constitutionally protected conduct was implicated. 69 M.J. at 469. Although the court cited the facts that were elicited in the providence inquiry, it did not discuss the constitutional

significance, if any, of those facts. *Id*. In other words, the court simply found that the charge of sodomy in-and-of-itself required a heightened providence inquiry; the court did not look further into the elicited facts to determine whether the appellant's conduct was in fact constitutionally protected (even though, arguably, since the appellant's alleged sodomy occurred in a shared room in the presence of a third person, his conduct would not have been constitutionally protected). *Id*.

Similarly, the C.A.A.F. in *United States v. Moon* found that because the language of the specification referenced only images of "nude minors and persons appearing to be nude minors," and nudity without more *may* implicate constitutionally protected conduct, the trial court should have conducted a heightened providence inquiry. 73 M.J. 382, 383, 387 (C.A.A.F. 2014). Again, C.A.A.F. did not look to the underlying facts to determine whether the images were or were not constitutionally protected; the mere possibility based on the language of the specification was enough to trigger the heightened requirements of *Hartman*. *Id*.

Further, the appellant in *Byunggu Kim* was charged under Article 134 with commission of "indecent conduct, to wit: conducting an internet search for 'rape sleep' and 'drugged sleep[.]'" 83 M.J. at 237. The C.A.A.F. found that Appellant's charged conduct potentially implicated constitutionally protected speech under the First Amendment, saying "Appellant's behavior here occupies a constitutional gray area similar to that at issue in *Hartman*." *Id*. at 239.

b. The language of Appellant's charge implicates constitutionally protected conduct.

Appellant was charged with two specifications which consisted of "knowingly and wrongfully" possessing and viewing "child pornography, to wit: digital images and videos of minors, or *what appear to be minors*, engaging in sexually explicit conduct[.]" Charge Sheet (emphasis added). As discussed above, Article 134's definition of "child pornography" is so

broad that it captures both criminal and constitutionally protected conduct. Additionally, as discussed above, the specifications' descriptions of "what appears to be minors" further implicates constitutionally protected conduct as possession of images of "what appears to be minors" may be criminalized only if the images are obscene, and possession of obscenity is only criminal when outside the privacy of the home.

Thus, Appellant's specifications one and two under Charge I implicate constitutionally protected conduct.

ii. Even if the facts elicited during Appellant's plea colloquy are looked to, constitutionally protected conduct was implicated because the military trial judge failed to distinguish between actual minors and what appears to be minors.

Even if it is necessary to examine the underlying facts of a case to determine if constitutionally protected conduct has been implicated, the underlying facts of Appellant's case implicate constitutionally protected conduct. They do so in at least three ways, (1) the military judge's explanation of the definitions of the offense to Appellant, (2) Appellant's description of the images to the military judge, and (3) Appellant's description of the location of the possession and viewing of the images.

First, during the providence inquiry the military judge provided the following definitions to Appellant:

> Child pornography means material that contains a visual depiction of an actual minor engaging in sexually explicit conduct. Child pornography also means material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct. Such a depiction need not involve an actual minor, but instead only what appears to be a minor.

R. at 23. This definition collapses the "always criminal" (actual minors engaged in sexually explicit conduct) into the same definition of "sometimes constitutionally protected conduct"

(obscene materials of what appears to be minors in the privacy of one's home). Thus, the military judge's explanation to Appellant implicated constitutionally protected conduct.

Second, Appellant's description of the images to the military judge implicated constitutionally protected conduct because the description collapsed actual minors into the same definition of "child pornography" as what appears to be minors. Appellant explained that the images he viewed and possessed "were minors *or what appeared to be minors*." R. at 26 (emphasis added). Later, when the military judge asked, "Do you know or have any reason to believe that the visual depictions you possessed contained actual minors," Appellant responded that "I had no way of actually knowing, but they did depict minors or what seemed to be minors." R. at 29-30. Thus, Appellant's factual description of the images he possessed and received implicated constitutionally protected conduct.

Lastly, Appellant clearly explained to the military judge that the images were possessed and viewed in the privacy of his home. The military judge asked, "Where were you when you viewed and possessed these images," to which Appellant replied, "in my dorm room at Travis Air Force Base." R. at 34. Later, while discussing receiving images, the military judge reiterated that the conduct occurred in Appellant's dorm room. *See* R. at 38. These discussions, when coupled with *Stanley v. Georgia's* admonition, clearly implicate constitutionally protected conduct.

iii. *United States v. Bowersox* does not change the analysis: Appellant's dormitory room enjoys the same privacy protections as a home.

C.A.A.F.'s holding in *United States v. Bowersox* is inapposite to this case. 72 M.J. 71, 72 (C.A.A.F. 2013). In *Bowersox*, the appellant was convicted of knowingly possessing visual depictions of minors in the form of cartoon images engaging in sexually explicit conduct. One argument presented on appeal was that the application of 18 U.S.C. § 1466A to the appellant was

unconstitutional "as applied to him because he [had] the right to possess obscenity in the privacy of his shared barracks room." *Id*. at 75. In denying this argument C.A.A.F. first reasoned that the protections of *Stanley v. Georgia* do not extend beyond the home. *Id*. at 76. The court then "decline[d] to extend [*Stanley's*] holding to a *shared* barracks room." *Id*. at 77 (emphasis added). Thus, the court held the appellant's conduct was not constitutionally protected under *Stanley v. Georgia*. *Id*. at 72. *Bowersox* is inapposite here for three reasons.

The first reason *Bowersox* is inapplicable to the current case is that, as discussed above, a military trial judge's duty to engage in a heightened providence inquiry is triggered by the language of the charge on its face, not by the underlying facts of the case. That duty cannot be defeated by turning to additional facts on the record. Therefore, the heightened inquiry requirement would already be triggered before the military trial judge ever learned whether an accused lived in a shared dormitory, or an apartment, or a house.

The second reason *Bowersox* is inapplicable to the current case is that the accused in *Bowersox* pled not guilty and was tried by judge alone. *Id*. at 72. In that situation, an accused's understanding of the potential constitutional protections of *Stanley v. Georgia* is irrelevant. However, in the instant case Appellant had a right to a heightened *Care* inquiry so that an "appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior" could be held. *Hartman*, 69 M.J. at 468.

The third reason *Bowersox* is inapplicable to the current case is that the court made it clear that its holding was based on the "shared" aspect of where the appellant lived; it was not based on the "barracks" aspect. The court repeatedly made this point stating "the issue is whether a *shared* barracks room is a 'home,'" *Bowersox*, 72 M.J. at 76 (emphasis added), "we do not agree that one's privacy interest in a *shared* barracks room is coextensive with one's privacy

interest in their home," *id*. (emphasis added) (citation omitted), "a soldier has less of an expectation of privacy in his *shared* barracks room than a civilian does in his home," *id*. (emphasis added), "[t]he 'natural tendency of material in the home being kept private' is substantially diminished in a *shared* barracks room," *id*. (emphasis added) (citation omitted), "we decline to extend [*Stanley's*] holding to a *shared* barracks room, *id*. at 77 (emphasis added), and "the *shared* barracks room at issue in this case does not merit the protections of a home. *Id*. at 77 n.9 (emphasis added).

The *Bowersox* Court further drove home the point by stating "the fact that [the appellant] purposefully exposed [his barracks mate] to the obscene computer depictions in their shared barracks room highlights the divergent natures of a shared barracks room and a private home." *Id*. at 76. The C.A.A.F. seemed to be pointing out the very obvious fact that, unlike the hypothetical man discussed in *Stanley v. Georgia* who was reading obscene books and watching obscene films while "sitting alone in his own house," the appellant in *Bowersox* was not sitting alone in his shared house; in fact he went out of his way to expose his obscene images to his barracks mate. *Id*. The court went on to say, "[t]he very nature of a shared barracks room increases the risk that obscene materials will be viewed by those who do not wish to view them." *Id*. Therefore, *Bowersox* is not applicable to this case.

B. When a charged offense implicates constitutionally protected conduct, a heightened plea inquiry is required.

Once a charge implicates both criminal and constitutionally protected conduct "the colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *Hartman,* 69 M.J. at 468.

Hartman's "appropriate discussion" amounts to "heightened plea inquiry requirements" that the military trial judge must engage in with the accused. *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014). To be considered an "appropriate discussion," the colloquy between the trial judge and the accused must "reflect consideration of the [constitutional] framework" at issue in the case. *See Hartman,* 69 M.J. at 469. Phrased another way, "the military judge should have discussed with Appellant the existence of constitutional rights relevant to his situation and made sure Appellant understood why his behavior under the circumstances did not merit such protection." *Byunggu Kim,* 83 M.J. at 239.

The military trial judge in the instant case wholly failed "to elicit from Appellant that he clearly understood the critical distinction between criminal and constitutionally protected conduct." *Moon*, 73 M.J. at 388. Regardless of whether *Stanley v. Georgia's* prohibition is based on a right to free speech or on a right to privacy, *see Bowersox* 72 M.J. at 75, that prohibition was implicated in this case and the judge had the duty to ensure Appellant understood that implication.

C. The military judge's failure to conduct a heightened plea inquiry is reversible error.

If a defendant's guilty plea is not voluntary and knowing, "it has been obtained in violation of due process and is therefore void." *Care*, 40 C.M.R. at 251. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Byunggu Kim*, 83 M.J. at 238 (citations omitted). When a charge implicates both criminal and constitutionally protected conduct, one of the aspects of the law the accused must understand is the "critical distinction between permissible and prohibited behavior." *Hartman,* 69 M.J. at 468. In order to understand the "critical distinction between permissible and prohibited behavior," the

"colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused." *Id*. Thus, the lack of an appropriate discussion renders guilty plea void.

Because an appropriate discussion was not held in the instant case, Appellant's plea is void.

WHEREFORE, Appellant respectfully requests this Honorable Cort set aside his convictions for specifications 1 and 2 of Charge I.

II.

THE MILITARY TRIAL JUDGE FAILED TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE ARTICLE 82, UCMJ, SPECIFICATION OF CHARGE II BECAUSE (1) THE CHARGE ALLEGED APPELLANT SOLICITED ANOTHER TO DO THE IMPOSSIBLE, (2) NO EVIDENCE WAS ELICITED THAT APPELLANT HAD THE SPECIFIC INTENT THAT ANOTHER BRING DISCREDIT UPON THE ARMED FORCES, AND (3) NO EVIDENCE WAS ELICITED THAT THE PERSON BEING SOLICITED HAD KNOWLEDGE OF THE SERVICE DISCREDITING NATURE OF THE CONDUCT HE WAS SOLICITED TO PERFORM.

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *Inabinette*, 66 M.J. at 322. The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *Passut*, 73 M.J. at 29.

Law and Analysis

Because it is impossible for a civilian to commit an offense under the U.C.M.J., it was equally impossible for the military trial judge to elicit a sufficient factual basis for an offense of soliciting a civilian to commit an Article 134 offense. Even if this Court finds that it is possible to solicit another to do the impossible, the charge must still fail because the military trial judge

failed to elicit facts proving the specific intent element of the alleged solicitation offense. Even if this Court finds that the military trial judge did not fail to elicit the required facts of the specific intent element, the charge still must fail because the military trial judge failed to elicit facts showing that the solicitee appreciated the criminality of the service discrediting nature of his act.

"Before accepting a guilty plea, a military judge must ensure that there is a factual basis for the accused's plea." *Care*, 40 C.M.R. at 253. A sufficient factual basis for a plea, in turn, requires *a sufficient factual basis for each element* of the offense for which the accused is pleading. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004). Additionally, "a military judge must elicit *actual facts* from an accused and not merely legal conclusions." *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021) (emphasis in original) (citing *United States v. Price*, 76 MJ 136, 138 (C.A.A.F. 2017)).

A military judge's failure to obtain an adequate factual basis for a guilty plea constitutes an abuse of discretion. *Inabinette*, 66 M.J. at 322. However, military judges are afforded significant deference on this point and are granted substantial leeway in conducting providence inquiries. *Moratalla*, 82 M.J. at 4. In determining whether a military judge abused his or her discretion, a court applies the "substantial basis" test. *Inabinette*, 66 M.J. at 322. "Specifically, [the court asks] 'whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.'" *Id*. (citations omitted).

A. The elements of an Article 82 Solicitation of an Article 134 Distribution offense.

Appellant was charged under Article 82, U.C.M.J., with soliciting another to commit an offense under clause 2 of Article 134, U.C.M.J. Therefore, both articles must be examined in

order to determine exactly what elements the military trial judge had the duty to elicit a factual basis.

Until 2016, solicitation was one of the enumerated offenses of Article 134, U.C.M.J. *See United States v. Heppermann*, 82 M.J. 794, 799 (A.F. Ct. Crim. App. 2022). Congress then revised the offense and incorporated it in Article 82, U.C.M.J. *See* Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5403, 130 Stat. 2000, 2939 (2016). Article 82(a) of the U.C.M.J. states, "Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct." 10 U.S.C. § 882(a) (referring to chapter 47 of Title 10, U.S. Code, the Uniform Code of Military Justice). This Court found the President's non-binding breakdown of this into the following elements persuasive:

> (1) That the accused solicited or advised a certain person or persons to commit a certain offense under the U.C.M.J.; and
>
> (2) That the accused did so with the intent that the offense actually be committed.

See Heppermann, 82 M.J. at 798.

In the instant case, Appellant was charged with soliciting another to commit a clause 2, Article 134 offense. Article 134 of the U.C.M.J. "is an expansive, flexible, and amorphous prosecutorial tool within the military justice system with no analog in Title 18 [of the United States Code]." *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020).

An Article 134 offense requires a finding that "'(1) the accused did or failed to do certain acts, and (2), proof that Appellant's conduct was 'to the prejudice of good order and discipline in the armed forces,' 'of a nature to bring discredit upon the armed forces,' or a 'crime or offense not capital.'" *Id*. (citing *MCM*, pt. IV, ¶ 60.b (2008 ed.)). "The exceptionally broad statutory

language and potential for abuse is balanced, in large part, by this Court's duty to constrain it." *Id*.

Therefore, taking the above precedents together, for Appellant's plea of guilty to the instant Article 82(a), U.C.M.J., Solicitation offense to be provident, the military trial judge had the duty to ensure that a factual basis existed for each of the following elements:

> (1) Appellant solicited a certain person to [1] do or fail to do a certain act, and [2] commit an act or omission that was of a nature to bring discredit upon the armed forces; and
>
> (2) That Appellant did so [1] with the specific intent that the act/omission be committed and [2] with the specific intent that the act/omission was of a nature to bring discredit upon the armed forces.

Indeed, the military trial judge in the instant case explained the elements of the offense to Appellant in this very way. *See generally* R. at 40-49.

B. The military trial judge could not elicit an adequate factual basis for solicitation because Appellant was charged with soliciting another to do the impossible.

The way this case was charged requires Appellant to solicit another to do the impossible; it requires Appellant to solicit a civilian to commit an act that in turn discredits the armed forces. Because civilians are not subject to the U.C.M.J., it is impossible for a civilian to violate Article 134, U.C.M.J. by committing an act which is discrediting to the armed forces. Because it would be impossible for a civilian's conduct to violate Article 134, U.C.M.J., by discrediting the armed forces, it is equally impossible to solicit a civilian to conduct themselves in a way to violate Article 134, U.C.M.J., by bringing discredit to the armed forces. Because a person cannot be found guilty of soliciting another to do the impossible, this charge must be dismissed.

1. One cannot solicit another to commit an impossible crime.

The C.A.A.F. case *United States v. Sutton* stands for the proposition that a person cannot be found guilty of soliciting another to do the impossible. *See* 68 M.J. 455 (C.A.A.F. 2010). In

Sutton the appellant was charged under the previous Article 134 version of solicitation with soliciting his stepdaughter to engage in the Article 134 offense of "indecent liberties with a child." *Id*. Specifically, the appellant was charged with soliciting his stepdaughter to lift her shirt; thus, the charge alleged that the stepdaughter – by lifting her shirt – was taking indecent liberties with herself. *Id*. C.A.A.F. found that it was not possible for the stepdaughter to commit the offense of indecent liberties with a child because she could not commit the offense on herself. *Id*. at 459. Because it was not possible for the underlying offense of the solicitation to be committed, C.A.A.F. dismissed the charge. *Id.; see also Heppermann*, 82 M.J. at 799 (finding that *Sutton* stood for the proposition that "[t]he offense allegedly solicited must have been one that could possibly be committed by the solicited person."). In other words, soliciting a person to commit an act that is not a crime, is not soliciting a crime.

2. Article 82(a) requires the person being solicited to be subject to the U.C.M.J.

The plain language of Article 82(a) requires the solicitation of "another to commit an offense under this chapter[.]" 10 U.S.C. § 882. In order to commit an offense under the U.C.M.J., one generally has to be subject to the jurisdiction of the U.C.M.J. With the sole exceptions of Articles 103 (spies), 103b (aiding the enemy), 104a (fraudulent enlistment, appointment, or separation), and 79 (a procedural article in the U.C.M.J.'s punitive articles subchapter) every punitive article includes a phrase restricting its applicability to "Any person subject to this chapter" or some subset of those subject to the U.C.M.J.[1] Article 134's plain text

[1] Articles 85, 86, and 99 apply to "Any member of the armed forces." 10 U.S.C. § 885(a); 10 U.S.C. § 886; 10 U.S.C. § 899. Article 88 applies to "Any commissioned officer." 10 U.S.C. § 888. Article 91 applies to "Any warrant officer or enlisted member." 10 U.S.C. § 891. Article 95 applies to "Any sentinel or lookout." 10 U.S.C. § 895. Article 133 applies to "Any commissioned officer, cadet or midshipman." 10 U.S.C. § 933.

limits that statute's applicability to "persons subject to this chapter." 10 U.S.C. § 934. An individual who is not subject to the U.C.M.J., therefore, *cannot* commit an Article 134 offense.

Article 2 of the U.C.M.J. lays out the persons who are subject to the U.C.M.J. 10 U.S.C. § 802. It includes members of a regular component of the armed forces, cadets and midshipmen, members of the reserve and national guard during certain periods, retired members of a regular or reserve component or the Space Force, persons in custody of the armed forces serving a sentence imposed by court-martial, members of certain Federal agencies when assigned to and serving with the armed forces, prisoners of war in the custody of the armed forces, persons serving with or accompanying an armed force in the field during a time of war or a contingency operation, subject to certain treaties or agreements certain persons serving with or employed by or accompanying the armed forces outside of the United States or its territories, subject to certain treaties or agreements certain persons within certain areas leased by or otherwise reserved or acquired for the use of the United States, and individuals belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention who violate the law of war. *Id*. Noticeably missing from this list are civilian online users of the "imgsrc.ru" website.

Because civilian online users of the "imgsrc.ru" website are not subject to the U.C.M.J., they cannot engage in conduct that tends to bring discredit to the armed forces in violation of Article 134 of the UCMJ; it is impossible. Nor can they violate Article 134 because that statute, on its face, restricts its own application to "persons subject to this chapter." Because it is impossible for civilian online users of the "imgsrc.ru" website to violate Article 134, it is equally impossible to solicit them to violate Article 134. *See generally, Sutton* 68 M.J. 455. As discussed below, the Air Force Court of Criminal Appeals case of *United States v. Heppermann*, which holds the contrary, was decided incorrectly. *See generally* 82 M.J. 794.

3. *United States v. Heppermann* was decided incorrectly.

The appellant in *Heppermann* was charged under Article 82 with soliciting another to distribute and produce child pornography in violation of Article 134. *Id*. at 796. The solicitee in the appellant's case was a 13-year-old female whom appellant had asked to create and send sexually explicit images of herself to him. *Id*. The appellant in that case made a similar, if not the same, argument as the one being made in the instant case —that the person being solicited under Article 82(a), U.C.M.J., must be subject to the U.C.M.J. *Id*. at 799. The argument was rejected. *Id*.

This Court pointed to four justifications in coming to its holding. *Id.* at 800-801. Each justification will be addressed in turn.

i. Justification One: Plain Language.

This Court first pointed to the plain language of the statute. This Court stated, "First, looking at the plain language, Article 82(a) requires that a person subject to the UCMJ solicit 'another to commit an offense' under the UCMJ—not solicit *another person subject to the UCMJ* to commit an offense under the UCMJ." *Id*. at 800. This justification fails for a number of reasons.

Appellant agrees that looking to the plain language of a statute is the primary canon of statutory construction. *See*, *e.g.*, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). However, this Court's understanding of the plain meaning in *Heppermann* was incorrect. In that case, this Court seemed to hold that "solicit or advise another to commit an offense under this chapter" merely means the *offense* that is solicited must only be generally a part of the family of offenses that would tend to be outlawed by the U.C.M.J.

However, the *person* being solicited must actually be capable of committing an offense under the U.C.M.J.; if it is legally impossible for the solicitee to commit an Article 134 offense, then it is not possible to solicit that person "to commit an offense under this chapter" since—with the exceptions of Articles 103, 103b, and 104a—someone subject to the U.C.M.J. would not meet the statutory requirement that the solicitee be "subject to this chapter" or a subset of the U.C.M.J., depending on the particular offense. Taking the offense at issue in this case—Article 134—under the plain language of that article, it applies only to "persons subject to this chapter." Ergo, under a plain language interpretation, asking someone who is not subject to the U.C.M.J. to commit an act enumerated in Part IV of the *MCM* as a violation of Article 134 violation is not a solicitation "to commit an offense under this chapter" since the act would not and could not satisfy Article 134's express limitation to "persons subject to this chapter." The person and their ability to commit an offense cannot be separated; to hold otherwise goes against C.A.A.F. precedent and would result in nonsensical outcomes.

In *Sutton*, the C.A.A.F. held that the appellant's solicitation charge had to be dismissed *because the person solicited could not commit the offense* of Indecent Liberties with a Child. 68 M.J. at 459. If *Heppermann*'s reading of Article 82(a) were correct, the C.A.A.F. reasoning would have been appellant's charge of soliciting another to commit an Indecent Liberty with a Child was legally sufficient because "Indecent Liberty with a Child" is, in-fact, an offense under the U.C.M.J. In other words, the C.A.A.F. would have found that because "Indecent Liberties with a Child" was "an offense under the U.C.M.J." the appellant's solicitation charge was legally sufficient. However, the C.A.A.F. found soliciting another to commit an Indecent Liberty with a Child to be legally insufficient because *the person solicited could not commit the offense of*

indecent liberty with a child. *Id*. Thus, *Heppermann*'s interpretation is clearly incorrect. *Id*. at 800.

Additionally, *Heppermann*'s reading of the solicitation offense would lead to nonsensical outcomes. For instance, that reading would allow the criminal prosecution of a military member for, among other things: advising a civilian to engage in partisan political fundraising activities (a violation of a lawful order, namely DoD Directive 1344.10), advising a civilian to allow or cause to be published partisan political articles or endorsements (a violation of a lawful order), advising a civilian to march or ride in a partisan political parade (violation of lawful order), advising a civilian to display a partisan political sign in their work area (a violation of a lawful order), advising a civilian to fill their lawfully obtained medical marijuana prescription (a violation of Article 112a), advising a civilian to act in a way that is unbecoming an officer (a violation of Article 133), or -- as we have here -- advising a civilian to act in a way that discredits the service (an article 134 offense). These are all absurd notions and, again, they could all take place under this Court's view that all that is needed to sustain a conviction for solicitation is that the conduct being solicited would generally be a U.C.M.J. violation if committed by someone subject to the U.C.M.J.

Additionally, Congress understood what it meant when it required the solicitee to be subject to the U.C.M.J. because, as previously discussed, there are, in fact, instances in which a military member could be found criminally liable under Article 82(a) for soliciting a civilian to commit an offense under the U.C.M.J. because there are instances in which civilians are subject to the U.C.M.J. A military member could be found guilty under Article 82(a) of soliciting a civilian to spy, aid the enemy, or fraudulently enlist.

ii. Justifications Two (Congressional Intent), and Three (The "Essence" of the Solicitation Offense).

The *Heppermann* Court's next two justifications are based on a lack of Congressional intent, and the "essence of the offense of solicitation." Both justifications fail. AFCCA said,

> Second, Appellant cites no authority—and we find none—that Congress intended to change the offense of solicitation previously enumerated under *Article 134, UCMJ*, to add such a requirement.
>
> Next, assuming that the statute's language is ambiguous, we find convincing the rationale of the case law addressing this issue in the context of solicitation before it was codified in *Article 82, UCMJ.* The essence of the offense of solicitation is the invitation to engage in criminal conduct.

Heppermann, 82 M.J. at 800.

Both of these positions were made invalid by the Supreme Court in *United States v. Universal C.I.T. Credit Corp*., 344 U.S. 218 (1952). *Heppermann*'s finding that a lack of perceived congressional intent should result in a harsher reading of a criminal statute is erroneous. Additionally, while there is no ambiguity in Article 82(a), even if an ambiguity existed, looking to the "essence" of a criminal statute is inappropriate, especially given that criminal statutes generally entail stigma and penalties and prison. The Supreme Court has stated that to the extent possible, a commonsense meaning should be given to a criminal statute. *Universal C.I.T. Credit Corp*., 344 U.S. 218. As stated above, the commonsense reading of Article 82(a) is that a solicitation requires the person who is being solicited to be legally able to commit a UCMJ offense; to hold otherwise – as demonstrated above – would lead to absurd (that is to say, the opposite of commonsense) results.

But, perhaps more importantly for the instant case, the Supreme Court stated:

> But when a choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Universal C.I.T. Credit Corp., 344 U.S. at 222. That approach is mandated by the rule of lenity, which "generally holds that 'criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused.'" *United States v. Mays*, 83 M.J. 277, 281 (C.A.A.F. 2023) (quoting *United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007)).

If the *Heppermann* Court determined that Article 82(a) is ambiguous, then *Universal C.I.T. Credit Corp*. and the rule of lenity command that the statute be given the least harsh interpretation, not the most draconian. Contrary to those edicts, *Heppermann*'s reading of Article 82(a) is a "harsher alternative" to the plain reading of Article 82(a). This is because that reading makes substantially more conduct criminal. Because it is a harsher alternative, this Court's reasoning conflicts with the Supreme Court's holding in *Universal C.I.T. Credit Corp*. and the rule of lenity.

Universal C.I.T. Credit Corp. also resolves whether courts should look to the "essence" of an offense; they should not. *Id*. If there is a lack of clarity in a criminal statute, it is resolved in favor of the accused. *Id*. A court does not resort to interpreting the "essence" of an offense.

Additionally, an increase in the penalty portion of a criminal statute "affords justifiable ground" to interpret the "offense-creating portions of the legislation" less harshly. *Universal C.I.T. Credit Corp*., 344 U.S. at 223. Solicitation under Article 134 carried a maximum sentence that included confinement for five years. *See*, *e.g.*, *MCM*, Pt. IV, ¶ 105.e (2016 ed.). After Congress moved Solicitation to a standalone Article 82(a), the maximum confinement was doubled to ten years. *MCM*, Pt. IV, ¶ 6.d.(3) (2019 ed.).

iii. Justification Four: The maximum punishment.

Lastly, *Heppermann* said, "[W]e are persuaded by the President's language addressing the maximum punishment authorized for a violation of Article 82(a), UCMJ, which plainly anticipates the person being solicited may or may not be subject to the UCMJ."

This is an apparent reference to the non-binding maximum punishment discussion portion of Article 82(a), which states, "Any person subject to the UCMJ who is found guilty of soliciting [...] another person to commit an offense […] that, if committed by one subject to the UCMJ, would be punishable under the UCMJ, shall be subject to the following maximum punishment [.]" *See MCM*, Pt. IV, ¶ 6.d.(3) (2019 ed.).

However, it is this Court's "responsibility to interpret the elements of substantive offenses – at least those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the Code[.]" *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998) (citation omitted). Courts "are not bound by the President's interpretation of the elements of substantive offenses." *Id*. (citing *United States v. Mance*, 26 M.J. 244, 252 (C.A.A.F. 1988)). Indeed, when the President's interpretation conflicts with the language of the statute, the interpretation should be rejected. *See Davis*, 47 M.J. at 486 ("[W]here the President unambiguously gives an accused greater rights than those conveyed by higher sources [in part IV of the Manual for Corts Martial], this Court should abide by that decision unless it clearly contradicts the express language of the Code.").

In the instant case, the President's interpretation should be rejected, not embraced. As stated above, "[i]t is axiomatic that in determining the scope of a statute, we look first to its language." *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (quoting *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015)). To the extent that the President's interpretation seeks to broaden the criminal liability of Article 82(a), it is pushing beyond the bounds called for

by the plain language of the statute. This attempt to point to the President's interpretation in order to expand the criminal liability created by Congress is contradictory to the express language of the code.

Again, because a person cannot solicit another to do the impossible, it was not possible for the military trial judge to elicit a factual basis for Appellant's solicitation offense.

C. The military trial judge failed to elicit facts to support the element of Appellant's specific intent to have "another" bring discredit on the armed forces.

Even if this Court finds that it is possible to solicit another to do the impossible, the finding of guilty to the charge is still invalid. Due to the way this case was charged, it is not *Appellant's* conduct that must be proven to be service discrediting; "service discrediting" attaches to the conduct of the person Appellant allegedly solicited to commit an Article 134 offense. Therefore, to sustain a conviction, there must be facts on the record that prove that Appellant had the specific intent for online users of the "imgsrc.ru" website to conduct themselves in a manner to bring discredit to the armed forces.

A sufficient factual basis for a plea requires *a sufficient factual basis for each element* of the offense to which the accused is pleading guilty. *Barton*, 60 M.J. at 64 Additionally, "[i]t is well established that the terminal element of the general article is an essential element of the offense." *United States v. Richard*, 82 M.J. 473, (C.A.A.F. 2022) (quotation and citation omitted). "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea." *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

Because of the interplay between the elements of Article 82(a) and the elements of Article 134, the military trial judge was required to elicit facts to support the element that Appellant solicited the solicitee with the specific intent that the solicitee's act/omission was of a nature to bring discredit upon the armed forces. No statements were elicited to support this element of

specific intent on the part of Appellant. Because the military trial judge failed to elicit a factual basis for the specific intent element of this solicitation offense, the finding of guilty must be set aside.

D. The military trial judge failed to elicit facts regarding the solictee's knowledge of the criminality of the solicited act.

Even if this Court finds that it is possible to solicit another to do the impossible, and finds that the military trial judge did, in fact, elicit facts establishing the specific intent element of Appellant's solicitation offense, the finding of guilty is still invalid. For a plea to a solicitation offense to be sufficient, the military trial judge had to elicit facts showing that the solicitee appreciated the criminality of the service-discrediting nature of his act. Because the military trial judge failed to do this, the charge must be dismissed.

"The first element of the charged solicitation is that appellant 'solicited or advised a certain person or persons to *commit a certain offense* under the code.'" *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994). "[T]his requires that the solicitor's request be such that the solicitee know that the act requested of him is part of a criminal venture." *Id*.

An Article 134 offense "has two elements: (1) a predicate act or failure to act, and (2) a terminal element." *United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013) (citing *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008)). In the context of solicitation of a clause 2 Article 134 offense, if it were not required that a solicitee understand that the requested act tended to discredit the service, then all the solicitee would have to know about the request is that the request consisted of *any* act or omission. It cannot be the case that a solicitee need only appreciate that he was asked to commit *an act*; under that reading nothing would require the solicitee to appreciate the criminality of the act. Given the "expansive, flexible, and amorphous prosecutorial tool" that Article 134 is, if the solicitee were not required to appreciate the terminal

elements of Article 134, he would not be required to appreciate the criminality of the request being made of him at all. *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020). This would make the caselaw in this area meaningless.

In *United States v. Oakley*, the Court of Military Appeals discussed the requirement that the solicitee understand the criminality of the act he was solicited to commit. 23 C.M.R. 197, 198 (C.M.A. 1957). In *Oakley*, the appellant was charged with two specifications of soliciting two civilians to procure rat poison for him. *Id*. The court said that if the solicitees only appreciated the act (the procuring of rat poison), the solicitation would have been legally insufficient. *Id*. The court explained, "As far as the record shows, the purchase of rat poison is a legal act." *Id*. at 199. "It follows therefrom that a request to another to make such a purchase is not an invitation to commit an offense under the Uniform Code." *Id*. It was only when the purpose of the procurement – to poison appellant's first sergeant – was made known to the solicitees that the solicitees appreciated the criminality of the solicited act, and a solicitation offense had been committed. *Id*.

The same requirement was applied in *United States v. Higgins*. 40 M.J. 67. In *Higgins* the appellant was charged with a specification of solicitation of another to commit larceny. *Id*. at 68. The appellant had stolen an ATM card and "solicited" another to make a cash withdraw; however, the solicitee had no knowledge that the card was stolen and, thus, did not appreciate the criminality of the requested act. *Id*. The court held that because the solicitee did not know the withdraw was criminal, no solicitation occurred. *Id*. at 70.

Like *Oakley*'s procurement of rat poison and *Higgins*'s swiping of an ATM card, a clause 2 Article 134 act by itself does not impart criminality unless and until that act is connected to the concept of bringing discredit to the armed forces and the solicitee appreciates that. Even if it

were possible for a civilian's act to bring discredit to the armed forces – which, as discussed above, it is not – the military trial judge failed to elicit any evidence on the record that the solicitee in this case had any reason to know his act may bring discredit to the armed forces.

Because the military trial judge failed to elicit a factual basis for the solicitee's appreciation of the criminality of the act he was solicited to perform, the charge must be dismissed.

E. Material prejudice to the substantial rights of Appellant.

"Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea 'materially prejudice[d] the substantial rights of the accused.'" *Moratalla*, 82 M.J. at 4 (citing Article 45(c), UCMJ).

A military judge's erroneous acceptance of a guilty plea and the resulting erroneous finding of guilty for an act that does not constitute an offense itself materially prejudices an appellant's substantial rights. *See*, *e.g.*, *United States v. McCullough*, No. ARMY 20220376, 2024 CCA LEXIS 198, *4 (A. Ct. Crim. App. Apr. 30, 2024); *see also United States v. Kibler*, 84 M.J. 603, 608 (A. Ct. Crim. App. 2024) (finding material prejudice to an appellant's substantial rights resulting from military judge's erroneous acceptance of a guilty plea "because appellant now stands improperly convicted of suffocating his spouse, and the sentence to confinement for that offense resulted in an additional 108 days of confinement").[2] Further material harm

[2] Article 45(c), U.C.M.J., was enacted by the Military justice Act of 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, §5227, 130 Stat. 2000, 2911 (2016). The Military Justice Review Group (MJRG), chaired by the Honorable Andrew S. Effron, proposed the enactment of subsection 45(c). The MJRG explained its rationale for the new provision:

> The military providence inquiry has developed over the years into a careful, deliberate procedure with comprehensive protections to ensure that every guilty plea is knowing and voluntary. A guilty plea of that character should not be overturned for minor or technical violations of Article 45(a) that amount to harmless error.

occurred at the sentencing stage. The military trial judge sentenced Appellant to thirty months' confinement specifically because of this charge. R. at 84. The next greatest period of confinement for a specification and charge was only eighteen months of concurrent confinement. *Id*. Clearly, the erroneous conviction of this solicitation charge materially prejudiced Appellant's substantial rights.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside his conviction of Charge II and its specification.

III.

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

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.*

Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations 399 (Dec. 22, 2015), https://tile.loc.gov/storage-services/service/ll/llmlp/Military-Justice-Review-Group-Report_Part1/Military-Justice-Review-Group-Report_Part1.pdf. The failures of the providence inquiry in this case were far from "minor or technical violations." Rather, Appellant was erroneously convicted of conduct that was not a criminal offense.

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 Appellant'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). Appellant meets each of the statutory thresholds: (1) an error, (2) raised by Appellant, (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 possibly apply to Appellant, 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).

A. Appellant has demonstrated error: the unconstitutional application of what appears to be 18 U.S.C. § 922(g)(1) to Appellant.

Facially, only one part of 18 U.S.C. § 922 could conceivably apply to Appellant: 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 Appellant faced up to ten years for each offense. R. at 1524. But this is the only category under 18 U.S.C. § 922(g) that could seem to apply to Appellant. And, as discussed below, when the sole applicable provision is viewed through the lens of the absence of violence in Appellant's case, the purported statutory application of 18 U.S.C. § 922(g)(1) 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. at 274. 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 Appellant, the question then becomes: Does the purported application of the lifetime firearm ban enumerated in 18 U.S.C. § 922(g)(1) 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 Appellant'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—here, purportedly through 18 U.S.C. § 922(g)(1)—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, Appellant's case never involved a threat to physical safety or special danger of misuse.

Moreover, 18 U.S.C. § 922(g)(1) cannot constitutionally apply because the Government has not proven—and cannot prove—that such a ban as applied to Appellant 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 Appellant's convictions did not involve violence of any kind. And unlike *Rahimi*, disarmament under 18

U.S.C. § 922(g)(1) (the only possible category for prohibition) is not temporary; it will last forever.

Appellant 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 Appellant's. And such relief is within this Court's power to provide because, as discussed below, Appellant has demonstrated the erroneous application of the firearm prohibition occurred after entry of judgment.

B. 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 22 August 2023 after the military judge signed on 11 August 2023. *Compare* EOJ at 2, *with* EOJ at 3.

C. 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, Appellant 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.

D. 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 Appellant'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*. Changing the firearm prohibition on the EOJ therefore corrects the unconstitutional bar. Specifically, it would correct the erroneous indexing of Appellant 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 Jan. 14, 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 Jan. 14, 2025); *see* NICS Indices, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/nics-indices (last visited Jan. 14, 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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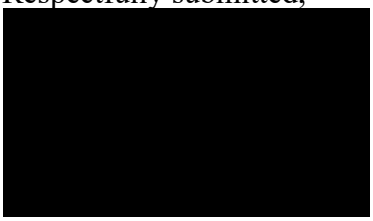
CERTIFICATE OF FILING AND SERVICE

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 11 March 2025.

Respectfully submitted,



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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. 1
Senior Airman (E-4) **KEEGAN L. LOVELL** United States Air Force *Appellant.*	)	No. ACM 40614 10 April 2025

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

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

ISSUES PRESENTED

I.

THE SPECIFICATIONS UNDER CHARGE I IMPLICATED BOTH CRIMINAL AND CONSTITUTIONALLY PROTECTED CONDUCT. DESPITE THIS, THE COLLOQUY BETWEEN THE MILITARY JUDGE AND APPELLANT FAILED TO CONTAIN AN APPROPRIATE DISCUSSION AND ACKNOWLEDGEMENT ON THE PART OF APPELLANT OF THE CRITICAL DISTINCTION BETWEEN PERMISSIBLE AND PROHIBITED BEHAVIOR. DID THIS FAILURE RESULT IN AN IMPROVIDENT PLEA?

II.

DID THE MILITARY TRIAL JUDGE FAIL TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE OF CHARGE II?

III.

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

STATEMENT OF CASE

The United States agrees with Appellant's statement of the case in his Summary of Proceedings section. (App. Br. at 2-3).

STATEMENT OF FACTS

Pursuant to his plea agreement, Appellant pled guilty to all the charges and specifications brought against him. (*Offer for Plea Agreement*, ROT Vol. 1; R. at 14.) In exchange, the Convening Authority agreed to a maximum of six years of confinement for each specification of Charge I, and a range of confinement from 1 year to six years for Charge II. (*Offer for Plea Agreement,* para. 3). As part of his plea, Appellant agreed to provide a stipulation of fact. (Id. at para. 2.c.; *Stipulation of Fact,* ROT Vol. 1.) His stipulation of fact contained a disc containing six videos and 19 photos. (Id.) Appellant agreed that this media was admissible for both his guilty plea and sentencing. (R. at 19-20.) The military judge engaged in a colloquy with Appellant to ensure a factual basis for his pleas. (R. at 21-49).

Facts Related to Charge I

Charge I, Specifications 1 and 2[2] alleged that Appellant possessed and viewed child pornography in violation of Article 134, UCMJ[3]. (*Charge Sheet*, ROT Vol. 1). The judge explained the elements and definitions of the offenses to Appellant. (R. at 22-25.) In the definition for child pornography, the judge explained, "Child pornography also means material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct." (R. at 23.) The judge then explained obscenity saying,

[2] Appellant does not allege that his plea of guilty to Specification 3, Charge I is improvident. So Specification 3 is not analyzed in this brief.

[3] Appellant confirmed that the answers he gave relating to Specification 1 applied to Specification 2 as well. (R. at 34.)

> Obscene means [. . .] an average person applying contemporary community standards would find that the visual images depicting minors engaging in sexually explicit conduct, when taken as a whole, appeal to the prurient interest in sex and portray sexual conduct in a patently offensive way, and that a reasonable person would not find serious literary, artistic, political, or scientific value in the visual images depicting minors engaging in sexually explicit conduct.

(Id.) The judge then explained sexually explicit conduct.

> Sexually explicit conduct means actual or simulated, [. . .] sexual intercourse or sodomy, including genital to genital, oral to genital, anal to [genital], or oral to anal, whether between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.

(Id.)

He clarified that not every exposure of the genitals or pubic area constitutes lascivious exhibition. (Id.)

> Consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition. In making this determination, important factors are whether the focal point of the depiction is on the genitals or pubic area, whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or an inappropriate attire considering the child's age, whether the child is partially clothed or nude, whether the depiction suggests sexual coyness or willingness to engage in sexual activity, and whether the depiction is intended or designed to elicit a sexual response in the viewer, as well as any other factors that may be equally as not more important in determining whether a visual depiction contains a lascivious exhibition.

(R. at 23 – 24.)

Appellant admitted that he possessed, viewed, and received hundreds of files of child pornography. (*Stipulation of Fact* at para. 8; R. at 29.) He admitted that the elements and definitions taken together correctly described what he did. (R. at 25, 26, 33). Appellant

explained that he went to a website[4] and viewed suggestive naked photos of children. (R. at 26, 27). The website did not allow child pornography and would delete it. (R. at 43.) When Appellant clicked on the profiles that had uploaded the suggestive images of children, he saw that people were offering "more of things that can't be posted" on the website. (Id.) He believed that statement meant he could get child pornography from those people if he asked for it. (R. at 49.) Based on this, he sent requests for more images to 30 people. (*Stipulation of Fact;* R. at 26.) In response he received links from 7 people to file sharing websites, either Google Drive or something like it, with child pornography. (R. at 26, 28, 37, 38, 44.) He viewed the child pornography on the website. (R. at 28, 38.) He then downloaded the images and videos to his Google Drive. (R. at 28.) Appellant redistributed the child pornography to other online users when they made the same request to him. (R. at 26.) The military judge confirmed that Appellant's possession of the videos and pictures was always over the internet. (R. at 28.) He did this from his military dorm room on Travis Air Force Base. (R. at 34.)

Appellant admitted that the images and videos were child pornography as the military judge had defined it. (R. at 27.) But when asked if he knew or had any reason to believe that the visual depictions that he possessed contained actual minors, Appellant said he had "no way of actually knowing." (R. at 29-30.) Even so, he confirmed that he believed they were minors based on their physical characteristics. (Id.) The attachments to the stipulation of fact included some of the images and videos Appellant possessed. None of the images or videos are cartoons or drawings. They depict real minors, including an infant and toddlers, being subjected to

[4] Appellant specifically identified the website during his plea colloquy and in his stipulation of fact. The name of the website is intentionally not included in this brief to avoid further publishing the name of a website that hosts distributors of child pornography and obscene images of children.

explicit sex acts. (*Stipulation of Fact*, para. 8.p.) Appellant admitted that files described in paragraphs 8.a-y of the Stipulation of Fact depicted children under the age of 18 years old. (Id. at para. 10.) He did not contend that those images were merely what appeared to be children.

Appellant admitted that the depictions of what appear to be minors were obscene as it had been previously defined to him. (R. at 30.) He also admitted that a reasonable person would not find serious literary, artistic, political, or scientific value in the visual images depicting minors engaging in sexually explicit conduct. (Id.)

Facts Related to Charge II

Related to Charge II, the judge explained the elements of Article 82, UCMJ, to Appellant as follows:

> One [. . .] you solicited online users on the website [. . .] to send you nude images and videos of minors or what appear to be minors engaging in sexually explicit conduct in violation of Article 134, UCMJ. And two that you specifically intended the online users on the website [. . .] [to] commit the offense of sending you nude images and videos of minors, or what appear to be minors, engaging in sexually explicit conduct, also known as distribution of child pornography, in violation of Article 134, UCMJ.

(R. at 40.)

The judge was clear that Appellant must have intended that online users at the website commit every element of the offense of distribution of child pornography. (R. at 41.) He explained that the elements of distribution of child pornography are:

> One that on divers occasions [. . .] online users knowingly and wrongfully distributed child pornography to wit, sending you nude images and videos of minors or what appear to be minors engaging in sexually explicit conduct to [Appellant]. And two that under the circumstances, the conduct of [the online users] was of a nature to bring discredit upon the armed forces or to the prejudicial [sic] good order [and] discipline in the armed forces.

(R. at 41.)

Appellant admitted that the elements and definitions correctly described what he did. (R. at 42.)

Appellant contacted around 30 people who had posted suggestive photos of children on the website and "implied" he was looking for child pornography. (R. at 27.) The judge explained that "solicit means any statement oral or written or any other act or conduct which reasonably may be construed as a serious request to commit the offense." (R. at 42.) He then asked Appellant to explain how he solicited the images and "why that [was] reasonably construed as a request for them to distribute digital images of what appear to be minors?" (Id.) In response, Appellant explained that the website wouldn't allow images of child pornography but on the profile the users would say, "send me an email if you would like more things that can't be posted here." (R. at 43.)

The judge inquired further by asking how, based on the circumstances, his implied request for child pornography would be reasonably construed as soliciting distribution of child pornography. (R. at 44.) To give context for his request, Appellant admitted that of his thirty requests, seven people responded with links to a file sharing website such as Google Drive. (R. at 44.) Each time there was child pornography at the link. (R. at 44 – 45.) Appellant admitted that receiving child pornography because of his request was intentional. (R. at 39, 45.)

Appellant admitted that he specifically intended the users on the website commit the offense of sending him nude images and videos of minors or what appear to be minors engaging in sexually explicit conduct. (R. at 45, 46.) Appellant admitted that the action of sending him nude images and videos of minors or what appear to be minors engaging in sexually explicit would violate Article 134, UCMJ. (R. at 45.) Appellant explained that his possession of child pornography was service discrediting. (R. at 32.)

ARGUMENT

I.

THERE IS A SUFFICIENT FACTUAL BASIS IN THE RECORD TO CONCLUDE THAT APPELLANT POSSESSED CHILD PORNOGRAPHY INVOLVING ACTUAL CHILDREN NOT PROTECTED BY THE FIRST AMENDMENT[5], AND THEREFORE HIS GUILTY PLEA WAS PROVIDENT. EVEN IF SOME OF THE DEPICTIONS WERE NOT OF ACTUAL CHILDREN, THE DEPICTIONS WERE OBSCENE, AND HIS POSSESSION AND VIEWING DID NOT IMPLICATE THE LIMITED PROTECTION OF STANLEY V. GEORGIA.

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).

Law and Analysis

"During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." Id. at 321-322 (internal citation omitted). A military judge abuses his or her discretion by "fail[ing] to obtain from the accused an adequate factual basis to support the plea." Id. at 322. A military judge is afforded "significant deference" in obtaining an adequate factual basis to support the plea. Id. A military judge can also abuse his or her discretion if acceptance of the plea is based on an erroneous view of the law. Id. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. An abuse of discretion is more than a mere difference of

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opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000).

In reviewing the military judge's decision, the Court applies a substantial basis test which evaluates whether the record shows "a substantial basis in law and fact for questioning the guilty plea." Id. (quoting United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

"[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." United States v. Care, 18 C.M.A. 535, 539 (1969)(quoting McCarthy v. United States, 394 U.S. 459, 466 (1969)).

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." United States v. Hartman, 69 M.J. 467, 468 (C.A.A.F. 2011). In a guilty plea, "the colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." Id. The military judge may use lay terminology to explain the distinction between criminal and constitutionally protected conduct. Id.

Contrary to Appellant's assertion, the facts of a case, not the language on the charge sheet, determine whether a judge needs to have more discussion into the implication of constitutional protections. (App. Br. at 9). This is because the heightened inquiry is seeking to establish an understanding of the "existence of constitutional rights *relevant to [the appellant's] situation*". United States v. Byunggu Kim, 83 M.J. 235, 239 (C.A.A.F. 2023). This is supported by both our Superior Court and this Court's analysis of whether a heightened inquiry was

required. In Byunguu Kim, the appellant pled guilty to indecent conduct by searching for pornographic videos that was of a nature to bring discredit upon the armed forces. 83 M.J. 235, 237 (C.A.A.F. 2023). The Court found the appellant's "behavior occupied a constitutional gray area" and therefore required a heightened plea inquiry. Id. at 239. This consideration of the appellant's behavior, as well as the Court's statement that the discussion should have included "the existence of constitutional rights *relevant to his situation*" reflects consideration of the facts beyond the words on the charge sheet. Id. (emphasis added). In United States v. Whitaker, 72 M.J. 292 (C.A.A.F. 2013), our Superior Court reversed the Coast Guard Court of Criminal Appeals conclusion that an appellant's plea was improvident where the facts elicited revealed that the appellant's conduct fell outside constitutional protections. There, the appellant was convicted of sodomy in violation of Article 125, UCMJ. The Court noted that the appellant's admission in the stipulation of fact that the sodomy occurred without consent removed his actions from implicating constitutional protections. Whitaker, 72 M.J. at 293. This was true even though the charge of sodomy on its face implicated constitutional protections of Lawrence v. Texas, 539 U.S. 558 (2003).

This Court has also looked beyond the language of the charge sheet to determine whether the charge implicates constitutionally protected conduct. In United States v. Timsuren, 72 M.J. 823 (A.F. Ct. Crim. App. 2013), the appellant pled guilty to conduct unbecoming an officer for engaging in sexual conduct with the wife of an Air Force officer while at a party attended by enlisted Airmen and hosted by an enlisted Airman. The appellant argued that his plea was improvident because the military judge failed to explain the difference between private, consensual sexual activity that is constitutionally protected and what is criminally proscribed. Id. at 825. The Court looked to the facts and found an inquiry into constitutional protection was

not required because the appellant's own admissions established that the sexual activity that formed the basis for the offense was neither consensual, nor private, and therefore did not implicate constitutional protections. Id. at 827.

Based on both this Court and our superior Court's precedent, it was proper for the military judge to consider the facts of Appellant's conduct from both the stipulation and the colloquy to determine whether an inquiry into constitutional protections was required. The facts established that Appellant's conduct did not implicate constitutional considerations and so a heightened inquiry was not required.

A. Appellant's Conduct Was Not Constitutionally Protected.

The child pornography Appellant viewed and possessed, to the extent that it involved depictions of what appear to be minors rather than actual minors, was obscene and not protected by the Constitution. Additionally, neither Appellant's viewing nor his possession of child pornography occurred alone, in the privacy of a home. His actions therefore did not fall within the limited protection of Stanley v. Georgia, 394 U.S. 557 (1969). Because the facts removed Appellant's conduct from constitutional protection, a heightened plea inquiry was not required, and there is not a substantial basis in law to question the providence of his plea.

1. The images and videos Appellant possessed were obscene and therefore not Constitutionally protected.

"The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-246 (2002). These categories may be prohibited without violating the First Amendment[6]. Id. at 246. In regulating obscenity, the

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Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. Id. (citing Miller v. California, 413 U.S. 15, 24 (1973)).

The images and videos Appellant viewed and possessed were obscene. The attachments to the stipulation of fact on their face establish that they are obscene. Any reasonable person applying contemporary standards would find the images and videos that depict minors, including infants and toddlers, being subjected to sex acts appeals to the prurient interest in sex and portrays sexual conduct in a patently offensive way. No reasonable person would find serious literary, artistic, political, or scientific value in the visual images depicting children being subjected to such sexually explicit conduct. Appellant admitted as much when he stipulated that the videos attached to the stipulation of fact were child pornography because the definition of child pornography includes obscene depictions of children. (*Stipulation of Fact* at para. 10.) Thus, Appellant was admitting either that the images depicted real children or that they were obscene. Because the facts Appellant stipulated to remove his conduct from constitutional protection, as in Whitaker, no further inquiry was required. Whitaker, 72 M.J. at 293.

Even still, the military judge was diligent in ensuring Appellant understood that his conduct was criminal, to the extent that it involved only depictions of what appears to be minors, if the depictions were obscene. The military judge provided Appellant a clear definition of obscenity that accounted for the Miller standard. (R. at 23.) He defined sexually explicit conduct and lascivious exhibition of the genitals and expressly explained the exception that not every exposure of the genitals is lascivious exhibition. (R. at 23-24.) Appellant confirmed that he understood the definitions. (R. at 25.) Appellant admitted that the depictions of what appears to be minors were obscene. (R.at 30.) He admitted that a reasonable person would not find

serious literary, artistic, political, or scientific value in the images depicting minors engaging in sexually explicit conduct. (R. at 30.) This thorough explanation of criminality satisfies the heightened plea inquiry standard. The military judge's acceptance of the guilty plea, based on all the facts in front of him, was not arbitrary, fanciful, clearly unreasonable or clearly erroneous. Therefore, he did not abuse his discretion in accepting Appellant's guilty plea and there is no substantial basis in law or fact to question the providence of Appellant's plea of guilty to Specifications 1 and 2 of Charge I.

2. Appellant's viewing and possession of obscene images and videos did not occur alone in the privacy of his home and so the limited protection of Stanley did not apply to his situation.

As explained above, obscenity is not protected under the First Amendment[7]. Miller, 413 U.S. at 23. Stanley created a *very narrow* exception to this general rule for private possession, alone, in one's home, of obscene material depicting adults. 394 U.S. at 564-565. This exception is "strictly limited to its facts." United States v. Bowersox, 72 M.J. 71, 75 (C.A.A.F. 2013)(citing Osborne v. Ohio, 495 U.S., 103, 108 (1990)).

While the constitutional principle underlying the holding in Stanley is "less than clear" it implicates the right to privacy in one's own home. Id. at 75-76; *See* United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 126 (1973)[8]. "The Court has consistently rejected constitutional protection for obscene material outside the home." United States v. Orito, 413 U.S. 139, 143 (1973). But, even within a dwelling, the Court evaluates whether natural tendency

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[8] While in Osborne v. Ohio, 495 U.S. 103, 108 n.3 (1990), the Supreme Court also stated that its decision in Stanley was "firmly grounded in the First Amendment," this is dicta the Court used to explain why the ruling of Stanley was supported by the Constitution aside from the privacy interest alone. The Court did not overrule its precedent that Stanley implicated the Fourth Amendment.

of material to be kept private in the home is substantially diminished to determine whether the privacy interest in a home applies to that dwelling. Bowersox, 72 M.J. at 76. This is because Stanley relies on the consideration of whether private possession of obscene material presents a danger that "it might intrude upon the . . . privacy of the general public." Id. (quoting Stanley, 394 U.S. at 567).

The facts established that Appellant's conduct did not implicate the "discrete and special privacy interest in one's home recognized by Stanley" for two reasons: (a) Appellant's conduct occurred in his military quarters; (b) he viewed and possessed the obscene images online. Id. at 77. The military judge was therefore not required to conduct a heightened plea inquiry and there is not a substantial basis in law for questioning Appellant's plea of guilty to Specifications 1 and 2 of Charge I.

a. Appellant's viewing and possession of obscene depictions of minors in his military dorm room is not protected by Stanley.

Military quarters are not a "home" under Stanley because they do not enjoy the same discrete and special privacy interests of a home. Bowersox, 72 M.J. at 77. Appellant told the military judge his viewing and possession of child pornography occurred in his military dorm room. (R. at 35.) Where the facts in the colloquy established that Appellant's possession of obscene material – that is otherwise not constitutionally protected – occurred in an area our Superior Court treated as outside the limited reach of Stanley, no constitutional considerations were implicated, and a heightened inquiry was not required.

In Bowersox, 72 M.J. 76-77, our Superior Court established that military quarters are not covered by the narrow scope of Stanley. Contrary to Appellant's interpretation, the fact that the appellant's room was shared was not the focus of the court's rationale. (App. Br. at 12-14). Instead, the Court's rationale focused on the nature of military quarters. The court reiterated the

findings in United States v. McCarthy, 38 M.J. 398, 403 (C.M.A. 1993) that "the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home." Id. The court continued by listing the factors that make military quarters different from a home,

> Appellant was assigned his room; he did not choose it. Appellant was assigned his roommate; he did not choose him. Appellant could not cook in his room, have overnight guests, or have unaccompanied underage guests. Appellant knew that he was subject to inspection to a degree not contemplated in private homes.

Id. at 76 (citing McCarthy, 38 M.J. at 403). The Court concluded that for these reasons, an airman has "less of an expectation of privacy in his shared barracks room than a civilian does in his home." Id.

The shared nature of the appellant's barracks room in Bowersox was a fact that emphasized the diminished privacy, but the diminishment in the "natural tendency of material in the home being kept private" exists in solitary dormitory quarters as well. Appellant's dormitory room was equally subject to inspections that one would not have expected in an off-base residence. *See* Bowersox (referencing M.R.E. 313(b) permitting inspection of the whole or part of a unit as an incident of command). The discrete and special privacy interest a person has in their home is substantially diminished in all military quarters. Therefore, a military dorm is not covered by the limited protection of Stanley. Because the limited constitutional protection of Stanely was not implicated by Appellant's conduct, a heightened inquiry was not required and there is not a substantial basis in law or fact to question the providence of Appellant's guilty pleas.

b. Online viewing and possession of obscene materials does not implicate the limited protection of Stanley.

Even if Stanley covered Appellant's military quarters, Appellant did not view or possess the obscene files alone in the privacy of his home because his actions occurred on an internet file sharing and storage website.

Appellant received the obscene photos and videos from others through a link to a file share website that was either Google Drive or something similar. (R. at 44.) He viewed the files on those sites and saw that they were child pornography. (Id.) Then, Appellant saved these obscene images and videos on Google Drive, (R. at 28), an online storage service and file sharing platform that allows users to store, access, and share files. Viewing obscene material on a website accessible to others and downloading the photos and videos to his Google Drive brought Appellant's actions outside the exception in Stanley because his actions were no longer private or alone.[9]

i. ***Viewing obscene material on a Google Drive accessible with a link is not analogous to viewing obscene material alone in the privacy of one's home.***

The limited privacy of the home in Stanley is not a "zone of privacy that follows a distributor or a consumer of obscene materials wherever he goes." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973). "Stanley is predicated on both the sanctity of the home and *solitude.*" United States v Meakin, 78 M.J. 396, 402 (C.A.A.F. 2019) (emphasis added). It does not extend beyond the home. Id. Actions on the internet occur beyond the home. Id. (transmissions of obscenity constitute "travel" in interstate commerce) (citing United States v. Pierce, 70 M.J. 391, 394

[9] As explained above Stanley is strictly limited to its facts. Bowersox, 72 M.J. at 75. Stanley was decided in 1969. The internet was not publicly available until more than two decades later in 1993. This Court should hesitate to expand Stanley's concern for "mere private possession" to encompass the internet as it exists, especially when the Court in Stanley could not have contemplated how public possession of obscenity "in one's home" could be.

(C.A.A.F. 2011) (finding it an "unremarkable proposition" that the internet is a means of interstate commerce). Viewing obscene materials on the internet through a file sharing website that anyone can access with a link does not occur in solitude or within the limited "zone of privacy" contemplated by Stanley.

Viewing obscenity on a website which would be accessible to anyone else with the link is more like watching obscene films in a movie theater than it is reading a book alone in one's home. A privacy right and a place of public accommodation are mutually exclusive. Paris Adult Theatre I, 413 U.S. at 66. The internet, especially file sharing websites that can be accessed with a link, are public. Viewing obscene materials in that way is not private. In distinguishing between obscenity in the home and in public places the Supreme Court highlighted "if he demands a right . . . to foregather in public places -- *discreet, if you will, but accessible to all* -- with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies." Id. at 59 (emphasis added) (internal quotation and citation omitted). Therefore, just as "it is unavailing to compare a theater open to the public for a fee, with the private home of Stanley" it is unavailing to compare a website open to anyone with a link with the privacy considered in Stanley, and Appellant's conduct was not constitutionally protected. Id. at 65.

Appellant's case is also distinct from the private possession contemplated by Stanley because, unlike private possession in the home there is little if anything, that protects unconsenting adults or juveniles from being exposed to the obscene content on such file sharing websites. The Court in Stanley distinguished public distribution, which implicates public possession, from private possession in the home because there was "no . . . danger" that the obscene material might fall into the hands of children or intrude upon the sensibilities of the

public. Stanley, 394 U.S. at 567. That danger is present here. The military judge even noted, "people can send you all sorts of links to anything." (R. at 31.) Where that danger is present, in consideration that Stanley is strictly limited to its facts, viewing obscenity on a file sharing website must fall outside of constitutional protection.

Because Stanley was not implicated by the facts of Appellant's case, the military judge did not have to conduct a detailed inquiry into the applicability of Stanley and there is not a substantial basis to question Appellant's plea of guilty to Specifications 1 and 2 of Charge I.

ii. Online storage of obscenity, where the content is subject to review by a third party, is not possession alone, in the privacy of one's home as contemplated by Stanley.

Appellant's storage of obscene material on Google Drive was not private. Like his military quarters, his Google Drive was subject to routine searches for illegal content such as child pornography. *See* United States v. Maher, No. 5:21-CR-0275 (GTS/TWD), 2022 U.S. Dist. LEXIS 254105, *1-2 (N.D.N.Y. Aug. 22, 2022)("As part of its Terms of Service, Google informs its users that it may review content to determine whether it is illegal or violates its policies. . . Based on its strong business interest in enforcing its Terms of Service and ensuring its services are free of illegal content, including apparent child sexual abuse material (CSAM), Google has taken active efforts to independently and voluntarily . . . monitor and safeguard its platform.")(internal citations and quotations omitted). Routine and consensual monitoring of content by a third party removes Appellant's online storage of obscene materials from the limited protection of Stanley because possession does not occur in solitude and the "natural tendency of material in the home being kept private is substantially diminished." Meakin, 78 M.J. at 402; Bowersox, 72 M.J. at 76. Therefore, the military judge was not required to conduct a heightened inquiry into the applicability of Stanley, and he did not abuse his discretion in accepting Appellant's guilty plea.

The facts elicited established that Appellant's viewing and possession of obscene material occurred in military quarters and on the internet. This conduct does not implicate constitutional protections. Therefore, no further inquiry by the judge was required. Because the military judge's decision to accept Appellant's plea of guilty to Specifications 1 and 2 of Charge I was not arbitrary, fanciful, clearly unreasonable or clearly erroneous and so his plea was provident.

3. Appellant's Guilty Plea to Possessing and Viewing Child Pornography Involving Actual Minors Was Provident.

Should this Court find the military judge abused his discretion in accepting Appellant's guilty plea because he did not satisfy the heightened inquiry for possession and viewing obscene material of what appears to be minors, the proper remedy is to except from the specification the words "or what appears to be minors" and affirm the rest of Specifications 1 and 2 of Charge I. This Court should not invalidate all of Appellant's guilty plea for Specifications 1 and 2 of Charge I because the military judge did not abuse his discretion in accepting Appellant's plea for possession and viewing child pornography involving actual minors

The military judge elicited a sufficient factual basis to support the specifications that Appellant possessed and viewed child pornography depicting actual minors. Appellant admitted that some images he possessed, and viewed were "positively identified as child pornography based on NCMEC March 2021 hash matches." (*Stipulation of Fact*, page 3, paragraph 7.) "NCMEC is a tool for law enforcement and is relied upon by law enforcement organizations. Images believed to be child pornography are submitted to NCMEC to determine if the images depict any known victims and to establish that the images are of actual minors." United States v. Kleinkauf, No. 4:10-CR-13, 2010 U.S. Dist. LEXIS 99367, *4-5 (E.D. Tex. Aug. 6, 2010) (internal quotations omitted). "[A] matching hash value indicates a file that was previously

identified as a copy of a known image of child pornography." United States v. Guihama, 2022 CCA LEXIS 672, *12, n.5 (A.F. Ct. Crim. App. 18 November 2022). Appellant stated that he believed the images and videos were of minors based on their physical characteristics. (R. at 30, 34.) Appellant agreed that the 25 files attached to the stipulation of fact depicted children under the age of eighteen. (R. at 30.) A review of the images attached to the stipulation of fact further establishes sufficient factual basis that Appellant possessed child pornography of actual minors, including an infant and toddlers.

There is no First Amendment[10] right to possess child pornography. New York v. Ferber, 458 U.S. 747 (1982); Osborne v. Ohio, 495 U.S. 103 (1990). Appellant does not challenge the providence of his plea as it relates to possession of child pornography of actual minors.

Because there is a sufficient factual basis to support Appellant's plea for possession and viewing of child pornography of actual minors, the military judge did not abuse his discretion in accepting Appellant's plea of guilty. Even if this Court finds error for any images that depict what appears to be minors, dismissal of the entirety of Specifications 1 and 2 of Charge I is inappropriate. In that situation, this Court has previously excepted the words "or what appears to be minors" from the specifications and sustained the remainder the conviction. United States v. Mullings, 2015 CCA LEXIS 405 (A.F. Ct. Crim. App. 2015) (excepting "or what appears to be a minor" from the specification where the military judge failed to conduct an adequate plea inquiry under Hartman but affirming the remainder of the specification); United States v. Stanton, 2014 CCA LEXIS 650 (A.F. Ct. Crim. App. 2014) (excepting "or what appears to be minors" from the specification but affirming the remainder of the specification). Appellant has provided no justification for why this Court should treat his case differently. Based on this, if this Court finds

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the military judge abused his discretion in accepting Appellant's plea of guilty as it relates to "what appears to be minors" this Court should except that language from the specification and sustain the remainder of Appellant's conviction.

II.

APPELLANT'S GUILTY PLEA TO CHARGE II WAS PROVIDENT AND THIS COURT SHOULD NOT OVERRULE UNITED STATES V. HEPPERMANN.

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion. Inabinette, 66 M.J. at 322[11].

Law and Analysis

"During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." Id. at 321 – 22 (internal citation omitted). A military judge abuses his or her discretion by "fail[ing] to obtain from the accused an adequate factual basis to support the plea." Id. at 322. A military judge is afforded "significant deference" in obtaining an adequate factual basis to support the plea. Id. A military judge can also abuse his or her discretion if acceptance of the plea is based on an erroneous view of the law. Id.

In reviewing the military judge's decision, the Court applies a substantial basis test which evaluates whether the record shows "a substantial basis in law and fact for questioning the guilty plea." Id. (quoting United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

[11] When the providence of a plea raises a pure question of law, appellate court's review the question of law de novo. Inabinette, 66 M.J. at 322. The providence of Appellant's guilty plea as to Charge II does not raise a pure question of law, and so this Court must review the providence of the plea for an abuse of discretion using the substantial basis test.

Appellant's claim that the military judge could not elicit a sufficient factual basis to support his guilty plea to Charge II rests on two assertions: (1) that to sustain a conviction under Article 82, the solicitee must have been subject to the UCMJ; and (2) that it is impossible for a civilian to take action that discredits the armed forces. (App. Br. at 19). Both assertions are incorrect, and the military judge elicited a sufficient factual basis to support Appellant's conviction for soliciting distribution of child pornography.

A. A Solicitee Does Not Need To Be Subject To The UCMJ To Prosecute The Solicitor Under Article 82, UCMJ.

This Court has continuously rejected the notion that a solicitee must be subject to the UCMJ for the solicitor to be prosecuted under Article 82, UCMJ. This rejection began when the crime of solicitation existed under Article 134, UCMJ, and has continued through the offense being moved to Article 82, UCMJ. Stare decisis dictates that this Court adhere to this longstanding precedent.

> Stare decisis is defined as [t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. The doctrine encompasses at least two distinct concepts ... : (1) "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself" (horizontal stare decisis); and (2) courts "must strictly follow the decisions handed down by higher courts" (vertical stare decisis).

United States v. Andrews, 77 M.J. 396, 399 (C.A.A.F. 2018) (internal citation omitted)(brackets in original).

"[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting United States v. Sills, 56 M.J. 239, 241 (C.A.A.F. 2002) (per curiam)). Stare decisis is most compelling

where courts undertake statutory construction. Andrews, 77 M.J. at 399 (internal quotations omitted)(citing United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003). The party requesting that the Court overturn precedent bears "a substantial burden of persuasion." Id. (internal citation and quotations omitted).

Applying stare decisis is, however, "not an inexorable command." Blanks, 77 M.J. at 242 (internal quotation and citations omitted). The Court considers four factors in evaluating the application of stare decisis: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of servicemembers; and (4) the risk of undermining public confidence in the law. Id. "Even if these factors weigh in favor of overturning long-settled precedent, we [still] require special justification, not just an argument that the precedent was wrongly decided." Andrews, 77 M.J. at 399 (internal citation and quotation omitted)(brackets in original).

Appellant does not even attempt to meet the substantial burden of persuasion that rests on his shoulders. Instead, he only claims that this Court's decision in United States v. Heppermann, 82 M.J. 794 (A.F. Ct. Crim. App. 2022), was "decided incorrectly." (App. Br. at 22.) This is insufficient. *See* Andrews, 77 M.J. at 399 (requiring special justification not just an argument that precedent was wrongly decided); United Sates v. Driskill, 84 M.J. 248, 257 (C.A.A.F. 2024) (finding that the claim that a case was wrongly decided insufficient where the stare decisis factors were not addressed). Appellant makes no new argument that was not already put forth and rejected in Hepperman, United States v. Massey, 2023 CCA LEXIS 46 (A.F. Ct. Crim. App. 30 Jan 2023), and United States v. Bickford, 2024 CCA LEXIS 86 (A.F. Ct. Crim. App. 14 Feb 2024). (App. Br. at 22) (Conceding the appellant in Heppermann made a similar "if not the same" argument Appellant now makes). With no new argument or reasoning to support his

claim that the Court erred, this Court should decline Appellant's unsupported request to overturn its prior holdings and dismiss Appellant's claim.

Even construing Appellant's broad claim as meeting the stare decisis factors, this Court should reject his argument and adhere to its precedent because the decision is not unworkable or poorly reasoned, there have been no intervening events, and the risk of undermining public confidence in the law by overturning more than four decades of precedent is high.

1. Heppermann Is Not Unworkable Or Poorly Reasoned.

"Under the doctrine of stare decisis, the question is not whether the interpretation [at issue] is plausible; it is whether the ... decision is so unworkable or poorly reasoned that it should be overruled." United States v. Tualla, 52 M.J. 228, 231 (C.A.A.F. 2000). This Court's decision in Heppermann is not unworkable or poorly reasoned – it is correct. Appellant argues four justifications for his conclusion that Hepperman was wrongly decided: (i) plain language; (ii) congressional intent; (iii) "essence" of the solicitation offense; and (iv) maximum punishment. Each are addressed below.

i. Plain Language

This Court was correct in finding that the plain language of Article 82 supports the conclusion that a solicitee does not need to be subject to the UCMJ for the solicitor to be prosecuted. Appellant concedes that "there is no ambiguity in Article 82(a)". (App. Br. at 24). "It is well established that when a statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." Lamie v. United States Tr., 540 U.S. 526, 534 (2004). As this Court noted, Article 82 criminalizes soliciting another "to commit a certain offense under the UCMJ." Heppermann, 82 M.J. at 800. It does not prohibit the solicitation of "another person subject to the UCMJ to

commit an offense under the UCMJ." Id. Therefore, this Court's application of the plain language of Article 82, UCMJ, is not unworkable or poorly reasoned.

Appellant's assertion that the term "offense" includes that the person be subject to the jurisdiction of the code is unpersuasive. First, Appellant does not even acknowledge 40 years of precedent contrary to his proposition let alone explain why this Court should depart from that precedent. In Heppermann this Court pointed out, "Service courts have routinely rejected arguments that the person solicited must be subject to the UCMJ." 82 M.J. at n.8 (internal citation and quotation omitted); *See* United States v. Hanner, 1993 C.M.R. LEXIS 61 (A.F.C.M.R. 1993)(the person solicited can be a civilian); United States v. Reed, 11 M.J. 649 (A.F.C.M.R. 1981) (solicit civilian to rob armory of M-16 rifles); United States v. Knox, 3 M.J. 971 (A.F.C.M.R. 1977) (solicited a boy under 16 to commit sodomy); United States v. Dyer, 22 M.J. 578, 583 (A.C.M.R. 1986) (solicit step-daughter to commit indecent act with another in his presence); United States v. Robertson, 17 M.J. 846, 851 (N.M.C.M.R. 1984) (solicit state civilian undercover agent to sell cocaine).

Congress can amend a statute to depart from judicial interpretations, but failure to do so "enhances the precedential force of those interpretations." Blanks, 77 M.J. at 242 (C.A.A.F. 2018). The precedential value of 40 years of caselaw establishing statutory interpretation over 12 iterations of the UCMJ is strong. Andrews, 77 M.J. at 399 (Stare decisis is most compelling where courts undertake statutory construction). With no justification for why this Court should overrule such precedent, this Court should reject Appellant's claim that the plain language of the statute requires that the solicitee be subject to the UCMJ.

Appellant's reliance on United States v. Sutton, 68 M.J. 455 (C.A.A.F. 2010) to support his argument that Heppermann was wrongly decided is misplaced because it ignores the facts

that were at issue. In Sutton, the appellant was charged with soliciting his step-daughter to commit lewd acts against a minor – herself. The issue centered on the legal impossibility for a victim to commit an offense against themselves– not a *jurisdictional* impossibility about whether they could be prosecuted for the offense. The Court in Sutton found a child could not commit indecent liberties against herself because indecent liberties with a child contemplates two actors – the accused and the victim. Id. This is distinct from whether a solicitee needs to be subject to the UCMJ for the solicitor to be prosecuted. Emphasizing this distinction is the fact that our Superior Court in Sutton did not analyze – let alone overrule – decades of lower court precedent holding that solicitee does not need to be subject to the UCMJ for the solicitor to be prosecuted.

This Court should not expand our Superior Court's holding to cover facts not contemplated, especially when the Court declined to hear challenges to this exact issue three times in the 15 years since Sutton was decided. United States v. Heppermann, 83 M.J. 103, 2022 CAAF LEXIS 839, 2022 WL 17572710 (C.A.A.F., Nov. 22, 2022); United States v. Massey, 83 M.J. 317, 2023 CAAF LEXIS 238, 2023 WL 3511419 (C.A.A.F., Apr. 21, 2023); United States v. Bickford, 2024 CAAF LEXIS 348 (C.A.A.F., June 21, 2024).

Appellant also claims that the results of this Court's interpretation of Article 82 are absurd. They are not. Appellant's attempt to lay out a parade of horrible arising from this Court's ruling in Heppermann is unpersuasive because they could not occur. (App. Br. at 24). In each of his examples, he fails to consider the requirement that the accused have the specific intent that the crime solicited be committed and the elements of the offenses. Article 92 requires that the accused knew or reasonably should have known of their duty – a civilian has no duty to obey military orders and so the solicitor could not intend the civilian to commit the offense. Article 112a requires that possession of the drug be wrongful – a civilian with the legal authority

to possess marijuana cannot wrongfully possess marijuana and so the solicitor could not intend the civilian to commit the offense. Article 133 requires that the accused be a commissioned officer – a civilian is not a commissioned officer and so the solicitor could not intend the civilian to commit the offense.

The nature of the service discrediting element of Article 134 is different from the examples above. It requires that the *circumstances* of the conduct make the action being service discrediting. Article 134, UCMJ, para. (b)(3)(b).(emphasis added). This element can be satisfied by a civilian's actions and result in criminal liability under Article 82, UCMJ, where a person subject to the UCMJ solicits the conduct and specifically intends the circumstances that make that conduct service discrediting. "[I]n our court, it is settled law that 'the solicitation of another person to commit an offense which, if committed by one subject to the UCMJ, would be punishable under the UCMJ, is an offense cognizable []" as solicitation. Heppermann, 82 M.J. at 799. (internal citation and quotations omitted). The civilian's actions of distributing child pornography by providing links to a file sharing website is a punishable offense under the UCMJ if committed by a service-member. It would be service discrediting for a service member to distribute child pornography containing photos and videos of young children being subjected to, sexual acts, some of which involved ball gags and restraints. (*Stipulation of Fact)*. Appellant specifically intended to solicit a civilian to distribute child pornography. Therefore, his solicitation is criminal under Article 82 and his plea of guilty was provident.

Conversely, Appellant's interpretation would result in service members being able to solicit civilians to commit any offense under the UCMJ, including murder and rape, but be untouchable by the military justice system. Such interpretation is absurd.

This Court's holding in Hepperman is not clearly unworkable or poorly reasoned. It is supported by the plain language of the statute. Even if the language were ambiguous, which Appellant concedes it is not, the interpretation employed by this Court avoids absurd results. (App. Br. at 25).

ii. Congressional Intent

This Court's consideration of legislative process, particularly Congress' choice to not add a requirement that the solicitee be subject to the UCMJ, was proper. The Supreme Court, as well as our Superior Court, have held that Congress failure to act – even on ambiguous criminal statutes – "enhance[s] even the unusual precedential force" afforded to prior decisions. Watson v. United States, 552 U.S. 74, 82-83 (2007)(citation omitted); Blanks, 77 M.J. at 242. Even in the case Appellant relies on, United States v. Universal C.I.T. Credit Corp., the Supreme Court relied on "the specific history of the legislative process" to determine the meaning of a statute. 344 U.S. 218, 222 (1952). Because consideration of the legislative process is proper, this Court's use of that process does not make its decision in Heppermann poorly reasoned or unworkable.

iii. Essence of the Offense/Past Precedent

While Appellant labels this section as the "essence of the offense" that is not what this Court considered. (App. Br. at 24-26). Instead, this Court stated that even if Article 82 were ambiguous, the Court considered and found "convincing the rationale of the case law addressing this issue in the context of solicitation before it was codified in Article 82, UCMJ." Heppermann, 82 M.J. at 800-801. This was correct. As our superior Court has stated, "We may also resort to case law to resolve any ambiguity, although fundamentally case law must comport with the

statute, not vice versa." United States v. Schmidt, 82 M.J. 68, 73 (C.A.A.F. 2022).[12] In resolving even the argument of ambiguity, it was proper for this Court to consider its prior precedent to determine whether the prior rational continued to exist in the offense of solicitation after it was moved to an enumerated Article.

iv. Maximum Punishment

It was correct for this Court to consider the President's interpretations of the elements as persuasive authority because the interpretation did not expressly conflict with the language of the statute. The president's interpretation of the elements of substantive offenses is persuasive authority to the courts. United States v. Forrester, 76 M.J. 479, 485(C.A.A.F. 2017) (internal citation omitted). The Court should abide by the President's interpretation "unless it clearly contradicts the express language of the Code." United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998). The express language of Article 82 does not require the person solicited to be subject to the UCMJ. It therefore does not conflict with the President's interpretation that contemplates the solicitee may not be subject to the code, and this Court's consideration of its persuasive authority was proper.

[12] Appellant claims the rule of lenity "command[s]" that the statute be given the least harsh interpretation in Heppermann. This is incorrect. The rule of lenity is a rule of last resort if ambiguity remains. United States v. Thomas, 65 M.J. 132 (C.A.A.F. 2007). "The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable." United States v. Mays, 83 M.J. 277 (C.A.A.F. 2023)(internal citation and quotations omitted). Because the Court found no ambiguity and even assuming ambiguity, resolved it, the rule of lenity had no application.

2. Factors 2 And 4 Resolve In The Government's Favor[13].

There have been no intervening events between this Court's decision in Hepperman and Appellant's assignments of error. The risk of undermining public confidence in the law supports adhering to more than four decades of precedent.

Appellant has provided no special justification for why this Court should depart from its precedent beyond his incorrect claim that Heppermann was wrongly decided. This is insufficient, and therefore this Court should adhere to its precedent that a solicitee does not need to be subject to the UCMJ for a solicitor to be guilty under Article 82, UCMJ.

B. The Military Judge Elicited A Sufficient Factual Basis To Support Appellant's Plea Of Guilty To Charge II.

The military judge elicited sufficient facts to support that Appellant intended the solicitees to distribute child pornography to a military member. Appellant specifically intended to possess child pornography while he was an active-duty member of the Air Force. (R. at 45). He fulfilled this intent by soliciting others to distribute child pornography to him. (R. at 42). Every time he received the child pornography it was through a file sharing website accessible with a link. (R. at 26, 28, 37, 38, 44). He knew he received the files in this manner and would repeatedly make the same request. Distribution of child pornography through sending links to file sharing websites containing hundreds of horrific images and videos of young children being subjected to sex acts, especially those involving restraints, force, and obvious pain "has a tendency to bring the service into disrepute" or "lower it in public esteem." United States v. Wells, 2024 CAAF LEXIS 552, *10 (C.A.A.F. 24 September 2024)(internal citation omitted). The average member of the public would tend to think less of the military if they knew

[13] The Government acknowledges nothing indicates that servicemembers have relied on Heppermann.

individuals were engaging with service members in the surreptitious online trade of obscene and reprehensible images of children like the ones in this case that involved explicit sexual acts being perpetrated on infants and toddlers. Appellant admitted the circumstances rendered his conduct "of a nature to bring discredit upon the armed forces." *(Stipulation of Fact*, para. 11.) Because Appellant specifically intended that the solicitees distribute child pornography to a service member through an easily available file sharing website, there is a sufficient factual basis to support that Appellant specifically intended the circumstances that make the distribution service discrediting. Given the significant discretion that is afforded judges in obtaining a sufficient factual basis to support a plea of guilty, the military judge's acceptance of Appellant's plea of guilty was not arbitrary, fanciful, or clearly erroneous. Therefore, this Court should find Appellant's plea of guilty to Charge II provident.

C. The Solicitee Appreciated The Criminal Nature Of Distributing Child Pornography.

The solicitation must be such that "the solicitee know[s] that the act requested of him is part of a criminal venture." United States v. Higgins, 40 M.J. 67, 68 (C.M.A. 1994). Appellant cites no authority for his claim that the solicitee had to know that their actions were service discrediting. (App. Br. at 29). This is because no court has required that the criminality of the act solicited to align with the act charged. His claim that "if the solicitee were not required to appreciate the terminal element of Article 134, he would not be required to appreciate the criminality of the request made of him at all" is absurd. Unlike the facially innocuous acts of purchasing rat poison, or using an ATM card of United States v. Oakley and Higgins, 40 M.J. at 70, there can be no question that distributing child pornography is a criminal venture.

"It is long established that evidence of the entire context in which an alleged statement was made can be considered in determining its criminal nature as solicitation." United States v.

Williams, 52 M.J. 218, 220-221 (C.A.A.F. 2001) (internal citation and quotations omitted). The website specifically said it would not allow child pornography. (R. at 49.) To avoid this limitation, users would post suggestive naked photos of children and include a statement like "send me an email if you would like more of things that can't be posted here." (R. at 43, 49.) Appellant interpreted this to mean that he might be able to get child pornography if he asked for it. (R. at 49.) His interpretation was correct. Of the 7 people who responded to his solicitation, he received child pornography every time. (R. at 44-45, 49). This context establishes that the solicitee knew that they were being asked to distribute child pornography – a criminal venture. Therefore, the military judge elicited sufficient facts to support Appellant's plea of guilty to Charge II, and there is not a substantial basis in fact to question the providence of Appellant's plea of guilty to Charge II.

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 Entry of Judgment (EOJ) in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Statement of Trial Results,* 14 March 2024*,* ROT, Vol. 1); (*Entry of Judgment*, 24 April 2024, ROT, Vol. 1.)

Standard of Review

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

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Appellant asserts that his convictions did not trigger the firearm prohibition under 18 U.S.C. § 922. (App. Br. at 33). He also argues that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, citing the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). (App. Br. at 34). Appellant's constitutional argument lacks merit and is a collateral matter beyond this Court's authority to review.

A. This Court Lacks Jurisdiction To Determine Whether Appellant Should Be Criminally Indexed In Accordance With 18 U.S.C. § 922.

This Court recently held in its published opinion in United States v.Vanzant 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. 84 M.J. 671, 675 (A.F. Ct. Crim. App. 28 May 2024). Thus, this Court lacks jurisdiction to grant Appellant relief.

B. The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant.

Appellant argues that 18 U.S.C. § 922 is unconstitutionally applied because he is not a violent offender. (App. Br. at 35.) Even if this Court considers Appellant not to be a physically violent offender, he is a danger to our society. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) ("[The] use of children as … subjects of pornographic materials is very harmful to both the children and the society as a whole."). Felons convicted of child pornography related offenses are required to register as sex offenders – even if they did not personally abuse the child. See 34 U.S.C. § 20911. Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

C. This Court May Not Order Correction Of The First Indorsement To The Entry Of Judgment Under Article 66(D)(2), UCMJ.

Appellant suggests that Vanzant is not dispositive of his request because he has framed the issue merely as an error in post-trial processing under Article 66(d)(2), UCMJ, which he claims this Court did not analyze in Vanzant. (App. Br. at 54.) First, the Vanzant opinion was clear as to the scope of its jurisdiction under Article 66, UCMJ. Next, Appellant is not entitled to relief under Article 66(d)(2), UCMJ. A CCA "***may*** provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial ***after*** the judgment was entered into the record under section 860c of this title[.]" (emphasis added). The 18 U.S.C. § 922 annotation was entered into the record before the EOJ was entered into the record. The 18 U.S.C. § 922 annotation on the First Indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are entered into the record. 10 U.S.C. § 8, 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 18 U.S.C. § 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).

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

Appellant suggests that this Court could correct the First Indorsement to the EOJ because it was attached to the EOJ, which was completed after the EOJ during post-trial processing. (App. Br. at 33, 36-37.) But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Even if this Court had authority to remove the firearms prohibition annotation from the First Indorsement to EOJ (*Entry of Judgment*, ROT Vol. 1 at 3), it could not remove the firearms annotation from the STR that was incorporated into the EOJ (*Entry of Judgment*, ROT, Vol. 1, Attach. at 3) because that annotation on the STR occurred before the EOJ was entered into the record. Thus, Appellant would remain in the same situation he is in now – having a firearms prohibition annotated on the EOJ. Since this Court's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should deny Appellant's claim.

Appellant asks this Court to remand the record to correct the EOJ under R.C.M. 1112(d)(2). (App. Br. at 37-38.) But Appellant failed to articulate what authority this Court has to remand for correction for an issue that this Court does not have jurisdiction to review. In any event, remand is not appropriate because even if this Court had jurisdiction to review a collateral

matter, the 18 U.S.C. § 922 annotation was constitutionally applied to Appellant. For these reasons, this Court should deny this assignment of error.

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.

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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 10 April 2025.

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IN THE UNTED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **KEEGAN L. LOVELL**, United States Air Force, *Appellant.*	)))))))))))	APPELLANT'S MOTION FOR ORAL ARGUMENT Before Panel No. 1 ACM 40614 11 March 2025

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

Pursuant to Rules 23 and 25 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for oral argument on the following issue:

II.
DID THE MILITARY TRIAL JUDGE FAIL TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE OF CHARGE II?

WHEREFORE, Appellant respectfully requests this Honorable Court grant the motion for oral argument.

Respectfully submitted,

[redacted]

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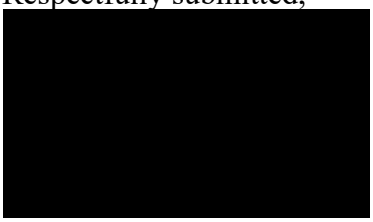
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 11 March 2025.

Respectfully submitted,



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18 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) KEEGAN L. LOVELL, USAF *Appellant*.	))))))))	OPPOSITION TO MOTION FOR ORAL ARGUMENT ACM 40614

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

Pursuant to Rules 23(c), and 23.3(a) of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument.

Appellant has moved this Court for oral argument on one of his three presented issues. (*See* App. Mot. at 1.) Issue II alleges the military judge failed to elicit a factual basis of Appellant's guilty plea to soliciting another to distribute child pornography, in violation of Article 82, UCMJ. This Honorable Court is well-versed and well-equipped to review this issue without the need for oral argument. Further, in his brief, Appellant spent nearly 17 pages discussing this issue. This, along with the record and the Government's forthcoming Answer, will speak for themselves and require no further discussion. Moreover, and most importantly, Appellant provides no justification as to why oral argument is warranted in this case.

Here, this Court has the record of trial and Appellant's brief, and will soon have the Government's forthcoming Answer and a likely reply brief from Appellant. Considering these submissions and Appellant's failure to even attempt to explain why oral argument is necessary for this Court to decide this case, this Court should proceed to issue a decision in due course of its deliberations without the further delay of an unjustified oral argument.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 18 March 2025 via electronic filing.

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IN THE UNTED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **KEEGAN L. LOVELL**, United States Air Force, *Appellant.*	)))))))))))	REPLY TO APPELLEE'S ANSWER TO ASSIGNMENT OF ERRORS Before Panel No. 1 ACM 40614 17 April 2025

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

Appellant, Senior Airman Keegan L. Lovell, 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 10 April 2025. In addition to the arguments in his opening brief, filed on 11 March 2025, Appellant submits the following arguments for the issues listed below.

I.

THE SPECIFICATIONS UNDER CHARGE I IMPLICATED BOTH CRIMINAL AND CONSTITUTIONALLY PROTECTED CONDUCT. DESPITE THIS, THE COLLOQUY BETWEEN THE MILITARY JUDGE AND APPELLANT FAILED TO CONTAIN AN APPROPRIATE DISCUSSION AND ACKNOWLEDGMENT ON THE PART OF APPELLANT OF THE CRITICAL DISTINCTION BETWEEN PERMISSIBLE AND PROHIBITED BEHAVIOR. THIS FAILURE RESULTED IN AN IMPROVIDENT PLEA.

A. The Government's argument misunderstands the heightened plea inquiry requirement.

1. Regarding the triggering event for a heightened inquiry.

The Government argues, "Contrary to Appellant's assertion, the facts of a case, not the language on the charge sheet, determine whether a judge needs to have more discussion into the implication of constitutional protections." Answer at 8. This cannot be the correct position.

The Government's position is that a heightened providence inquiry is only required if the facts elicited by the trial judge during the providence inquiry implicate constitutional protections. *This would result in the heightened providence inquiry only being required if the accused's conduct was in fact constitutionally protected*. Under the Government's position, if an accused is pleading guilty to an offense, and the elicited providence inquiry facts do not implicate constitutional protections, no heightened providence inquiry is required. The heightened providence inquiry would only be required once the accused factually establishes for the trial judge that his conduct is constitutionally protected.

Such a position fails to understand the underlying purpose of the heightened providence inquiry in the first place. The heightened providence inquiry was never meant to be a tool for a trial judge to root out constitutionally protected conduct; it is, instead, a tool to make sure that an accused understands the distinction between what is permitted and what is prohibited conduct so that his or her plea is knowing and voluntary. *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011).

The Government's reliance on *United States v. Whitaker,* 72 M.J. 292 (C.A.A.F. 2013), and *United States v. Timsuren,* 72 M.J. 823 (A.F. Ct. Crim. App 2013), is misplaced. Answer at 9. *Whitaker* and *Timsuren* directly contradict *United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011), *United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014), and *United States v. Byunggu Kim*,

83 M.J. 235 (C.A.A.F. 2023). The contradiction is apparent by comparing *Hartman* to *Whitaker*. *Compare* 69 M.J. 467 *with* 72 M.J. 292. In both cases the appellants were charged with sodomy under Article 125, UCMJ. *Id*. In both cases the appellants pleaded guilty. *Id*. In both cases, facts were elicited during the providence inquiry that demonstrated their conduct was outside constitutional protection (in *Hartman* the sodomy was not private as it was in the presence of a third person; in *Whitaker* the sodomy was non-consensual). *See* 69 M.J. at 469; 72 M.J. at 293. Yet, in *Hartman* the Court of Appeals for the Armed Forces (CAAF) found that constitutional protections were implicated and a heightened providence inquiry was required, while in *Whitaker* the CAAF found that constitutional protections were not implicated and a heightened providence inquiry was not required. *Id.*

Given this contradiction, and the logical result that the Government's reading would only require a heightened providence inquiry if the accused's conduct was in fact constitutionally protected, the correct reading of the law is that the heightened providence inquiry is triggered by the face of the specification.

2. Regarding the heightened inquiry itself.

The Government spends a substantial amount of time arguing that it believes Appellant's conduct was not constitutionally protected. *See* Answer at 10 (arguing obscenity is not constitutionally protected), 12 (arguing *Stanley* is inapplicable because the conduct was not in the home, and military quarters can never have the privacy protections of a home), 15 (arguing online conduct extends beyond the home). The flaw in this is that in the context of a knowing and voluntary plea, it is not the Government's belief or understanding of why conduct is not constitutionally protected that matters; it is the accused's belief and understanding that matters. *Hartman,* 69 M.J. at 468. And that is precisely why the heightened providence inquiry exists.

It is the accused's understanding of the law in relation to the facts that matters, not the Government's. *Byunggu Kim*, 83 M.J. at 238. While the Government makes a lot of points in its Answer, those points were never discussed by Appellant during his providence inquiry. The CAAF has repeatedly held that the Government's knowledge of the law and its applicability to the facts of a case is no "substitute for the requisite interchange between the military judge and the accused." *Moon,* 73 M.J. at 388.

Indeed, the more points the Government makes, the more apparent it becomes that those points should have been discussed with Appellant during his providence inquiry to ensure his plea was knowing and voluntary.

B. The Government's argument assumes facts that were never established.

The Government repeatedly invites this Court to improperly assume facts that do not exist in the record. It asks the Court to assume that Appellant's Google Drive was "an online storage service and file sharing platform that allows users to store, access, and share files" (Answer at 15), that the drive was not private (Answer at 17), and that it came with a set of terms of service identical to those explained by a Northern District of New York district court judge in the fact section of an unpublished case that took place at a different time period than the instant case. *See United States v. Maher*, No. 5:21-CR-0275 (GTS/TWD), 2022 U.S. Dist. LEXIS 254105, *1-2 (N.D.N.Y. Aug. 22, 2022). None of this, however, was established in the record.

As discussed in subsection C below, the Government also asks this Court to assume the existence of a number of facts regarding the National Center for Missing and Exploited Children (NCMEC), including whether its definition of "child pornography" includes both actual and what appears to be depictions or whether its definition excludes one or the other, what the term

"hash match" means, or what significance—if any—there is in a "hash match." *See* Answer at 18.

Neither were the particular conditions of Appellant's living arrangements established on the record. There are no facts regarding whether Appellant chose the room, whether he could cook in the room, whether he could have overnight guests, or whether he was subject to inspections.

The Government asks this Court to fill in the factual gaps left by the military trial judge to establish that (1) these were depictions of actual minors so that constitutional rights did not apply, (2) Appellant's factual living conditions were such that took him outside constitutional protections, (3) and Appellant's alleged viewing and possessing factually occurred outside the privacy of his home so that constitutional protections did not apply. This was improper in *United States v. Paul*, 73 M.J. 274 (C.A.A.F. 2014), it was improper in *United States v. Williams*, 3 M.J. 155 (C.M.A. 1977), and it is improper here.

C. The Government's argument misunderstands the parameters of exceptions and substitutions.

The Government argues that "the proper remedy is to except from the specification the words 'or what appears to be minors' and affirm the rest of Specifications 1 and 2 of Charge I." Answer at 18. To support its argument it cites two unpublished opinions, *United States v. Mullings*, No. ACM 38623, 2015 CCA LEXIS 405 (A.F. Ct. Crim. App. Sept. 30, 2015), and *United States v. Stanton*, No. ACM 38385, 2014 CCA LEXIS 650 (A.F. Ct. Crim. App. Aug. 28, 2014). Answer at 19.

The Government fails to appreciate that, unlike the instant case, the military trial judges in *Mullings* and *Stanton* elicited sufficient factual bases to establish that those offenses involved actual minors engaged in sexually explicit conduct. *See Mullings*, slip op. at 7; *Stanton*, slip op.

at 14-15. Thus, the "what appears to be" language could be stripped from those offenses leaving only the provident—and constitutionally unprotected—conduct involving visual depictions of actual minors. Despite Government arguments to the contrary, that is not the situation in Appellant's case.

As pointed out in Appellant's Assignment of Errors, when asked about the nature of the minors in the visual depictions by the military trial judge, Appellant said the images "were minors or what appeared to be minors." Br. on Behalf of Appellant at 3; R. at 26. When specifically asked by the military trial judge if he knew or had "any reason to believe that the visual depictions [he] possessed contained actual minors," Appellant said, "I had no way of actually knowing, but they did depict minors or what seemed to be minors." Br. on Behalf of Appellant at 3; R. at 30. The military trial judge never cleared up these apparent inconsistencies.

The Government's argument to the contrary is misguided. The Government argues that a sufficient basis was elicited to support depictions of actual minors because the Stipulation of Fact states that "Some of the files reviewed by DC3 were positively identified as child pornography based on NCMEC March 2021 hash values." Answer at 18. However, there is nothing in this sentence that clarifies what type of child pornography—actual or what appears to be—these files were "positively identified" as being.

The Government attempts to resolve those missing facts by supplementing Appellant's providence inquiry with the fact sections of a 2010 unpublished Eastern District of Texas District court case and an unpublished Air Force Court of Criminal Appeals case. *See* Answer at 18-19. It would be improper for this Court to accept the Government's invitation to supplement Appellant's providence inquiry with fact sections of other cases. *See United States v. Paul*, 73 M.J. 274, 278 (C.A.A.F. 2014) (appellate courts may only take judicial notice of "indisputable

facts.") The facts are far from "indisputable" in this case because the record does not explain what a "hash match" is, or what significance, if any, it may have.

WHEREFORE, Appellant respectfully requests this Honorable Cort set aside his convictions for specifications 1 and 2 of Charge I.

II.

THE FINDING FOR THE SPECIFICATION AND CHARGE OF CHARGE II MUST BE SET ASIDE BECAUSE THE MILITARY TRIAL JUDGE FAILED TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA.

A. Regarding the Government's argument that there are forty years of precedent.

In its Answer, the Government repeatedly argues that there is forty years of precedent supporting its argument. *See* Answer at 23 ("the risk of undermining public confidence in the law by overturning more than four decades of precedent is high"), 24 ("Appellant does not even acknowledge 40 years of precedent"), 29 ("The risk of undermining public confidence in the law supports adhering to more than four decades of precedent.") This is simply not so.

As pointed out in Appellant's Assignment of Errors, in 2016 Congress preempted the Presidentially listed Article 134 offense of Solicitation when it created the Article 82(a) offense of Solicitation. By doing so, Congress created a very different offense.

Article 134 is "is an expansive, flexible, and amorphous prosecutorial tool within the military justice system …; intended to serve as a means for a military commander to meet and enforce the exigencies of military discipline[.]" *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020). A clause 1 or 2 Article 134 offense is uniquely military; any act or omission can be considered a criminal offense if it is prejudicial to good order and discipline or service discrediting. The caselaw of Article 134 necessarily reflects these realities of Article 134.

Article 82(a) reflects none of these concerns. As pointed out in the analysis section of the *Manual for Courts Martial*, "Soliciting another to commit a criminal offense is a well-recognized concept in criminal law that does not rely upon the 'terminal element' of Article 134 as the basis for its criminality." *Manual for Courts-Martial, United States* (2024 ed.) (*MCM*), App. 17, at A17-1. The gravamen of an Article 82(a) offense is in the solicitation of an offense itself; the concepts of prejudice to good order and discipline, and service discrediting are irrelevant.

Given that Article 82(a) and Article 134 criminalize different conduct, it would not make sense to incorporate the caselaw from Article 134 into Article 82(a).

Further, the idea that Article 134 caselaw interpreting a Presidential declaration regarding the elements that the President created in the first place misses the fundamental difference between Articles 80 through 132, and a "listed" offense of Article 134. The listed offenses of Article 134 are nothing more than an exercise in the President's Article 56 duty to set punishments. *See* 10 USC § 856. By creating the listed offenses of Article 134 the President narrowed the scope of Article 134 and dictated that certain elements must be present in a case in order to receive the associated maximum punishments. Of course, the President can discuss what he wants to see in the elements in order for a punishment to be justified; he created the elements. The Article 134 caselaw discussing what "commit an offense under the code" means is a discussion of the President's authority to set his terms But, when Congress preempts a Presidentially created offense the continued use of the caselaw associated with the listed offense no longer makes sense.

This same conclusion was reached in a recent case, *United States v. Caswell*, No. ACM 23035, 2015 CCA LEXIS 598, at *21 (A.F. Ct. Crim. App. 17 Mar. 2025) (unpub. op.). In *Caswell*, a question arose regarding the precedential value of caselaw interpreting the prior

Article 134 version of Carrying a Concealed Weapon after Congress had moved the offense to Article 114. *Id*. This Court found "Congress's choice to move this offense from Article 134, UCMJ, to Article 114, UCMJ, was an intervening event that severed the prior precedent from control or consideration of the new Article 114, UCMJ." *Id*. This Court found "Congress could have expressly incorporated the prior [caselaw from Article 134, UCMJ,] into Article 114, UCMJ, but did not." *Id*. This Court then held,

> We find intent in Congress's choice to be silent about previously established guidance. It is plain to see that at the time when Article 114, UCMJ, was written, Congress knew it could expressly state what law and definitions moved together with offenses it chose to relocate to different articles of the UCMJ. Therefore, the absence of preserving the prior definition of unlawfulness communicates intent *not* to transfer over substantial portions of the offense as it was understood under Article 134, UCMJ, to the new Article 114, UCMJ.

Id. at *21-22.

That same silence is present with Congress's preemption of solicitation under Article 134 with Article 82(a).

Indeed, even the analysis portion of the *MCM* makes clear that prior caselaw was not meant to follow the solicitation offense. This can be seen in comparing the analysis section on the preemption of solicitation with the analysis section on the preemption of communicating threats. In finding Article 134 precedent applicable to the offense of communicating threats, this Court found "[t]he analysis section of this Code expressly noted that prior case law on communicating a threat moved with it and would continue to apply" because the analysis portion specifically pointed out that "[t]he explanations for threat and wrongful are amended and are consistent with [caselaw interpreting the Article 134 version of the offense]." No such language is found in the analysis section of Article 82(a). *See Manual for Courts-Martial, United States* (2024 ed.) (*MCM*), App. 17, at A17-1. It becomes even more apparent when the relevant portion

of the analysis section of Article 82(a) solicitation is placed side-by-side with the relevant analysis section of Article 115 communicating threats.

Relevant portion of the Analysis Section of Article 82(a), Solicitation	Relevant portion of the Analysis Section of Article 115, Communicating Threats
"Soliciting another to commit a criminal offense is a well-recognized concept in criminal law that does not rely upon the 'terminal element' of Article 134 as the basis for its criminality. **Accordingly, the newly consolidated Article 82 does not require proof of the Article 134 'terminal element.'**"	"**Proof of the Article 134 'terminal element' is no longer required**. The explanations for threat and wrongful are amended and are consistent with *Elonis v. United States*, 135 S.Ct. 2001 (2015), and *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016)."

MCM, App. 17, at A17-1, and A17-9 (emphasis added).

Since the time the Congress preempted Article 134 with Article 82(a), there have been twelve cases that reference an Article 82(a) solicitation.[1] Of those eleven, only six actually discuss solicitation in any way beyond the bare mention that the appellant was charged with an Article 82(a) offense.[2] Of those six cases, only three discuss the issue of whether the solicitee

[1] *United States v. Day*, No. ACM 39962, 2022 CCA LEXIS 5 (A.F. Ct. Crim. App. 5 Jan. 2022); *United States v. Daniels*, No. ACM S32644, 2022 CCA LEXIS 121 (A.F. Ct. Crim. App. 24 Feb. 2022); *United States v. Raines*, 82 M.J. 608 (N-M. Ct. Crim. App. 2022); *United States v. Craven*, 82 MJ 728 (N-M. Ct. Crim. App. 2022); *United States v. Heppermann*, 82 MJ 794 (A.F. Ct. Crim. App 2022); *United States v. Massey*, No. ACM 40017, 2023 CCA LEXIS 46 (A.F. Ct. Crim. App. 30 Jan. 2023); *United States v. Susong*, No. 202100345, 2023 CCA LEXIS 161 (N-M. Ct. Crim. App. 24 Feb. 2022); *United States v. Bickford*, No. ACM 40326, 2024 CCA LEXIS 86 (A.F. Ct. Crim. App. 14 Feb. 2024); *United States v. Hitchcock*, No. 202300080, 2024 CCA LEXIS 165 (N-M. Ct. Crim. App. 30 Apr. 2024); *United States v. Suarez*, No. 202300080, 2024 CCA LEXIS 348 (N-M. Ct. Crim. App. 23 Aug. 2024); *United States v. Chapman*, No. 20220557, 2025 CCA LEXIS 7 (A. Ct. Crim. App. 10 Jan 2025); *United States v. Reykhman*, No. 202400080, 2025 CCA LEXIS 161 (N-M. Ct. Crim. App. 16 Apr. 2024).

[2] *United States v. Day*; *United States v. Raines*; *United States v. Heppermann*; *United States v. Massey*; *United States v. Susong*; *United States v. Bickford*.

must be subject to the code.[3] Of those three, only one has precedential value, *United States v. Heppermann*. 82 M.J. 794 (A.F. Ct. Crim. App. 2022). The Government's argument that there are forty years of precedent on this issue is incorrect.

Heppermann was wrongly decided and should be overturned. The offense of which both Airman First Class (A1C) Heppermann and Appellant were convicted—violating Article 134, UCMJ—applies only to "persons subject to this chapter." UCMJ art. 134, 10 U.S.C. § 934. The Government is wrong to treat the deficiency as merely a matter of "jurisdiction." Answer at 24-25. The essential problem is not that someone who is not subject to the Code cannot be *tried* for committing an Article 134 offense; rather, someone subject to the Code cannot *violate* Article 134, which facially applies only to "persons subject to this chapter." But even if this Court were to decline to overturn *Heppermann*, that case is clearly distinguishable from this case in that Airman First Class Heppermann pleaded not guilty while Appellant pleaded guilty. *See Heppermann*, 82 M.J. at 796. Even under *Heppermann*'s interpretation of Article 82, the military judge's providence inquiry was deficient, requiring reversal.

B. Regarding the Government's misunderstandings.

Peppered throughout the Government's Answer are a series of statements that demonstrate a lack of understanding of how Appellant's case was charged. This misunderstanding leads to a series of fatal flaws in the Government's argument.

As discussed in Appellant's Assignment of Errors, an Article 82(a) solicitation of a clause 2 Article 134 offense requires a showing that Appellant had both the specific intent that the solicitee commit the act/omission, and the specific intent that the act/omission was of a

[3] *United States v. Heppermann*; *United States v. Massey*; *United States v. Bickford*.

nature to bring discredit upon the armed forces. Br. on Behalf of Appellant at 19. The Government does not dispute that. Yet, the Government still argues that "[t]he military judge elicited sufficient facts to support that Appellant intended the solicitees to distribute child pornography to a military member" even though no facts were elicited to support Appellant's alleged specific intent that the solicitees' conduct was service discrediting. Answer at 29.

Rather than point to any facts on the record, the Government asks this Court to (1) assume that somehow a civilian's act of sending links to images "'has a tendency to bring the service into disrepute' or 'lower it in public esteem,'" even though the concept was not discussed during the providence inquiry, and then (2) assume Appellant specifically intended that result even though that specific intent was not discussed in the providence inquiry. Answer at 29. This is not allowed. *See United States v. Gaskins*, 72 M.J. 225, 233 (C.A.A.F. 2013) (holding the suggestion "that there was no prejudice because the predicate acts were 'intuitively' prejudicial to good order and discipline and service discrediting fails to recognize Article 134, UCMJ's terminal element for what *Fosler* reiterated it is -- a discrete element of a criminal offense.").

The Government's further attempt to attach some type of significance to paragraph 11 of the Stipulation of Fact also shows its misunderstanding of a solicitation of an Article 134 offense. The Government argues "Appellant admitted the circumstances rendered *his conduct* 'of a nature to bring discredit upon the armed forces.'" Answer at 30 (emphasis added). Any service discrediting nature of Appellant's conduct has no bearing on this case because Appellant was not charged with violating Article 134.

The Government goes on to misunderstand the interplay between Article 82(a) and Article 134 by arguing "Appellant's interpretation would result in service members being able to solicit civilians to commit any offense under the UCMJ, including murder and rape, but be

untouchable by the military justice system." Answer at 26. This is not true for at least two reasons. First, as discussed at length in Appellant's Assignment of Errors, with very few exceptions civilians cannot commit offenses under the UCMJ, thus it would be impossible for a service member to solicit them to do so. Second, Article 82(a) prohibits a service member from soliciting someone to commit a UCMJ violation. Nothing prohibits the Government from crafting an Article 134 offense of a service member soliciting a civilian to commit an offense under state, federal, or international law. Additionally, a service member's solicitation of a civilian to violate many criminal offenses established by Title 18 or Title 21 of the United States Code could be prosecuted under Article 134(3). *See*, *e.g.*, 18 U.S.C. 373.

Additionally, the Government fails to appreciate how its own charging decision impacted this case. In responding to Appellant's argument that solicitees must appreciate the criminality of what they are being asked to do, the Government argues,

> His claim that "if the solicitee were not required to appreciate the terminal element of Article 134, he would not be required to appreciate the criminality of the request made of him at all" is absurd. Unlike the facially innocuous acts of purchasing rat poison, or using an ATM card of *United States v. Oakley and Higgins*, 40 M.J. at 70, there can be no question that distributing child pornography is a criminal venture.

Answer at 30.

This argument demonstrates a lack of understanding of Article 134, and a lack of appreciation for the consequences of the Government charging this offense as a solicitation of an Article 134 offense. As was recently reiterated,

> The President has indicated that an offense under [clause 1 or 2 of Article 134] has only two elements, namely, (a) that "the accused did or failed to do certain acts," and (b) that, under the circumstances, the accused's conduct was either "to the prejudice of good order and discipline in the armed forces" or was "of a nature to bring discredit upon the armed forces."

United States v. Shafran, ___ MJ ___, No. 24-0134/CG, slip op. at 5, 2025 CAAF LEXIS 286 (C.A.A.F. 15 April 2025).

When charged as a clause 1 or 2 Article 134 offense, it is the second element that turns the act or omission alleged in the first element into a UCMJ offense; without the second element there can be no clause 1 or 2 Article 134 offense. *See United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2012) (holding that where an Article 134, UCMJ, specification neither expressly alleges nor necessarily implies the terminal element, the specification is defective). Because it is clause 1 or 2 that makes an act criminal, what must be appreciated by a solicitee is not the act itself, but that which makes the act criminal; its prejudice to good order and discipline, or its service discrediting nature.

Stated another way, the distribution of obscene materials is not an Article 134, UCMJ, offense unless that distribution is prejudicial to good order and discipline or service discrediting.

C. Regarding the Government's erroneous interpretation of *United States v. Sutton*.

First, the Government argues, "This Court should not expand our Superior Court's holding to cover facts not contemplated, *especially when the Court declined to hear challenges to this exact issue three times in the 15 years since Sutton was decided*." Answer at 25 (emphasis added). As the Government should know, a superior court's denial of a petition for review is in no way precedent.

The CAAF has repeatedly reiterated this point. For instance, in *United States v. McGriff*, the CAAF said "we note that denial of a petition, although it allows the decision below to stand, does not suggest that we either agree or disagree with the merits of a lower court's resolution of the case." 78 M.J. 487 (C.A.A.F. 2019). The denial of a petition "carries no support whatsoever for concluding that the lower court either correctly or incorrectly interpreted the scope and

application of [a case]." *Id*. Thus, the CAAF's denial of petitions for grant of review in *Heppermann* and two similar cases carries no implication that the CAAF agrees with those cases' outcomes or reasoning.

Second, the Government's attempt to distinguish *Sutton* is not persuasive. After acknowledging that *Sutton* stands for the proposition that a person cannot be found guilty of soliciting another to do what is legally impossible, the Government attempts to argue that—what it terms—a jurisdictional impossibility is not a legal impossibility. *See* Answer at 25 (stating "[t]he issue [in *Sutton*] centered on the legal impossibility for a victim to commit an offense against themselves–not a *jurisdictional* impossibility about whether they could be prosecuted for the offense.") (emphasis in the original). However, while not all legal impossibilities would be jurisdictional impossibilities, it is certainly the case that all jurisdictional impossibilities would be legal impossibilities. *See United States v. Nealy*, 71 M.J. 73, 75 (C.A.A.F. 2012) (stating "Jurisdiction is a legal question[.]").

Third, the Government seems to argue that because the CAAF in *Sutton* did not analyze or explicitly overrule cases interpreting the elements of solicitation under Article 134, that somehow demonstrates that *Sutton* is inapplicable in the instant case. *See* Answer at 25 (stating "[e]mphasizing this distinction [between legal and jurisdictional impossibility] is the fact that our Superior Court in *Sutton* did not analyze – let alone overrule – decades of lower court precedent holding that [the] solicitee does not need to be subject to the UCMJ for the solicitor to be prosecuted."). The appellant in *Sutton*, however, did not raise that specific impossibility issue; he raised an impossibility issue regarding the ability of a child to commit an offense on herself. 68 M.J. at 459. Thus, the issue of whether a solicitee must be subject to the UCMJ was not in front of the CAAF for a decision. That court had no reason to discuss the impact of its

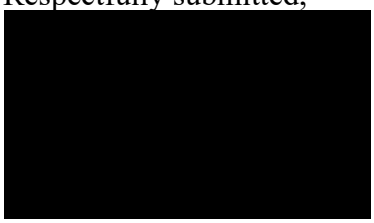
ruling in *Sutton* on other areas. In fact, it would have been improper for it to do so. *See B.M. v. United States*, 84 M.J. 314 (C.A.A.F. 2024) (holding that the court does not issue advisory opinions and explaining that an advisory opinion is "is an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties.").

D. The Government, in essence, has conceded Appellant's argument.

In attempting to argue that *Heppermann* would not lead to absurd results, the Government argued, "In each of [Appellant's] examples, he fails to consider the requirement that the accused have the specific intent that the crime solicited be committed and the elements of the offenses." Answer at 25. The Government then makes Appellant's argument -- that one cannot solicit the impossible -- back to Appellant. *See* Answer at 25-26. It argues that *Heppermann* could not result in the solicitation of a civilian to commit an Article 92 offense because "a civilian has no duty to obey military orders and so the solicitor could not intend the civilian to commit the offense." Answer at 25. It makes the same argument regarding civilians committing Articles 112 and 133 offenses. *See* Answer at 25-26. That is to say, a military member cannot solicit a civilian to commit an act that would be legally impossible for the civilian to commit. This is the very argument Appellant made in his Assignment of Errors. The idea that a civilian cannot commit an Article 92 offense because civilians have no duty to follow military orders, but that a civilian could commit an Article 134 offense because they could commit acts that discredit the armed forces is conflicting and nonsensical. It would mean that a civilian could not be solicited to commit an Article 92 violation, but a civilian could be solicited to commit an Article 134 violation of fraternization, or gambling with subordinates, or straggling.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside his conviction of Charge II and its specification.

Respectfully submitted,



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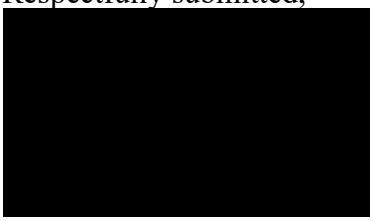
CERTIFICATE OF FILING AND SERVICE

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 17 April 2025.

Respectfully submitted,



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