June 20, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW**
v.	)	
	)	Crim. App. Dkt. No. 39055
Airman First Class (E-3) **JEREMIAH L. KING**, United States Air Force Appellant	)	USCA Dkt. No. - /AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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ISSUES PRESENTED

I.

After submitting his case without specific assignment of error, A1C King hired civilian counsel and requested reconsideration of the CCA's opinion based on factual and legal insufficiency of the evidence. The CCA denied A1C King's request for reconsideration and denied his request to consider his assignments of error under *United States v. Grostefon*, 112 M.J. 431 (C.M.A. 1982). Did the CCA err?

II.

Did the CCA abrogate its responsibility under Article 66(c), UCMJ, 10 U.S.C. § 866(c), when it denied A1C King's motion for reconsideration 242 days after it was filed without reviewing the record of trial?

III.

The CCA took 718 days to complete its Article 66, UCMJ, review. Of those 718 days, 242 days were due to the delay in the CCA issuing its decision on A1C King's motion for reconsideration. Did the CCA err by refusing to review A1C King's speedy post-trial processing claim and ruling that it was "moot?"

IV.

The military judge found A1C King guilty of viewing, and attempting to view, child pornography. But all of the alleged child pornography A1C King allegedly viewed (or attempted to view) was found in unallocated space or a Google cache. Is the evidence legally sufficient?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (CCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c)

(2012). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On March 2, 2016, A1C King was tried at a general court-martial by a military judge sitting alone at Eielson Air Force Base, Alaska. Contrary to his pleas, A1C King was found guilty of one charge and one specification of attempting to view child pornography in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2012); one charge and one specification of violating a lawful general regulation in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2012); and one charge and one specification of viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). A1C King was sentenced to be reduced to the grade of E-1, to be confined for nine months, and to be dishonorably discharged from the service. R. at 854-855. On April 20, 2016, the convening authority approved the findings and sentence as adjudged.

The CCA approved the findings and sentence on July 26, 2017 (Appendix A). On August 25, 2017, A1C King timely filed a motion for reconsideration (Appendix B). The CCA denied the request on April 24, 2018 (Appendix C).

STATEMENT OF FACTS

Legal Insufficiency of the Evidence for Charge I, Specification 1, and, Charge III, Specification 2.

On March 1, 2016, contrary to his pleas, A1C King, by military judge alone, was found guilty, with exceptions, of Charge III, Specification 2, a violation of Article 134, UCMJ, 10 U.S.C. § 934, for knowingly and wrongfully viewing child pornography between on or about March 1, 2011 and December 18, 2013. R. at 819. Specifically, A1C King was found guilty of knowingly and wrongfully viewing three images: 01136627, 01136666, and 01173367. R. at 819. He was found not guilty of knowingly and wrongfully viewing images 01889855 and 01218614. R. at 819. Images 01136627 and 01136666 were located within a Google Chrome cache file. R. at 603, 610, 672-73. Image 01889855 was a volume shadow copy.[1] R. at 611. Images 01218614 and 01173667 were located within unallocated space. R. at 611, 613-14, 674.

During the trial on the merits, the government called an expert in computer forensics. He testified that the cache created by Google Chrome is an automatic

[1] As explained by the government's expert, a "[v]olume shadow copy is a snapshot of the computer at a specific point in time that the user can usually restore back to in an event of a crash or an error." R. at 611. With a volume shadow copy, it is forensically indiscernible whether the image was captured from a cache, a thumbs.db image, or any other image. R. at 707. It was forensically impossible to determine where this image originated from, and it is quite possible that A1C King never saw the image and never knew it was on his computer. R. at 707-08.

function. R. at 676. In other words, in order to facilitate a user's experience, which includes the speed with which the individual accesses content, Google (without the user's knowledge) preloads cached items onto a user's computer to allow the webpage and any images contained therein to load faster. R. at 603, 682. The user has no control over this automated download function, and Google does not request permission from the user to load this content on the device; the user does not view these cached files prior to downloading. R. at 686-87. The following dialogue between the trial defense counsel and the government's forensic computer expert, addressing Defense Exhibit C, a demonstrative aid, illustrates this point:

> Q: Right. So, you do a Google search and you have a pop-up window that allows you to see a certain set of images, correct?
>
> A: Yes, sir.
>
> Q: You don't see all the images when you Google, you know, whatever, blue crosses, you don't see every blue cross that Google actually pulls up at that point, is that correct?
>
> A: Correct.
>
> Q: Okay. So, it's limited consistent or like the view that you just saw to a certain set of images, is that right?
>
> A: Yes, sir.
>
> Q: Okay. But, forensically, or the computer is actually doing something else and adding more images than what you actually see, is that correct?

A: It could potentially capture images that are not on the user screen at that specific time, yes.
…

Q: Okay. So, to be even more clear, if I had seen let's say 10 images on my screen, is it possible that it caches another 20 or 30 onto the machine that are outside my view?

A: It's possible, yes.

Q: Okay. So, sort of like what we saw on the screen where you have a certain amount of images and then, forensically what you see is a whole bunch more images that you can recover?

A: Potentially, yes, sir.

Q: Okay. But, there's no way of knowing how many images were cached at that time, or what was actually downloaded by Google Chrome?

A: Well, images that would exist within the Google cache, would be ones that were downloaded by Google Chrome. Maybe I don't understand exactly what you're asking?

Q: Right. So, what I'm asking you is, when Google is doing this, is the user controlling that program at that point? Like, is the user like copying or dragging the images over into the cache, or is Google Chrome doing this on its own outside of the purview of the user?

A: Google Chrome is doing it on its own.

Q: Okay. So, this is not a user interface? This is a completely automated interface outside the user's control?

A: Caching specifically, that's correct, yes.

Q: Okay.

MJ: Defense Counsel, can I ask a clarifying question? Again, I could wait until the end, but - -

CIVDC: Sure, yes, sir.

MJ: Using the example, say, I wanted to search for images of President Obama. I type in images and I type in President Obama and while there's thousands or millions of pictures of President Obama, only say, you know, 100 show up on my screen at any one time. So, say there's maybe 100 different pages of Google search results of those pictures. So, I guess the question is, if I only look at that first page of search results, could the computer be caching images from say page 15 of the search results that I never even looked at?

WIT: The way that Google images works now, it doesn't . . . from my experience, it doesn't work in the page necessarily when you click next. The way it works now is, you can typically scroll down and as you scroll down, it loads more of what would be considered a page. So, if there was a page of the theme, that potentially wouldn't be loaded until you continue to scroll down and requested more of those images. But, it could be possible on page 1 of your Google image search, not all of those images are shown on your specific web browser when you're looking at it until you scroll down.

MJ: Okay. So, the ones you don't . . . so, it might cache an image that's further down that you don't scroll down to, is that - -

WIT: Yes, Sir.

CIVC: That's the point, Your Honor.

Q: So, just again, to restate it . . . so, you'll see a certain limited images, but what Google Chrome is doing is loading images that you may not even have known existed because you didn't scroll down?

A: Correct.

R. at 686-90.

The government's expert further testified unallocated space means that at one point, a forensic file existed logically on the computer and had been deleted, or

overwritten, but there is no way of determining: (1) what that file was, (2) if the image was accessed, (3) when the file was created, (4) where on the computer the file logically existed, or (5) if the user knew the file existed, accessed, or could have accessed the file at any point. R. at 611-12, 698. If a file is in unallocated space, it is impossible to forensically determine whether the user ever viewed the file, as the file could have originally been in a cached file. R. at 695, 698, 719. Cache files are typically deleted automatically and would then reside in unallocated space until overwritten. R. at 692-94.

Finally, the government expert testified that a common user does not have access to Google Chrome cache, volume shadow copy, or unallocated space, nor was there any evidence that any of the images found within the Google Chrome cache or unallocated space were converted into a viewable image or accessed by A1C King at any time. R. at 694, 712, 721-24. Forensic tools are required to access each one of these, and there was no forensic indication that A1C King had the knowledge or forensic tools to access these particular files. R. at 695, 712, 724-725. In other words, had A1C King accessed these files, a forensic indication would have been discernable; a forensic examiner would look for such indications during a review, and there was no evidence of such derived from the government's review of the electronic media.

CCA's Denial of A1C King's Motion for Reconsideration.

On June 29, 2017, A1C King's detailed appellate counsel submitted his case to the CCA without specific assignment of error. (Appendix A). On July 26, 2017, the CCA issued its opinion affirming the finding and sentence in A1C King's case. (Appendix A). After the CCA issued its opinion, on August 17, 2017, A1C King retained civilian counsel and his civilian appellate counsel requested reconsideration of the court's opinion on August 25, 2017. (Appendix B).

A1C King's civilian appellate counsel identified "a material legal and/or factual matter" which he believed "was overlooked or misapplied by [the CCA] in its Article 66, UCMJ, review." (Appendix B). Specifically, civilian appellate counsel asserted that the evidence was factually and legally insufficient to sustain the convictions because there was a lack of evidence showing A1C King knowingly viewed, or attempted to view child pornography. (Appendix B). To support his argument, civilian appellate counsel brought several key facts and court decisions to the CCA's attention. (Appendix B); *See United States v. Yohe*, No. ACM 37950, 2015 CCA LEXIS 380 (A.F. Ct. Crim. App. 3 September 2015) (unpub. op.) (Appendix H); *United States v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008). In the event the CCA refused to consider his motion for reconsideration, civilian appellate counsel requested the court consider the issues under *United States v. Grostefon*, 112 M.J. 431 (C.M.A. 1982). (Appendix B).

On August 31, 2017, the Government responded to the motion for reconsideration and requested the court deny it. (Appendix D). By February 2018 the CCA had still not acted on A1C King's motion for reconsideration so his counsel filed a request for expedited review on February 15, 2018. (Appendix E). By March 2018 the CCA had still not issued a decision on the motion for reconsideration and had not yet acted on the request for expedited review so A1C King's counsel filed a second request for expedited review on March 15, 2018. (Appendix F). In both requests for expedited review A1C King asserted his right to speedy post-trial processing and requested the CCA "determine if relief is warranted based on the delay in the processing of his case." (Appendix E and F).

On April 24, 2018, 242 days after it was filed, the CCA finally took action on A1C King's motion for reconsideration. (Appendix C). On the same day, the CCA took action on his two requests for expedited review, ruling that they were "moot." (Appendix E and F).

The CCA denied A1C King's motion for reconsideration, and his request that in the alternative that the court consider his issues under *Grostefon*, because "[n]o material legal or factual issue was overlooked or misapplied in our review which necessarily found the approved findings legally and factually sufficient." (Appendix C).

During the timeframe that A1C King's request for reconsideration was pending, the CCA did not have the record of trial (ROT). (*See* Appendix G). According to the chief of appellate records, the court returned the ROT to the appellate records office on July 28, 2017. The ROT was not returned to the CCA until April 25, 2018-- the day after the court issued its order on A1C King's motion for reconsideration. (Appendix G).

REASONS TO GRANT REVIEW

The first three issues raise novel questions regarding the CCA's obligations when conducting direct appellate review under Article 66(c), UCMJ, 10 U.S.C. § 866(c). The first issue addresses an accused's ability to ask for reconsideration when, after consultation with civilian counsel, new facts or legal arguments are brought to the attention of the CCA that were not raised by prior counsel. Also connected with the first issue, is the ability of an accused to raise issues pursuant to *Grostefon* through a motion for reconsideration.

The second issue goes to the heart of the statutory function of the CCAs and seeks to clarify what is the minimum amount of review a CCA must conduct when deciding a motion or assignment of error. In A1C King's case, the facts appear to demonstrate that the CCA failed to timely rule on a motion for reconsideration despite numerous requests from A1C King, and then issued its order without the benefit of the record of trial.

The third issue addresses a CCA's responsibility to consider violations of an accused's right to speedy post-trial processing when the delay occurs following the submission of briefs and is attributable to the court. In A1C King's case, his speedy post-trial processing claim was not even considered by the court and was ruled "moot" despite being raised in two motions.

Although the fourth issue may not be novel, the CCA's opinion is in direct conflict with this Court's precedent in *Navrestad*, 66 M.J. 262, and the CCA's own precedent in *Yohe*, 2015 CCA LEXIS 380. The CCA affirmed the findings for viewing (and attempted viewing) of child pornography despite a dearth of evidence establishing knowledge or actual viewing. The evidence at trial merely established that the files were on A1C King's electronic devices. But since the files were located in unallocated space or an obscure cache folder, there was no evidence that A1C King knew of the files' existence, viewed them, or even attempted to view them.

ARGUMENT

I.

The CCA erred when it denied A1C King's request for reconsideration and denied his request to consider his assignments of error under *United States v. Grostefon*, 112 M.J. 431 (C.M.A. 1982), when after submitting his case without specific assignment of error, A1C King hired civilian counsel and requested reconsideration of the CCA's opinion based on factual and legal insufficiency of the evidence.

Standard of Review

Denial of a motion for reconsideration is reviewed for abuse of discretion. *United States v. Douglas*, 56 M.J. 168, 170 (C.A.A.F. 2001).

Law

The CCA "may, in its discretion, reconsider its decision or order in any case upon a motion filed. . . [b]y appellate defense counsel within 30 days after receipt by counsel. . . of a decision or order." A.F. CT. CRIM. APP. R. 19(b). "A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of the facts showing jurisdiction in the Court." A.F. CT. CRIM. APP. R. 19(c). "Ordinarily, reconsideration will not be granted without a showing of the following grounds:

(1) A material legal or factual matter was overlooked or misapplied in the decision;

(2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;

(3) The decision conflicts with a decision of the Supreme Court of the United States, the CAAF, another service court of criminal appeals, or this Court; or

(4) New information is received which raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial."

A.F. CT. CRIM. APP. R. 19.2(b).

In addition, "clarification of the reasoning is an appropriate object of a petition for reconsideration." *United States v. Campbell*, 52 M.J. 386, 387 (C.A.A.F. 2000).

"In the military justice system, if an 'accused specifies error in his request for appellate representation or in some other form, the appellate defense counsel will, at a minimum, invite the attention of the [CCA] to those issues[.]'" *Douglas*, 56 M.J. at 170 citing *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982). "The Court of Criminal Appeals must, 'at a minimum, acknowledge that it has considered those issues enumerated by the accused and its disposition of them.'" *Id*.

In *Douglas*, the appellant requested an enlargement of time to file for reconsideration of the CCA's opinion because he had issues that he wanted to raise for the court's consideration that he was unable to discuss with his original appellate defense counsel. 56 M.J. at 169. As part of the request for additional time, appellant cited the need for his new appellate defense counsel to be able to review the case and draft the motion for reconsideration. *Id*. The CCA denied the

request for an enlargement of time, so the appellant's counsel filed the motion for reconsideration, which the court also denied. *Id*.

This Court affirmed the CCA's denial of both the motion for enlargement of time and the motion for reconsideration. *Id*. at 171. This Court reasoned that the CCA did not abuse its discretion because:

> Appellant's December 4, 2000, motion for an extension of time placed before the court below nothing more than a vague allegation that appellant had "issues that he would like to raise for the Court's consideration that he was unable to discuss with his appellate counsel." The motion did not identify with specificity the issues appellant wished to present to the court. Moreover, the motion did not offer an explanation as to why such issues were not raised in the original submission, such as ineffectiveness of his original appellate defense counsel. Under these circumstances, the Court of Criminal Appeals did not abuse its discretion in denying the motion for an extension of time.

Id. at 170.

Argument

The CCA abused its discretion in denying A1C King's motion for reconsideration because a "material legal or factual matter was overlooked or misapplied in the [CCA's] decision" and the decision conflicted with a decision of this Court and the CCA's own decisions. Although not raised specifically in his initial assignment of errors, as soon as A1C King received the CCA's opinion he retained civilian counsel and attempted to correct the CCA's errors.

Unlike in *Douglas* where the accused broadly claimed he wanted to present new matters to the CCA, A1C King's civilian appellate counsel wrote an extensive

53 page motion for reconsideration which specifically detailed how the CCA erred in its decision. Civilian counsel drew the CCA's attention to the factual and legal insufficiency of the evidence (discussed in Section IV below) and how the CCA's opinion conflicted with precedent from this Court, other CCAs, and the CCA's own precedent.

Based upon the CCA's own rules of practice and procedure, A1C King's motion for reconsideration was proper and should have been granted. A.F. CT. CRIM. APP. R. 19.2(b)(1) and (3) were both applicable to A1C King's motion for reconsideration. The fact that A1C King recently hired civilian counsel also provided good cause for why the issues were being raised at that time instead of earlier.

Even if the CCA did not abuse its discretion by refusing to grant the motion for reconsideration, it committed error when it refused to consider the issues raised in the motion for reconsideration under *Grostefon*. As this Court has stated, "at a minimum, [the CCA must] acknowledge that it has considered those issues enumerated by the accused and its disposition of them." *Douglas*, 56 M.J. at 170 (internal quotations omitted). Here, the CCA did not even consider the issues raised by A1C King in his motion for reconsideration.

II.

The CCA abrogated its responsibility under Article 66(c), UCMJ, 10 U.S.C. § 866(c) when it denied A1C King's motion for reconsideration 242 days after it was filed without reviewing the record of trial.

Standard of Review

A CCA's Article 66(c), UCMJ, 10 U.S.C. § 866, review is reviewed for error *de novo*. *United States v. Swift*, 76 M.J. 210 (C.A.A.F. 2017).

Law

"Article 66(c), UCMJ, requires the service courts to conduct a plenary review of the record and 'affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [they] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved.'" *Swift*, 76 M.J. at 216 quoting Article 66(c), UCMJ, 10 U.S.C. § 866 (2012). "A complete Article 66, UCMJ, review is a 'substantial right' of an accused." *Id.* The CCAs have an "affirmative obligation to ensure that the findings and sentence in each such case are 'correct in law and fact . . . and should be approved.'" *Id*. quoting *United States v. Miller*, 62 M.J. 471, 472 (C.A.A.F. 2006) (alteration in original). Although appellate courts "are not required to articulate reasons for [their] decision[s], the issuance of reasoned opinions constitutes standard appellate practice." *United States v. Campbell*, 52 M.J. 386, 387 (C.A.A.F. 2000). Where the "underlying validity of the Article 66(c), UCMJ, review is in question . . . the

remedy is to remand the case for a proper factual and legal sufficiency review of the findings of guilty." *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

Argument

The CCA failed to carry out its "affirmative obligation to ensure that the findings and sentence in [A1C King's] case [we]re correct in law and fact . . . and should be approved." *Swift*, 76 M.J. at 216 (internal quotations omitted). Instead of carefully reviewing the facts, law, and argument that A1C King raised in his 53-page motion for reconsideration, it appears the CCA summarily denied it without even consulting the record of trial.[2]

The CCA's denial is a single page and does not analyze any of the legal issues raised in the motion other than to say "No material legal or factual issue was overlooked or misapplied in our review which necessarily found the approved findings legally and factually sufficient." (Appendix C). Despite such thrift treatment, it took 242 days for the CCA to issue this decision.

This Court should grant review and return A1C King's case to the CCA with an order for the CCA to grant A1C King's motion for reconsideration. This will

[2] It is, of course, possible that the CCA had a complete copy of the record of trial other than the official one maintained by the appellate records office. However, this is highly unlikely because A1C King's record of trial is eight volumes and contains 855 pages of trial transcript alone. Furthermore, the affidavit from the appellate records office indicates that the CCA requested the record back the day after it ruled on the motion for reconsideration which would be unnecessary if the CCA made its own copy.

ensure A1C King's "substantial right" of a "complete" appellate review is conducted by the CCA.

III.

The CCA erred by refusing to review A1C King's speedy post-trial processing claim and ruling that it was "moot" when the CCA took 718 days to complete its Article 66, UCMJ, 10 U.S.C. § 866, review and 242 of those days were due to the delay in the CCA issuing its decision on A1C King's motion for reconsideration.

Standard of Review

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

"This court has recognized that convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135. The CCA has two distinct responsibilities in addressing appellate delay. *See Toohey v. United States*, 60 M.J. 100, 103-04 (C.A.A.F. 2004). First, the court may grant relief for excessive post-trial delay under its broad authority to determine sentence appropriateness under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Second, as a matter of law, the court reviews claims of untimely review and appeal under

the Due Process Clause of the Constitution. U.S. CONST. amend. V; *see Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003).

Military courts use "a four-factor test to review claims of unreasonable post-trial delay, evaluating (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013). "Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation." *Moreno*, 63 M.J. at 135. "[W]e will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." *Id*. at 142.

Argument

A1C King's constitutional right to a speedy review of his case was violated when the CCA refused to even consider granting him relief for the 718 days it took for the CCA to complete its review of his case. Under this Court's decision in *Moreno*, there is a presumption of unreasonable delay when a decision is not rendered within 18 months (540 days) of docketing with the CCA. 63 M.J. at 142. Here, the CCA did not issue its decision on A1C King's motion for reconsideration until 242 days after he submitted it.

More troubling than the CCA's delay is its utter refusal to even consider granting A1C King relief for the 242 day delay that was completely attributable to the court. Despite filing two motions for expedited review, and requesting speedy post-trial processing relief in both, the court ruled that the motions were "moot."

This Court should grant review and return A1C King's case to the CCA with directions for the CCA to consider granting relief for violating his right to speedy post-trial processing. Alternatively, this Court should grant A1C King relief for the speedy post-trial processing violation.

IV.

The evidence supporting A1C King's convictions for viewing and attempting to view child pornography is legally insufficient because all of the alleged child pornography was found in unallocated space or a Google cache.

Standard of Review

Legal sufficiency of the evidence is reviewed *de novo*. *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014). "[T]he question of legal sufficiency requires us to consider the evidence in the light most favorable to the Government, and to determine whether the evidence provides a sufficient basis upon which rational factfinders could find all the essential elements beyond a reasonable doubt." *United States v. Holt*, 52 M.J. 173, 186 (C.A.A.F. 1999).

Law

The elements of knowingly and wrongfully viewing child pornography are: (1) the accused knowingly and wrongfully viewed child pornography; and (2) that under the circumstances, the conduct of the appellant was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (2012 ed.) (*MCM*), pt. IV, ¶ 68b. Two factors for consideration of wrongfulness are whether the images were (1) unintentionally or (2) inadvertently acquired. *MCM*, pt. IV, ¶ 68b.c.(9).

"Knowing viewing" requires the viewing of the images to be both "knowing and conscious." *See Navrestad*, 66 M.J. at 267 (requiring knowing possession to be both "knowing and conscious"). Factors to be considered in finding knowing viewing include, *inter alia*, the accessing of a particular image or website responsive to a particular search term, the ability to access the images without forensic tools, and the selection of specific images for download. *See United States v. Nichlos*, No. 201300321, 2014 CCA LEXIS 691, at *7- *8 (N.M. Ct. Crim. App. 18 September 2014) (unpub. op.) (Appendix I) (finding the appellant viewed a video appearing to portray "Jenny 9yo" based on evidence that the appellant's iPhone contained three cookies revealing the appellant used the Google search engine to search for and access a website responsive to the search term "9yo Jenny pics"); *United States v. Kamara*, No. 201400156, 2015 CCA LEXIS 214, at

*4 (N-M. Ct. Crim. App. 21 May 2015) (unpub. op.) (Appendix J) (finding no knowing possession when the images were located in unallocated space, and there was no evidence appellant had a forensic device to access the unallocated space or knew how to use such a forensic device); *Yohe*, 2015 CCA LEXIS 380 at *3-*4 (finding sufficient evidence to support a conviction of knowingly and wrongfully viewing based on evidence that the appellant found the videos through LimeWire after using search terms designed to find it, and then specifically selected the two videos for downloading, and watched them while they downloaded).

Argument

Charge III, Specification 2.

There exists no forensic evidence suggesting A1C King knowingly viewed images 01136627, 01136666, or 01173367. First and foremost, it is forensically impossible to say with any degree of certainty whether A1C King accessed (or attempted to access), let alone saw, any of these three images. The first two images, 01136627 and 01136666, were found in the Google Chrome cache file, and the third image, 01173367, was found in unallocated space. As the government's own expert testified, images 01136627 and 01136666 could have been downloaded onto the computer without A1C King ever having viewed them. Just because he may have visited a particular site does not mean he viewed these particular images. Indeed, with respect to these images, the government's expert

testified there was no way of knowing "if they were on the screen," and confirmed Google Chrome may have created the images in the cache file without A1C King ever having seen them. R. at 715.

Similarly, the same lack of certainty exists with image 01173367. The military judge asked the government's expert whether it was possible that 01173367 "could have been from a web search where the computer automatically cached the image without the user specifically doing [so]" to which the expert replied, "Yes, sir." R. at 719. The trial defense counsel then clarified, "[T]o follow up on the military judge, when you say, viewing that, part of that process is that the user may not have even seen the logical image that we're talking about," to which the expert responded, "That's a possibility, yes." R. at 719. The expert ultimately concluded there was no way to determine forensically whether the images within the unallocated space – 01173367 and 01218614 – were ever viewed by A1C King. R. at 719.

Second, once images 01136627 and 01136666 were cached, there was no evidence A1C King then went into the cache file and manually manipulated the images in any manner. R. at 691-92, 752. If they had been manipulated in some fashion, to include an indication that he "double-clicked" the images to allow them to open into a viewable image, then such evidence would be direct evidence of conscious viewing. Absent such evidence, there is no indication he ever

knowingly viewed the images or they ever appeared on his screen allowing him to view them. Furthermore, not only is the record devoid of evidence he manipulated the images, there is also zero evidence showing he knew how to access the cache file, had the forensic tools to access the cache file, or ever did access the cache file.

Third, the government never linked the search terms found in Charge I, Specification 1 to any of the three images upon which he was convicted. Indeed, in response to the trial defense counsel's question regarding any connections of the search terms to the images in Charge III, Specification 2, the government's expert stated there were none. R. at 752.

Fourth, the government's expert confirmed all three of these images may have also been the inadvertent result of a legal search, such as for anime which is associated with "Gaia," a file name which appeared on A1C King's computer. R. at 751. In response to the trial defense counsel's question, "So, if I'm looking for a cartoon and an actual image happens to pop up and I don't see it, but it caches on my computer, that's a scenario that can play out based on the forensic analysis that you did," the expert stated, "Yes." R. at 751-52.

Charge I, Specification 1.

If this Court finds the evidence within the record is legally insufficient to sustain a conviction of Charge III, Specification 2, then it should also find Charge I, Specification 1 is similarly legally insufficient. Charge I, Specification 1 is an

attempt to view child pornography in violation of Article 80, UCMJ, 10 U.S.C. § 880. The elements of attempt are: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. *MCM* (2012 ed.), pt. IV, ¶ 80.b. The key element lacking sufficient evidence is that the act was done with the specific intent to commit a certain offense under the UCMJ.

Of the 40 images A1C King was originally charged with viewing under Charge III, A1C King was only found guilty of three, as previously discussed. That is because a majority of those charges were either anime or "erotica," which did not meet the factors under *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986), and were subsequently either dismissed by the military judge or withdrawn by the government as reflected on the charge sheet. R. at 185; App. Ex. XV. Indeed, the bulk of images that went before the military judge were in the form of Military Rules of Evidence 404(b), uncharged misconduct, and were anime. Pros. Ex. 6.

When the Court considers all of the images, to include the Mil. R. Evid. 404(b) images, in the aggregate, and the fact that only three of those images constitute child pornography – which were not even found to either logically exist on his computer, or were generated through an automatic function of Google Chrome – it is clear that A1C King did not intend to search for any illegal images;

rather, he attempted, in a unartful and naïve way which resulted in unattended Google Chrome caching, to search for anime, which the military judge found was not in violation of the UCMJ. App. Ex. XV. Therefore, based on the entire record, and the fact that there is insufficient evidence to find that he knowingly viewed the three images of child pornography, it is unreasonable to believe that a reasonable factfinder had enough evidence to find him guilty, beyond a reasonable doubt, of attempting to view illegal child pornography.

WHEREFORE, Airman First Class King respectfully requests this Honorable Court grant review.

Respectfully submitted,

F

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing Supplement was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on June 20, 2018.

[redacted]
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CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

This supplement complies with the type-volume limitation of Rule 21(b) because this supplement contains 6,603 words. Additionally, this supplement complies with the typeface and type style requirements of Rule 37.

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Dated: June 20, 2018

APPENDICES

Appendix A	*United States v. King*, ACM 39055 (A.F. Ct. Crim. App. July 26, 2017)
Appendix B	*Motion for Reconsideration*, ACM 39055 (A.F. Ct. Crim. App. August 25, 2017)
Appendix C	*Motion for Reconsideration Denial*, ACM 39055 (A.F. Ct. Crim. App. April 24, 2018)
Appendix D	*Motion for Reconsideration Answer*, ACM 39055 (A.F. Ct. Crim. App. August 31, 2017)
Appendix E	*Motion for Expedited Review #1*, ACM 39055 (A.F. Ct. Crim. App. February 15, 2018)
Appendix F	*Motion for Expedited Review #2*, ACM 39055 (A.F. Ct. Crim. App. March 15, 2018)
Appendix G	*Affidavit from Chief of Appellate Records*, ACM 39055 (A.F. Ct. Crim. App. May 17, 2018)
Appendix H	*United States v. Yohe*, No. ACM 37950, 2015 CCA LEXIS 380 (A.F. Ct. Crim. App. 3 September 2015)
Appendix I	*United States v. Nichlos*, No. 201300321, 2014 CCA LEXIS 691 (N.M. Ct. Crim. App. 18 September 2014)

Appendix J *United States v. Kamara*, No. 201400156, 2015 CCA LEXIS 214 (N-M. Ct. Crim. App. 21 May 2015)

APPENDIX A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39055

UNITED STATES
Appellee

v.

Jeremiah L. KING
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 26 July 2017

Military Judge: L. Martin Powell.

Approved sentence: Dishonorable discharge, confinement for 9 months, and reduction to E-1. Sentence adjudged 2 March 2016 by GCM convened at Eielson Air Force Base, Alaska.

For Appellant: Major Lauren A. Shure, USAF; Captain Patricia Encarnación Miranda, USAF.

For Appellee: Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire.

Before MAYBERRY, HARDING, and BROWN, *Appellate Military Judges.*

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

PER CURIAM:

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles

59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are **AFFIRMED**.[*]

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court

[*] We note the Court-Martial Order (CMO) misstates the result of trial in two respects. First, the CMO incorrectly reflects Specifications 2 and 4 of Charge III as "*withdrawn* and dismissed." Those specifications were not withdrawn. Instead the military judge dismissed them pursuant to a Defense motion. Second, the CMO provides that Appellant was found guilty of Specification 3 of Charge III "except the *words* 01889855.jpg and 01218614.jpg" when in fact the finding was "except the *figures* 01889855.jpg and 01218614.jpg; of the excepted *figures*, not guilty." (Emphasis added). We find no prejudice, but to ensure the accuracy of court-martial records, we order promulgation of a corrected CMO.

APPENDIX B

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR RECONSIDERATION**
v.	)	Before Panel No. 3
JEREMIAH L. KING, Airman First Class (E-3), United States Air Force, *Appellant.*	)	Case No. ACM 39055
	)	Filed on: 25 August 2017

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

Reconsideration of a decision or an order terminating a case is appropriate when a material legal or factual matter was overlooked or misapplied in the decision and when a decision conflicts with a decision of the Court of Appeals for the Armed Forces (C.A.A.F.). A.F. Ct. Rule 19.2(b)(1). Accordingly, and pursuant to Rule 19 of this Honorable Court, Appellant, Airman First Class (A1C) Jeremiah King, through counsel, hereby moves for reconsideration of this Court's decision issued on 26 July 2017, and requests this Court set aside the conviction of Charge III, Specification 2, for knowingly and wrongfully viewing child pornography, as the conviction is factually and legally insufficient.

On 29 June 2017, A1C King, through detailed appellate counsel, filed a submission of case without specific assignment of error. On 26 July 2017, this Court issued a *per curiam* opinion affirming the approved findings and sentence as correct in law and fact, and finding no error materially prejudicial to Appellant's substantial

rights. Articles 59(a) and 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 859(a) and 866(c).

On 17 August 2017, A1C King retained the undersigned as civilian appellate counsel.[1] Upon review of the transcript, civilian appellate counsel identified a material legal and/or factual matter which it believes was overlooked or misapplied by this Court in its Article 66, UCMJ, review, and that the opinion affirming the conviction conflicts with previous decisions of both this Court, and the C.A.A.F. Specifically, the conviction of Charge III, Specification 2, images 01136627, 01136666, and 01173367 are factually and legally insufficient in accordance with this Court's analysis and rationale in *United States v. Yohe*, No. ACM 37950, 2015 CCA LEXIS 380 (A.F. Ct. Crim. App. 3 September 2015) (unpub. op.) and *United States v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008), which in turn renders Charge I, Specification 1, attempt to view child pornography, factually and legally insufficient.

In the event this Court does not believe such matter constitutes a "material legal or factual matter" under which this Court can conduct a reconsideration, then A1C King respectfully submits the issue of factual and legal sufficiency before this Court pursuant to *United States v. Grostefon*, 112 M.J. 431 (C.M.A. 1982), which provides that an appellant may personally raise issues before a military appellate court.

[1] The undersigned represented A1C King during the trial phase of his matter; however, the undersigned was not involved with the appeal until retained on 17 August 2017.

STATEMENT OF FACTS

On 1 March 2016, contrary to his pleas, A1C King, by military judge alone, was found guilty, with exceptions, of Charge III, Specification 2, a violation of Article 134, UCMJ, for knowingly and wrongfully viewing child pornography between on or about 1 March 2011 and 18 December 2013. R. at 819. Specifically, A1C King was found guilty of knowingly and wrongfully viewing three (3) images: 01136627, 01136666, and 01173367. R. at 819. He was found not guilty of knowingly and wrongfully viewing images 01889855 and 01218614. R. at 819. Images 01136627 and 01136666 were located within a Google Chrome cache file. R. at 603, 610, 672-73. Image 01889855 was a volume shadow copy.[2] R. at 611. Images 01218614 and 01173667 were located within unallocated space. R. at 611, 613-14, 674.

During the trial on the merits, the government called an expert in computer forensics. He testified that the cache created by Google Chrome is an *automatic function*. R. at 676. In other words, in order to facilitate a user's experience, which includes the speed with which the individual accesses content, Google (without the user's knowledge) preloads cached items onto a user's computer to allow the webpage and any images contained therein to load faster. R. at 603, 682. The user has no control over this automated download function, and Google does not request

[2] As explained by the government's expert, a "[v]olume shadow copy is a snapshot of the computer at a specific point in time that the user can usually restore back to in an event of a crash or an error." R. at 611. With a volume shadow copy, it is forensically indiscernible whether the image was captured from a cache, a thumbs.db image, or any other image. R. at 707. It was forensically impossible to determine where this image originated from, and it is quite possible that A1C King never saw the image and never knew it was on his computer. R. at 707-08.

permission from the user to load this content on the device; the user does not view these cached files prior to downloading. R. at 686-87. The following dialogue between the trial defense counsel and the government's forensic computer expert, addressing Defense Exhibit C, a demonstrative aid, illustrates this point:

> Q: Right. So, you do a Google search and you have a pop-up window that allows you to see a certain set of images, correct?
>
> A: Yes, sir.
>
> Q: You don't see all the images when you Google, you know, whatever, blue crosses, you don't see every blue cross that Google actually pulls up at that point, is that correct?
>
> A: Correct.
>
> Q: Okay. So, it's limited consistent or like the view that you just saw to a certain set of images, is that right?
>
> A: Yes, sir.
>
> Q: Okay. But, forensically, or the computer is actually doing something else and adding more images than what you actually see, is that correct?
>
> A: It could potentially capture images that are not on the user screen at that specific time, yes.
> …
>
> Q: Okay. So, to be even more clear, if I had seen let's say 10 images on my screen, is it possible that it caches another 20 or 30 onto the machine that are outside my view?
>
> A: It's possible, yes.
>
> Q: Okay. So, sort of like what we saw on the screen where you have a certain amount of images and then, forensically what you see is a whole bunch more images that you can recover?
>
> A: Potentially, yes, sir.

Q: Okay. But, there's no way of knowing how many images were cached at that time, or what was actually downloaded by Google Chrome?

A: Well, images that would exist within the Google cache, would be ones that were downloaded by Google Chrome. Maybe I don't understand exactly what you're asking?

Q: Right. So, what I'm asking you is, when Google is doing this, is the user controlling that program at that point? Like, is the user like copying or dragging the images over into the cache, or is Google Chrome doing this on its own outside of the purview of the user?

A: Google Chrome is doing it on its own.

Q: Okay. So, this is not a user interface? This is a completely automated interface outside the user's control?

A: Caching specifically, that's correct, yes.

Q: Okay.

MJ: Defense Counsel, can I ask a clarifying question? Again, I could wait until the end, but - -

CIVDC: Sure, yes, sir.

MJ: Using the example, say, I wanted to search for images of President Obama. I type in images and I type in President Obama and while there's thousands or millions of pictures of President Obama, only say, you know, 100 show up on my screen at any one time. So, say there's maybe 100 different pages of Google search results of those pictures. So, I guess the question is, if I only look at that first page of search results, could the computer be caching images from say page 15 of the search results that I never even looked at?

WIT: The way that Google images works now, it doesn't . . . from my experience, it doesn't work in the page necessarily when you click next. The way it works now is, you can typically scroll down and as you scroll down, it loads more of what would be considered a page. So, if there

> was a page of the theme, that potentially wouldn't be loaded until you continue to scroll down and requested more of those images. But, it could be possible on page 1 of your Google image search, not all of those images are shown on your specific web browser when you're looking at it until you scroll down.
>
> MJ: Okay. So, the ones you don't . . . so, it might cache an image that's further down that you don't scroll down to, is that - -
>
> WIT: Yes, Sir.
>
> CIVC: That's the point, Your Honor.
>
> Q: So, just again, to restate it . . . so, you'll see a certain limited images, but what Google Chrome is doing is loading images that you may not even have known existed because you didn't scroll down?
>
> A: Correct.

R. at 686-90.

The government's expert further testified unallocated space means that at one point, a forensic file existed logically on the computer and had been deleted, or overridden, but there is no way of determining: (1) what that file was, (2) if the image was accessed, (3) when the file was created, (4) where on the computer the file logically existed, or (5) if the user knew the file existed, accessed, or could have accessed the file at any point. R. at 611-12, 698. If a file is in unallocated space, it is impossible to forensically determine whether the user ever viewed the file, as the file could have originally been in a cached file. R. at 695, 698, 719. Cache files are typically deleted automatically and would then reside in unallocated space until overwritten. R. at 692-94.

Finally, the government expert testified that a common user does not have access to Google Chrome cache, volume shadow copy, or unallocated space, nor was there any evidence that any of the images found within the Google Chrome cache or unallocated space were converted into a viewable image or accessed by A1C King at any time. R. at 694, 712, 721-24. Forensic tools are required to access each one of these, and there was no forensic indication that A1C King had the knowledge or forensic tools to access these particular files. R. at 695, 712, 724-725. In other words, had A1C King accessed these files, a forensic indication would have been discernable; a forensic examiner would look for such indications during a review, and there was no evidence of such derived from the government's review of the electronic media.

Upon conviction, A1C King was sentenced to reduction to E-1, nine (9) months' confinement, and a dishonorable discharge from the service. R. at 854-55. The convening authority approved the sentence, and ordered all except for the dishonorable discharge to be executed.

ARGUMENT

The findings of guilt for knowingly and wrongfully viewing child pornography, Charge III, Specification 2 – images 01136627, 01136666, and 01173367 – is factually and legally insufficient, and therefore must be set aside. If this Court finds that Charge III, Specification 2 is factually and legally insufficient, then A1C King further asserts Charge I, Specification 1, attempt to view child pornography, is also factually and legally insufficient, and should similarly be set aside.

A. Legal Standard

Questions of legal and factual sufficiency are reviewed *de novo*. *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011). The test for legal sufficiency is whether any rational trier of fact could have found the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for factual sufficiency is whether this Court is convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that the Court did not personally observe any witnesses. *Id.* at 325.

The elements of knowingly and wrongfully viewing child pornography are: (1) the accused knowingly and wrongfully viewed child pornography; and (2) that under the circumstances, the conduct of the appellant was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (2012 ed.) (*MCM*), pt. IV, ¶ 68b. Two factors for consideration of wrongfulness are whether the images were (1) unintentionally or (2) inadvertently acquired. *MCM*, pt. IV, ¶ 68b.c.(9).

"Knowing viewing" requires the viewing of the images to be both "knowing and conscious." *See Navrestad*, 66 M.J. at 267 (requiring knowing possession to be both "knowing and conscious"). This Court takes a "totality of the circumstances approach" toward determining knowing and wrongful viewing. *Yohe*, unpub. op. at *3-*4. Factors to be considered in finding knowing viewing include, *inter alia*, the accessing of a particular image or website responsive to a particular search term, the ability to access the images without forensic tools, and the selection of specific images for download. *See United States v. Nichlos*, No. 201300321, 2014 CCA LEXIS 691, at *7-

*8 (N.M. Ct. Crim. App. 18 September 2014) (unpub. op.) (finding the appellant viewed a video appearing to portray "Jenny 9yo" based on evidence that the appellant's iPhone contained three cookies revealing the appellant used the Google search engine to search for and access a website responsive to the search term "9yo Jenny pics"); *United States v. Kamara*, No. 201400156, 2015 CCA LEXIS 214, at *4 (N-M. Ct. Crim. App. 21 May 2015) (unpub. op.) (finding no knowing possession when the images were located in unallocated space, and there was no evidence appellant had a forensic device to access the unallocated space or knew how to use such a forensic device); *Yohe*, unpub. op. at *3-*4 (finding sufficient evidence to support a conviction of knowingly and wrongfully viewing based on evidence that the appellant found the videos through LimeWire after using search terms designed to find it, and then specifically selected the two videos for downloading, and watched them while they downloaded).

B. Legal and Factual Insufficiency of Charge III, Specification 2

There exists no forensic evidence suggesting A1C King knowingly viewed images 01136627, 01136666, or 01173367. First and foremost, it is forensically impossible to say with any degree of certainty whether A1C King accessed, let alone saw, any of these three images. The first two images, 01136627 and 01136666, were found in the Google Chrome cache file, and the third image, 01173367, was found in unallocated space. As testified to by the government's own expert, 01136627 and 01136666 could have been downloaded onto the computer without A1C King ever having viewed them. Just because he may have visited a particular site does not mean he viewed these particular images. Indeed, with respect to these images, the

government's expert testified he has no way of knowing "if they were on the screen," and confirmed Google Chrome may have created the images in the cache file without A1C King ever having seen them. R. at 715. Even the trial counsel, during re-direct of their expert, corroborated this evidentiary position:

> Q: And so, your understanding of how Google works is that there may be some images that could potentially be loaded into Google Chrome cache that are off-screen, but that if you wanted a large volume more you have to scroll down, is that a fair example?
>
> A: Yes, ma'am.
>
> Q: So, it's not that the Google Chrome cache is going to cache thousands and thousands of images that a user wouldn't see on the screen?
>
> A: I have no way of knowing exactly what the user may have seen; but, from a specific search and what was loaded initially, it's likely that thousands of images won't be cached.
>
> Q: So, and I guess kind of what I'm getting at is, how likely is it that Google Chrome cache specifically would capture an image that the user wouldn't see, if you can speak to that?
>
> A: I'm unsure as to the certainty of what a user would or would not see.

R. at 735.

Similarly, the same lack of certainty exists with 01173367. The military judge asked the government's expert whether it was possible that 01173367 "could have been from a web search where the computer automatically cached the image without the user specifically doing [so]" to which the expert replied, "Yes, sir." R. at 719. The trial defense counsel then clarified, "[T]o follow up on the military judge, when you

say, viewing that, part of that process is that the user may not have even seen the logical image that we're talking about," to which the expert responded, "That's a possibility, yes." R. at 719. The expert ultimately concluded there was no way to determine forensically whether the images within the unallocated space – 01173367 and 01218614 – were ever viewed by A1C King.[3] R. at 719.

Second, once 01136627 and 01136666 were cached, there was no evidence A1C King then went into the cache file and manually manipulated the images in any manner. R. at 691-92, 752. If they had been manipulated in some fashion, to include an indication that he "double-clicked" the images to allow them to open into a viewable image, then such evidence would be direct evidence of conscious viewing. Absent such evidence, there is no indication he ever knowingly viewed the images or they ever appeared on his screen allowing him to view them. Furthermore, not only is the record devoid of evidence he manipulated the images, there is also zero evidence showing he knew how to access the cache file, had the forensic tools to access the cache file, or ever did access the cache file.

Third, the government never linked the search terms found in Charge I, Specification 1 to any of the three images upon which he was convicted. Indeed, in response to the trial defense counsel's question regarding any connections of the search terms to the images in Charge III, Specification 2, the government's expert stated there were none:

[3] A1C King was found not guilty of knowingly and wrongfully viewing 01218614, which was located in unallocated space. If he was found not guilty of 01218614, a similarly situated image, then he should also be found not guilty of 01173367.

> Q: And to follow up on the military judge's question, at no time have you determined that any of the images that we've spoke of here . . . 6627, 6666, 9855, 3367, or 8614, any of those images, forensically, did you determine that there was a search term that created access to that image?
>
> A: Correct.
>
> Q: Did you link any search that you forensically determined to any of these images?
>
> A: Not to my recollection, no, sir.

R. at 752.

Fourth, the government's expert confirmed all three of these images may have also been the inadvertent result of a legal search, such as for anime which is associated with "Gaia," a file name which appeared on A1C King's computer. R. at 751. In response to the trial defense counsel's question, "So, if I'm looking for a cartoon and an actual image happens to pop up and I don't see it, but it caches on my computer, that's a scenario that can play out based on the forensic analysis that you did," the expert stated, "Yes." R. at 751-52.

Based on this Court's rationale and analysis in *Yohe*, the facts and circumstances of this case - that no search terms were connected to the three images, that the three images were found in either Google Chrome cache or unallocated space, that there is no indication that A1C King either manipulated or accessed any of the three images at any time, or even that A1C King even had the knowledge, sophistication, or forensic tools necessary to access images within Google Chrome cache or unallocated space – are insufficient to sustain a conviction of Charge III, Specification 2:

> Under these circumstances, we find the evidence factually and legally insufficient to prove Appellant knowingly and wrongfully possessed or viewed these 16 visual depictions or that he possessed or viewed the original depictions that resulted in their creation. *See United States v. Sanchez,* 59 M.J. 566, 570 (A.F. Ct. Crim. App. 2003) (upholding a possession conviction based on deleted files and files located in the computer's cache based on other evidence, including the accused's relative sophistication in computer matters), *aff'd in part, rev'd in part on other grounds,* 60 M.J. 329 (C.A.A.F. 2004); *United States v. Nichols,* NMCCA 201300321, unpub. op. at 11–12 (N.M. Ct. Crim. App. 18 September 2014) (unpub. op.) (holding there was "no question the appellant possessed child pornography" but "did not 'knowingly possess' child pornography on the date charged" because the files were located in unallocated space and there was no evidence that the appellant had the ability to retrieve files from unallocated space); *Accord United States v. Flyer,* 633 F.3d 911, 919–20 (9th Cir. 2011) (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession of child pornography in unallocated space); *United States v. Moreland,* 665 F.3d 137, 154 (5th Cir. 2011) (refusing to find constructive possession of child pornography in unallocated space without additional evidence of the defendant's knowledge and dominion or control of the images); *United States v. Kuchinski,* 469 F.3d 853, 863 (9th Cir. 2006) (holding that a defendant who lacks knowledge about and access to cache files should not be charged with possessing child pornography images located in those files without additional evidence of dominion and control over the images).

Yohe, unpub. op. at *5.

C. Legal and Factual Insufficiency of Charge I, Specification 1

If this Court finds the evidence within the record is legally and factually insufficient to sustain a conviction of Charge III, Specification 2, then it should also find Charge I, Specification 1 is similarly legally and factually insufficient. Charge I, Specification 1 is an attempt to view child pornography in violation of Article 80,

UCMJ, 10 U.S.C. § 880. The elements of attempt are: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. *MCM* (2012 ed.), pt. IV, ¶ 80.b. The key element lacking sufficient evidence is that the act was done with the specific intent to commit a certain offense under the UCMJ.

Of the forty (40) images A1C King was originally charged with either viewing or possessing under Charge III, A1C King was only found guilty of three (3), as previously discussed. That is because a majority of those charges were either anime or "erotica," which did not meet the factors under *United States v. Dost*, 636 F.Supp. 828 (S.D.Cal. 1986), and were subsequently either dismissed by the military judge or withdrawn by the government as reflected on the charge sheet. R. at 185, App. Ex. XV. Indeed, the bulk of images that went before the military judge were in the form of Military Rules of Evidence 404(b), uncharged misconduct, and were anime. Pros. Ex. 6.

The Military Judges' Benchbook offers guidance to the fact finder in what constitutes reasonable doubt:

> A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty the proof must be such as to exclude not every hypothesis or possibility of innocence, but *every fair and rational hypothesis except that of guilt*.

Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 2-5-12 (1 Jan. 2010) (emphasis added). In this case, it is both fair and rational to believe that A1C King was looking for anime, as he confessed to the investigating Air Force Office of Special Investigations agents. Pros. Ex. 5. If we consider all images, to include the Mil. R. Evid. 404(b) images, in the aggregate, and the fact that of those only three images constitute child pornography – which were not even found to either logically exist on his computer, or were generated through an automatic function of Google Chrome – it is clear that A1C King did not intend to search for any illegal images; rather, he attempted, in a unartful and naïve way which resulted in unattended Google Chrome caching, to search for anime, which the military judge found was not in violation of the UCMJ. App. Ex. XV. Therefore, based on the entire record, and the fact that there is insufficient evidence to find that he knowingly viewed the three images of child pornography, it is unreasonable to believe that a factfinder would find him guilty, beyond a reasonable doubt, of attempting to view illegal child pornography.

Accordingly, counsel requests that this Honorable Court grant this motion and set aside Charge I, Specification 1, and Charge III, Specification 2. Because dismissal of these charges represents "a 'dramatic change' in the penalty landscape" under *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003), counsel further requests that the sentence be set aside, and the case returned to the convening authority for a sentence rehearing.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 25 August 2017.

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APPENDIX

United States v. Yohe

United States Air Force Court of Criminal Appeals

September 3, 2015, Decided

ACM 37950 (recon)

Reporter
2015 CCA LEXIS 380 *

UNITED STATES v. Airman First Class CHARLES N. YOHE, United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Yohe, 2015 CAAF LEXIS 1087 (C.A.A.F., Dec. 1, 2015)*

Review denied by *United States v. Yohe, 2016 CAAF LEXIS 208 (C.A.A.F., Mar. 7, 2016)*

Prior History: **[*1]** Sentence adjudged 27 April 2011 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: William C. Muldoon. Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

United States v. Yohe, 2013 CCA LEXIS 304 (A.F.C.C.A., Apr. 9, 2013)

Core Terms

videos, images, child pornography, files, depictions, downloaded, law enforcement, investigator, sentence, possessed, thumbnail, military, user, previewed, viewing, sexually explicit, reasonable doubt, computer's, forensic, factors, sharing, specifications, circumstances, convicted, minors, values, hash, extraneous, post-trial, engaging

Case Summary

Overview

HOLDINGS: [1]-Although the military judge erred during a servicemember's trial on charges alleging that he possessed and viewed sexually explicit depictions of minors, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*, when he allowed the panel to review, during deliberations, a DVD the Government prepared that contained documents that had not been admitted into evidence, the panel's verdict convicting the servicemember did not have to be set aside because it was not reasonably possible the extraneous evidence influenced the members' decision; [2]-The verdict did not have to be set aside because the panel was shown some images of children that were constitutionally protected; [3]-Although it took the court over four years to issue its decision, in part because a decision it issued in 2013 was overturned, the servicemember did not suffer harm that warranted relief.

Outcome
The court consolidated two specifications alleging that the servicemember violated UCMJ art. 134 into one specification, affirmed that specification and the charge, and affirmed the sentence.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] **Judicial Review, Standards of Review**

The United States Air Force Court of Criminal Appeals reviews issues of legal and factual sufficiency de novo.

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of an appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN2[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

In order to be admissible, evidence of uncharged misconduct must reasonably support a finding that an accused committed that misconduct and proof beyond a reasonable doubt is not required.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Offenses > General Article > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] Trial Procedures, Findings

In light of the United States Court of Appeals for the Armed Forces' ("CAAF's") ruling in United States v. Piolunek, it is no longer necessary to reject an entire verdict simply because some of the conduct that resulted in the verdict was constitutionally protected. In Piolunek, the CAAF held that contrary to its conclusion in United States v. Barberi, convictions by general verdict for possession and receipt of visual depictions of a minor engaging in sexually explicit conduct on divers occasions by a properly instructed panel did not have to be set aside after a service court decided that several images considered by the members did not depict the genitals or pubic region of a minor.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] Criminal Process, Right to Confrontation

The decision as to whether evidence admitted during a trial by court-martial violated an accused rights under the *Confrontation Clause* is reviewed de novo. Among the factors the United States Air Force Court of Criminal Appeals considers in assessing harmlessness in this context are: (1) the importance of the testimonial hearsay to the prosecution's case; (2) whether the testimonial hearsay was cumulative; (3) the existence of other corroborating evidence; (4) the extent of confrontation permitted; and (5) the strength of the prosecution's case.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN5 **Plain Error, Evidence**

The findings of a court-martial may be impeached when extraneous prejudicial information was improperly brought to the attention of a member. R.C.M. 923, Manual Courts-Martial. In some circumstances, evidence that court members considered extraneous prejudicial information from a third party or from outside materials can be considered in deciding whether the findings or sentence are impeached. Mil. R. Evid. 606(b), Manual Courts-Martial. Because Mil. R. Evid. 606(b) prohibits members from disclosing the subjective effects of such extrinsic influences on their deliberations, there is a presumption of prejudice from such influences. The burden is on the Government to rebut that presumption by proving harmlessness. In the absence of an objection at trial, the United States Air Force Court of Criminal Appeals applies a plain error analysis under which an appellant must show that there was an error, that the error was plain or obvious, and that the error materially prejudiced a substantial right.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 **Harmless & Invited Error, Evidence**

To prevail of a claim that an accused did not suffer harm because a document was provided to panel members without being admitted into evidence, the Government must demonstrate that the error did not have a substantial influence on the findings. In evaluating this issue, the United States Air Force Court of Criminal Appeals considers (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7 **Trial Procedures, Deliberations & Voting**

In determining whether the verdict in a servicemember's case should be impeached, the United States Air Force Court of Criminal Appeals attempts to determine any prejudicial impact extraneous evidence that came to a panel member's attention during the servicemember's court-martial had on the members' deliberations. In assessing that impact, the court considers whether there is a reasonable possibility the evidence influenced the members' verdict. In making that determination, the court considers what additional evidence the members considered that supported their verdict.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8 **Procedural Due Process, Scope of Protection**

The United States Air Force Court of Criminal Appeals reviews de novo whether an appellant has been denied the due process right to speedy posttrial review and whether any constitutional error is harmless beyond a reasonable doubt. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case

being docketed before the court, and the 18-month standard the United States Court of Appeals for the Armed Forces ("CAAF") adopted in United States v. Moreno applies as a case continues through the appellate process; however, the Moreno standard is not violated when each period of time used for the resolution of legal issues between the court of criminal appeals and the CAAF is within the 18-month standard. However, when a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors the United States Supreme Court elucidated in Barker v. Wingo and the CAAF adopted in Moreno. Those factors are: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Procedural Due Process, Scope of Protection**

When there is no showing of prejudice under the fourth factor of the four-factor test the United States Supreme Court elucidated in Barker v. Wingo for determining if an appellant's due process rights have been violated because of unreasonable posttrial delay, the United States Air Force Court of Criminal Appeals will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 **Procedural Due Process, Scope of Protection**

A finding of harmless error does not end the inquiry of whether a servicemember is entitled to sentencing relief because his due process right to speedy posttrial review has been violated, as the United States Air Force Court of Criminal Appeals may grant sentence relief under Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*, for excessive posttrial delay without the showing of actual prejudice required by UCMJ art. 59(a), *10 U.S.C.S. § 859(a)*. In United States v. Gay, the court identified a list of factors to consider in evaluating whether UCMJ art. 66(c) relief should be granted for posttrial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the Government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, if relief is consistent with the goals of both justice and good order and discipline, and can the court provide any meaningful relief. No single factor is dispositive and the court may consider other factors as appropriate.

Counsel: For the Appellant: Major Matthew T. King, Major Shane A. McCammon, Captain Johnathan D. Legg.

For the United States: Colonel Don M. Christensen; Lieutenant Colonel Nurit Anderson, Major Daniel J. Breen; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, MITCHELL, and HECKER, Appellate Military Judges.

Opinion by: HECKER

Opinion

OPINION OF THE COURT UPON RECONSIDERATION

HECKER, Senior Judge:

Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members of possessing and viewing sexually explicit depictions of minors, in violation of Article 134, UCMJ, *10 U.S.C. § 934*. He was sentenced to a dishonorable discharge,

confinement for 9 months and reduction to the grade of E-1. The convening authority reduced the punitive discharge to a bad-conduct discharge and approved the remainder of the sentence as adjudged.

Procedural History

On 9 April 2013, we issued a decision affirming the findings and sentence in Appellant's case. *United States v. Yohe, ACM 37950, 2013 CCA LEXIS 304 (A.F. Ct. Crim. App. 9 April 2013)* **[*2]** (unpub. op.). Mr. Laurence M. Soybel was an appellate judge on the panel that issued the decision, pursuant to an appointment by The Judge Advocate General of the Air Force. After the Secretary of Defense issued a memorandum on 25 June 2013 appointing Mr. Soybel to this court, we vacated our initial decision and issued a second one on 22 July 2013, reaffirming the substance and holdings of the prior decision. *United States v. Yohe, ACM 37950, 2013 CCA LEXIS 686 (A.F. Ct. Crim. App. 22 July 2013)* (unpub. op.).

In September 2013, Appellant filed a petition for grant of review with our superior court. On 31 October 2013, our superior court dismissed the petition for review without prejudice. *United States v. Yohe, 73 M.J. 91 (C.A.A.F. 2013)* (mem.). The record of trial was returned to our court on 13 March 2014.

On 15 April 2014, our superior court issued its decision in *United States v. Janssen, 73 M.J. 221, 225 (C.A.A.F. 2014)*, holding that the Secretary of Defense did not have the legislative authority to appoint appellate military judges and that his appointment of Mr. Soybel to this Court was "invalid and of no effect." In light of *Janssen*, we granted reconsideration on 29 April 2014, and permitted counsel for Appellant to file a supplemental pleading.

When Appellant's case was initially before **[*3]** us, he argued (1) the evidence was factually and legally insufficient to support his convictions, (2) the military judge violated his right to confrontation by admitting testimonial hearsay into evidence and (3) the military judge erred by admitting certain evidence. After we permitted Appellant to submit a supplemental assignment of errors, he raised the issue of post-trial delay, arguing his due process right to speedy appellate processing was violated under *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*, and *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. In September 2014 and January 2015, we specified two issues: (1) whether the trial court's findings and sentence or this court's review are affected by the possibility that certain non-admitted evidence was improperly brought to the attention of the panel, and (2) whether the general verdict in the case must be set aside because certain images in the case were constitutionally protected.

With a properly constituted panel, we have reviewed Appellant's case, to include Appellant's previous and current filings and the previous opinions issued by this court. We affirm the findings, but, for the reasons provided below, consolidate the specifications. We affirm the sentence as adjudged.

Background

In May 2009, an investigator **[*4]** with the Nebraska state police used a law enforcement program to identify Internet protocol (IP) addresses that were sharing child pornography through peer-to-peer networks, including Limewire.[1] This automated program was operated from the investigator's computer and sent out queries using certain key words commonly associated with child pornography. If a peer-to-peer user's computer was on-line and the program was being used, his computer would automatically respond to the query by indicating it had a responsive file or files. The law enforcement program used this response to compare the suspect file to over four million items of known child pornography found in a law enforcement database, through a comparison of their "hash values," which are unique characters associated with digital files.[2] If the "hash values" of a suspect file matched one found in the law enforcement database, the program would automatically

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[1] Peer-to-peer file sharing is a means of obtaining and **[*5]** sharing files directly from other computer users who are connected to the Internet and who are also using the peer-to-peer file sharing software. Once the peer-to-peer file sharing software has been installed by the user, the user may interface directly with other computers that have the same file sharing software, and is able to browse and obtain files that have been made available for sharing on those other computers by typing search terms into the program's search field.

[2] The values are calculated using a mathematical algorithm and are also known as "Secure Hash Algorithm" (SHA) values. This mathematical figure will remain the same for an unchanged file, no matter where the file is found or on which computer the file is located. Changing the file name will not make a change to this value. Investigators compare the hash values of files in order to determine whether they are identical, a process described by the civilian investigator in this case as "thousands of times more reliable" than DNA testing.

generate a report containing the "hash value," the name of the file, and the IP address of the computer that offered to share the file. Law enforcement personnel then used that information to conduct further investigation.

On 6 May 2009, the law enforcement program detected that an individual file of child pornography was present and available for sharing in a Limewire folder on a computer associated with **[*6]** a particular IP address. On 11 May 2009, the program repeated the query but no longer detected that file as present in the shared folder. It did, however, find a second file of child pornography there. The titles of these two files suggested sexual activity by 15- and 7-year-old children, and their "hash values" matched those for two child pornography videos found in a law enforcement database of known child pornography. The law enforcement program did not download either video onto the investigator's computer. Subsequent queries by the law enforcement program in June, July and August 2009, did not receive any responses indicating this IP address had made child pornography available for sharing.

Through a subpoena served on the Internet service provider, investigators learned the relevant IP address was assigned to Appellant in his on-base dormitory room, where he lived alone. Appellant's laptop computer was seized on 8 October 2009. A forensic examination of the computer's contents was conducted by the Defense Computer Forensic Laboratory (DCFL).

Appellant was subsequently charged with and convicted of two specifications under *Article 134, UCMJ:* (1) viewing one or more visual depictions **[*7]** of minors engaged in sexually explicit conduct between 25 March 2008 and 8 October 2009, and (2) wrongfully and knowingly possessing one or more such depictions during that same time frame.

Sufficiency of the Evidence

HN1[] We review issues of legal and factual sufficiency de novo. *See United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324 (C.M.A. 1987))*. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [Appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

When examining Appellant's computer, the forensic examiner found that Limewire had been installed on Appellant's laptop. **[*8]** He did not find the two videos identified by the law enforcement program, which indicated to him that they had been deleted from the computer at an unknown time. The forensic examiner, however, found evidence that two videos with the same file name had been downloaded onto the hard drive of Appellant's computer through the use of Limewire. He also found evidence that a user of the computer previewed the two movies through Limewire as they were being downloaded. For one video, the evidence indicated (1) it was partially downloaded onto Appellant's computer on 9 December 2008, (2) it was successfully downloaded on 6 May 2009 (the same day the law enforcement program found it in Appellant's shared folder), (3) it was previewed and again partially downloaded on 7 May 2009, and (4) it was previewed again on 16 May 2009 and then successfully downloaded three minutes later. For the second video, the evidence revealed (1) it was partially downloaded onto Appellant's computer on 22 August 2008, (2) it was previewed on 11 May 2009 and then was successfully downloaded three minutes later (the same day the law enforcement program found it in Appellant's shared folder), and (3) it was again successfully **[*9]** downloaded on 16 May 2009.

The forensic examiner also found evidence that someone using the computer had at some point conducted five separate searches on Limewire, looking for files containing the terms "pthc" (an abbreviation commonly used for "preteen hard core"), "preteen porn," "pedopedo," "young Latina" and "young." The two videos found by the law enforcement program both contained the word "pthc" in their filenames, and one filename also contained the words "preteen" and "pedo."

The forensic examiner also testified about 16 items he found inside several areas of Appellant's computer. One item was a three-minute video while the other fifteen

were "thumbnails," which are reduced-sized versions of pictures. Some of the thumbnails depict obviously young, preteen boys engaging in homosexual acts and other obviously preteen children engaged in sexual acts and suggestive poses, and the video depicts a child engaging in oral sodomy.

Appellant argues he is not guilty of possessing or viewing the thumbnail images and three-minute video because (1) there was no evidence he knew these items were on his computer and (2) he could not access the areas of the computer where the items were located. **[*10]** He also contends the two videos cannot serve as the basis for his conviction of viewing child pornography as they do not depict minors engaged in sexually explicit conduct.

A. Viewing of Child Pornography

Appellant generally does not dispute that someone used his computer to preview some portion of these two videos in May 2009. Instead, he contends there is insufficient evidence to prove he was the person who previewed them or, even if he did preview them, that he viewed them long enough to see the sexually explicit activity on them. For one of the videos, he also argues that the individuals depicted in them are not minors. We disagree.[3]

The Government presented strong circumstantial evidence that Appellant was the individual who was using the computer during the relevant time periods in May 2009 when these videos were previewed and/or downloaded. Only one user account and one user profile was associated with the computer's operating system, and the user account was password protected. Appellant's email address was associated with this user profile and the search term "pthc" was found in an area of the computer associated with that user profile. A close friend of Appellant testified he had never seen anyone else using Appellant's computer outside his presence and Appellant had never complained to him about someone doing so. Additionally, Appellant's work schedule revealed he was not working at any of the times in May 2009 when the videos were being downloaded and previewed, and no downloads or previews **[*12]** occurred while he was working during this time period.

Similarly, we find sufficient evidence present to conclude that Appellant viewed the portions of these two videos that contained the depictions of minors engaging in sexually explicit conduct. These two videos were available for previewing and downloading because Appellant used Limewire to search for files containing terms strongly indicative of child pornography, received a list of files containing some of those terms (and whose file names described sexual activity by children), and selected these two files from that list to download onto his computer. He then took the further affirmative step of clicking again on the files so he could preview them as they were downloading.

Under the totality of the circumstances, we conclude the evidence is both factually and legally sufficient to establish Appellant was intentionally searching for child pornography in May 2009, found it through Limewire after using search terms designed to find it, selected these two files for downloading and then watched these videos while they were downloading.[4] Having evaluated the entire record of trial, we are therefore convinced Appellant's conviction for **[*13]** viewing one or more visual depictions of minors[5] engaged in sexually explicit conduct is legally and factually sufficient, based solely

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[3] Over defense objection, the members were shown the two videos from the law enforcement database whose "hash values" matched those found in Appellant's Limeware folder by the law enforcement program in May 2009. We find the military judge did not abuse his discretion by admitting these videos even though they were not found on Appellant's computer. *See* United States v. Clayton, 67 M.J. 283, 286 (C.A.A.F. 2009). As discussed in this opinion, the Nebraska state police investigator was able to determine exactly which videos were downloaded and previewed on Appellant's computer through the use of their hash values. **[*11]** The court members were able to view copies of these recordings and see precisely what movies were previewed and downloaded. We do not find that the military judge abused his discretion, nor do we find that the members would have been confused or misled or that Appellant was unfairly prejudiced by the admission of the videos.

[4] For the reasons discussed below, we do not find the evidence sufficient to prove Appellant viewed the other images in this case.

[5] In one video, a young female reads a newspaper at a kitchen table for approximately 14 seconds, goes into a bedroom and disrobes, and, approximately 1 minute later, engages in masturbation. In the second video, a young male and young female are naked together in a bathtub and engage in sexual activity for almost 9 minutes. There is no question that the young girl engaging in sexual behavior in the first movie was under 18 years old. Although Appellant argues the two individuals in the second video are clearly over 18 years old, we conclude otherwise, and find that a reasonable fact-finder could as well.

on these two videos.

B. Possession of Child Pornography

In arguing the evidence is insufficient to sustain his conviction for possessing images of child pornography, Appellant relies heavily on our superior court's decision in *United States v. Navrestad, 66 M.J. 262 (C.A.A.F. 2008)*. There, the accused used a public computer to search for and view child pornography images from the Internet, **[*14]** leading him to several public online file storage folders created by users of an Internet service provider. *Id. at 264, 268*. He opened these storage folders and viewed their contents, which included images of child pornography. *Id. at 264*. Although these images were automatically saved onto the computer's hard drive, our superior court found the accused lacked sufficient dominion and control to knowingly "possess" them. *Id. at 268*.

In reaching this conclusion, the court found the following facts to be significant: (1) there was no evidence the accused knew the images were being automatically saved onto the hard drive; (2) there was no evidence the accused emailed, printed or purchased copies of the images, (3) users on this public computer could not access the computer's hard drive or download the images onto a portable storage device, and (4) the accused did not have the ability to control who else had access to the images in their location on the Internet. *Id. at 267-68*. Within this context, the court concluded the accused's actions with the images "went no further" than viewing them and this "viewing alone does not constitute 'control' as the term is used" in child pornography possession cases. *Id.* Such possession must be **[*15]** "knowing and conscious." *Id. at 267*.

Because the holding in *Navrestad* was based on unique facts, we do not find it dispositive as to whether Appellant possessed the two videos detected by the law enforcement program in May 2009. Unlike the accused in *Navrestad*, Appellant viewed these videos of child pornography on his personal computer; and he, through the use of the Limewire program, directed that the two videos be downloaded onto the hard drive of his computer. We recognize that these two videos were no longer on Appellant's computer when it was forensically examined. However, those items were present in a user-accessible area of his computer (the "shared" Limeware folder) on the days in May 2009 when his computer offered to share them in response to a query sent by the law enforcement program, as well as on several other days. Under those facts, we find Appellant knowingly and consciously possessed the images and exercised the dominion and control necessary to constitute "possession" of them. Therefore, the evidence is factually and legally sufficient to convict Appellant of wrongfully and knowingly possessing one or more visual depictions of minors engaging in sexually explicit conduct. **[*16]**

We reach a different result as to whether Appellant possessed the thumbnail images of child pornography found on his computer. All these items were found in locations associated with either the computer's backup system or temporary files, rather than in locations where computer users typically save or store files.[6] The forensic examiner testified the thumbnail images were automatically created by the computer when a user viewed a photograph or video on the computer or when the computer conducted a system backup at a given point, and remained even after the original image was deleted. As with the video files discussed above, the forensic examination did not find the original photographs or videos that resulted in the creation of these thumbnails. Unlike those video files, however, the forensic examiner could not determine the file names of the original photographs or videos that resulted in these thumbnails, or when a user downloaded or viewed those items. Therefore, there is not proof beyond a reasonable doubt that Appellant was the one who viewed them. Furthermore, these thumbnails were found in areas of the computer that an average computer could not access without specialized computer **[*17]** software, none of which was found on Appellant's computer. There was no evidence presented that Appellant knew the images were being saved onto his hard drive in that manner, nor was there evidence that Appellant possessed specialized computer skills. A similar problem exists with the three-minute video, found in the unallocated space on Appellant's computer.

Under these circumstances, we find the evidence factually and legally insufficient to prove Appellant knowingly and wrongfully possessed or viewed these 16 visual depictions or that he possessed or viewed the original depictions that resulted in their creation. *See United States v. Sanchez, 59 M.J. 566, 570 (A.F. Ct. Crim. App. 2003)* (upholding a possession conviction based on deleted files and files located in the computer's cache based on other evidence, including the accused's relative sophistication in computer matters), *aff'd in part, rev'd in part on other grounds*, *60*

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[6] These inaccessible areas included the hard drive's unallocated space or clusters, index files, thumbcache databases and shadow volume.

M.J. 329 (C.A.A.F. 2004); *United States v. Nichlos, NMCCA 201300321, 2014 CCA LEXIS 691, at *27-28 (N.M. Ct. Crim. App. 18 September 2014)* (unpub. op.) (holding there was "no question the appellant possessed child pornography" but **[*18]** "did not 'knowingly possess' child pornography on the date charged" because the files were located in unallocated space and there was no evidence that the appellant had the ability to retrieve files from unallocated space); *Accord United States v. Flyer, 633 F.3d 911, 919-20 (9th Cir. 2011)* (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession of child pornography in unallocated space); *United States v. Moreland, 665 F.3d 137, 154 (5th Cir. 2011)* (refusing to find constructive possession of child pornography in unallocated space without additional evidence of the defendant's knowledge and dominion or control of the images); *United States v. Kuchinski, 469 F.3d 853, 863 (9th Cir. 2006)* (holding that a defendant who lacks knowledge about and access to cache files should not be charged with possessing child pornography images located in those files without additional evidence of dominion and control over the images).[7]

C. Consolidation of the Specifications

As described above, we have found Appellant guilty of viewing and possessing one or more visual depictions of **[*19]** minors engaged in sexually explicit conduct, based solely on the two video recordings detected by the law enforcement program in May 2009. We have also concluded that his possession of those recordings was not simply incident to his viewing of the recordings. Under ordinary circumstances, therefore, we would affirm both specifications.

Here, however, the military judge instructed the panel that "[i]n order to 'possess' a computer file, the Accused must have been able to manipulate the image in some way. Manipulation includes saving, deleting, editing or viewing." (emphasis added). Once that instruction was given, Appellant would automatically be convicted of possessing the images once it is determined he viewed them.[8] Under these unique circumstances, we elect to consolidate the two specifications and so direct in our decretal paragraph. *See United States v. Campbell, 71 M.J. 19, 22-23 (C.A.A.F. 2012)*. Because the panel was also instructed they must consider the "viewing" and "possessing" specification as "one offense" for which Appellant faced a maximum of 10 years confinement, we find the Appellant's sentence was not affected by the lack of consolidation at trial.

Admission of Thumbnail Images and the Three-Minute Video

We have concluded Appellant's conviction is based solely on the two videos detected by the law enforcement program in May 2009. We must, therefore, assess whether Appellant was prejudiced by the admission of the 15 thumbnail images and the three-minute video that we have not used to support Appellant's conviction.

First, we note the trial counsel argued to the panel that Appellant could be convicted of both specifications based solely on his actions with the two videos, and that the thumbnails found on the computer simply prove that Appellant acted purposefully. In light of this argument, the evidence, and the military judge's instructions, it is possible the panel concluded, as did we, that the government only proved beyond a reasonable doubt that Appellant viewed and possessed the two videos. Under these circumstances, Appellant would not have been prejudiced in sentencing regarding the other items admitted into evidence.

Moreover, we find this evidence would have been otherwise admissible. The three minute video and 13 of the 15 thumbnail images clearly are sexually explicit **[*21]** depictions of minor children and would have been admissible under Mil. R. Evid. 404(b) as proof of Appellant's intent, knowledge, or absence of mistake or accident regarding his actions with the two videos. Mil. R. Evid. 404(b); *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)* (holding that ***HN2***[↑] in order to be admissible, the evidence of uncharged misconduct must "reasonably support a finding" that the accused committed that misconduct and proof beyond a reasonable doubt is not required). The other two thumbnail images depicted fully-clothed children who are not engaged in any sexual activity. However, the government told the panel these two images were

[7] *See generally* Katie Grant, *Crying over the Cache: Why Technology has Compromised the Uniform Application of Child Pornography Laws*, *81 Fordham L. Rev. 319 (October 2012)*; J. Elizabeth McBath, *Trashing our System of Justice? Overturning Jury Verdicts Where Evidence is Found in the Computer's Cache*, *39 Am. J. Crim. L. 381 (2012)*.

[8] We note that this instruction is to some extent inconsistent with *Navrestad's* holding **[*20]** that viewing alone does not always constitute possession.

snapshots of the first frame of a longer video that depicted sexually explicit conduct. The Nebraska investigator then testified that, based on his knowledge from other child pornography cases, these two snapshots are from two videos which depict a 15-year-old and 9-year-old child engaging in oral sodomy.[9] The forensic examiner testified that the presence of all these items on Appellant's computer meant the original images were on that computer at some point. Under these circumstances, we find these images and testimony would have been admissible under Mil. R. Evid. 404(b).[10]

This evidence would also have been admissible in sentencing under Rule for Courts-Martial (R.C.M.) 1001(b)(4) as an aggravating circumstance directly relating to or resulting from the offenses of which **[*23]** Appellant was convicted. *United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1998)*. As such, the evidence could be used to inform the sentencing authority's judgment regarding the charged offense as well as placing that offense in context, including the facts and circumstances surrounding the offense. *United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001)*; *United States v. Mullens, 29 M.J. 398, 400-01 (C.M.A. 1990)*; *United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982)*; *see also United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)*. Therefore, we are convinced beyond a reasonable doubt that the admission of the 15 thumbnail images and 3-minute video did not prejudice Appellant.

Appellant also contends that the military judge erred by allowing the government to admit testimonial hearsay about the two images depicting fully-clothed children by introducing portions of the DCFL report that stated the images "contain[ed] known child victims based on analysis with the National Center for Missing and Exploited Children (NCMEC) database" when no one from NCMEC testified at trial. ***HN4***[↑] The decision as to whether the admitted evidence violates the *Confrontation Clause* is reviewed de novo. *See, e.g., United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008)*; *United States v. Rankin, 64 M.J. 348, 351 (C.A.A.F. 2007)*. Here, we are convinced that any error in its admission was harmless beyond a reasonable doubt. *United States v. Sweeney, 70 M.J. 296, 306 (C.A.A.F. 2011)*; *see Rankin, 64 M.J. at 353*.

Among the factors we consider in assessing harmlessness in this context are: (1) the importance of the testimonial hearsay to the prosecution's case, (2) whether the testimonial hearsay was cumulative, **[*24]** (3) the existence of other corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case. *Sweeney, at 306* (citing *Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674)*. After analyzing these factors, we find that any error in admitting this information was harmless. First, as described above, the two images of the children were snapshots from pornographic movies; thus, the images themselves were minimally important to the Government's case. Second, the fact that the individuals in these images were under the age of 18 is clear upon a review of the images themselves. Third, approximately 20 other images in the report were not labeled as depicting known child victims identified by NCMEC, and they clearly depicted children engaged in sexual acts; thus, allowing NCMEC's identification of two pictures was of minimal impact. Fourth, the NCMEC comment that these children were under the age of 18 was not relied upon by trial counsel, and the members were not informed of the significance of the NCMEC reference. Fifth, the Nebraska state investigator had personal knowledge of the age of these two children, and he was present and testified about it, subject to cross-examination. Finally, Appellant's trial **[*25]** defense strategy did not hinge on the age of the people in these two images as the defense was focused on the lack of proof that Appellant possessed or viewed them. Based on the forgoing, we find that, even if these NCMEC references constituted testimonial hearsay whose admission violated the *Confrontation Clause*, that error was harmless beyond a reasonable doubt.

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[9] In light of this and our own conclusions about the sufficiency of the evidence **[*22]** on appeal, we find the introduction of these two thumbnail images did not create a circumstance where Appellant may have been convicted based in part on conduct that is constitutionally protected. Furthermore, even if such a circumstance did exist, ***HN3***[↑] in light of our superior court's recent ruling in *United States v. Piolunek*, it is no longer necessary to reject an entire verdict simply because some of the conduct that resulted in the verdict was constitutionally protected. *74 M.J. 107, 111-12. (C.A.A.F. 2015)* ("Contrary to our conclusion in *Barberi*, convictions by general verdict for possession and receipt of visual depictions of a minor engaging in sexually explicit conduct on divers occasions by a properly instructed panel need not be set aside after the [service court] decides several images considered by the members do not depict the genitals or pubic region.").

[10] Because the admission of evidence under Mil. R. Evid. 404(b) is also subject to the balancing test of Mil. R. Evid. 403, we also find the probative value of this evidence was not substantially outweighed by any danger of unfair prejudice.

Non-Admitted Evidence Provided to Members

The military judge admitted a DVD disc into evidence as Prosecution Exhibit 4. While establishing the foundation for the DVD and before the panel, the Nebraska investigator described this DVD as containing "IP history log files" and two video files[11] associated with those log files. The investigator further stated that he verified the contents of the DVD that same day. The record does not reflect whether the military judge, trial counsel, or trial defense counsel examined the contents of the DVD prior to its going to the members.

Prior to instructions and argument, the parties held an *Article 39(a), UCMJ*, session to discuss how **[*26]** the members would review the videos on Prosecution Exhibit 4 (as well as the thumbnail images found on Prosecution 8). With the agreement of the parties, the panel was told they would be sent into the deliberation room with the DVDs and a laptop so they could view the "images and the videos that are at issue" in the case. The military judge said "the only things that are on the DVDs should be" three videos and a number of still images. One representative from each side was authorized to go into the deliberation room with the investigator who was setting up the laptop for the panel. Following a brief recess, the military judge stated "the members did review the materials." After hearing instructions and closing argument, the panel was again given the two DVDs and the laptop, to use during their deliberations. The military judge instructed the panel to discuss "all the evidence that has been presented" to them.

This court's review of Prosecution Exhibit 4 revealed that Prosecution Exhibit 4 contained extraneous documents beyond the "log files" and videos. We then directed the parties to brief whether the trial court's findings and sentence or this court's review are affected by this error. **[*27]**

HN5[] The findings of a court-martial may be impeached "when extraneous prejudicial information was improperly brought to the attention of a member." R.C.M. 923. In some circumstances, evidence that court members considered extraneous prejudicial information from a third party or from outside materials can be considered in deciding whether the findings or sentence are impeached. Mil. R. Evid. 606(b); *United States v. Straight, 42 M.J. 244, 250 (C.A.A.F. 1995)*. Because Mil. R. Evid 606(b) would prohibit members from disclosing the subjective effects of such extrinsic influences on their deliberations, there is a presumption of prejudice from such influences. *Straight, 42 M.J. at 249*.

The burden is on the Government to rebut that presumption by proving harmlessness. *Id.* (citing *United States v. Bassler, 651 F.2d 600, 603 (8th Cir. 1981)*). In the absence of an objection at trial, we apply a plain error analysis under which Appellant must show that there was an error, that the error was plain or obvious, and that the error materially prejudiced a substantial right. *United States v. Reyes, 63 M.J. 265, 267 (C.A.A.F. 2006)*.

Here, in order to protect the secrecy of panel deliberations, we presume the members viewed and considered all the evidence presented to the panel, including the extraneous documents erroneously included on Prosecution Exhibit 4. *Id.* In his brief, Appellant only expressly complains about one such document contained on the **[*28]** DVD—a multi-page unsigned affidavit by an agent with the Air Force Office of Special Investigations (AFOSI) asking the 55th Mission Support Group commander for authorization to search Appellant's dormitory room and seize computers and other materials.[12] This document is entitled "YOHE Search Authority."

It was a plain and obvious error for this document to be provided to the panel members without being admitted into evidence. To determine whether this error had a prejudicial impact on the findings or sentencing process, we must consider whether the panel might have been substantially swayed by the error. *United States v. Clark, 62 M.J. 195, 201 (C.A.A.F. 2005)* (citing *Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*). ***HN6***[] To prevail, the government must demonstrate the error "did not have a substantial influence on the findings." *Clark, 62 M.J. at 200*. In evaluating this issue, we consider "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence **[*29]** in question, and (4) the quality of the evidence in question." *Id. at 200-201* (quoting *United*

[11] These are the two video files discussed above that were not on Appellant's computer, but, based on their hash values, were found in the investigator's database of child pornography.

[12] The other materials were (1) a document entitled "subpoena" which is a subpoena to an Internet service provider for records relating to an IP address that did not belong to Appellant, and (2) 36 pictures associated with the search of Appellant's dormitory room, four of which were admitted into evidence at trial.

States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999).

This document contains factual assertions and legal conclusions by a non-testifying AFOSI agent, based on his investigation and experience and that of the Nebraska investigator. The affidavit discusses computer technology (including peer-to-peer systems) and their role in the proliferation of child pornography. It states Appellant's IP address had made available for sharing two videos of suspected child pornography. The AFOSI agent opines the female in one video is between 10 and 12 years old, and the two individuals in the second video are between 14 and 16 years old. He also asserts that the videos are child pornography. The affidavit concludes "that probable cause exists to believe there has been a violation of . . . Article 134, UCMJ which prohibits possession, advertising, promoting, presenting, distributing, or soliciting through interstate or foreign commerce by any means, child pornography . . . ."

HN7[] In determining whether the verdict in this case should be impeached, we attempt to determine any prejudicial impact the extraneous evidence had on the members' deliberations. *See* United States v. Diaz, 59 M.J. 79, 91 (C.A.A.F. 2003). In assessing the impact, **[*30]** we consider whether there is a reasonable possibility the evidence influenced the members' verdict. *See* United States v. Ureta, 44 M.J. 290, 299 (C.A.A.F. 1996). In making this determination, we consider what additional evidence the members considered that supported their verdict. *Id.*

The affidavit contains extraneous prejudicial information. The affidavit would not have been evidence that the Government could have admitted during either its findings case or sentencing case. The document contains a few pieces of information not otherwise before the members, but we find the affidavit, even if read by the panel, would not have had an impact on the verdict or sentence. Most of the information in the affidavit was presented at trial by the civilian investigator who investigated Appellant's misconduct. This same investigator is referred to as the source of much of the information in the affidavit. While the affidavit contains a few additional details about file sharing networks and computers not testified to at trial, we find these details would not have influenced the panel's findings. Similarly, reading the affidavit's conclusion concerning probable cause would not have been prejudicial, given the other evidence available to the members.

By **[*31]** far the most damning evidence came from the analysis of Appellant's computer after it was seized. An analysis of the Appellant's computer showed he had the sole user profile and that profile was used to search for and look at child pornography. We conclude that it was not reasonably possible that the extraneous evidence influenced the members' verdict and, therefore, the presumption of prejudice has been rebutted.

Post-Trial Processing Delays

Appellant argues, citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006), that unreasonable post-trial delay warrants relief. Appellant further cites United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), noting this court's broad power and responsibility to affirm only those findings and sentence that should be approved.

HN8[] We review de novo whether an appellant has been denied the due process right to speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before this court. Moreno, 63 M.J. at 142. The *Moreno* standards continue to apply as a case continues through the appellate process; however, the *Moreno* standard is not violated when each period of time used for the **[*32]** resolution of legal issues between this court and our superior court is within the 18-month standard. United States v. Mackie, 72 M.J. 135, 135-36 (C.A.A.F. 2013); *see also* United States v. Roach, 69 M.J. 17, 22 (C.A.A.F. 2010). However, when a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and Moreno. *See* United States v. Arriaga, 70 M.J. 51, 56 (C.A.A.F. 2011). Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." United States v. Mizgala, 61 M.J. 122, 129 (C.A.A.F. 2005); *see* Barker, 407 U.S. at 530.

This case was originally docketed with this court on 22 June 2011, and our initial decision was issued on 9 April 2013, over 21 months later. We then *sua sponte* reconsidered our decision and issued an opinion on 22 July 2013, 25 months after the initial docketing. Both decisions exceeded the Moreno standards and were, therefore, facially unreasonable. Our opinions did not address the presumptively unreasonable delay. Conducting that analysis now, we note that Appellant

did not make a demand for speedy appellate processing and thus did not reference any prejudice he suffered from the delay.[13] HN9[] When there is no showing of prejudice under the fourth factor, "we will find a due process violation only when, in balancing the **[*33]** other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in the initial processing of this case to not be so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. We are convinced that even if there is error, it is harmless beyond a reasonable doubt.

The time between our superior court's action to return the record of trial to our court for our action and this decision has not exceeded 18 months; therefore, the *Moreno* presumption of unreasonable delay is not triggered and we do not examine the remaining *Barker* factors. **[*34]** *See Id. at 136*; *Toohey, 60 M.J. at 102*.

HN10[] A finding of harmless error does not end the inquiry, as we may grant sentence relief under Article 66(c), UCMJ, *10 U.S.C. § 866(c)*, for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, *10 U.S.C. § 859(a)*. *Tardif, 57 M.J. at 224*; *see also United States v. Harvey, 64 M.J. 13, 24 (C.A.A.F. 2006)*. In *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, we identified a list of factors to consider in evaluating whether *Article 66(c), UCMJ*, relief should be granted for post-trial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to Appellant or to the institution, if relief is consistent with the goals of both justice and good order and discipline, and can this court provide any meaningful relief. *Id.* No single factor is dispositive and we may consider other factors as appropriate. *Id.*

After considering the relevant factors in this case, we determine that no relief is warranted. Although the initial delay exceeded the *Moreno* standard by seven months, no other time period exceeded the standards. Even analyzing the entire period from the time the case was first docketed until today, we find there was no bad faith or gross negligence **[*35]** in the post-trial processing. The reason for the delay after our initial decision was to allow this court and our superior court to fully consider a constitutional issue of first impression concerning whether the Secretary of Defense has the authority under the *Appointments Clause*[14] to appoint civilian employees to the service courts of criminal appeals. Subsequent delays were the result of a thorough analysis of the casefile,[15] and providing the parties the opportunity to fully brief the evolving case law regarding general verdicts in child pornography cases.[16] Based on these facts, we find no evidence of harm to the integrity of the military justice system.

Based on our review of the entire record, we conclude that sentence relief under *Article 66, UCMJ*, is not warranted.

Conclusion

The specifications of the Charge and Additional Charge are hereby consolidated into one specification that reads as follows:

> In that AIRMAN FIRST CLASS CHARLES N. YOHE, United States Air Force, 55th Security Forces Squadron, Offutt Air Force Base, Nebraska, did, **[*36]** at or near Offutt Air Force Base, Nebraska, between on or about 25 March 2008 and on or about 8 October 2009, wrongfully and knowingly possess and view one or more visual depictions of minors engaged in sexually explicit conduct, which conduct was prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

With this modification, the findings and the sentence are **AFFIRMED**.

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[13] We reject Appellant's intimation that, because the Secretary of Defense's appointment of the civilian employee was invalid and of no effect, the *Moreno* clock was not tolled by our earlier decisions. We thus decline to consider the time from initial docketing on 22 June 2011 until this opinion as uninterrupted for purposes of analysis under *Moreno*.

[14] *U.S. Const. art II § 2, cl. 2*.

[15] The review by this court uncovered the extraneous matters included in Prosecution Exhibit 4 that Appellant and the Government had overlooked.

[16] *See United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012) overruled by United States v. Piolunek, 74 M.J. 107 (C.A.A.F. 2015)*.

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United States v. Kamara

United States Navy-Marine Corps Court of Criminal Appeals

May 21, 2015, Decided

NMCCA 201400156

Reporter
2015 CCA LEXIS 214 *

UNITED STATES OF AMERICA v. ARNOLD C. KAMARA, GUNNERY SERGEANT (E-7), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: **[*1]** GENERAL COURT-MARTIAL. Sentence Adjudged: 5 December 2013. Military Judge: LtCol Eugene H. Robinson, Jr., USMC. Convening Authority: Commanding General, 1st MAW, Okinawa, Japan. Staff Judge Advocate's Recommendation: Maj J.M. Hackel, USMC.

Core Terms

images, child pornography, drive, unallocated, space, files, possessed, external, sentence, hard drive, Specification, knowingly, depict, sexual, constitutionally protected, general verdict, devices, thumb

Case Summary

Overview

HOLDINGS: [1]-Two specifications alleging that a servicemember possessed child pornography, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*, had to be modified on appeal before the servicemember's convictions could be affirmed because a DVD that was used to convict the servicemember and was part of the record could no longer be read and the Government's evidence did not show that the servicemember knowingly possessed child pornography on any device other than an external hard drive; [2]-There was no merit to the servicemember's claim that his convictions had to be set aside because the panel returned a general verdict of guilty without specifically indicating which pieces of evidence they relied upon to reach their decision; [3]-The sentence that was approved by the convening authority was appropriate because changes the court made did not dramatically alter the sentencing landscape.

Outcome

The court modified both specifications charging the servicemember with possession of child pornography, affirmed the modified specifications and the charge, reassessed the servicemember's sentence, and affirmed the sentence of a dishonorable discharge and confinement for ten years that the convening authority approved.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Offenses > General Article > General Overview

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > ... > Trial Procedures > Instructions > Elements of the Offense

HN1[] **Courts Martial, Court-Martial Member Panel**

In United States v. Piolunek, the United States Court of Appeals for the Armed Forces ("CAAF") held that its decision in *United States v. Barberi, 71 M.J. 127, 2012 CAAF LEXIS 594*, "was wrongly decided." In Piolunek, which dealt with a general verdict where the evidence

contained both proscribed and constitutionally protected material, the CAAF recognized that properly instructed members are well suited to assess the evidence and make a factual determination whether an image does or does not depict the genitals or pubic region, and is, or is not, a visual depiction of a minor engaging in sexually explicit conduct. Furthermore, absent an unconstitutional definition of criminal conduct, flawed instructions, or evidence that members of a court-martial panel did not follow a military judge's instructions, there is simply no basis in law to upset the ordinary assumption that members are well suited to assess the evidence in light of the judge's instructions.

Evidence > Inferences & Presumptions > Presumptions > Creation

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] **Presumptions, Creation**

The question of whether a record of trial that is prepared following a trial by court-martial is incomplete is a matter of law which the United States Navy-Marine Corps Court of Criminal Appeals reviews de novo. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] **Judicial Review, Courts of Criminal Appeals**

Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, states that a military court of criminal appeals may affirm findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN4[] **Judicial Review, Standards of Review**

The United States Navy-Marine Corps Court of Criminal Appeals reviews questions of legal and factual sufficiency de novo. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. The test for factual sufficiency is whether the court of criminal appeals is convinced of an appellant's guilt beyond a reasonable doubt, allowing for the fact that it did not personally observe the witnesses.

Military & Veterans Law > Military Offenses > General Article > General Overview

HN5[] **Military Offenses, General Article**

The United States Court of Appeals for the Armed Forces has recognized that "knowing possession" as it relates to child pornography means "to exercise control of something." Manual Courts-Martial pt. IV, para. 37c(2).

Counsel: For Appellant: Maj Jason R. Wareham, USMC.

For Appellee: Capt Matthew M. Harris, USMC; LT James M. Belforti, JAGC, USN.

Judges: Before F.D. MITCHELL, K.J. BRUBAKER, M.C. HOLIFIELD, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A panel comprised of both officer and enlisted members sitting as a general court-martial convicted the

appellant, contrary to his pleas, of two specifications of possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*. The members sentenced the appellant to confinement for ten years and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and ordered it executed.[1]

The appellant now raises three assignments of error (AOEs):

> 1. that the appellant's conviction should be overturned because a general verdict cannot be upheld when the evidence offered to support **[*2]** the charge also includes constitutionally protected content;
> 2. that the appellant's conviction for possessing 14 DVDs containing child pornography cannot be sustained without amendment since one of the DVDs is not viewable; and,
> 3. that the files recovered from "unallocated space" are legally and factually insufficient to sustain the appellant's conviction.

After careful consideration of the record of trial and the submissions of the parties, we find merit in the appellant's second and third AOEs. We will grant relief in our decretal paragraph. We are convinced the findings as amended and the sentence are correct in law and fact and that no error material prejudicial to the substantial rights of the appellant remains. *Arts. 59(a)* and *66(c)*, UCMJ.

Background

On 8 November 2012, an agent of the Naval Criminal Investigative Service (NCIS) executed a valid search authorization in the appellant's workplace and residence. He seized a laptop computer, an external hard drive labeled "G drive," a tower computer, an Iomega external hard drive, and several thumb drives. These devices contained video clips and images of both adults and children engaged in sexual activity. The NCIS agent also retrieved **[*3]** a safe from the appellant's residence; inside were 14 DVDs allegedly containing child pornography.

The contraband uncovered in the appellant's possession depicted children as young as five engaging in oral, vaginal, and anal sex, as well as digital and object penetration of their vaginas and anuses. While some of the evidence also depicted adult pornography and nudist images, the agent estimated at trial that approximately 70% of the images found were child pornography. Record at 459.

Specification 1 of the Charge was based upon images allegedly found on the "external hard drives, computers, and thumb drives." Charge Sheet. The "G drive" contained these images as saved files. The images found on the other devices were located in "unallocated space."[2] The second specification concerned the 14 DVDs. The members received all of the electronic evidence, but it is unknown which DVDs or CDs they viewed during deliberations. One of the DVDs, Prosecution Exhibit 16, will no longer open for viewing.

Prior to closing arguments, the military judge properly instructed the members, *inter alia*, on the definitions of "child pornography," "sexually explicit conduct," and "lascivious." Record at 661-62. He instructed that the evidence must go beyond mere child nudity, and must be "sexually suggestive" and "designed to elicit a sexual response in the viewer." *Id.* at 662. During argument, trial counsel acknowledged that there was adult pornography mixed in with the child pornography, and urged the members to appropriately distinguish between the two when reaching a decision. *Id.* at 692-94. The members returned a general verdict of guilt without specifically indicating which pieces of evidence they relied upon to reach their decision.

Other facts necessary to address the assigned errors will be provided below.

General Verdict

Relying on *United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012)*, the appellant contends that his conviction should be overturned because the members returned a general verdict where the evidence presented contained both child pornography and constitutionally protected material (adult pornography and non-prurient nudist pictures). He claims that, given the possibility the members may have **[*5]** based their verdict on constitutionally protected images, this court

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[1] To the extent the CA's action purports to execute the dishonorable discharge, it is a legal nullity. ***United States v. Bailey, 68 M.J. 409 (C.A.A.F. 2009)***.

[2] "Unallocated Space" was defined by the Government's expert as that portion of a disc drive "not currently occupied by file in the systems" and which "often retains information that was previously in **[*4]** a file that has since then been deleted." Record at 587.

cannot affirm the conviction.

We may have found merit in this argument if *Barberi* was still an accurate reflection of the law. ***HN1***[↑] In *United States v. Piolunek, No. 14-0283 & 14-5006, 74 M.J. 107, 2015 CAAF Lexis 313 at *3, (C.A.A.F. Mar. 26, 2015)*, the Court of Appeals for the Armed Forces (CAAF) held that *Barberi* "was wrongly decided." In *Piolunek*, which, like the instant case, dealt with a general verdict where the evidence contained both proscribed and constitutionally protected material, the CAAF "recognize[d] that properly instructed members are well suited to assess the evidence and make the . . . factual determination . . . whether an image does or does not depict the genitals or pubic region, and is, or is not, a visual depiction of a minor engaging in sexually explicit conduct." *Id., at *8*. Furthermore, "[A]bsent an unconstitutional definition of criminal conduct, flawed instructions, or evidence that members did not follow those instructions . . . there is simply no basis in law to upset the ordinary assumption that members are well suited to assess the evidence in light of the military judge's instructions." *Id., at *3-4*.

Here, the prosecution offered hundreds of images and videos to prove the appellant possessed child pornography. While **[*6]** there was some amount of constitutionally protected content mixed in with the contraband, there is no reason to second-guess the ability of the members to distinguish between the two when reaching a verdict, particularly when the record shows that the military judge instructed them properly and trial counsel cautioned the members to be careful in making the distinction. Accordingly, we are confident that the members were able to properly identify child pornography and distinguish it from other content.

Malfunctioning DVD

Although not styled as such, the appellant's second AOE is a question of whether the record of trial is incomplete. ***HN2***[↑] This is a matter of law we review *de novo*. *United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000)*. "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *Id. at 111* (citations omitted).

We find our inability to view Prosecution Exhibit 16 to be tantamount to the DVD being missing from the record, and we find this "omission" to be substantial. ***HN3***[↑] *Article 66, UCMJ*, states that this court "may affirm findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the **[*7]** entire record, should be approved." The contents of Prosecution Exhibit 16 go to the very heart of the charged misconduct. Without the ability to view the exhibit, we cannot determine whether it did indeed contain child pornography.

In its Answer, the Government claims any prejudice is remedied by the fact it provided this court with copies of all 14 DVDs admitted at trial, including Prosecution Exhibit 16. We cannot agree, as we are unable to discern which of the images in the copies reflect those contained in Prosecution Exhibit 16. The Government also argues that the pictures on the DVD wrapper are sufficient to show that Prosecution Exhibit 16 contains images of child pornography. The pictures are small and of very poor quality. Even if we could find an adequate connection between the wrapper images and the contents of the DVD, the wrapper's pictures do not clearly depict child pornography.

As there is no other substitute for, or sufficient description of, the unviewable DVD, we find the Government has failed to rebut the presumption of prejudice. Accordingly, we cannot affirm a finding of guilt to the specification insofar as it alleges the appellant possessed 14 DVDs containing **[*8]** child pornography.

Files in Unallocated Space

The appellant claims that his conviction of Specification 1 cannot stand as it is based, in part, on files extracted from the unallocated space on the Iomega hard drive, and the Government failed to prove he knowingly possessed those files. We agree, but only to the extent the specification alleges knowing possession of child pornography images on any electronic device other than the "G drive" external drive.

HN4[↑] We review questions of legal and factual sufficiency *de novo*. *United States v. Winckelmann, 70 M.J. 403, 406 (C.A.A.F. 2011)*. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)*; *United States v. Reed, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999)*, *aff'd*, *54 M.J. 37 (C.A.A.F. 2000)*. The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally

observe the witnesses. *Turner, 25 M.J. at 325*.

1. *The Images*

At trial, the Government's expert testified she reviewed 25 images provided by the NCIS agent. Of those, 19 were in saved files on the appellant's "G drive" external drive. The remaining six were located in unallocated space on the Iomega external **[*9]** drive. The expert also located possible images of child pornography in unallocated space on one thumb drive and the laptop computer. Using evidence of search terms used on 18 September 2012, the expert was able to link the images on the "G drive" to the laptop computer. She was also able to show that the "G drive" and Iomega drives were at some point connected to the laptop. However, due to her inability to discern the filenames of the images in unallocated space on the Iomega drive, the expert could not say when or whether these files were accessed.

2. *Legal Sufficiency*

The elements of possessing child pornography, as charged in the present case, are: (1) that the accused knowingly and wrongfully possessed child pornography; and, (2) that under the circumstances, the conduct of the appellant was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 68b. The Government charged the appellant with possessing the child pornography in question "between on or about 7 October 2012 and on or about 8 November 2012." Charge Sheet.

Viewing the evidence in the light most favorable to the Government, we find that the testimony of the **[*10]** NCIS agent and the Government's computer forensic expert, as well as the images contained in Prosecution Exhibit 1, support a finding that the appellant knowingly possessed child pornography in files found on his "G drive" external drive when it was seized on 8 November 2012. Thus, we find the evidence to be legally sufficient for the images on that electronic device.

We cannot do the same with regards to images found on the other devices. ***HN5***[] The CAAF has recognized that "knowing possession" as it relates to child pornography means "'to exercise control of something.'" *United States v. Navrestad, 66 M.J. 262, 267 (C.A.A.F. 2008)* (quoting MCM, Part IV, ¶ 37c(2)). Here, the Government's expert testified she would be unable to view the files found in unallocated space without using some sort of forensic device. The Government presented no evidence to show the appellant possessed or knew how to use such a forensic device. Thus, the existence of the images in unallocated space on the thumb drives, IOMEGA external drive and computers is, alone, legally insufficient to prove the appellant exercised "dominion and control" over the files on the date NCIS seized these devices. *Id.; see United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006)* (holding that in situation in which "a defendant lacks knowledge about **[*11]** the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control").

We find no other evidence in the record to overcome this shortcoming. While the record includes circumstantial evidence indicating the appellant downloaded these images, this evidence does nothing to show the appellant "knowingly possessed" the image during the period charged. *See United States v. Flyer, 633 F.3d 911, 919-20 (9th Cir. 2011)* (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession of child pornography in his computer's unallocated space on or about the date charged in the indictment). The Government charged a specific, month-long period during which the appellant allegedly possessed child pornography. However, they produced no evidence to indicate when the appellant accessed the images found in unallocated space. Accordingly, we find the evidence to be legally insufficient to prove the appellant knowingly and wrongfully **[*12]** possessed images depicting child pornography on any devices other than the "G drive" external hard drive.

3. *Factual sufficiency*

Based on a careful review of the record, we are convinced beyond a reasonable doubt both that the appellant knowingly possessed child pornography on the "G drive" external hard drive and that such possession was of a nature to bring discredit upon the armed forces.

Sentence Reassessment

We find no reason to alter the appellant's punishment in this case. Setting aside one of the 14 DVDs and the images found in unallocated space does not dramatically alter the sentencing landscape. *See United States v. Buber, 62 M.J. 476 (C.A.A.F. 2006)*. The

remaining evidence includes many dozens of videos involving young children engaging in sexual activity. The nature and gravity of the offenses has not changed. There is no lessening of the appellant's punitive exposure. Applying the analysis set forth in *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, and *United States v. Cook, 48 M.J. 434, 438, (C.A.A.F. 1998)*, we are convinced the members would have imposed the same sentence in the absence of the fourteenth DVD and unallocated space images, and find that the sentence imposed is appropriate.

Conclusion

Accordingly, the finding as to the charge is affirmed. The finding as to Specification 1 is affirmed, excepting the words **[*13]** "external hard drives, computers and thumb drives," substituting therefore the words "his 'G drive' external hard drive." The finding as to Specification 2 is affirmed, excepting the numeral "14" and substituting therefor the numeral "13." The sentence as approved by the CA is affirmed.

End of Document

United States v. Nichlos

United States Navy-Marine Corps Court of Criminal Appeals

September 18, 2014, Decided

NMCCA 201300321

Reporter
2014 CCA LEXIS 691 *

UNITED STATES OF AMERICA v. SHANE A. NICHLOS, FIRECONTROLMAN SECOND CLASS (E-5), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Review denied by *United States v. Nichlos, 2015 CAAF LEXIS 572 (C.A.A.F., Apr. 22, 2015)*

Prior History: **[*1]** GENERAL COURT-MARTIAL. Sentence Adjudged: 17 April 2013. Military Judge: CDR John A. Maksym, JAGC, USN. Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan. Staff Judge Advocate's Recommendation: LCDR Maryann M. Stampfli, JAGC, USN.

Core Terms

files, hard drive, video, military, digital, space, child pornography, images, Specification, portable, unallocated, retrieve, laptop, downloaded, seizure, apartment, accessed, deleted, depiction, user, girls, legal insufficiency, sexual, personnel, argues, knowingly, forensic, variance, reasonable expectation of privacy, inevitable discovery

Case Summary

Overview
HOLDINGS: [1]-Appellant did not have an expectation of privacy in a portable hard drive left in the common area of a friend's apartment and did not gain such an expectation at the time a good friend was directed to deliver it to security personnel; [2]-The military judge did not err in finding that the portable hard drive would inevitably have been discovered after the Naval Criminal Investigative Service began in investigation based on information received from the good friend regarding the contents of the hard drive; [3]-The determination that appellant knowingly possessed three video files located in unallocated space was erroneous, because there was no evidence that he had the ability to retrieve such files or that he had downloaded and viewed those files; [4]-No substantial right of appellant was materially prejudiced by the military judge's failure to defined the word "lascivious."

Outcome
Set aside in part, affirmed in part.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN1[] **Judicial Review, Standards of Review**

A military court of criminal appeals reviews a military judge's denial of a suppression motion under an abuse of discretion standard and considers the evidence in the light most favorable to the prevailing party. The military court of criminal appeals reviews the military judge's factfinding under the clearly erroneous standard and his conclusions of law under the de novo standard. The military court of criminal appeals will find an abuse of discretion if the military judge's findings of fact are clearly erroneous or his conclusions of law are incorrect.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] Judicial Review, Standards of Review

If a military judge does not make explicit findings of fact and conclusions of law, the military court of criminal appeals accords him less deference.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

HN3[] Search & Seizure, Scope of Protection

The *Fourth Amendment* protects the persons, houses, papers, and effects of individuals against unreasonable searches and seizures. *U.S. Const. amend. IV*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against an accused if the accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

HN4[] Search & Seizure, Expectation of Privacy

To determine whether an appellant had a reasonable expectation of privacy in a think, a military court of criminal appeals applies a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN5[] Search & Seizure, Unlawful Search & Seizure

A seizure is unlawful if it was conducted, instigated, or participated in by military personnel or their agents and was in violation of the United States Constitution as applied to members of the armed forces. Mil. R. Evid. 311(c)(1), Manual Courts-Martial. Whether an individual is acting as a Government agent depends on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. More explicitly, there must be clear indices of the Government's encouragement, endorsement, and participation to implicate the *Fourth Amendment*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN6[] Search & Seizure, Scope of Protection

The *Fourth Amendment* prohibits only "meaningful interference" with a person's possessory interests, not Government action that is reasonable under the circumstances.

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN7[] Search & Seizure, Unlawful Search & Seizure

Evidence obtained as a result of an unlawful seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made. Mil. R. Evid. 311(b)(2), Manual Courts-Martial. When routine procedures of a law enforcement agency would have discovered the same evidence, the inevitable discovery rule applies even in the absence of a prior or parallel investigation. The inevitable discovery exception to the exclusionary rule exists to ensure that the Government is not placed in a worse position than it would have been had no law enforcement error taken place.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN8 **Judicial Review, Standards of Review**

A military court of criminal appeals reviews questions of legal and factual sufficiency de novo. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. The test for factual sufficiency is whether the appellate court is convinced of an appellant's guilt beyond a reasonable doubt, allowing for the fact that the appellate court did not personally observe the witnesses. The term "reasonable doubt" does not mean that the evidence must be free of any conflict. When weighing the credibility of a witness, this court, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie. Additionally, the members may believe one part of a witness's testimony and disbelieve another.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

HN9 **Sex Crimes, Child Pornography**

"Knowing possession" for purposes of child pornography is defined as requiring the possession to be both knowing and conscious.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN10 **Sex Crimes, Child Pornography**

For evidence to be legally sufficient on a constructive possession theory, a person must exercise "dominion or control" over the child pornography digital files.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

HN11 **Sex Crimes, Child Pornography**

The factors outlined in Dost are used in determining whether an image portrays a "lascivious exhibition." A military court of criminal appeals reviews the Dost factors with an overall consideration of the totality of the circumstances. Furthermore, it is the prerogative of the fact-finder to decide whether images of child pornography contain actual minors. That decision may also be made based on a review of the images alone, without expert assistance.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

HN12 **Sex Crimes, Child Pornography**

The Dost factors for determining whether an image portrays a "lascivious exhibition" are: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13 **Plain Error, Definition of Plain Error**

If an appellant did not object to a military judge's instruction, a military court of criminal appeals reviews for plain error. To meet his plain error burden, the appellant must show that: (1) there was error; (2) the error was plain or obvious; and, (3) the error materially prejudiced the appellant's substantial rights.

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN14[] **Courts Martial, Sentences**

A dramatic change in the penalty landscape gravitates away from the ability to reassess the sentence.

Counsel: For Appellant: Maj John J. Stephens, USMC.

For Appellee: Maj Paul M. Ervasti, USMC; Capt Matthew M. Harris, USMC.

Judges: Before F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON, Appellate Military Judges. Chief Judge MITCHELL and Judge FISCHER concur.

Opinion by: M.K. JAMISON

Opinion

OPINION OF THE COURT

JAMISON, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of knowingly possessing child pornography in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*. The members sentenced the appellant to reduction to pay grade E-1, confinement for a period of six months, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence.

The appellant alleges four assignments of error: (1) that the military judge abused his discretion in failing to suppress evidence obtained from the appellant's portable hard drive — as well as all derivative evidence — based on **[*2]** an unconstitutional seizure; (2) that his conviction for knowing possession of child pornography is legally and factually insufficient; (3) that his conviction for knowing possession of child pornography in Specification 2 is legally and factually insufficient because the digital images that served as the basis for his conviction do not meet the statutory definition of child pornography; and, (4) that the military judge committed plain error by failing to define the term "lascivious" in his instructions to the members.

After careful consideration of the record, the pleadings of the parties, and the excellent oral argument by both parties,[1] we find merit in part of the appellant's second assignment of error and conclude that the evidence is legally insufficient to support a conviction for knowing possession of child pornography under Specification 1 of the Charge. Thus, we will set aside the finding of guilty to Specification 1 and dismiss that specification in our decretal paragraph. *Arts. 59(a)* and *66(c)*, UCMJ.

I. Background

The appellant was stationed at U.S. Fleet Activities Sasebo, Japan, aboard USS ESSEX (LHD **[*3]** 2). Following his promotion, the appellant was required to find off-ship living accommodations. He secured a lease at an apartment building. While waiting for his lease to start, he stayed with a friend, Fire Controlman Second Class (FC2) SW. The appellant was given a spare bedroom in which to sleep and store his personal belongings. Other petty officers also stayed at FC2 SW's apartment. The apartment had a common area that was used as a "crash pad" and "an awful lot of people" would use the apartment as a place to "hang out." Record at 92.

Intelligence Specialist Third Class (IT3) MD, a good friend of FC2 SW, also stored personal belongings at FC2 SW's apartment. On Thursday, 12 May 2011, IT3 MD picked up his laptop computer, a computer game, and several portable computer hard drives from FC2 SW's apartment. This gear had been stored in the common area of the apartment. One of the hard drives that he believed was his and took with him was made by Western Digital. He brought his laptop, the portable hard drives, and other electronic media to his new apartment.

A day or so later, IT3 MD wanted to watch a movie. Knowing that he had movies stored on his Western Digital hard drive, he accessed **[*4]** it and immediately realized it was not his hard drive, because he saw approximately 50 thumbnail images of young nude girls. He specifically recollected viewing an image of several young nude girls arranged in a cheerleader-type

[1] We granted and heard oral argument on the appellant's first assigned error.

pyramid. Disturbed by the images he saw and initially thinking that he had inadvertently grabbed a portable hard drive belonging to FC2 SW, his good friend, IT3 MD accessed the root directory and ascertained that the hard drive belonged to the appellant.

The following Monday, still disturbed by the images he had seen, IT3 MD sought guidance from the ship's legalman chief and was advised to speak with the ship's security department. After informing security department personnel that he believed he had a portable hard drive with suspected child pornography, IT3 MD was told to retrieve the hard drive and bring it back to security department personnel.

Security department personnel contacted the Naval Criminal Investigative Service (NCIS) regarding IT3 MD's allegations and then turned the portable hard drive over to the NCIS. Special Agent LG received the Western Digital hard drive at approximately 1405 on Monday, 16 May 2011. At approximately 1430, IT3 MD signed **[*5]** a written sworn statement for Special Agent JP, who was working the case with Special Agent LG. *See* Appellate Exhibit IX.

At approximately 1730 that same day, NCIS agents interviewed the appellant. During that interview, the appellant gave consent to search his workspace aboard ESSEX, his living space at FC2 SW's apartment, and all his electronic media, to include his iPhone. He accompanied the NCIS agents to FC2 SW's apartment and cooperated fully throughout the process.

In addition to the Western Digital hard drive, NCIS agents seized the appellant's Alienware laptop and iPhone, along with other electronic media. The appellant's electronic media items were sent to the Defense Computer Forensic Laboratory (DCFL) for forensic analysis. Forensic analysis revealed video files and digital images of child pornography on the appellant's laptop. It also revealed digital images of child pornography on the appellant's portable hard drive. Additional facts necessary for the resolution of particular assignments of error are included below.

II. Suppression of the Appellant's Portable Hard Drive

In his first assignment of error, the appellant argues that the military judge abused his discretion by **[*6]** failing to suppress the evidence obtained from the appellant's portable hard drive and all derivative evidence. Specifically, he argues that the military judge erred by relying on the inevitable discovery exception to the exclusionary rule in concluding that the evidence was admissible. The appellant argues that the inevitable discovery exception is not applicable under these facts because at the time of the seizure, the Government was not actively pursuing a case that would have inevitably led to the discovery of the evidence. Appellant's Brief of 21 Jan 2014 at 25. We disagree.

HN1[] We review a military judge's denial of a suppression motion under an abuse of discretion standard and "consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)* (quoting *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996))*. We review the military judge's "factfinding under the clearly erroneous standard and [his] conclusions of law under the *de novo* standard." *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)* (citations omitted). We will find an abuse of discretion if the military judge's "findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.*

HN2[] Because the military judge did not make explicit findings of fact and conclusions of law, we accord him less deference. **[*7]** We begin our analysis by exploring whether the appellant had a reasonable expectation of privacy in the portable hard drive that he had left in the common area of FC2 SW's apartment.

1. *Reasonable Expectation of Privacy*

HN3[] The *Fourth Amendment* protects the "persons, houses, papers, and effects" of individuals against unreasonable searches and seizures. *U.S. CONST. amend. IV*. "'Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against an accused if: . . . The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.'" *United States v. Salazar, 44 M.J. 464, 466-67 (C.A.A.F. 1996)* (quoting MILITARY RULE OF EVIDENCE 311(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)).

HN4[] To determine whether the appellant had a reasonable expectation of privacy in the contents of his portable hard drive, we apply "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the

expectation **[*8]** be one that society is prepared to recognize as 'reasonable.'" *United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006)* (quoting *Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* (Harlan, J., concurring)).

Despite the fact that the appellant had a bedroom at FC2 SW's apartment and stored his laptop there, he chose to leave his portable hard drive in an area where, by his own admission, "an awful lot of people" would "hang out" and access one another's electronic media. Record at 92. The hard drive was neither labeled nor password protected. It was also similar to other portable hard drives located in the common area, to include the hard drive belonging to IT3 MD as evidenced by the fact that he mistakenly took it. Additionally, the ease by which IT3 MD accessed the appellant's portable hard drive and its child pornography images is further evidence that the appellant did not have a reasonable expectation of privacy in this hard drive. *See United States v. Rader, 65 M.J. 30, 34 (C.A.A.F. 2007)* (stating that within the context of personal computers "courts examine whether the relevant files were password-protected or whether the defendant otherwise manifested an intention to restrict third-party access") (citation and internal quotation marks omitted)); *United States v. Barrows, 481 F.3d 1246, 1249 (10th Cir. 2007)* (holding that Barrows's "failure to password protect his computer, turn it off, or take **[*9]** any other steps to prevent third-party use" demonstrated a lack of subjective expectation of privacy).

Based on the facts of this case, we conclude that the appellant did not have a subjective expectation of privacy in his portable hard drive left in the common area of FC2 SW's apartment. Additionally, we conclude — at least with regard to the various Sailors who had unfettered access to FC2 SW's apartment and common area — that the appellant's expectation of privacy was not objectively reasonable.

In this case, the military judge appeared to conclude that at the time IT3 MD took the portable hard drive, the appellant had no expectation of privacy because he had left it in the common area. Record at 136. However, as the testimony and facts developed, the military judge appeared to conclude that once IT3 MD was directed to retrieve the appellant's hard drive, IT3 MD became a Government actor and this resulted in the appellant developing a reasonable expectation of privacy. *Id.* at 140. We disagree and hold that the appellant did not gain a reasonable expectation of privacy at the time IT3 MD was directed to deliver the hard drive to security personnel. We nonetheless continue our analysis, assuming **[*10]** *arguendo* that the appellant had a reasonable expectation of privacy in his hard drive and consider the appellant's argument that the seizure was unconstitutional and a violation of MIL. R. EVID. 316.

2. *Seizure of Portable Hard Drive*

HN5[↑] A seizure is unlawful if it was conducted, instigated, or participated in by "[m]ilitary personnel or their agents and was in violation of the [United States] Constitution as applied to members of the armed forces." MIL. R. EVID 311(c)(1). Whether an individual is acting as a Government agent depends "'on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances.'" *United States v. Daniels, 60 M.J. 69, 71 (C.A.A.F. 2004)* (quoting *Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-15, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)*). More explicitly, there must be "clear indices of the Government's encouragement, endorsement, and participation . . . to implicate the *Fourth Amendment*." *Skinner, 489 U.S. at 615-16*.

The appellant correctly concedes that when IT3 MD initially accessed the appellant's hard drive, he did so as a private actor. Record at 128, 132. Accordingly, none of the appellant's constitutional or regulatory rights were violated at that point. *See United States v. Wicks, 73 M.J. 93, 100 (C.A.A.F. 2014)* (stating that it is "well-established" that "search and seizure rules do not apply to searches conducted by private parties") **[*11]** (citations omitted)).

The appellant instead argues that IT3 MD became a Government actor once he retrieved the portable hard drive and turned it over to the ship's security personnel at their request. The appellant further argues that, as a Government actor, IT3 MD performed an unlawful warrantless seizure of the hard drive as the appellant had a legitimate privacy and possessory interest in the hard drive. Appellant's Brief at 24-25. We disagree.

The appellant premises his argument on the Government's concession at trial that IT3 MD became a Government actor and on the holding of the Court of Appeals for the Armed Forces (CAAF) in *Daniels. Id.* at 22-23. Our review of the record reveals that any concession by the Government came only after the military judge had ruled that IT3 MD had become a

Government actor.[2] Record at 127-28.

As for the comparison to *Daniels*, we find **[*12]** the facts in that case clearly distinguishable. In *Daniels*, Seaman Apprentice (SA) V told his leading chief petty officer, Chief W, that the previous evening Daniels had held up a vial and told SA V that the vial contained cocaine. Daniels had then put the vial in the top drawer of his nightstand. Based on SA V's report, Chief W directed that he retrieve the vial. Within this context, it was Chief W's order that triggered SA V's seizure of the contraband from an area in which Daniels had a reasonable expectation of privacy.

Unlike *Daniels*, this case is not one in which contraband was seized following an order from a Government official; rather IT3 MD accessed the appellant's portable hard drive as a private actor and discovered what he believed to be contraband. At the time he reported his suspicions to security department personnel, IT3 MD had already independently collected the hard drive absent a request from Government officials to do so. The Government did not encourage, endorse, or participate in any of IT3 MD's actions and the ship's security department personnel only instructed IT3 MD to retrieve the hard drive from his apartment once he sought advice of what to do with an item **[*13]** that he believed contained contraband. Accordingly, we hold that the direction by the ship's security department personnel did not rise to the level of constituting "clear indices of Government encouragement, endorsement, and participation" in the challenged seizure.[3] *Daniels, 60 M.J. at 71* (quoting *Skinner, 489 U.S. at 615-16*).

Assuming *arguendo* that IT3 MD did become an agent, we hold that the seizure was not unreasonable under these facts. First, it was reasonable for the ship's security personnel to direct IT3 MD to retrieve the hard drive from his apartment based on the fact that it contained suspected contraband. Second, it was temporary in nature and totaled no more than four hours before the appellant gave consent to its seizure and search.

HN6[↑] The *Fourth Amendment* prohibits only "meaningful interference" with **[*14]** a person's possessory interests, not Government action that is reasonable under the circumstances. *See United States v. Place, 462 U.S. 696, 706, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)* (stating that "brief detentions of personal effects may be so minimally intrusive of *Fourth Amendment* interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime"); *United States v. Visser, 40 M.J. 86, 90 (C.M.A. 1994)* (holding a seven-day hold on Visser's military household goods shipment for purposes to obtain a civilian search warrant was reasonable Government action); *United States v. Garcia-Lopez, 16 M.J. 229, 231 (C.M.A. 1983)* (stating that "[l]aw enforcement authorities can properly take reasonable measures to assure that, until reasonable investigative steps can be completed, evidence is not destroyed, crime scenes are not disarranged, and suspects do not flee.") (quoting *United States v. Glaze, 11 M.J. 176, 177 (C.M.A. 1981))* (additional citations omitted); MIL. R. EVID. 316 (d)(5) (authorizing "temporary detention of property on less than probable cause").

After careful consideration, we find that even assuming IT3 MD became a Government actor and seized the appellant's hard drive within the meaning of MIL. R. EVID. 316, the seizure was reasonable under the circumstances and did not violate the appellant's *Fourth Amendment* rights. We last address the military judge's **[*15]** ruling relying on the inevitable discovery exception to conclude that the evidence was admissible.

3. *Inevitable Discovery Exception to Exclusionary Rule*

In this case, the military judge apparently found that there had been an unreasonable seizure and that the appellant gained a reasonable expectation of privacy in

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[2] MJ: So, essentially what the Government is conceding here, to their credit, is that the Security Department say[s], "Go get this thing," right?

ATC: Yes, Your Honor.

MJ: All right.

ATC: And—

MJ: He's their agent.

ATC: Your Honor —

MJ: He acts like an agent, he dressed like an agent, he's got the look of an agent. Guess what he is? An agent

Record at 127.

[3] During oral argument, the appellate defense counsel conceded that if IT3 MD would have brought the hard drive with him when he initially sought guidance from USS ESSEX personnel, there would have been no unconstitutional seizure. Based on the particular facts of this case, we do not find a legal distinction between the two situations because IT3 MD had already taken possession of the hard drive, examined it, and secured it in his apartment.

his portable hard drive once IT3 MD became a Government actor. Finding a constitutional and regulatory violation of the appellant's rights, the military judge nevertheless ruled the evidence admissible based on the inevitable discovery exception to the exclusionary rule. Record at 147.

The appellant argues that the military judge abused his discretion because the inevitable discovery exception is not applicable under these facts. Appellant's Brief at 25. Citing various cases from our superior court that address the inevitable discovery exception, the appellant argues that there was no evidence that the Government was actively pursuing leads or evidence at the time IT3 MD was directed to retrieve the hard drive from his apartment. *Id.* We disagree.

HN7[] Evidence obtained as a result of an unlawful seizure may be used when the evidence "would have been obtained even if such unlawful **[*16]** search or seizure had not been made." MIL. R. EVID. 311(b)(2). When routine procedures of a law enforcement agency would have discovered the same evidence, the inevitable discovery rule applies even in the absence of a prior or parallel investigation. *See* United States v. Owens, 51 M.J. 204, 210-11 (C.A.A.F. 1999). The inevitable discovery exception to the exclusionary rule exists to ensure that the Government is not placed in a worse position than it would have been had no law enforcement error taken place. *See* Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984) (holding that the Government must show by a preponderance of the evidence that Government agents would have inevitably discovered the evidence by legal means); *cf.* Hudson v. Michigan, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (stating that "[s]uppression of evidence, however, has always been our last resort, not our first impulse").

Once IT3 MD left the ship to retrieve the portable hard drive from his apartment, security department personnel contacted NCIS regarding IT3 MD's allegation. As a result, NCIS opened an investigation prior to having received the hard drive. Additionally, once IT3 MD returned with the hard drive, it was immediately turned over to Special Agent LG (at approximately 1400). At approximately 1430, IT3 MD provided a sworn statement to Special Agent JP. AE IX. No NCIS agent accessed the appellant's **[*17]** hard drive prior to interviewing either IT3 MD or the appellant. Thus, there was no governmental search in this case until the appellant gave consent. Special Agent LG relied on information provided by IT3 MD as to how he obtained the hard drive, what he saw, and how he found out that it belonged to the appellant. Based only on the information he received from IT3 MD, Special Agent LG interviewed the appellant and requested his consent to search the hard drive and his other electronic media items.

Contrary to the appellant's argument, we find that under the facts of this case, the military judge did not abuse his discretion in applying the inevitable discovery exception to the regulatory exclusionary rule. MIL. R. EVID. 311(a)(2). The preponderance of the evidence establishes that once Special Agent LG was informed of IT3 MD's allegations that the appellant's portable hard drive contained suspected child pornography, which IT3 MD had discovered in his private capacity, NCIS began an investigation. Special Agent LG interviewed IT3 MD and about three hours later interviewed the appellant. But for the appellant's freely and voluntarily given consent, it is reasonable that NCIS would have requested **[*18]** a search authorization of the appellant's hard drive. In this regard, the appellant does not contend that IT3 MD's sworn statement was lacking in probable cause sufficient to secure a search authorization. In fact, he conceded this issue. Record at 132. We agree and find sufficient probable cause within IT3 MD's sworn statement that NCIS could and would have secured a search authorization.[4] MIL. R. EVID. 315; *see* United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (stating that probable cause means that there is a "fair probability" that contraband "will be found in a particular place").

Accordingly, we find no error by the military judge in applying the inevitable discovery exception to the facts of this case.

III. Factual and Legal Sufficiency

In his second assignment of error, the appellant argues that his conviction for knowingly possessing child pornography is factually and legally insufficient. First, the appellant argues that since the three charged video **[*19]** files from his Alienware laptop computer were found in unallocated space the evidence was insufficient to prove "knowing possession." Second, the appellant argues that because the digital images from

[4] We note that Special Agent LG testified that he ultimately sought and received a search authorization subsequent to the appellant's Article 32, UCMJ, pretrial investigation. Record at 63. He sought a search authorization because he believed that the appellant may revoke his consent. *Id.*

his hard drive were found among nearly a thousand adult pornography images, this was insufficient to prove knowing possession. We address first the appellant's sufficiency argument with regard to the three video files found on his Alienware laptop (Specification 1) prior to moving to his sufficiency argument of the digital images recovered from his hard drive (Specification 2).

HN8[] We review questions of legal and factual sufficiency *de novo*. United States v. Winckelmann, 70 M.J. 403, 406 (C.A.A.F. 2011). The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. Id. at 325.

The term "reasonable doubt" does not mean that the evidence must be free of any conflict. United States v. Rankin, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). When weighing the credibility of a witness, **[*20]** this court, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie. United States. v. Goode, 54 M.J. 836, 844 (N.M.Crim.Ct.App 2001). Additionally, the members may "believe one part of a witness's testimony and disbelieve another." United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979).

1. *Factual and Procedural Background*

Prior to conducting our sufficiency analysis, we need to recapitulate the factual and procedural background to frame the appellant's argument. While deceptively simple in appearance, the appellant's argument in combination with the Government's evidence and the military judge's variance instruction makes this a complicated issue requiring extensive contextual analysis. We begin with the Government's charging theory and move to the evidentiary posture of this largely circumstantial case.

The Government preferred three specifications alleging the appellant's knowing possession of child pornography on or about 16 May 2011:[5] three video files from the appellant's laptop (Specification 1); three digital images from the laptop (Specification 2); and, nine digital images from the appellant's portable hard drive (Specification 3). Following the presentation of the Government's case-in-chief, **[*21]** the appellant moved for a finding of not guilty under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Record at 1515. The appellant's argument was that the evidence was insufficient to prove knowing possession in that the video files and some of the digital images had been forensically retrieved from the unallocated space of the appellant's laptop and portable hard drive with no evidence as to when the files were created, accessed, or deleted.

The military judge partially agreed and acquitted the appellant of the three digital images that served as the basis for Specification 2. With regard to Specification 3, the military judge acquitted the appellant of seven digital images, which had been retrieved from the unallocated space on the appellant's portable hard drive.[6] Because only images 8 and 9 had been retrieved in allocated space, the military judge allowed the members to consider these two images and the members convicted the appellant of this specification.

With regard to Specification 1, the members asked several questions that required the court to reassemble. Following extensive deliberation, the members convicted the appellant of knowing possession of the three video files except for the words "16 May 2011" and substituting the words "3 March 2011."[7]

2. *Prosecution Theory and Evidence (Video Files)*

We first address Specification 1 and the three charged video files that were retrieved from unallocated space on the appellant's laptop. The appellant does not contest that the girl in the three video files is, in fact, a minor. Appellant's Brief at 7 n.26. Additionally, this minor is clearly involved in a sexual act and each video file is of the same minor girl.[8] The trial counsel played a fourth

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[5] For reasons that will become apparent, the Government's decision to charge a date certain is critical to our analysis on the question of knowing possession.

[6] Following the motion for a finding of not guilty, original Specification **[*22]** 3 became Specification 2.

[7] As part of the instructions on findings, the military judge gave the members a variance instruction that the members could go back up to 150 days from the date alleged on the charge sheet. Record at 1774-75.

[8] The charged video files depict a prepubescent girl, partially bound at her legs, performing oral sex on an adult male who is

video file pursuant to MIL. R. EVID. 404(b) of the same minor girl. This movie clip had a superimposed annotation in the middle of the screen with the following: "Jenny 9yo all clips."[9] It was this linkage to "Jenny 9yo" that provided **[*23]** the strongest circumstantial evidence of the appellant's knowing possession of the three video files in unallocated space appearing to portray "Jenny 9yo."

The Government presented a circumstantially strong case that the appellant had, at some point, received, downloaded, and viewed child pornography videos. The Government called Ms. SH, a forensic expert with the Defense Computer Forensic Laboratory DCFL. In addition to her testimony, the Government relied on the forensic exploitation of the appellant's laptop, portable hard drive, and iPhone to present its case.

First, the Government offered Prosecution Exhibit 3, a DCFL forensic report of the appellant's **[*24]** iPhone. This exhibit contained three cookies revealing that on 24 December 2010, the appellant had used the Google search engine and searched for and accessed a website responsive to the appellant's search term: "9yo Jenny pics."[10]

Second, the Government offered PE 4, a list of property files from LimeWire that contained the most recently downloaded files to the appellant's laptop. **[*25]** [11] These LimeWire property files were retrieved from unallocated space on the appellant's laptop; however, the search terms that the appellant entered and downloaded were highly indicative of child pornography and some of the downloaded files contained the unique naming convention "9yo Jenny" in various permutations. Because the LimeWire files were retrieved in unallocated space on the appellant's laptop, Ms. SH was not able to retrieve any digital files that matched the digital files from the LimeWire download.[12] Ms. SH testified that the file names in the LimeWire download were downloaded onto the appellant's laptop; however, because these files were retrieved from unallocated space, the only information attainable was the digital file names themselves.

Third, the Government offered PE 5, a list of the appellant's recently accessed video files. Ms. SH conducted a search of the appellant's laptop for the most recently viewed movie files in the .mov and .qt format.[13] Whenever a user accesses a movie or video file that contains the file extension .mov or .qt, a link file is automatically created by the program. Record at 1417. A link file creates a shortcut for the user and allows the user to "double-click" on that file to access and view that particular video file. Ms. SH testified that even if the underlying digital file is deleted, the link file still exists on the computer. Additionally, Ms. SH testified that although she was not able to find the underlying video files associated with the link files, she was able to testify that at some **[*27]** point in time, these files had been viewed. *Id.* at 1418. Of the ten recently

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fondling her vaginal area. The files are twenty-one, twenty-six, and six seconds in length. *See* Prosecution Exhibit 1.

[9] The Government played this video file in its opening statement and the trial defense counsel subsequently stipulated that the video shown had the superimposed title "Jenny 9yo all clips." Record at 1438. As discussed *infra*, the three videos that form the basis of Specification 1 were not labeled.

[10] A cookie is a text file that is created when an individual uses e.g. the Google search engine. In this case, the appellant's iPhone contained three cookies that contained "9yo Jenny pics." *See* PE 3, Cookies 183, 366, and 374; Record at 1394-1400. One type of cookie is a UTMA cookie (# 183), which was placed on the appellant's iPhone when he visited the actual website. *Id.* at 1396. This cookie is updated with each subsequent visit and a UTMA cookie remains on the device for two years. *Id.* at 1397. The other type of cookie on the appellant's phone was a UTMZ cookie (# 366 and 374). This is a campaign cookie. This type of cookie is used to assist the web site to determine how the user accessed the web site, e.g. through Google or another type of search engine, because some search engines receive pay for facilitating digital searches. *Id.*

[11] LimeWire is a file-sharing program that allows users to share files stored on their respective computers with other LimeWire users. *Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481, 494 (S.D.N.Y 2010)*. When a LimeWire user wants to locate digital files or videos, the user enters "search criteria into the search function on LimeWire's interface." *Id.* LimeWire then searches the computers of the various users for files that match the search criteria and then the user downloads these files onto his or her computer. **[*26]** *Id.*

[12] The testimony of both the Government and the defense expert was that there appeared to be a mass download onto the appellant's laptop in 2009 using the LimeWire program and that at some point in 2009, the LimeWire program had been deleted. The 26 September 2009 date on PE 4 "indicates when LimeWire was last accessed. It does not indicate that's the date those files were downloaded." Record at 1506.

[13] Movie or video files that contain either the .mov or .qt file extension are for the software program QuickTime by Apple. Record at 1416-17.

viewed files that contain the .mov extension, three of them include the title "9yo Jenny." PE 5.[14]

The Government's theory was that the appellant had an interest in child pornography and a particularly unusual interest in images or video files that contained "9yo Jenny," the same prepubescent girl depicted in the charged video files. Based on the evidence and expert testimony that the appellant had used his iPhone on 24 December 2010 to actively search for and access the website purportedly containing "9yo Jenny pics," this served as a circumstantial link to the charged video files of "9yo Jenny."

There is no question that the appellant possessed child pornography; the question is whether the appellant "knowingly possessed" child pornography *on* the charged date. Having concluded that the Government presented a **[*28]** circumstantially strong case that at some point in time while the appellant owned his laptop, he had received, downloaded, viewed, and knowingly possessed child pornography, we turn next to the Government charging decision. Although the Government's case as to knowing possession may have been circumstantially strong, the decision to charge "on or about 16 May 2011" became the Government's evidentiary Achilles heel.

3. *Unallocated Space and Knowing Possession (Video Files)*

Because of its charging decision, the Government was required to prove that the appellant "knowingly possess[ed]" the three charged video files (01864590.mpg; 01864588.mpg; and, 01864901.mpg) "on or about 16 May 2011." Accordingly, the critical issue we must now decide is not whether the appellant knowingly possessed these video files at any time from the date he acquired his computer until the date NCIS seized it. Instead, we must decide whether the appellant knowingly possessed the three charged video files retrieved from unallocated space on or about 16 May 2011. Based on binding precedent from the CAAF, we conclude that he did not. To support our conclusion, we first consider the technical aspects associated with unallocated **[*29]** space prior to considering whether a computer user can "possess" a digital file, either actually or constructively, if that file exists only in the unallocated space of a computer.

According to the Government's expert witness, Ms. SH, unallocated space is the location on the computer where files are stored after having been permanently deleted. When a user permanently deletes a digital file that file continues to exist on the computer; however, it exists in unallocated space until the file is overwritten. Once a digital file is in unallocated space, the metadata associated with that file is stripped away (e.g. its name, when it was accessed, when it was viewed, when it was created, or when it was downloaded). Record at 1391. Ms. SH's testimony is consistent with federal courts that have defined unallocated space. *See* United States v. Hill, 750 F.3d 982, 988 n.6 (8th Cir. 2014) ("Unallocated space is space on a hard drive that contains deleted data, *usually emptied from the operating system's trash or recycle bin folder*, that cannot be seen or accessed by the user without the use of forensic software") (quoting United States v. Flyer, 633 F.3d 911, 918 (9th Cir. 2011)); United States v. Seiver, 692 F.3d 774, 776 (7th Cir. 2012) (stating that when one deletes a file, that file goes into a "trash" folder; when one empties the "trash folder" the file has not **[*30]** left the computer because although the "trash folder is a wastepaper basket[,] it has no drainage pipe to the outside"; the file may be "recoverable by computer experts" unless it has been overwritten), *cert. denied sub nom Seiver v. United States, 133 S. Ct. 915, 184 L. Ed. 2d 703 (2013)*.[15]

The CAAF has defined what constitutes "knowing possession" for purposes of possession of child pornography. *See* United States v. Navrestad, 66 M.J. 262, 267 (C.A.A.F. 2008). To constitute "knowing possession" for purposes of child pornography, the CAAF imported the definition of possession from the President's definition of "possess" in Article 112a, UCMJ.[16] *Id.*; *see* MANUAL FOR COURTS-MARTIAL, UNITED

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[14] The three link files with the .qt file extension also contains a reference to "9yo Jenny." That file is titled: 9yo dog full jenny mpg sucking, loli 11yo 20minute hard.qt. PE 5.

[15] Digital files found in unallocated space or slack space have also been referred to as "orphan files" because "it is difficult or impossible to trace their origin or date of download." United States v. Moreland, 665 F.3d 137, 142 n.2 (5th Cir. 2011) (citing United States v. Kain, 589 F.3d 945, 948 (8th Cir. 2009) (stating that "[o]rphan files are files that were on the computer somewhere saved but were subsequently deleted, so the computer doesn't know exactly where they came from")).

[16] Following the presentation of the evidence, the military **[*31]** judge gave the following definition of "possession" to the members: "'Possessing' means exercising control of something. Possession may be direct physical custody like holding an item in one's hand or it may be constructive as in the case of a person who hides something in a locker or a car which the person may return to retrieve it. Possession must be

STATES (2012 ed.), Part IV, ¶ 37c(2). Because Navrestad did not have actual possession or constructive possession of child pornography under that definition, the CAAF held that the evidence was legally insufficient. *Id. at 268*.

In this case, the Government presented no evidence that the appellant had the required forensic tools to retrieve digital files from the unallocated space of his computer. In fact, Ms. SH testified that once a digital file is in unallocated space, a user does not have the ability to access that digital file. Record at 1449. Because the appellant was unable to access any of the video files in unallocated space, he lacked the ability to exercise "dominion or control" over these files. *Navrestad, 66 M.J. at 267*; *see Flyer, 633 F.3d at 919* (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession on **[*32]** or about the date charged in the indictment); *see also United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006)* (holding that in situation in which "a defendant lacks knowledge about the cache files and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over those images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control"); *United States v. Moreland, 665 F.3d 137, 154 (5th Cir. 2011)* (holding that the evidence was legally insufficient to sustain conviction for possession of child pornography in which Government failed to prove dominion and control over the digital images and citing cases for the proposition that the evidence is legally insufficient to show constructive possession based solely on the fact that the accused possessed the computer, "without additional evidence of the [accused's] knowledge and dominion or control over the images").

Having defined ***HN9***[↑] "knowing possession" for purposes of child pornography as requiring the possession to be both "knowing and conscious," *Navrestad, 66 M.J. at 267*, we hold that the appellant did not "knowingly possess" any of the three charged videos **[*33]** on the date charged (16 May 2011).[17]

Bound by *Navrestad*, we also conclude that the evidence was legally insufficient to prove constructive possession on the date charged. The CAAF has held that ***HN10***[↑] for the evidence to be legally sufficient on a constructive possession theory, a person must exercise "dominion or control" over the child pornography digital files.[18] *Id. at 267*. Based on the technical aspects associated with unallocated space, Ms. SH's testimony, and a lack of any evidence presented that the appellant was a sophisticated computer user in possession of the forensic tools necessary to retrieve digital files from unallocated space, we conclude that the evidence is legally insufficient to prove knowing possession on or about the charged date of 16 May 2011. We move next to evaluate the legal sufficiency of Specification 1 with regard to the 3 March 2011 date that the members substituted for the original date on the charge sheet.

4. *Members' Verdict*

Following the appellant's partially successful motion for a finding of not guilty under R.C.M. 917 with regard to proving "knowing possession" on the date reflected on the charge sheet, the Government requested a variance instruction. Record at 1708. The military judge was open to a variance instruction, but indicated that he would not go back two years (presumably to the 2009 LimeWire download). After some discussion, the military judge agreed to give the members a variance instruction that they could go back for up to 150 days from the date alleged on the charge sheet.[19] *Id.* at 1774-75. The 150-

knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item." Record at 1758.

[17] Factually, this case is similar to *Flyer* in that all images of child pornography charged in Flyer's indictment had been retrieved from unallocated space. The *Flyer* court agreed with the general proposition that one way to exercise dominion and control over a digital **[*34]** file would be to delete that file; however, that alone was insufficient to prove knowing possession on the date indicated on the indictment. *633 F.3d at 919*. Because the Government was unable to prove that on the date alleged in the indictment Flyer was able to access or retrieve any of the child pornography digital images, the evidence was legally insufficient.

[18] *But cf. United States v. Carpegna, 2013 U.S. Dist. LEXIS 115002 at *14 (D. Mont. Aug. 14, 2013)* (distinguishing Carpegna's acts of deleting contraband from the facts in *Navrestad* and *Flyer* based on the fact that Carpegna "knew enough about the presence of the images on the laptop to 'hit delete' after he was finished viewing them").

[19] "If you have any reasonable doubt relative to the time alleged on the charge sheet, 16 May 2011, but you are satisfied beyond any reasonable doubt that the offense was

day variance **[*35]** supported the Government's theory that within this period, the appellant searched and accessed "9yo Jenny pics" based on his 24 December 2010 iPhone Google search and that this evidence circumstantially proved constructive possession given the unique association with the "9yo Jenny" naming convention. PE 3.

Based on our review of the record, it is evident from the questions by the members during deliberation that the date on the charge sheet was a cause for concern. The members first asked the military judge whether Specification 1 required a specific time frame or whether they could remove the date "16 May 2011" entirely **[*36]** from Specification 1. AE CXXXV. The military judge responded by reiterating the 150-day variance instruction. Record at 1809. After further deliberation, the members asked the military judge to define the meaning of "on or about" and asked whether "on or about" in Specification 1 could encompass the time period from the date when the appellant reported to USS ESSEX until 16 May 2011. AE CXXXVI. In response, the military judge instructed the members that "on or about" means a short time period not to exceed 30 days and that any time period beyond 30 days would constitute variance. Record at 1815. Following additional deliberation, the members convicted the appellant by excepting the date "16 May 2011" and substituting the date "3 March 2011."

Having already concluded that the evidence was legally insufficient to convict the appellant for knowing possession on or about 16 May 2011, we must assess whether any evidence supports constructive possession of the video files on or about 3 March 2011. Based on our careful review of the record we conclude that it does not.

Because the 3 March 2011 date was not argued or emphasized by either party at trial, we are left to speculate how the members **[*37]** arrived at that particular date. Two possibilities emerge, one more likely than the other. The only evidence discussed on the record that references 3 March 2011 is within the context that this was the date the appellant password-protected or changed the password on his laptop. *Id.* at 1579. The more likely scenario is the fact that 3 March 2011 is referenced in the document containing the link files to the most recently viewed video file by the appellant. *See* PE 5. There was no discussion in the record as to the significance of the 3 March 2011 date in PE 5 as to what particular video files were viewed. A review of the record reveals that the significance of that date was that it represented "the most recent time any file of that type (.mov or .qt) was accessed, not when the specific files in question were accessed." *See* PE 6 for Identification at 12. Because there was no testimony or evidence presented regarding the 3 March 2011 date, we cannot rule out that the members may have interpreted that particular date as the date that the appellant viewed every one of those video files containing the .mov format. If that were true, this case would be a much stronger case in terms of legal and factual sufficiency. That, **[*38]** however, is not an accurate premise. In fact, based on PE 6 for Identification, the 3 March 2011 date could be the most recent time that the appellant accessed *any* video file in the .mov file format. In this regard, the 3 March 2011 date, bereft of any evidentiary or testimonial linkage, fares no better than the charged date of 16 May 2011.

With regard to the 3 March 2011 date, no evidence was presented to demonstrate: (a) when the video files were deleted; (b) when or how the videos were downloaded; (c) when they were viewed; or, (d) whether the appellant knew enough about computers to understand that when one deletes a file, it is not permanently deleted, but exists in unallocated space. Ms. SH was only able to testify that the videos had been on the computer at some point and then deleted. Neither Ms. SH nor the defense expert were able to testify with any degree of scientific certainty when the videos had been deleted from allocated space on the appellant's laptop.

Accordingly, we hold that under the unique facts and circumstances of this case and bound by *Navrestad*, the evidence was legally insufficient to prove that the appellant knowingly possessed the three charged video files **[*39]** on the date alleged in the charge sheet or the date that the members found the appellant guilty by exceptions and substitutions. Accordingly, we will set aside the finding of guilty as to Specification 1.[20]

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committed at a time that differs slightly from the exact date on 16 May 2011, you may make minor modifications in reaching your findings by what we call exceptions and substitutions, that is excepting or cutting out certain language in a specification or date, and substituting language or dates so long as the alteration of that date does not exceed more than 150 days prior to 16 May 2011." Record at 1774-75.

[20] Because we set aside the finding as to Specification 1 as legally insufficient, this obviates our need to consider whether the military judge gave a fatal variance instruction. *See United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014) (holding that the test for material variance is whether the variance "substantially changes the nature of the offense, increases the seriousness

It is important to note that these results are predicated only upon *the particular facts of this case* and how the Government chose to charge the offense. In this case, the Government built a strong circumstantial web that the appellant searched for, downloaded, viewed, and possessed child pornography video files; however, the web contained no connective tissue to the specific date in question.[21]

5. *Images* ***[*40]*** *8 and 9*

The appellant argues that because only two digital images of child pornography were found on his portable hard drive in allocated space amongst thousands of adult pornography images, the evidence is factually and legally insufficient to prove knowing possession. We disagree.

Based on our review of the record, the appellant's 2009 LimeWire download, the fact that he viewed videos in the .mov and .qt video format containing titles highly suggestive of child pornography, and the fact that he had four video files of child pornography that had at one point been extant on his computer, we conclude that images 8 and 9 were not inadvertently downloaded by mistake or through a massive download of adult pornography. Ms. SH testified that the images of child pornography on the portable hard drive had been downloaded from the appellant's laptop. Accordingly, we reject the appellant's argument that he did not knowingly possess Images 8 and 9, which were located in *allocated* space on his portable hard drive.

Factual and Legal Sufficiency of Images 8 and 9

In appellant's third assignment of error, he alleges that Images 8 and 9 found on the Western Digital hard drive do not meet the statutory **[*41]** definition for child pornography.

The Government charged that the appellant knowingly possessed child pornography in violation of *Article 134*, UCMJ, clause (2). Although it is not required to do so under clause (1) and (2), the Government chose to allege child pornography as defined by *18 U.S.C. § 2256(8)*, the Child Pornography Prevention Act (CPPA). The military judge instructed the members as to the definition of child pornography that mirrored *18 U.S.C. § 2256(8)*.[22]

In *United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006)*, the CAAF adopted ***HN11***[↑] the factors outlined in *United States v. Dost* in determining whether an image portrays a "lascivious exhibition."[23] We review the *Dost* factors with an overall consideration of the totality of the circumstances. *Roderick, 62 M.J. at 430*. Furthermore, it is the prerogative of the fact-finder to decide whether images of child pornography contain actual minors. *United States v. Wolford, 62 M.J. 418, 423 (C.A.A.F. 2006)*. That decision may also be made based on a review of the images alone, without expert assistance. *Id.*

Image 8 in PE 1

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of the offense, or increases the punishment of the offense") (citation and internal quotation marks omitted).

[21] We express no opinion as to whether digital evidence found and retrieved in unallocated space can be used to circumstantially prove constructive possession.

[22] "Again, 'child pornography' is defined as means of any visual depiction including any photograph, film, video, picture or computer, or computer-generated image or picture, whether made or produced by electronic, mechanical or other means of sexually explicit conduct where: A. the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

'Minor' and 'child' mean any person under the age of 18 years.

'Sexually-explicit conduct' means actual or simulated of the following:

> (a) Sexual intercourse or sodomy including genital-to-genital, oral-to-genital, anal-to-genital, or oral-to-anal, between persons of the same or opposite sex;
>
> (b) Bestiality;
>
> (c) Masturbation;
>
> (d) Sadistic or masochistic abuse; or,
>
> Lascivious (e) lascivious **[*42]** exhibition of the genitals or pubic area of any person."

Record at 1762.

[23] *United States v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986)*, *aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987))*. ***HN12***[↑] The "*Dost* factors" are: "(1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Roderick, 62 M.J. at 429* (quoting **[*43]** *Dost, 636 F. Supp. at 832*).

Image 8 depicts a young girl who is clearly a minor receiving cunnilingus. It is clear from the young girl's physical and facial features that she is a minor. Additionally, it is apparent from the image that a sexual act is occurring and the image itself provides sufficient evidence to enable a reasonable fact-finder to find guilt beyond a reasonable doubt. *Wolford, 62 M.J. at 423*. The appellant concedes that image 8 depicts a sexual act. Expert testimony was not necessary for a panel of competent members to come to a conclusion that the female pictured in image 8 is a minor based on viewing the image and listening to the military judge's instruction on the definition of child pornography. We are likewise convinced beyond a reasonable doubt that the sexual act depicted in image 8 meets the CPPA definition of child pornography as defined by the military judge's instruction.

Image 9 in PE 1

Image 9 depicts at least four fully nude young girls with what appears to be two more nude girls bending over behind them forming a pyramid. The appellant concedes that the girls depicted are minors. From the manner in which the girls are positioned, their breasts and genital areas are clearly and fully displayed **[*44]** and their genitals appear to be the focal point of the image. We agree with the assertion of both parties that this appears be a cheerleader pyramid. *See* Appellant's Brief at 56-57; Government Brief of 21 Apr 2014 at 26. Furthermore, we agree with the Government's assertion that cheerleaders and school-age girls are well-known subjects of hypersexual fantasy and are widely depicted in various forms in adult pornography. Government's Brief at 26. Accordingly, image 9 satisfies the majority of the *Dost* factors and based on the "totality of the circumstances," *Roderick, 62 M.J. at 430*, a reasonable fact-finder could conclude beyond a reasonable doubt that the image meets the definition of "sexually explicit conduct" under the CPPA. Additionally, we are convinced beyond a reasonable doubt that image 9 meets the definition of child pornography.

Failure to Instruct on Definition of "Lascivious"

In his fourth assignment of error, the appellant argues that the military judge erred when he failed to further define the word "lascivious." ***HN13***[↑] Because the appellant did not object to the military judge's instruction, we review for plain error. *See United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)*. To meet his plain error burden, the appellant must show that: "(1) there was **[*45]** error; (2) the error was plain or obvious; and, (3) the error materially prejudiced [the appellant's] substantial right[s]." *Id. at 193-94* (citation and internal quotation marks omitted). Under the facts of this case, the appellant cannot meet his burden of establishing plain error.

Our plain error analysis of the military judge's failure to provide a definition of "lasciviousness" begins with a determination of whether the omission was error. The military judge provided instructions to the members by reading the CPPA statutory definition of child pornography. Record at 1762. He further instructed the members that they could ask any questions about definitions in his instruction. Absent any indication from the members that there was confusion on the specific term "lascivious," we find that there was no error on the part of the military judge for failing to *sua sponte* provide a definition of the term. Furthermore, the appellant provides no evidence that the term "lascivious" was outside the common understanding of the members. Thus, if error it was not obvious.

Assuming *arguendo* that the military judge erred in failing to provide a definition of "lascivious" and that it was obvious error, no substantial **[*46]** right of the appellant was materially prejudiced. Unlike the facts in *United States v. Barberi, 71 M.J. 127, 129 (C.A.A.F. 2012)*, the appellant in this case never claimed at trial that the images in question were not child pornography. Trial defense counsel's theory at trial was that the images were downloaded accidentally as part of a mass download of adult pornography. Thus, the appellant cannot meet his burden to demonstrate plain error.

Sentence Reassessment

Because of our action on the findings and the principles outlined in *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, *United States v. Cook, 48 M.J. 434, 438 (C.A.A.F. 1998)*, and *United States v. Sales, 22 M.J. 305, 307-09 (C.M.A. 1986)*, conducting a reassessment of the sentence would not be an appropriate option within the context of this case. ***HN14***[↑] "A 'dramatic change in the penalty landscape' gravitates away from the ability to reassess" the sentence. *United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)* (quoting *United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003))*.

We find that there has been a dramatic change in the penalty landscape and do not believe that we can reliably determine what sentence the members would have imposed. *Riley, 58 M.J. at 312*.

Conclusion

The finding of guilty to Specification 1 of the Charge is set aside and that specification is dismissed. The findings of guilty to the Charge and Specification 2 of the Charge are affirmed. The sentence is set aside. We return the record to the Judge Advocate General for remand to an appropriate CA with a rehearing **[*47]** on the sentence authorized.

Chief Judge MITCHELL and Judge FISCHER concur.

APPENDIX C

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**ACM 39055**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jeremiah L. KING	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

Appellant submitted his case for review without specific assignment of error on 29 June 2017—419 days after the case was docketed with this court. After review under Article 66(c), UCMJ, we affirmed the approved findings and sentence on 26 July 2017. *United States v. King*, No. ACM 39055, 2017 CCA LEXIS 501 (A.F. Ct. Crim. App. 26 Jul. 2017) (unpub. op.).

On 25 August 2017, Appellant, through newly hired appellate counsel, filed a Motion for Reconsideration requesting we set aside the findings for specification 2 of Charge III and specification 1 of Charge I, on the grounds they are factually and legally insufficient in light of *United States v. Yohe*, No. ACM 37950, 2015 CCA LEXIS 380 (A.F. Ct. Crim. App. 3 Sep. 2015) (unpub. op.) and *United States v. Navrestad*, 66. M.J. 262 (C.A.A.F. 2008). Alternatively Appellant requested, if we concluded these grounds did not constitute a "material or factual matter" under which we could conduct a reconsideration, that we consider the issue of factual and legal sufficiency pursuant to *United States v. Grostefon,* 112 M.J. 431 (C.M.A. 1982). No material legal or factual issue was overlooked or misapplied in our review which necessarily found the approved findings legally and factually sufficient.

Accordingly it is by the court on this 24th day of April, 2018,

ORDERED:

Appellant's Motion for Reconsideration is **DENIED** and Appellant's request to raise his issues pursuant to *Grostefon* is **DENIED.**

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

APPENDIX D

31 August 2017

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JEREMIAH L. KING, USAF *Appellant.*	) UNITED STATES' OPPOSITION) TO APPELLANT'S MOTION FOR) RECONSIDERATION))) Panel No. 3)) ACM 39055

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

Pursuant to Rule 23(c) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully requests that the Court promptly deny Appellant's Motion for Reconsideration, dated 25 August 2017, because Appellant has improperly raised these issues for the first time in a motion for reconsideration, and because this Court has already reviewed the record in accordance with its statutory authority in Article 66(c), UCMJ.

Rule 15 of this Honorable Court's Rules states that "Appellate counsel for the accused may file an assignment of error, if any are to be alleged, setting forth separately each error asserted." Such errors should be "filed within 60 days after appellate counsel has been notified of the receipt of the record in the Office of the Judge Advocate General." Id. Appellant submitted and was granted eight enlargements of time, over 400 days from docketing, before finally submitting the case to this Court on its merits with no assignments of error. Now, after this Court has fully reviewed the case and found no errors in the findings or sentence, Appellant seeks to relitigate his case anew via motion for reconsideration.

Such an approach to appellate practice serves to delay justice and to undermine the finality of this Court's decisions. "Piecemeal litigation in capital cases, or for that matter, in any case, is counterproductive to the fair, orderly judicial process created by Congress." Murphy v.

Judges of United States Army Court of Military Review, 34 M.J. 310, 311 (C.M.A. 1992). For this reason, this Court has promulgated specific rules, not suggestions, governing the appropriate means to raise issues. Circumvention of these rules does nothing more than create appellate chaos.

Appellant had more than adequate time to bring these issues through an appropriate assignment of errors. While the United States understands that Appellant has only recently hired civilian appellate counsel, allowing Appellant to bring these issues in this manner would encourage future appellants to also get the proverbial "two bites at the apple" by obtaining new appellate counsel and submitting new issues after the first attempt fails. To prevent this type of incentive, this Court should deny Appellant's motion.

Additionally, Article 66(c), UCMJ, allows this Court to "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." As such, even though Appellant submitted the case on its merits, this Court already performed a thorough review of the record of trial. After conducting its review of Appellant's case, this Court declared, "[t]he approved findings and sentence are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred." United States v. King, ACM 39055 (A.F. Ct. Crim. App. 26 July 2017) (unpub. op.). Within his Motion for Reconsideration, Appellant essentially argues that his convictions were not factually and legally sufficient. As this Court has already performed its own review of the factual and legal sufficiency of Appellant's conviction, there is no reason for this Court to revisit their decision.

For the above reasons, the United States requests that this Court deny Appellant's motion. However, in the event that this Court decides to review the issues raised by Appellant in

his motion, the United States requests an additional 30 days enlargement to have time to provide a proper response. The record of trial in this case contains 855 pages and numerous exhibits. It would be unfair to require the United States to submit a response to these belated issues within seven days when Appellant has had 476 days to review the record of trial and identify issues. Seven days is simply not enough for the United States to review the record of trial and answer all of Appellant's newly minted assertions.

WHEREFORE, the United States requests this Court promptly deny Appellant's Motion for Reconsideration. Alternatively, the United States requests an additional 30 days in order to respond to Appellant's motion.

J. RONALD STEELMAN III, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

JOSEPH KUBLER, Lt Col, USAF
Appellate Government Counsel
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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, to Mr. and to the Appellate Defense Division on 31 August 2017.

J. RONALD STEELMAN III, Capt, USAF
Appellate Government Counsel
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APPENDIX E

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Airman First Class (E-3) **JEREMIAH L. KING**, United States Air Force, *Appellant.*	**MOTION FOR LEAVE TO REQUEST EXPEDITED REVIEW** Before Special Panel Case No. ACM 39055 Filed on: 15 February 2018

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

CONTINUING OBJECTION

On 6 September 2017, Appellant filed a motion requesting the recusal of Judge Julie J.R. Huygen, when his case was before Panel 3. Generally, Appellant's request is based on the appearance of partiality based on Judge Huygen's previous assignment. Although Judge Huygen's previous assignment did not involve a prosecutorial function, it was aligned with the government as it entailed, for example, advising convening authorities and prosecuting legal offices. It also involved ex parte communications with the prosecuting legal offices on every criminal investigation, to include Appellant's. Appellant's case is now before a different panel that again includes Judge Huygen, and Appellant renews his objection to her continued participation in his case on the basis that Judge Huygen's appointment to this Court [illegible]pation in Appellant's case, under the facts and circumstances, casts an

appearance of partiality and undermines the public's confidence in the judicial process.

REQUEST FOR EXPEDITED REVIEW

COMES NOW, Appellant, through counsel, pursuant to Rules 23, 23(d), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, and respectfully moves for leave to file a Motion Requesting Expedited Review given that this case has been pending before this Court for 650 days at the time of this filing.

This case was docketed before this Court on 6 May 2016. This Court issued its opinion in this case on 26 July 2017. After this Court's issued its opinion, Appellant hired civilian counsel and submitted a Motion for Reconsideration on 25 August 2017. The Government opposed Appellant's request for reconsideration on 31 August 2017. All the filings in this case have been submitted since day 482 after docketing.

Appellant asserts his right to a timely review of his appeal, requests expedited review of his case, and respectfully request that this Court determine if relief is warranted based on the delay in the processing of his case.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 15 February 2018.

PATRICIA ENCARNACIÓN MIRANDA, Maj, USAF
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APPENDIX F

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Airman First Class (E-3) **JEREMIAH L. KING**, United States Air Force, *Appellant.*	**SECOND MOTION FOR LEAVE TO REQUEST EXPEDITED REVIEW** Before Special Panel Case No. ACM 39055 Filed on: 15 March 2018

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

SECOND REQUEST FOR EXPEDITED REVIEW

COMES NOW, Appellant, through counsel, pursuant to Rules 23, 23(d), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, and respectfully moves for leave to file a second Motion Requesting Expedited Review given that this case has been pending before this Court for **678 days** at the time of this filing.

This case was docketed before this Court on 6 May 2016. This Court issued its opinion in this case on 26 July 2017. After this Court's issued its opinion, Appellant hired civilian counsel and submitted a Motion for Reconsideration on 25 August 2017. The Government opposed Appellant's request for reconsideration on 31 August 2017. All the filings in this case have been submitted since day 482 after docketing.

Appellant filed a request for expedited review on 15 February 2018. Appellant once again asserts his right to a timely review of his appeal, requests expedited

review of his case, and respectfully request that this Court determine if relief is warranted based on the delay in the processing of his case.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 15 March 2018.

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APPENDIX G

AFFIDAVIT

I, MS. HATTIE D. SIMMONS, do swear and affirm that the following information is true and correct to the best of my knowledge and belief.

1. I am Ms. Hattie Simmons. I am the Chief of Appellate records at AFLOA/JAJM. In that position I am responsible for the accuracy, integrity, and maintenance of the record as it goes through the appellate process. Whether in response to orders from AFCCA, or to resolve discrepancies we identify in our own reviews, we routinely correct omissions or errors in records of trial.

2. JAJM received the record of trial from AFCCA on 28 July 2017 after their initial opinion. Upon the Court's request, the record was taken back to AFCCA on 25 Apr 2018. The record was returned to our office on 26 Apr 2018.

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

HATTIE D. SIMMONS, GS-12
Chief, Appellate Records
AFLOA/JAJM

Subscribed, sworn to and acknowledged before me this 17th day of May, 2018.

Name of Notarizing Official: JOSH P. PETERS, MSgt, USAF
Notary Authority and Seal:

APPENDIX H

United States v. Yohe

United States Air Force Court of Criminal Appeals

September 3, 2015, Decided

ACM 37950 (recon)

Reporter
2015 CCA LEXIS 380 *

UNITED STATES v. Airman First Class CHARLES N. YOHE, United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Yohe, 2015 CAAF LEXIS 1087 (C.A.A.F., Dec. 1, 2015)*

Review denied by *United States v. Yohe, 2016 CAAF LEXIS 208 (C.A.A.F., Mar. 7, 2016)*

Prior History: **[*1]** Sentence adjudged 27 April 2011 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: William C. Muldoon. Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

United States v. Yohe, 2013 CCA LEXIS 304 (A.F.C.C.A., Apr. 9, 2013)

Core Terms

videos, images, child pornography, files, depictions, downloaded, law enforcement, investigator, sentence, possessed, thumbnail, military, user, previewed, viewing, sexually explicit, reasonable doubt, computer's, forensic, factors, sharing, specifications, circumstances, convicted, minors, values, hash, extraneous, post-trial, engaging

Case Summary

Overview

HOLDINGS: [1]-Although the military judge erred during a servicemember's trial on charges alleging that he possessed and viewed sexually explicit depictions of minors, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*, when he allowed the panel to review, during deliberations, a DVD the Government prepared that contained documents that had not been admitted into evidence, the panel's verdict convicting the servicemember did not have to be set aside because it was not reasonably possible the extraneous evidence influenced the members' decision; [2]-The verdict did not have to be set aside because the panel was shown some images of children that were constitutionally protected; [3]-Although it took the court over four years to issue its decision, in part because a decision it issued in 2013 was overturned, the servicemember did not suffer harm that warranted relief.

Outcome
The court consolidated two specifications alleging that the servicemember violated UCMJ art. 134 into one specification, affirmed that specification and the charge, and affirmed the sentence.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] **Judicial Review, Standards of Review**

The United States Air Force Court of Criminal Appeals reviews issues of legal and factual sufficiency de novo.

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of an appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN2[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

In order to be admissible, evidence of uncharged misconduct must reasonably support a finding that an accused committed that misconduct and proof beyond a reasonable doubt is not required.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Offenses > General Article > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] **Trial Procedures, Findings**

In light of the United States Court of Appeals for the Armed Forces' ("CAAF's") ruling in United States v. Piolunek, it is no longer necessary to reject an entire verdict simply because some of the conduct that resulted in the verdict was constitutionally protected. In Piolunek, the CAAF held that contrary to its conclusion in United States v. Barberi, convictions by general verdict for possession and receipt of visual depictions of a minor engaging in sexually explicit conduct on divers occasions by a properly instructed panel did not have to be set aside after a service court decided that several images considered by the members did not depict the genitals or pubic region of a minor.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Criminal Process, Right to Confrontation**

The decision as to whether evidence admitted during a trial by court-martial violated an accused rights under the *Confrontation Clause* is reviewed de novo. Among the factors the United States Air Force Court of Criminal Appeals considers in assessing harmlessness in this context are: (1) the importance of the testimonial hearsay to the prosecution's case; (2) whether the testimonial hearsay was cumulative; (3) the existence of other corroborating evidence; (4) the extent of confrontation permitted; and (5) the strength of the prosecution's case.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN5 **Plain Error, Evidence**

The findings of a court-martial may be impeached when extraneous prejudicial information was improperly brought to the attention of a member. R.C.M. 923, Manual Courts-Martial. In some circumstances, evidence that court members considered extraneous prejudicial information from a third party or from outside materials can be considered in deciding whether the findings or sentence are impeached. Mil. R. Evid. 606(b), Manual Courts-Martial. Because Mil. R. Evid. 606(b) prohibits members from disclosing the subjective effects of such extrinsic influences on their deliberations, there is a presumption of prejudice from such influences. The burden is on the Government to rebut that presumption by proving harmlessness. In the absence of an objection at trial, the United States Air Force Court of Criminal Appeals applies a plain error analysis under which an appellant must show that there was an error, that the error was plain or obvious, and that the error materially prejudiced a substantial right.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 **Harmless & Invited Error, Evidence**

To prevail of a claim that an accused did not suffer harm because a document was provided to panel members without being admitted into evidence, the Government must demonstrate that the error did not have a substantial influence on the findings. In evaluating this issue, the United States Air Force Court of Criminal Appeals considers (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7 **Trial Procedures, Deliberations & Voting**

In determining whether the verdict in a servicemember's case should be impeached, the United States Air Force Court of Criminal Appeals attempts to determine any prejudicial impact extraneous evidence that came to a panel member's attention during the servicemember's court-martial had on the members' deliberations. In assessing that impact, the court considers whether there is a reasonable possibility the evidence influenced the members' verdict. In making that determination, the court considers what additional evidence the members considered that supported their verdict.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8 **Procedural Due Process, Scope of Protection**

The United States Air Force Court of Criminal Appeals reviews de novo whether an appellant has been denied the due process right to speedy posttrial review and whether any constitutional error is harmless beyond a reasonable doubt. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before the court, and the 18-month standard the United States Court of Appeals for the Armed Forces ("CAAF") adopted in United States v. Moreno applies as a case continues through the appellate process; however, the Moreno standard is not violated when each period of time used for the resolution of legal issues between the court of criminal

appeals and the CAAF is within the 18-month standard. However, when a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors the United States Supreme Court elucidated in Barker v. Wingo and the CAAF adopted in Moreno. Those factors are: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9[] **Procedural Due Process, Scope of Protection**

When there is no showing of prejudice under the fourth factor of the four-factor test the United States Supreme Court elucidated in Barker v. Wingo for determining if an appellant's due process rights have been violated because of unreasonable posttrial delay, the United States Air Force Court of Criminal Appeals will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10[] **Procedural Due Process, Scope of Protection**

A finding of harmless error does not end the inquiry of whether a servicemember is entitled to sentencing relief because his due process right to speedy posttrial review has been violated, as the United States Air Force Court of Criminal Appeals may grant sentence relief under Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*, for excessive posttrial delay without the showing of actual prejudice required by UCMJ art. 59(a), *10 U.S.C.S. § 859(a)*. In United States v. Gay, the court identified a list of factors to consider in evaluating whether UCMJ art. 66(c) relief should be granted for posttrial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the Government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, if relief is consistent with the goals of both justice and good order and discipline, and can the court provide any meaningful relief. No single factor is dispositive and the court may consider other factors as appropriate.

Counsel: For the Appellant: Major Matthew T. King, Major Shane A. McCammon, Captain Johnathan D. Legg.

For the United States: Colonel Don M. Christensen; Lieutenant Colonel Nurit Anderson, Major Daniel J. Breen; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, MITCHELL, and HECKER, Appellate Military Judges.

Opinion by: HECKER

Opinion

OPINION OF THE COURT UPON RECONSIDERATION

HECKER, Senior Judge:

Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members of possessing and viewing sexually explicit depictions of minors, in violation of Article 134, UCMJ, *10 U.S.C. § 934*. He was sentenced to a dishonorable discharge, confinement for 9 months and reduction to the grade of E-1. The convening authority reduced the punitive discharge to a bad-conduct discharge and approved the remainder of the sentence as adjudged.

Procedural History

On 9 April 2013, we issued a decision affirming the

findings and sentence in Appellant's case. *United States v. Yohe, ACM 37950, 2013 CCA LEXIS 304 (A.F. Ct. Crim. App. 9 April 2013)* **[*2]** (unpub. op.). Mr. Laurence M. Soybel was an appellate judge on the panel that issued the decision, pursuant to an appointment by The Judge Advocate General of the Air Force. After the Secretary of Defense issued a memorandum on 25 June 2013 appointing Mr. Soybel to this court, we vacated our initial decision and issued a second one on 22 July 2013, reaffirming the substance and holdings of the prior decision. *United States v. Yohe, ACM 37950, 2013 CCA LEXIS 686 (A.F. Ct. Crim. App. 22 July 2013)* (unpub. op.).

In September 2013, Appellant filed a petition for grant of review with our superior court. On 31 October 2013, our superior court dismissed the petition for review without prejudice. *United States v. Yohe, 73 M.J. 91 (C.A.A.F. 2013)* (mem.). The record of trial was returned to our court on 13 March 2014.

On 15 April 2014, our superior court issued its decision in *United States v. Janssen, 73 M.J. 221, 225 (C.A.A.F. 2014)*, holding that the Secretary of Defense did not have the legislative authority to appoint appellate military judges and that his appointment of Mr. Soybel to this Court was "invalid and of no effect." In light of *Janssen*, we granted reconsideration on 29 April 2014, and permitted counsel for Appellant to file a supplemental pleading.

When Appellant's case was initially before **[*3]** us, he argued (1) the evidence was factually and legally insufficient to support his convictions, (2) the military judge violated his right to confrontation by admitting testimonial hearsay into evidence and (3) the military judge erred by admitting certain evidence. After we permitted Appellant to submit a supplemental assignment of errors, he raised the issue of post-trial delay, arguing his due process right to speedy appellate processing was violated under *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*, and *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. In September 2014 and January 2015, we specified two issues: (1) whether the trial court's findings and sentence or this court's review are affected by the possibility that certain non-admitted evidence was improperly brought to the attention of the panel, and (2) whether the general verdict in the case must be set aside because certain images in the case were constitutionally protected.

With a properly constituted panel, we have reviewed Appellant's case, to include Appellant's previous and current filings and the previous opinions issued by this court. We affirm the findings, but, for the reasons provided below, consolidate the specifications. We affirm the sentence as adjudged.

Background

In May 2009, an investigator **[*4]** with the Nebraska state police used a law enforcement program to identify Internet protocol (IP) addresses that were sharing child pornography through peer-to-peer networks, including Limewire.[1] This automated program was operated from the investigator's computer and sent out queries using certain key words commonly associated with child pornography. If a peer-to-peer user's computer was on-line and the program was being used, his computer would automatically respond to the query by indicating it had a responsive file or files. The law enforcement program used this response to compare the suspect file to over four million items of known child pornography found in a law enforcement database, through a comparison of their "hash values," which are unique characters associated with digital files.[2] If the "hash values" of a suspect file matched one found in the law enforcement database, the program would automatically generate a report containing the "hash value," the name of the file, and the IP address of the computer that offered to share the file. Law enforcement personnel then used that information to conduct further investigation.

On 6 May 2009, the law enforcement program detected

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[1] Peer-to-peer file sharing is a means of obtaining and **[*5]** sharing files directly from other computer users who are connected to the Internet and who are also using the peer-to-peer file sharing software. Once the peer-to-peer file sharing software has been installed by the user, the user may interface directly with other computers that have the same file sharing software, and is able to browse and obtain files that have been made available for sharing on those other computers by typing search terms into the program's search field.

[2] The values are calculated using a mathematical algorithm and are also known as "Secure Hash Algorithm" (SHA) values. This mathematical figure will remain the same for an unchanged file, no matter where the file is found or on which computer the file is located. Changing the file name will not make a change to this value. Investigators compare the hash values of files in order to determine whether they are identical, a process described by the civilian investigator in this case as "thousands of times more reliable" than DNA testing.

that an individual file of child pornography was present and available for sharing in a Limewire folder on a computer associated with **[*6]** a particular IP address. On 11 May 2009, the program repeated the query but no longer detected that file as present in the shared folder. It did, however, find a second file of child pornography there. The titles of these two files suggested sexual activity by 15- and 7-year-old children, and their "hash values" matched those for two child pornography videos found in a law enforcement database of known child pornography. The law enforcement program did not download either video onto the investigator's computer. Subsequent queries by the law enforcement program in June, July and August 2009, did not receive any responses indicating this IP address had made child pornography available for sharing.

Through a subpoena served on the Internet service provider, investigators learned the relevant IP address was assigned to Appellant in his on-base dormitory room, where he lived alone. Appellant's laptop computer was seized on 8 October 2009. A forensic examination of the computer's contents was conducted by the Defense Computer Forensic Laboratory (DCFL).

Appellant was subsequently charged with and convicted of two specifications under *Article 134, UCMJ:* (1) viewing one or more visual depictions **[*7]** of minors engaged in sexually explicit conduct between 25 March 2008 and 8 October 2009, and (2) wrongfully and knowingly possessing one or more such depictions during that same time frame.

Sufficiency of the Evidence

HN1[] We review issues of legal and factual sufficiency de novo. *See United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324 (C.M.A. 1987))*. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [Appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

When examining Appellant's computer, the forensic examiner found that Limewire had been installed on Appellant's laptop. **[*8]** He did not find the two videos identified by the law enforcement program, which indicated to him that they had been deleted from the computer at an unknown time. The forensic examiner, however, found evidence that two videos with the same file name had been downloaded onto the hard drive of Appellant's computer through the use of Limewire. He also found evidence that a user of the computer previewed the two movies through Limewire as they were being downloaded. For one video, the evidence indicated (1) it was partially downloaded onto Appellant's computer on 9 December 2008, (2) it was successfully downloaded on 6 May 2009 (the same day the law enforcement program found it in Appellant's shared folder), (3) it was previewed and again partially downloaded on 7 May 2009, and (4) it was previewed again on 16 May 2009 and then successfully downloaded three minutes later. For the second video, the evidence revealed (1) it was partially downloaded onto Appellant's computer on 22 August 2008, (2) it was previewed on 11 May 2009 and then was successfully downloaded three minutes later (the same day the law enforcement program found it in Appellant's shared folder), and (3) it was again successfully **[*9]** downloaded on 16 May 2009.

The forensic examiner also found evidence that someone using the computer had at some point conducted five separate searches on Limewire, looking for files containing the terms "pthc" (an abbreviation commonly used for "preteen hard core"), "preteen porn," "pedopedo," "young Latina" and "young." The two videos found by the law enforcement program both contained the word "pthc" in their filenames, and one filename also contained the words "preteen" and "pedo."

The forensic examiner also testified about 16 items he found inside several areas of Appellant's computer. One item was a three-minute video while the other fifteen were "thumbnails," which are reduced-sized versions of pictures. Some of the thumbnails depict obviously young, preteen boys engaging in homosexual acts and other obviously preteen children engaged in sexual acts and suggestive poses, and the video depicts a child engaging in oral sodomy.

Appellant argues he is not guilty of possessing or viewing the thumbnail images and three-minute video because (1) there was no evidence he knew these items were on his computer and (2) he could not access the areas of the computer where the items were located. **[*10]** He also contends the two videos cannot serve as the basis for his conviction of viewing child pornography as they do not depict minors engaged in sexually explicit conduct.

A. Viewing of Child Pornography

Appellant generally does not dispute that someone used his computer to preview some portion of these two videos in May 2009. Instead, he contends there is insufficient evidence to prove he was the person who previewed them or, even if he did preview them, that he viewed them long enough to see the sexually explicit activity on them. For one of the videos, he also argues that the individuals depicted in them are not minors. We disagree.[3]

The Government presented strong circumstantial evidence that Appellant was the individual who was using the computer during the relevant time periods in May 2009 when these videos were previewed and/or downloaded. Only one user account and one user profile was associated with the computer's operating system, and the user account was password protected. Appellant's email address was associated with this user profile and the search term "pthc" was found in an area of the computer associated with that user profile. A close friend of Appellant testified he had never seen anyone else using Appellant's computer outside his presence and Appellant had never complained to him about someone doing so. Additionally, Appellant's work schedule revealed he was not working at any of the times in May 2009 when the videos were being downloaded and previewed, and no downloads or previews **[*12]** occurred while he was working during this time period.

Similarly, we find sufficient evidence present to conclude that Appellant viewed the portions of these two videos that contained the depictions of minors engaging in sexually explicit conduct. These two videos were available for previewing and downloading because Appellant used Limewire to search for files containing terms strongly indicative of child pornography, received a list of files containing some of those terms (and whose file names described sexual activity by children), and selected these two files from that list to download onto his computer. He then took the further affirmative step of clicking again on the files so he could preview them as they were downloading.

Under the totality of the circumstances, we conclude the evidence is both factually and legally sufficient to establish Appellant was intentionally searching for child pornography in May 2009, found it through Limewire after using search terms designed to find it, selected these two files for downloading and then watched these videos while they were downloading.[4] Having evaluated the entire record of trial, we are therefore convinced Appellant's conviction for **[*13]** viewing one or more visual depictions of minors[5] engaged in sexually explicit conduct is legally and factually sufficient, based solely on these two videos.

B. Possession of Child Pornography

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[3] Over defense objection, the members were shown the two videos from the law enforcement database whose "hash values" matched those found in Appellant's Limeware folder by the law enforcement program in May 2009. We find the military judge did not abuse his discretion by admitting these videos even though they were not found on Appellant's computer. *See United States v. Clayton, 67 M.J. 283, 286 (C.A.A.F. 2009)*. As discussed in this opinion, the Nebraska state police investigator was able to determine exactly which videos were downloaded and previewed on Appellant's computer through the use of their hash values. **[*11]** The court members were able to view copies of these recordings and see precisely what movies were previewed and downloaded. We do not find that the military judge abused his discretion, nor do we find that the members would have been confused or misled or that Appellant was unfairly prejudiced by the admission of the videos.

[4] For the reasons discussed below, we do not find the evidence sufficient to prove Appellant viewed the other images in this case.

[5] In one video, a young female reads a newspaper at a kitchen table for approximately 14 seconds, goes into a bedroom and disrobes, and, approximately 1 minute later, engages in masturbation. In the second video, a young male and young female are naked together in a bathtub and engage in sexual activity for almost 9 minutes. There is no question that the young girl engaging in sexual behavior in the first movie was under 18 years old. Although Appellant argues the two individuals in the second video are clearly over 18 years old, we conclude otherwise, and find that a reasonable fact-finder could as well.

In arguing the evidence is insufficient to sustain his conviction for possessing images of child pornography, Appellant relies heavily on our superior court's decision in *United States v. Navrestad, 66 M.J. 262 (C.A.A.F. 2008)*. There, the accused used a public computer to search for and view child pornography images from the Internet, **[*14]** leading him to several public online file storage folders created by users of an Internet service provider. *Id. at 264, 268*. He opened these storage folders and viewed their contents, which included images of child pornography. *Id. at 264*. Although these images were automatically saved onto the computer's hard drive, our superior court found the accused lacked sufficient dominion and control to knowingly "possess" them. *Id. at 268*.

In reaching this conclusion, the court found the following facts to be significant: (1) there was no evidence the accused knew the images were being automatically saved onto the hard drive; (2) there was no evidence the accused emailed, printed or purchased copies of the images, (3) users on this public computer could not access the computer's hard drive or download the images onto a portable storage device, and (4) the accused did not have the ability to control who else had access to the images in their location on the Internet. *Id. at 267-68*. Within this context, the court concluded the accused's actions with the images "went no further" than viewing them and this "viewing alone does not constitute 'control' as the term is used" in child pornography possession cases. *Id.* Such possession must be **[*15]** "knowing and conscious." *Id. at 267*.

Because the holding in *Navrestad* was based on unique facts, we do not find it dispositive as to whether Appellant possessed the two videos detected by the law enforcement program in May 2009. Unlike the accused in *Navrestad*, Appellant viewed these videos of child pornography on his personal computer; and he, through the use of the Limewire program, directed that the two videos be downloaded onto the hard drive of his computer. We recognize that these two videos were no longer on Appellant's computer when it was forensically examined. However, those items were present in a user-accessible area of his computer (the "shared" Limeware folder) on the days in May 2009 when his computer offered to share them in response to a query sent by the law enforcement program, as well as on several other days. Under those facts, we find Appellant knowingly and consciously possessed the images and exercised the dominion and control necessary to constitute "possession" of them. Therefore, the evidence is factually and legally sufficient to convict Appellant of wrongfully and knowingly possessing one or more visual depictions of minors engaging in sexually explicit conduct. **[*16]**

We reach a different result as to whether Appellant possessed the thumbnail images of child pornography found on his computer. All these items were found in locations associated with either the computer's backup system or temporary files, rather than in locations where computer users typically save or store files.[6] The forensic examiner testified the thumbnail images were automatically created by the computer when a user viewed a photograph or video on the computer or when the computer conducted a system backup at a given point, and remained even after the original image was deleted. As with the video files discussed above, the forensic examination did not find the original photographs or videos that resulted in the creation of these thumbnails. Unlike those video files, however, the forensic examiner could not determine the file names of the original photographs or videos that resulted in these thumbnails, or when a user downloaded or viewed those items. Therefore, there is not proof beyond a reasonable doubt that Appellant was the one who viewed them. Furthermore, these thumbnails were found in areas of the computer that an average computer could not access without specialized computer **[*17]** software, none of which was found on Appellant's computer. There was no evidence presented that Appellant knew the images were being saved onto his hard drive in that manner, nor was there evidence that Appellant possessed specialized computer skills. A similar problem exists with the three-minute video, found in the unallocated space on Appellant's computer.

Under these circumstances, we find the evidence factually and legally insufficient to prove Appellant knowingly and wrongfully possessed or viewed these 16 visual depictions or that he possessed or viewed the original depictions that resulted in their creation. *See United States v. Sanchez, 59 M.J. 566, 570 (A.F. Ct. Crim. App. 2003)* (upholding a possession conviction based on deleted files and files located in the computer's cache based on other evidence, including the accused's relative sophistication in computer matters), *aff'd in part, rev'd in part on other grounds*, *60 M.J. 329 (C.A.A.F. 2004)*; *United States v. Nichlos, NMCCA 201300321, 2014 CCA LEXIS 691, at *27-28 (N.M. Ct. Crim. App. 18 September 2014)* (unpub. op.)

[6] These inaccessible areas included the hard drive's unallocated space or clusters, index files, thumbcache databases and shadow volume.

(holding there was "no question the appellant possessed child pornography" but **[*18]** "did not 'knowingly possess' child pornography on the date charged" because the files were located in unallocated space and there was no evidence that the appellant had the ability to retrieve files from unallocated space); *Accord* United States v. Flyer, 633 F.3d 911, 919-20 (9th Cir. 2011) (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession of child pornography in unallocated space); United States v. Moreland, 665 F.3d 137, 154 (5th Cir. 2011) (refusing to find constructive possession of child pornography in unallocated space without additional evidence of the defendant's knowledge and dominion or control of the images); United States v. Kuchinski, 469 F.3d 853, 863 (9th Cir. 2006) (holding that a defendant who lacks knowledge about and access to cache files should not be charged with possessing child pornography images located in those files without additional evidence of dominion and control over the images).[7]

C. Consolidation of the Specifications

As described above, we have found Appellant guilty of viewing and possessing one or more visual depictions of **[*19]** minors engaged in sexually explicit conduct, based solely on the two video recordings detected by the law enforcement program in May 2009. We have also concluded that his possession of those recordings was not simply incident to his viewing of the recordings. Under ordinary circumstances, therefore, we would affirm both specifications.

Here, however, the military judge instructed the panel that "[i]n order to 'possess' a computer file, the Accused must have been able to manipulate the image in some way. Manipulation includes saving, deleting, editing or viewing." (emphasis added). Once that instruction was given, Appellant would automatically be convicted of possessing the images once it is determined he viewed them.[8] Under these unique circumstances, we elect to consolidate the two specifications and so direct in our decretal paragraph. *See* United States v. Campbell, 71 M.J. 19, 22-23 (C.A.A.F. 2012). Because the panel was also instructed they must consider the "viewing" and "possessing" specification as "one offense" for which Appellant faced a maximum of 10 years confinement, we find the Appellant's sentence was not affected by the lack of consolidation at trial.

Admission of Thumbnail Images and the Three-Minute Video

We have concluded Appellant's conviction is based solely on the two videos detected by the law enforcement program in May 2009. We must, therefore, assess whether Appellant was prejudiced by the admission of the 15 thumbnail images and the three-minute video that we have not used to support Appellant's conviction.

First, we note the trial counsel argued to the panel that Appellant could be convicted of both specifications based solely on his actions with the two videos, and that the thumbnails found on the computer simply prove that Appellant acted purposefully. In light of this argument, the evidence, and the military judge's instructions, it is possible the panel concluded, as did we, that the government only proved beyond a reasonable doubt that Appellant viewed and possessed the two videos. Under these circumstances, Appellant would not have been prejudiced in sentencing regarding the other items admitted into evidence.

Moreover, we find this evidence would have been otherwise admissible. The three minute video and 13 of the 15 thumbnail images clearly are sexually explicit **[*21]** depictions of minor children and would have been admissible under Mil. R. Evid. 404(b) as proof of Appellant's intent, knowledge, or absence of mistake or accident regarding his actions with the two videos. Mil. R. Evid. 404(b); United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (holding that ***HN2***[↑] in order to be admissible, the evidence of uncharged misconduct must "reasonably support a finding" that the accused committed that misconduct and proof beyond a reasonable doubt is not required). The other two thumbnail images depicted fully-clothed children who are not engaged in any sexual activity. However, the government told the panel these two images were snapshots of the first frame of a longer video that

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[7] *See generally* Katie Grant, *Crying over the Cache: Why Technology has Compromised the Uniform Application of Child Pornography Laws*, 81 Fordham L. Rev. 319 (October 2012); J. Elizabeth McBath, *Trashing our System of Justice? Overturning Jury Verdicts Where Evidence is Found in the Computer's Cache*, 39 Am. J. Crim. L. 381 (2012).

[8] We note that this instruction is to some extent inconsistent with *Navrestad's* holding **[*20]** that viewing alone does not always constitute possession.

depicted sexually explicit conduct. The Nebraska investigator then testified that, based on his knowledge from other child pornography cases, these two snapshots are from two videos which depict a 15-year-old and 9-year-old child engaging in oral sodomy.[9] The forensic examiner testified that the presence of all these items on Appellant's computer meant the original images were on that computer at some point. Under these circumstances, we find these images and testimony would have been admissible under Mil. R. Evid. 404(b).[10]

This evidence would also have been admissible in sentencing under Rule for Courts-Martial (R.C.M.) 1001(b)(4) as an aggravating circumstance directly relating to or resulting from the offenses of which **[*23]** Appellant was convicted. *United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1998)*. As such, the evidence could be used to inform the sentencing authority's judgment regarding the charged offense as well as placing that offense in context, including the facts and circumstances surrounding the offense. *United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001)*; *United States v. Mullens, 29 M.J. 398, 400-01 (C.M.A. 1990)*; *United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982)*; *see also United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)*. Therefore, we are convinced beyond a reasonable doubt that the admission of the 15 thumbnail images and 3-minute video did not prejudice Appellant.

Appellant also contends that the military judge erred by allowing the government to admit testimonial hearsay about the two images depicting fully-clothed children by introducing portions of the DCFL report that stated the images "contain[ed] known child victims based on analysis with the National Center for Missing and Exploited Children (NCMEC) database" when no one from NCMEC testified at trial. ***HN4***[↑] The decision as to whether the admitted evidence violates the *Confrontation Clause* is reviewed de novo. *See, e.g., United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008)*; *United States v. Rankin, 64 M.J. 348, 351 (C.A.A.F. 2007)*. Here, we are convinced that any error in its admission was harmless beyond a reasonable doubt. *United States v. Sweeney, 70 M.J. 296, 306 (C.A.A.F. 2011)*; *see Rankin, 64 M.J. at 353*.

Among the factors we consider in assessing harmlessness in this context are: (1) the importance of the testimonial hearsay to the prosecution's case, (2) whether the testimonial hearsay was cumulative, **[*24]** (3) the existence of other corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case. *Sweeney, at 306* (citing *Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674)*. After analyzing these factors, we find that any error in admitting this information was harmless. First, as described above, the two images of the children were snapshots from pornographic movies; thus, the images themselves were minimally important to the Government's case. Second, the fact that the individuals in these images were under the age of 18 is clear upon a review of the images themselves. Third, approximately 20 other images in the report were not labeled as depicting known child victims identified by NCMEC, and they clearly depicted children engaged in sexual acts; thus, allowing NCMEC's identification of two pictures was of minimal impact. Fourth, the NCMEC comment that these children were under the age of 18 was not relied upon by trial counsel, and the members were not informed of the significance of the NCMEC reference. Fifth, the Nebraska state investigator had personal knowledge of the age of these two children, and he was present and testified about it, subject to cross-examination. Finally, Appellant's trial **[*25]** defense strategy did not hinge on the age of the people in these two images as the defense was focused on the lack of proof that Appellant possessed or viewed them. Based on the forgoing, we find that, even if these NCMEC references constituted testimonial hearsay whose admission violated the *Confrontation Clause*, that error was harmless beyond a reasonable doubt.

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[9] In light of this and our own conclusions about the sufficiency of the evidence **[*22]** on appeal, we find the introduction of these two thumbnail images did not create a circumstance where Appellant may have been convicted based in part on conduct that is constitutionally protected. Furthermore, even if such a circumstance did exist, ***HN3***[↑] in light of our superior court's recent ruling in *United States v. Piolunek*, it is no longer necessary to reject an entire verdict simply because some of the conduct that resulted in the verdict was constitutionally protected. *74 M.J. 107, 111-12. (C.A.A.F. 2015)* ("Contrary to our conclusion in *Barberi*, convictions by general verdict for possession and receipt of visual depictions of a minor engaging in sexually explicit conduct on divers occasions by a properly instructed panel need not be set aside after the [service court] decides several images considered by the members do not depict the genitals or pubic region.").

[10] Because the admission of evidence under Mil. R. Evid. 404(b) is also subject to the balancing test of Mil. R. Evid. 403, we also find the probative value of this evidence was not substantially outweighed by any danger of unfair prejudice.

Non-Admitted Evidence Provided to Members

The military judge admitted a DVD disc into evidence as Prosecution Exhibit 4. While establishing the foundation for the DVD and before the panel, the Nebraska investigator described this DVD as containing "IP history log files" and two video files[11] associated with those log files. The investigator further stated that he verified the contents of the DVD that same day. The record does not reflect whether the military judge, trial counsel, or trial defense counsel examined the contents of the DVD prior to its going to the members.

Prior to instructions and argument, the parties held an *Article 39(a), UCMJ*, session to discuss how **[*26]** the members would review the videos on Prosecution Exhibit 4 (as well as the thumbnail images found on Prosecution 8). With the agreement of the parties, the panel was told they would be sent into the deliberation room with the DVDs and a laptop so they could view the "images and the videos that are at issue" in the case. The military judge said "the only things that are on the DVDs should be" three videos and a number of still images. One representative from each side was authorized to go into the deliberation room with the investigator who was setting up the laptop for the panel. Following a brief recess, the military judge stated "the members did review the materials." After hearing instructions and closing argument, the panel was again given the two DVDs and the laptop, to use during their deliberations. The military judge instructed the panel to discuss "all the evidence that has been presented" to them.

This court's review of Prosecution Exhibit 4 revealed that Prosecution Exhibit 4 contained extraneous documents beyond the "log files" and videos. We then directed the parties to brief whether the trial court's findings and sentence or this court's review are affected by this error. **[*27]**

HN5[↑] The findings of a court-martial may be impeached "when extraneous prejudicial information was improperly brought to the attention of a member." R.C.M. 923. In some circumstances, evidence that court members considered extraneous prejudicial information from a third party or from outside materials can be considered in deciding whether the findings or sentence are impeached. Mil. R. Evid. 606(b); *United States v. Straight, 42 M.J. 244, 250 (C.A.A.F. 1995)*. Because Mil. R. Evid 606(b) would prohibit members from disclosing the subjective effects of such extrinsic influences on their deliberations, there is a presumption of prejudice from such influences. *Straight, 42 M.J. at 249*.

The burden is on the Government to rebut that presumption by proving harmlessness. *Id.* (citing *United States v. Bassler, 651 F.2d 600, 603 (8th Cir. 1981)*). In the absence of an objection at trial, we apply a plain error analysis under which Appellant must show that there was an error, that the error was plain or obvious, and that the error materially prejudiced a substantial right. *United States v. Reyes, 63 M.J. 265, 267 (C.A.A.F. 2006)*.

Here, in order to protect the secrecy of panel deliberations, we presume the members viewed and considered all the evidence presented to the panel, including the extraneous documents erroneously included on Prosecution Exhibit 4. *Id.* In his brief, Appellant only expressly complains about one such document contained on the **[*28]** DVD—a multi-page unsigned affidavit by an agent with the Air Force Office of Special Investigations (AFOSI) asking the 55th Mission Support Group commander for authorization to search Appellant's dormitory room and seize computers and other materials.[12] This document is entitled "YOHE Search Authority."

It was a plain and obvious error for this document to be provided to the panel members without being admitted into evidence. To determine whether this error had a prejudicial impact on the findings or sentencing process, we must consider whether the panel might have been substantially swayed by the error. *United States v. Clark, 62 M.J. 195, 201 (C.A.A.F. 2005)* (citing *Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*). ***HN6***[↑] To prevail, the government must demonstrate the error "did not have a substantial influence on the findings." *Clark, 62 M.J. at 200*. In evaluating this issue, we consider "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence **[*29]** in question, and (4) the quality of the evidence in question." *Id. at 200-201* (quoting *United*

[11] These are the two video files discussed above that were not on Appellant's computer, but, based on their hash values, were found in the investigator's database of child pornography.

[12] The other materials were (1) a document entitled "subpoena" which is a subpoena to an Internet service provider for records relating to an IP address that did not belong to Appellant, and (2) 36 pictures associated with the search of Appellant's dormitory room, four of which were admitted into evidence at trial.

States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999).

This document contains factual assertions and legal conclusions by a non-testifying AFOSI agent, based on his investigation and experience and that of the Nebraska investigator. The affidavit discusses computer technology (including peer-to-peer systems) and their role in the proliferation of child pornography. It states Appellant's IP address had made available for sharing two videos of suspected child pornography. The AFOSI agent opines the female in one video is between 10 and 12 years old, and the two individuals in the second video are between 14 and 16 years old. He also asserts that the videos are child pornography. The affidavit concludes "that probable cause exists to believe there has been a violation of . . . Article 134, UCMJ which prohibits possession, advertising, promoting, presenting, distributing, or soliciting through interstate or foreign commerce by any means, child pornography . . . ."

HN7[] In determining whether the verdict in this case should be impeached, we attempt to determine any prejudicial impact the extraneous evidence had on the members' deliberations. *See* United States v. Diaz, 59 M.J. 79, 91 (C.A.A.F. 2003). In assessing the impact, **[*30]** we consider whether there is a reasonable possibility the evidence influenced the members' verdict. *See* United States v. Ureta, 44 M.J. 290, 299 (C.A.A.F. 1996). In making this determination, we consider what additional evidence the members considered that supported their verdict. *Id.*

The affidavit contains extraneous prejudicial information. The affidavit would not have been evidence that the Government could have admitted during either its findings case or sentencing case. The document contains a few pieces of information not otherwise before the members, but we find the affidavit, even if read by the panel, would not have had an impact on the verdict or sentence. Most of the information in the affidavit was presented at trial by the civilian investigator who investigated Appellant's misconduct. This same investigator is referred to as the source of much of the information in the affidavit. While the affidavit contains a few additional details about file sharing networks and computers not testified to at trial, we find these details would not have influenced the panel's findings. Similarly, reading the affidavit's conclusion concerning probable cause would not have been prejudicial, given the other evidence available to the members.

By **[*31]** far the most damning evidence came from the analysis of Appellant's computer after it was seized. An analysis of the Appellant's computer showed he had the sole user profile and that profile was used to search for and look at child pornography. We conclude that it was not reasonably possible that the extraneous evidence influenced the members' verdict and, therefore, the presumption of prejudice has been rebutted.

Post-Trial Processing Delays

Appellant argues, citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006), that unreasonable post-trial delay warrants relief. Appellant further cites United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), noting this court's broad power and responsibility to affirm only those findings and sentence that should be approved.

HN8[] We review de novo whether an appellant has been denied the due process right to speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before this court. Moreno, 63 M.J. at 142. The *Moreno* standards continue to apply as a case continues through the appellate process; however, the *Moreno* standard is not violated when each period of time used for the **[*32]** resolution of legal issues between this court and our superior court is within the 18-month standard. United States v. Mackie, 72 M.J. 135, 135-36 (C.A.A.F. 2013); *see also* United States v. Roach, 69 M.J. 17, 22 (C.A.A.F. 2010). However, when a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and *Moreno*. *See* United States v. Arriaga, 70 M.J. 51, 56 (C.A.A.F. 2011). Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." United States v. Mizgala, 61 M.J. 122, 129 (C.A.A.F. 2005); *see* Barker, 407 U.S. at 530.

This case was originally docketed with this court on 22 June 2011, and our initial decision was issued on 9 April 2013, over 21 months later. We then *sua sponte* reconsidered our decision and issued an opinion on 22 July 2013, 25 months after the initial docketing. Both decisions exceeded the *Moreno* standards and were, therefore, facially unreasonable. Our opinions did not address the presumptively unreasonable delay.

Conducting that analysis now, we note that Appellant did not make a demand for speedy appellate processing and thus did not reference any prejudice he suffered from the delay.[13] HN9[] When there is no showing of prejudice under the fourth factor, "we will find a due process violation only when, in balancing the **[*33]** other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in the initial processing of this case to not be so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. We are convinced that even if there is error, it is harmless beyond a reasonable doubt.

The time between our superior court's action to return the record of trial to our court for our action and this decision has not exceeded 18 months; therefore, the *Moreno* presumption of unreasonable delay is not triggered and we do not examine the remaining *Barker* factors. **[*34]** *See Id. at 136*; *Toohey, 60 M.J. at 102*.

HN10[] A finding of harmless error does not end the inquiry, as we may grant sentence relief under Article 66(c), UCMJ, *10 U.S.C. § 866(c)*, for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, *10 U.S.C. § 859(a)*. *Tardif, 57 M.J. at 224*; *see also United States v. Harvey, 64 M.J. 13, 24 (C.A.A.F. 2006)*. In *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, we identified a list of factors to consider in evaluating whether *Article 66(c), UCMJ*, relief should be granted for post-trial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to Appellant or to the institution, if relief is consistent with the goals of both justice and good order and discipline, and can this court provide any meaningful relief. *Id.* No single factor is dispositive and we may consider other factors as appropriate. *Id.*

After considering the relevant factors in this case, we determine that no relief is warranted. Although the initial delay exceeded the *Moreno* standard by seven months, no other time period exceeded the standards. Even analyzing the entire period from the time the case was first docketed until today, we find there was no bad faith or gross negligence **[*35]** in the post-trial processing. The reason for the delay after our initial decision was to allow this court and our superior court to fully consider a constitutional issue of first impression concerning whether the Secretary of Defense has the authority under the *Appointments Clause*[14] to appoint civilian employees to the service courts of criminal appeals. Subsequent delays were the result of a thorough analysis of the casefile,[15] and providing the parties the opportunity to fully brief the evolving case law regarding general verdicts in child pornography cases.[16] Based on these facts, we find no evidence of harm to the integrity of the military justice system.

Based on our review of the entire record, we conclude that sentence relief under *Article 66, UCMJ*, is not warranted.

Conclusion

The specifications of the Charge and Additional Charge are hereby consolidated into one specification that reads as follows:

> In that AIRMAN FIRST CLASS CHARLES N. YOHE, United States Air Force, 55th Security Forces Squadron, Offutt Air Force Base, Nebraska, did, **[*36]** at or near Offutt Air Force Base, Nebraska, between on or about 25 March 2008 and on or about 8 October 2009, wrongfully and knowingly possess and view one or more visual depictions of minors engaged in sexually explicit conduct, which conduct was prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

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[13] We reject Appellant's intimation that, because the Secretary of Defense's appointment of the civilian employee was invalid and of no effect, the *Moreno* clock was not tolled by our earlier decisions. We thus decline to consider the time from initial docketing on 22 June 2011 until this opinion as uninterrupted for purposes of analysis under *Moreno*.

[14] *U.S. Const. art II § 2, cl. 2*.

[15] The review by this court uncovered the extraneous matters included in Prosecution Exhibit 4 that Appellant and the Government had overlooked.

[16] *See United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012) overruled by United States v. Piolunek, 74 M.J. 107 (C.A.A.F. 2015)*.

With this modification, the findings and the sentence are **AFFIRMED**.

End of Document

APPENDIX I

United States v. Nichlos

United States Navy-Marine Corps Court of Criminal Appeals

September 18, 2014, Decided

NMCCA 201300321

Reporter
2014 CCA LEXIS 691 *

UNITED STATES OF AMERICA v. SHANE A. NICHLOS, FIRECONTROLMAN SECOND CLASS (E-5), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Review denied by *United States v. Nichlos, 2015 CAAF LEXIS 572 (C.A.A.F., Apr. 22, 2015)*

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 17 April 2013. Military Judge: CDR John A. Maksym, JAGC, USN. Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan. Staff Judge Advocate's Recommendation: LCDR Maryann M. Stampfli, JAGC, USN.

Core Terms

files, hard drive, video, military, digital, space, child pornography, images, Specification, portable, unallocated, retrieve, laptop, downloaded, seizure, apartment, accessed, deleted, depiction, user, girls, legal insufficiency, sexual, personnel, argues, knowingly, forensic, variance, reasonable expectation of privacy, inevitable discovery

Case Summary

Overview
HOLDINGS: [1]-Appellant did not have an expectation of privacy in a portable hard drive left in the common area of a friend's apartment and did not gain such an expectation at the time a good friend was directed to deliver it to security personnel; [2]-The military judge did not err in finding that the portable hard drive would inevitably have been discovered after the Naval Criminal Investigative Service began in investigation based on information received from the good friend regarding the contents of the hard drive; [3]-The determination that appellant knowingly possessed three video files located in unallocated space was erroneous, because there was no evidence that he had the ability to retrieve such files or that he had downloaded and viewed those files; [4]-No substantial right of appellant was materially prejudiced by the military judge's failure to defined the word "lascivious."

Outcome
Set aside in part, affirmed in part.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN1[] **Judicial Review, Standards of Review**

A military court of criminal appeals reviews a military judge's denial of a suppression motion under an abuse of discretion standard and considers the evidence in the light most favorable to the prevailing party. The military court of criminal appeals reviews the military judge's factfinding under the clearly erroneous standard and his conclusions of law under the de novo standard. The military court of criminal appeals will find an abuse of discretion if the military judge's findings of fact are clearly erroneous or his conclusions of law are incorrect.

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

HN2[] Judicial Review, Standards of Review

If a military judge does not make explicit findings of fact and conclusions of law, the military court of criminal appeals accords him less deference.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

HN3[] Search & Seizure, Scope of Protection

The *Fourth Amendment* protects the persons, houses, papers, and effects of individuals against unreasonable searches and seizures. *U.S. Const. amend. IV*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against an accused if the accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

HN4[] Search & Seizure, Expectation of Privacy

To determine whether an appellant had a reasonable expectation of privacy in a think, a military court of criminal appeals applies a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN5[] Search & Seizure, Unlawful Search & Seizure

A seizure is unlawful if it was conducted, instigated, or participated in by military personnel or their agents and was in violation of the United States Constitution as applied to members of the armed forces. Mil. R. Evid. 311(c)(1), Manual Courts-Martial. Whether an individual is acting as a Government agent depends on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. More explicitly, there must be clear indices of the Government's encouragement, endorsement, and participation to implicate the *Fourth Amendment*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN6[] Search & Seizure, Scope of Protection

The *Fourth Amendment* prohibits only "meaningful interference" with a person's possessory interests, not Government action that is reasonable under the circumstances.

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN7[] Search & Seizure, Unlawful Search & Seizure

Evidence obtained as a result of an unlawful seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made. Mil. R. Evid. 311(b)(2), Manual Courts-Martial. When routine procedures of a law enforcement agency would have discovered the same evidence, the inevitable discovery rule applies even in the absence of a prior or parallel investigation. The inevitable discovery exception to the exclusionary rule exists to ensure that the Government is not placed in a worse position than it would have been had no law enforcement error taken place.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts

Martial > Evidence > Weight & Sufficiency of Evidence

HN8 **Judicial Review, Standards of Review**

A military court of criminal appeals reviews questions of legal and factual sufficiency de novo. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. The test for factual sufficiency is whether the appellate court is convinced of an appellant's guilt beyond a reasonable doubt, allowing for the fact that the appellate court did not personally observe the witnesses. The term "reasonable doubt" does not mean that the evidence must be free of any conflict. When weighing the credibility of a witness, this court, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie. Additionally, the members may believe one part of a witness's testimony and disbelieve another.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

HN9 **Sex Crimes, Child Pornography**

"Knowing possession" for purposes of child pornography is defined as requiring the possession to be both knowing and conscious.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN10 **Sex Crimes, Child Pornography**

For evidence to be legally sufficient on a constructive possession theory, a person must exercise "dominion or control" over the child pornography digital files.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

HN11 **Sex Crimes, Child Pornography**

The factors outlined in Dost are used in determining whether an image portrays a "lascivious exhibition." A military court of criminal appeals reviews the Dost factors with an overall consideration of the totality of the circumstances. Furthermore, it is the prerogative of the fact-finder to decide whether images of child pornography contain actual minors. That decision may also be made based on a review of the images alone, without expert assistance.

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

HN12 **Sex Crimes, Child Pornography**

The Dost factors for determining whether an image portrays a "lascivious exhibition" are: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13 **Plain Error, Definition of Plain Error**

If an appellant did not object to a military judge's instruction, a military court of criminal appeals reviews for plain error. To meet his plain error burden, the appellant must show that: (1) there was error; (2) the error was plain or obvious; and, (3) the error materially prejudiced the appellant's substantial rights.

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN14[] **Courts Martial, Sentences**

A dramatic change in the penalty landscape gravitates away from the ability to reassess the sentence.

Counsel: For Appellant: Maj John J. Stephens, USMC.

For Appellee: Maj Paul M. Ervasti, USMC; Capt Matthew M. Harris, USMC.

Judges: Before F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON, Appellate Military Judges. Chief Judge MITCHELL and Judge FISCHER concur.

Opinion by: M.K. JAMISON

Opinion

OPINION OF THE COURT

JAMISON, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of knowingly possessing child pornography in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*. The members sentenced the appellant to reduction to pay grade E-1, confinement for a period of six months, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence.

The appellant alleges four assignments of error: (1) that the military judge abused his discretion in failing to suppress evidence obtained from the appellant's portable hard drive — as well as all derivative evidence — based on **[*2]** an unconstitutional seizure; (2) that his conviction for knowing possession of child pornography is legally and factually insufficient; (3) that his conviction for knowing possession of child pornography in Specification 2 is legally and factually insufficient because the digital images that served as the basis for his conviction do not meet the statutory definition of child pornography; and, (4) that the military judge committed plain error by failing to define the term "lascivious" in his instructions to the members.

After careful consideration of the record, the pleadings of the parties, and the excellent oral argument by both parties,[1] we find merit in part of the appellant's second assignment of error and conclude that the evidence is legally insufficient to support a conviction for knowing possession of child pornography under Specification 1 of the Charge. Thus, we will set aside the finding of guilty to Specification 1 and dismiss that specification in our decretal paragraph. *Arts. 59(a)* and *66(c)*, UCMJ.

I. Background

The appellant was stationed at U.S. Fleet Activities Sasebo, Japan, aboard USS ESSEX (LHD **[*3]** 2). Following his promotion, the appellant was required to find off-ship living accommodations. He secured a lease at an apartment building. While waiting for his lease to start, he stayed with a friend, Fire Controlman Second Class (FC2) SW. The appellant was given a spare bedroom in which to sleep and store his personal belongings. Other petty officers also stayed at FC2 SW's apartment. The apartment had a common area that was used as a "crash pad" and "an awful lot of people" would use the apartment as a place to "hang out." Record at 92.

Intelligence Specialist Third Class (IT3) MD, a good friend of FC2 SW, also stored personal belongings at FC2 SW's apartment. On Thursday, 12 May 2011, IT3 MD picked up his laptop computer, a computer game, and several portable computer hard drives from FC2 SW's apartment. This gear had been stored in the common area of the apartment. One of the hard drives that he believed was his and took with him was made by Western Digital. He brought his laptop, the portable hard drives, and other electronic media to his new apartment.

A day or so later, IT3 MD wanted to watch a movie. Knowing that he had movies stored on his Western Digital hard drive, he accessed **[*4]** it and immediately realized it was not his hard drive, because he saw approximately 50 thumbnail images of young nude girls. He specifically recollected viewing an image of several young nude girls arranged in a cheerleader-type pyramid. Disturbed by the images he saw and initially thinking that he had inadvertently grabbed a portable hard drive belonging to FC2 SW, his good friend, IT3 MD accessed the root directory and ascertained that the hard drive belonged to the appellant.

The following Monday, still disturbed by the images he

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[1] We granted and heard oral argument on the appellant's first assigned error.

had seen, IT3 MD sought guidance from the ship's legalman chief and was advised to speak with the ship's security department. After informing security department personnel that he believed he had a portable hard drive with suspected child pornography, IT3 MD was told to retrieve the hard drive and bring it back to security department personnel.

Security department personnel contacted the Naval Criminal Investigative Service (NCIS) regarding IT3 MD's allegations and then turned the portable hard drive over to the NCIS. Special Agent LG received the Western Digital hard drive at approximately 1405 on Monday, 16 May 2011. At approximately 1430, IT3 MD signed **[*5]** a written sworn statement for Special Agent JP, who was working the case with Special Agent LG. *See* Appellate Exhibit IX.

At approximately 1730 that same day, NCIS agents interviewed the appellant. During that interview, the appellant gave consent to search his workspace aboard ESSEX, his living space at FC2 SW's apartment, and all his electronic media, to include his iPhone. He accompanied the NCIS agents to FC2 SW's apartment and cooperated fully throughout the process.

In addition to the Western Digital hard drive, NCIS agents seized the appellant's Alienware laptop and iPhone, along with other electronic media. The appellant's electronic media items were sent to the Defense Computer Forensic Laboratory (DCFL) for forensic analysis. Forensic analysis revealed video files and digital images of child pornography on the appellant's laptop. It also revealed digital images of child pornography on the appellant's portable hard drive. Additional facts necessary for the resolution of particular assignments of error are included below.

II. Suppression of the Appellant's Portable Hard Drive

In his first assignment of error, the appellant argues that the military judge abused his discretion by **[*6]** failing to suppress the evidence obtained from the appellant's portable hard drive and all derivative evidence. Specifically, he argues that the military judge erred by relying on the inevitable discovery exception to the exclusionary rule in concluding that the evidence was admissible. The appellant argues that the inevitable discovery exception is not applicable under these facts because at the time of the seizure, the Government was not actively pursuing a case that would have inevitably led to the discovery of the evidence. Appellant's Brief of 21 Jan 2014 at 25. We disagree.

HN1[↑] We review a military judge's denial of a suppression motion under an abuse of discretion standard and "consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)* (quoting *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996))*. We review the military judge's "factfinding under the clearly erroneous standard and [his] conclusions of law under the *de novo* standard." *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)* (citations omitted). We will find an abuse of discretion if the military judge's "findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.*

HN2[↑] Because the military judge did not make explicit findings of fact and conclusions of law, we accord him less deference. **[*7]** We begin our analysis by exploring whether the appellant had a reasonable expectation of privacy in the portable hard drive that he had left in the common area of FC2 SW's apartment.

1. *Reasonable Expectation of Privacy*

HN3[↑] The *Fourth Amendment* protects the "persons, houses, papers, and effects" of individuals against unreasonable searches and seizures. *U.S. CONST. amend. IV*. "'Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against an accused if: . . . The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.'" *United States v. Salazar, 44 M.J. 464, 466-67 (C.A.A.F. 1996)* (quoting MILITARY RULE OF EVIDENCE 311(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)).

HN4[↑] To determine whether the appellant had a reasonable expectation of privacy in the contents of his portable hard drive, we apply "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation **[*8]** be one that society is prepared to recognize as 'reasonable.'" *United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006)* (quoting *Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* (Harlan, J., concurring)).

Despite the fact that the appellant had a bedroom at FC2 SW's apartment and stored his laptop there, he chose to leave his portable hard drive in an area where, by his own admission, "an awful lot of people" would "hang out" and access one another's electronic media. Record at 92. The hard drive was neither labeled nor password protected. It was also similar to other portable hard drives located in the common area, to include the hard drive belonging to IT3 MD as evidenced by the fact that he mistakenly took it. Additionally, the ease by which IT3 MD accessed the appellant's portable hard drive and its child pornography images is further evidence that the appellant did not have a reasonable expectation of privacy in this hard drive. *See* United States v. Rader, 65 M.J. 30, 34 (C.A.A.F. 2007) (stating that within the context of personal computers "courts examine whether the relevant files were password-protected or whether the defendant otherwise manifested an intention to restrict third-party access") (citation and internal quotation marks omitted)); United States v. Barrows, 481 F.3d 1246, 1249 (10th Cir. 2007) (holding that Barrows's "failure to password protect his computer, turn it off, or take **[*9]** any other steps to prevent third-party use" demonstrated a lack of subjective expectation of privacy).

Based on the facts of this case, we conclude that the appellant did not have a subjective expectation of privacy in his portable hard drive left in the common area of FC2 SW's apartment. Additionally, we conclude — at least with regard to the various Sailors who had unfettered access to FC2 SW's apartment and common area — that the appellant's expectation of privacy was not objectively reasonable.

In this case, the military judge appeared to conclude that at the time IT3 MD took the portable hard drive, the appellant had no expectation of privacy because he had left it in the common area. Record at 136. However, as the testimony and facts developed, the military judge appeared to conclude that once IT3 MD was directed to retrieve the appellant's hard drive, IT3 MD became a Government actor and this resulted in the appellant developing a reasonable expectation of privacy. *Id.* at 140. We disagree and hold that the appellant did not gain a reasonable expectation of privacy at the time IT3 MD was directed to deliver the hard drive to security personnel. We nonetheless continue our analysis, assuming **[*10]** *arguendo* that the appellant had a reasonable expectation of privacy in his hard drive and consider the appellant's argument that the seizure was unconstitutional and a violation of MIL. R. EVID. 316.

2. *Seizure of Portable Hard Drive*

HN5[↑] A seizure is unlawful if it was conducted, instigated, or participated in by "[m]ilitary personnel or their agents and was in violation of the [United States] Constitution as applied to members of the armed forces." MIL. R. EVID 311(c)(1). Whether an individual is acting as a Government agent depends "'on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances.'" United States v. Daniels, 60 M.J. 69, 71 (C.A.A.F. 2004) (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-15, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)). More explicitly, there must be "clear indices of the Government's encouragement, endorsement, and participation . . . to implicate the *Fourth Amendment*." Skinner, 489 U.S. at 615-16.

The appellant correctly concedes that when IT3 MD initially accessed the appellant's hard drive, he did so as a private actor. Record at 128, 132. Accordingly, none of the appellant's constitutional or regulatory rights were violated at that point. *See* United States v. Wicks, 73 M.J. 93, 100 (C.A.A.F. 2014) (stating that it is "well-established" that "search and seizure rules do not apply to searches conducted by private parties") **[*11]** (citations omitted)).

The appellant instead argues that IT3 MD became a Government actor once he retrieved the portable hard drive and turned it over to the ship's security personnel at their request. The appellant further argues that, as a Government actor, IT3 MD performed an unlawful warrantless seizure of the hard drive as the appellant had a legitimate privacy and possessory interest in the hard drive. Appellant's Brief at 24-25. We disagree.

The appellant premises his argument on the Government's concession at trial that IT3 MD became a Government actor and on the holding of the Court of Appeals for the Armed Forces (CAAF) in *Daniels. Id.* at 22-23. Our review of the record reveals that any concession by the Government came only after the military judge had ruled that IT3 MD had become a Government actor.[2] Record at 127-28.

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[2] MJ: So, essentially what the Government is conceding here, to their credit, is that the Security Department say[s], "Go get this thing," right?

ATC: Yes, Your Honor.

MJ: All right.

ATC: And—

As for the comparison to *Daniels*, we find **[*12]** the facts in that case clearly distinguishable. In *Daniels*, Seaman Apprentice (SA) V told his leading chief petty officer, Chief W, that the previous evening Daniels had held up a vial and told SA V that the vial contained cocaine. Daniels had then put the vial in the top drawer of his nightstand. Based on SA V's report, Chief W directed that he retrieve the vial. Within this context, it was Chief W's order that triggered SA V's seizure of the contraband from an area in which Daniels had a reasonable expectation of privacy.

Unlike *Daniels*, this case is not one in which contraband was seized following an order from a Government official; rather IT3 MD accessed the appellant's portable hard drive as a private actor and discovered what he believed to be contraband. At the time he reported his suspicions to security department personnel, IT3 MD had already independently collected the hard drive absent a request from Government officials to do so. The Government did not encourage, endorse, or participate in any of IT3 MD's actions and the ship's security department personnel only instructed IT3 MD to retrieve the hard drive from his apartment once he sought advice of what to do with an item **[*13]** that he believed contained contraband. Accordingly, we hold that the direction by the ship's security department personnel did not rise to the level of constituting "clear indices of Government encouragement, endorsement, and participation" in the challenged seizure.[3] *Daniels, 60 M.J. at 71* (quoting *Skinner, 489 U.S. at 615-16*).

Assuming *arguendo* that IT3 MD did become an agent, we hold that the seizure was not unreasonable under these facts. First, it was reasonable for the ship's security personnel to direct IT3 MD to retrieve the hard drive from his apartment based on the fact that it contained suspected contraband. Second, it was temporary in nature and totaled no more than four hours before the appellant gave consent to its seizure and search.

HN6[↑] The *Fourth Amendment* prohibits only "meaningful interference" with **[*14]** a person's possessory interests, not Government action that is reasonable under the circumstances. *See United States v. Place, 462 U.S. 696, 706, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)* (stating that "brief detentions of personal effects may be so minimally intrusive of *Fourth Amendment* interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime"); *United States v. Visser, 40 M.J. 86, 90 (C.M.A. 1994)* (holding a seven-day hold on Visser's military household goods shipment for purposes to obtain a civilian search warrant was reasonable Government action); *United States v. Garcia-Lopez, 16 M.J. 229, 231 (C.M.A. 1983)* (stating that "[l]aw enforcement authorities can properly take reasonable measures to assure that, until reasonable investigative steps can be completed, evidence is not destroyed, crime scenes are not disarranged, and suspects do not flee.") (quoting *United States v. Glaze, 11 M.J. 176, 177 (C.M.A. 1981))* (additional citations omitted); MIL. R. EVID. 316 (d)(5) (authorizing "temporary detention of property on less than probable cause").

After careful consideration, we find that even assuming IT3 MD became a Government actor and seized the appellant's hard drive within the meaning of MIL. R. EVID. 316, the seizure was reasonable under the circumstances and did not violate the appellant's *Fourth Amendment* rights. We last address the military judge's **[*15]** ruling relying on the inevitable discovery exception to conclude that the evidence was admissible.

3. *Inevitable Discovery Exception to Exclusionary Rule*

In this case, the military judge apparently found that there had been an unreasonable seizure and that the appellant gained a reasonable expectation of privacy in his portable hard drive once IT3 MD became a Government actor. Finding a constitutional and regulatory violation of the appellant's rights, the military judge nevertheless ruled the evidence admissible based on the inevitable discovery exception to the exclusionary rule. Record at 147.

The appellant argues that the military judge abused his discretion because the inevitable discovery exception is not applicable under these facts. Appellant's Brief at 25.

MJ: He's their agent.

ATC: Your Honor —

MJ: He acts like an agent, he dressed like an agent, he's got the look of an agent. Guess what he is? An agent

Record at 127.

[3] During oral argument, the appellate defense counsel conceded that if IT3 MD would have brought the hard drive with him when he initially sought guidance from USS ESSEX personnel, there would have been no unconstitutional seizure. Based on the particular facts of this case, we do not find a legal distinction between the two situations because IT3 MD had already taken possession of the hard drive, examined it, and secured it in his apartment.

Citing various cases from our superior court that address the inevitable discovery exception, the appellant argues that there was no evidence that the Government was actively pursuing leads or evidence at the time IT3 MD was directed to retrieve the hard drive from his apartment. *Id.* We disagree.

HN7[] Evidence obtained as a result of an unlawful seizure may be used when the evidence "would have been obtained even if such unlawful **[*16]** search or seizure had not been made." MIL. R. EVID. 311(b)(2). When routine procedures of a law enforcement agency would have discovered the same evidence, the inevitable discovery rule applies even in the absence of a prior or parallel investigation. *See* *United States v. Owens, 51 M.J. 204, 210-11 (C.A.A.F. 1999)*. The inevitable discovery exception to the exclusionary rule exists to ensure that the Government is not placed in a worse position than it would have been had no law enforcement error taken place. *See* *Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)* (holding that the Government must show by a preponderance of the evidence that Government agents would have inevitably discovered the evidence by legal means); *cf.* *Hudson v. Michigan, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)* (stating that "[s]uppression of evidence, however, has always been our last resort, not our first impulse").

Once IT3 MD left the ship to retrieve the portable hard drive from his apartment, security department personnel contacted NCIS regarding IT3 MD's allegation. As a result, NCIS opened an investigation prior to having received the hard drive. Additionally, once IT3 MD returned with the hard drive, it was immediately turned over to Special Agent LG (at approximately 1400). At approximately 1430, IT3 MD provided a sworn statement to Special Agent JP. AE IX. No NCIS agent accessed the appellant's **[*17]** hard drive prior to interviewing either IT3 MD or the appellant. Thus, there was no governmental search in this case until the appellant gave consent. Special Agent LG relied on information provided by IT3 MD as to how he obtained the hard drive, what he saw, and how he found out that it belonged to the appellant. Based only on the information he received from IT3 MD, Special Agent LG interviewed the appellant and requested his consent to search the hard drive and his other electronic media items.

Contrary to the appellant's argument, we find that under the facts of this case, the military judge did not abuse his discretion in applying the inevitable discovery exception to the regulatory exclusionary rule. MIL. R. EVID. 311(a)(2). The preponderance of the evidence establishes that once Special Agent LG was informed of IT3 MD's allegations that the appellant's portable hard drive contained suspected child pornography, which IT3 MD had discovered in his private capacity, NCIS began an investigation. Special Agent LG interviewed IT3 MD and about three hours later interviewed the appellant. But for the appellant's freely and voluntarily given consent, it is reasonable that NCIS would have requested **[*18]** a search authorization of the appellant's hard drive. In this regard, the appellant does not contend that IT3 MD's sworn statement was lacking in probable cause sufficient to secure a search authorization. In fact, he conceded this issue. Record at 132. We agree and find sufficient probable cause within IT3 MD's sworn statement that NCIS could and would have secured a search authorization.[4] MIL. R. EVID. 315; *see* *United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005)* (stating that probable cause means that there is a "fair probability" that contraband "will be found in a particular place").

Accordingly, we find no error by the military judge in applying the inevitable discovery exception to the facts of this case.

III. Factual and Legal Sufficiency

In his second assignment of error, the appellant argues that his conviction for knowingly possessing child pornography is factually and legally insufficient. First, the appellant argues that since the three charged video **[*19]** files from his Alienware laptop computer were found in unallocated space the evidence was insufficient to prove "knowing possession." Second, the appellant argues that because the digital images from his hard drive were found among nearly a thousand adult pornography images, this was insufficient to prove knowing possession. We address first the appellant's sufficiency argument with regard to the three video files found on his Alienware laptop (Specification 1) prior to moving to his sufficiency argument of the digital images recovered from his hard drive (Specification 2).

HN8[] We review questions of legal and factual

[4] We note that Special Agent LG testified that he ultimately sought and received a search authorization subsequent to the appellant's Article 32, UCMJ, pretrial investigation. Record at 63. He sought a search authorization because he believed that the appellant may revoke his consent. *Id.*

sufficiency *de novo*. United States v. Winckelmann, 70 M.J. 403, 406 (C.A.A.F. 2011). The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. Id. at 325.

The term "reasonable doubt" does not mean that the evidence must be free of any conflict. United States v. Rankin, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). When weighing the credibility of a witness, **[*20]** this court, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie. United States. v. Goode, 54 M.J. 836, 844 (N.M.Crim.Ct.App 2001). Additionally, the members may "believe one part of a witness's testimony and disbelieve another." United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979).

1. *Factual and Procedural Background*

Prior to conducting our sufficiency analysis, we need to recapitulate the factual and procedural background to frame the appellant's argument. While deceptively simple in appearance, the appellant's argument in combination with the Government's evidence and the military judge's variance instruction makes this a complicated issue requiring extensive contextual analysis. We begin with the Government's charging theory and move to the evidentiary posture of this largely circumstantial case.

The Government preferred three specifications alleging the appellant's knowing possession of child pornography on or about 16 May 2011:[5] three video files from the appellant's laptop (Specification 1); three digital images from the laptop (Specification 2); and, nine digital images from the appellant's portable hard drive (Specification 3). Following the presentation of the Government's case-in-chief, **[*21]** the appellant moved for a finding of not guilty under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Record at 1515. The appellant's argument was that the evidence was insufficient to prove knowing possession in that the video files and some of the digital images had been forensically retrieved from the unallocated space of the appellant's laptop and portable hard drive with no evidence as to when the files were created, accessed, or deleted.

The military judge partially agreed and acquitted the appellant of the three digital images that served as the basis for Specification 2. With regard to Specification 3, the military judge acquitted the appellant of seven digital images, which had been retrieved from the unallocated space on the appellant's portable hard drive.[6] Because only images 8 and 9 had been retrieved in allocated space, the military judge allowed the members to consider these two images and the members convicted the appellant of this specification.

With regard to Specification 1, the members asked several questions that required the court to reassemble. Following extensive deliberation, the members convicted the appellant of knowing possession of the three video files except for the words "16 May 2011" and substituting the words "3 March 2011."[7]

2. *Prosecution Theory and Evidence (Video Files)*

We first address Specification 1 and the three charged video files that were retrieved from unallocated space on the appellant's laptop. The appellant does not contest that the girl in the three video files is, in fact, a minor. Appellant's Brief at 7 n.26. Additionally, this minor is clearly involved in a sexual act and each video file is of the same minor girl.[8] The trial counsel played a fourth video file pursuant to MIL. R. EVID. 404(b) of the same minor girl. This movie clip had a superimposed annotation in the middle of the screen with the following: "Jenny 9yo all clips."[9] It was this linkage to "Jenny 9yo"

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[5] For reasons that will become apparent, the Government's decision to charge a date certain is critical to our analysis on the question of knowing possession.

[6] Following the motion for a finding of not guilty, original Specification **[*22]** 3 became Specification 2.

[7] As part of the instructions on findings, the military judge gave the members a variance instruction that the members could go back up to 150 days from the date alleged on the charge sheet. Record at 1774-75.

[8] The charged video files depict a prepubescent girl, partially bound at her legs, performing oral sex on an adult male who is fondling her vaginal area. The files are twenty-one, twenty-six, and six seconds in length. *See* Prosecution Exhibit 1.

[9] The Government played this video file in its opening statement and the trial defense counsel subsequently stipulated that the video shown had the superimposed title

that provided **[*23]** the strongest circumstantial evidence of the appellant's knowing possession of the three video files in unallocated space appearing to portray "Jenny 9yo."

The Government presented a circumstantially strong case that the appellant had, at some point, received, downloaded, and viewed child pornography videos. The Government called Ms. SH, a forensic expert with the Defense Computer Forensic Laboratory DCFL. In addition to her testimony, the Government relied on the forensic exploitation of the appellant's laptop, portable hard drive, and iPhone to present its case.

First, the Government offered Prosecution Exhibit 3, a DCFL forensic report of the appellant's **[*24]** iPhone. This exhibit contained three cookies revealing that on 24 December 2010, the appellant had used the Google search engine and searched for and accessed a website responsive to the appellant's search term: "9yo Jenny pics."[10]

Second, the Government offered PE 4, a list of property files from LimeWire that contained the most recently downloaded files to the appellant's laptop. **[*25]** [11] These LimeWire property files were retrieved from unallocated space on the appellant's laptop; however, the search terms that the appellant entered and downloaded were highly indicative of child pornography and some of the downloaded files contained the unique naming convention "9yo Jenny" in various permutations. Because the LimeWire files were retrieved in unallocated space on the appellant's laptop, Ms. SH was not able to retrieve any digital files that matched the digital files from the LimeWire download.[12] Ms. SH testified that the file names in the LimeWire download were downloaded onto the appellant's laptop; however, because these files were retrieved from unallocated space, the only information attainable was the digital file names themselves.

Third, the Government offered PE 5, a list of the appellant's recently accessed video files. Ms. SH conducted a search of the appellant's laptop for the most recently viewed movie files in the .mov and .qt format.[13] Whenever a user accesses a movie or video file that contains the file extension .mov or .qt, a link file is automatically created by the program. Record at 1417. A link file creates a shortcut for the user and allows the user to "double-click" on that file to access and view that particular video file. Ms. SH testified that even if the underlying digital file is deleted, the link file still exists on the computer. Additionally, Ms. SH testified that although she was not able to find the underlying video files associated with the link files, she was able to testify that at some **[*27]** point in time, these files had been viewed. *Id.* at 1418. Of the ten recently viewed files that contain the .mov extension, three of them include the title "9yo Jenny." PE 5.[14]

The Government's theory was that the appellant had an interest in child pornography and a particularly unusual interest in images or video files that contained "9yo Jenny," the same prepubescent girl depicted in the

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"Jenny 9yo all clips." Record at 1438. As discussed *infra*, the three videos that form the basis of Specification 1 were not labeled.

[10] A cookie is a text file that is created when an individual uses e.g. the Google search engine. In this case, the appellant's iPhone contained three cookies that contained "9yo Jenny pics." *See* PE 3, Cookies 183, 366, and 374; Record at 1394-1400. One type of cookie is a UTMA cookie (# 183), which was placed on the appellant's iPhone when he visited the actual website. *Id.* at 1396. This cookie is updated with each subsequent visit and a UTMA cookie remains on the device for two years. *Id.* at 1397. The other type of cookie on the appellant's phone was a UTMZ cookie (# 366 and 374). This is a campaign cookie. This type of cookie is used to assist the web site to determine how the user accessed the web site, e.g. through Google or another type of search engine, because some search engines receive pay for facilitating digital searches. *Id.*

[11] LimeWire is a file-sharing program that allows users to share files stored on their respective computers with other LimeWire users. *Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481, 494 (S.D.N.Y 2010)*. When a LimeWire user wants to locate digital files or videos, the user enters "search criteria into the search function on LimeWire's interface." *Id.* LimeWire then searches the computers of the various users for files that match the search criteria and then the user downloads these files onto his or her computer. **[*26]** *Id.*

[12] The testimony of both the Government and the defense expert was that there appeared to be a mass download onto the appellant's laptop in 2009 using the LimeWire program and that at some point in 2009, the LimeWire program had been deleted. The 26 September 2009 date on PE 4 "indicates when LimeWire was last accessed. It does not indicate that's the date those files were downloaded." Record at 1506.

[13] Movie or video files that contain either the .mov or .qt file extension are for the software program QuickTime by Apple. Record at 1416-17.

[14] The three link files with the .qt file extension also contains a reference to "9yo Jenny." That file is titled: 9yo dog full jenny mpg sucking, loli 11yo 20minute hard.qt. PE 5.

charged video files. Based on the evidence and expert testimony that the appellant had used his iPhone on 24 December 2010 to actively search for and access the website purportedly containing "9yo Jenny pics," this served as a circumstantial link to the charged video files of "9yo Jenny."

There is no question that the appellant possessed child pornography; the question is whether the appellant "knowingly possessed" child pornography *on* the charged date. Having concluded that the Government presented a **[*28]** circumstantially strong case that at some point in time while the appellant owned his laptop, he had received, downloaded, viewed, and knowingly possessed child pornography, we turn next to the Government charging decision. Although the Government's case as to knowing possession may have been circumstantially strong, the decision to charge "on or about 16 May 2011" became the Government's evidentiary Achilles heel.

3. *Unallocated Space and Knowing Possession (Video Files)*

Because of its charging decision, the Government was required to prove that the appellant "knowingly possess[ed]" the three charged video files (01864590.mpg; 01864588.mpg; and, 01864901.mpg) "on or about 16 May 2011." Accordingly, the critical issue we must now decide is not whether the appellant knowingly possessed these video files at any time from the date he acquired his computer until the date NCIS seized it. Instead, we must decide whether the appellant knowingly possessed the three charged video files retrieved from unallocated space on or about 16 May 2011. Based on binding precedent from the CAAF, we conclude that he did not. To support our conclusion, we first consider the technical aspects associated with unallocated **[*29]** space prior to considering whether a computer user can "possess" a digital file, either actually or constructively, if that file exists only in the unallocated space of a computer.

According to the Government's expert witness, Ms. SH, unallocated space is the location on the computer where files are stored after having been permanently deleted. When a user permanently deletes a digital file that file continues to exist on the computer; however, it exists in unallocated space until the file is overwritten. Once a digital file is in unallocated space, the metadata associated with that file is stripped away (e.g. its name, when it was accessed, when it was viewed, when it was created, or when it was downloaded). Record at 1391. Ms. SH's testimony is consistent with federal courts that have defined unallocated space. *See* United States v. Hill, 750 F.3d 982, 988 n.6 (8th Cir. 2014) ("Unallocated space is space on a hard drive that contains deleted data, *usually emptied from the operating system's trash or recycle bin folder*, that cannot be seen or accessed by the user without the use of forensic software") (quoting United States v. Flyer, 633 F.3d 911, 918 (9th Cir. 2011)); United States v. Seiver, 692 F.3d 774, 776 (7th Cir. 2012) (stating that when one deletes a file, that file goes into a "trash" folder; when one empties the "trash folder" the file has not **[*30]** left the computer because although the "trash folder is a wastepaper basket[,] it has no drainage pipe to the outside"; the file may be "recoverable by computer experts" unless it has been overwritten), *cert. denied sub nom Seiver v. United States, 133 S. Ct. 915, 184 L. Ed. 2d 703 (2013)*.[15]

The CAAF has defined what constitutes "knowing possession" for purposes of possession of child pornography. *See* United States v. Navrestad, 66 M.J. 262, 267 (C.A.A.F. 2008). To constitute "knowing possession" for purposes of child pornography, the CAAF imported the definition of possession from the President's definition of "possess" in Article 112a, UCMJ.[16] *Id.*; *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 37c(2). Because Navrestad did not have actual possession or constructive possession of child pornography under that definition, the CAAF held that the evidence was legally insufficient. *Id. at 268*.

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[15] Digital files found in unallocated space or slack space have also been referred to as "orphan files" because "it is difficult or impossible to trace their origin or date of download." United States v. Moreland, 665 F.3d 137, 142 n.2 (5th Cir. 2011) (citing United States v. Kain, 589 F.3d 945, 948 (8th Cir. 2009) (stating that "[o]rphan files are files that were on the computer somewhere saved but were subsequently deleted, so the computer doesn't know exactly where they came from")).

[16] Following the presentation of the evidence, the military **[*31]** judge gave the following definition of "possession" to the members: "'Possessing' means exercising control of something. Possession may be direct physical custody like holding an item in one's hand or it may be constructive as in the case of a person who hides something in a locker or a car which the person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item." Record at 1758.

In this case, the Government presented no evidence that the appellant had the required forensic tools to retrieve digital files from the unallocated space of his computer. In fact, Ms. SH testified that once a digital file is in unallocated space, a user does not have the ability to access that digital file. Record at 1449. Because the appellant was unable to access any of the video files in unallocated space, he lacked the ability to exercise "dominion or control" over these files. *Navrestad, 66 M.J. at 267*; *see Flyer, 633 F.3d at 919* (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession on **[*32]** or about the date charged in the indictment); *see also United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006)* (holding that in situation in which "a defendant lacks knowledge about the cache files and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over those images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control"); *United States v. Moreland, 665 F.3d 137, 154 (5th Cir. 2011)* (holding that the evidence was legally insufficient to sustain conviction for possession of child pornography in which Government failed to prove dominion and control over the digital images and citing cases for the proposition that the evidence is legally insufficient to show constructive possession based solely on the fact that the accused possessed the computer, "without additional evidence of the [accused's] knowledge and dominion or control over the images").

Having defined ***HN9***[⬆] "knowing possession" for purposes of child pornography as requiring the possession to be both "knowing and conscious," *Navrestad, 66 M.J. at 267*, we hold that the appellant did not "knowingly possess" any of the three charged videos **[*33]** on the date charged (16 May 2011).[17]

Bound by *Navrestad*, we also conclude that the evidence was legally insufficient to prove constructive possession on the date charged. The CAAF has held that ***HN10***[⬆] for the evidence to be legally sufficient on a constructive possession theory, a person must exercise "dominion or control" over the child pornography digital files.[18] *Id. at 267*. Based on the technical aspects associated with unallocated space, Ms. SH's testimony, and a lack of any evidence presented that the appellant was a sophisticated computer user in possession of the forensic tools necessary to retrieve digital files from unallocated space, we conclude that the evidence is legally insufficient to prove knowing possession on or about the charged date of 16 May 2011. We move next to evaluate the legal sufficiency of Specification 1 with regard to the 3 March 2011 date that the members substituted for the original date on the charge sheet.

4. *Members' Verdict*

Following the appellant's partially successful motion for a finding of not guilty under R.C.M. 917 with regard to proving "knowing possession" on the date reflected on the charge sheet, the Government requested a variance instruction. Record at 1708. The military judge was open to a variance instruction, but indicated that he would not go back two years (presumably to the 2009 LimeWire download). After some discussion, the military judge agreed to give the members a variance instruction that they could go back for up to 150 days from the date alleged on the charge sheet.[19] *Id.* at 1774-75. The 150-day variance **[*35]** supported the Government's theory that within this period, the appellant searched and accessed "9yo Jenny pics" based on his 24 December 2010 iPhone Google search and that this evidence

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[17] Factually, this case is similar to *Flyer* in that all images of child pornography charged in Flyer's indictment had been retrieved from unallocated space. The *Flyer* court agreed with the general proposition that one way to exercise dominion and control over a digital **[*34]** file would be to delete that file; however, that alone was insufficient to prove knowing possession on the date indicated on the indictment. *633 F.3d at 919*. Because the Government was unable to prove that on the date alleged in the indictment Flyer was able to access or retrieve any of the child pornography digital images, the evidence was legally insufficient.

[18] *But cf. United States v. Carpegna, 2013 U.S. Dist. LEXIS 115002 at *14 (D. Mont. Aug. 14, 2013)* (distinguishing Carpegna's acts of deleting contraband from the facts in *Navrestad* and *Flyer* based on the fact that Carpegna "knew enough about the presence of the images on the laptop to 'hit delete' after he was finished viewing them").

[19] "If you have any reasonable doubt relative to the time alleged on the charge sheet, 16 May 2011, but you are satisfied beyond any reasonable doubt that the offense was committed at a time that differs slightly from the exact date on 16 May 2011, you may make minor modifications in reaching your findings by what we call exceptions and substitutions, that is excepting or cutting out certain language in a specification or date, and substituting language or dates so long as the alteration of that date does not exceed more than 150 days prior to 16 May 2011." Record at 1774-75.

circumstantially proved constructive possession given the unique association with the "9yo Jenny" naming convention. PE 3.

Based on our review of the record, it is evident from the questions by the members during deliberation that the date on the charge sheet was a cause for concern. The members first asked the military judge whether Specification 1 required a specific time frame or whether they could remove the date "16 May 2011" entirely **[*36]** from Specification 1. AE CXXXV. The military judge responded by reiterating the 150-day variance instruction. Record at 1809. After further deliberation, the members asked the military judge to define the meaning of "on or about" and asked whether "on or about" in Specification 1 could encompass the time period from the date when the appellant reported to USS ESSEX until 16 May 2011. AE CXXXVI. In response, the military judge instructed the members that "on or about" means a short time period not to exceed 30 days and that any time period beyond 30 days would constitute variance. Record at 1815. Following additional deliberation, the members convicted the appellant by excepting the date "16 May 2011" and substituting the date "3 March 2011."

Having already concluded that the evidence was legally insufficient to convict the appellant for knowing possession on or about 16 May 2011, we must assess whether any evidence supports constructive possession of the video files on or about 3 March 2011. Based on our careful review of the record we conclude that it does not.

Because the 3 March 2011 date was not argued or emphasized by either party at trial, we are left to speculate how the members **[*37]** arrived at that particular date. Two possibilities emerge, one more likely than the other. The only evidence discussed on the record that references 3 March 2011 is within the context that this was the date the appellant password-protected or changed the password on his laptop. *Id.* at 1579. The more likely scenario is the fact that 3 March 2011 is referenced in the document containing the link files to the most recently viewed video file by the appellant. *See* PE 5. There was no discussion in the record as to the significance of the 3 March 2011 date in PE 5 as to what particular video files were viewed. A review of the record reveals that the significance of that date was that it represented "the most recent time any file of that type (.mov or .qt) was accessed, not when the specific files in question were accessed." *See* PE 6 for Identification at 12. Because there was no testimony or evidence presented regarding the 3 March 2011 date, we cannot rule out that the members may have interpreted that particular date as the date that the appellant viewed every one of those video files containing the .mov format. If that were true, this case would be a much stronger case in terms of legal and factual sufficiency. That, **[*38]** however, is not an accurate premise. In fact, based on PE 6 for Identification, the 3 March 2011 date could be the most recent time that the appellant accessed *any* video file in the .mov file format. In this regard, the 3 March 2011 date, bereft of any evidentiary or testimonial linkage, fares no better than the charged date of 16 May 2011.

With regard to the 3 March 2011 date, no evidence was presented to demonstrate: (a) when the video files were deleted; (b) when or how the videos were downloaded; (c) when they were viewed; or, (d) whether the appellant knew enough about computers to understand that when one deletes a file, it is not permanently deleted, but exists in unallocated space. Ms. SH was only able to testify that the videos had been on the computer at some point and then deleted. Neither Ms. SH nor the defense expert were able to testify with any degree of scientific certainty when the videos had been deleted from allocated space on the appellant's laptop.

Accordingly, we hold that under the unique facts and circumstances of this case and bound by *Navrestad*, the evidence was legally insufficient to prove that the appellant knowingly possessed the three charged video files **[*39]** on the date alleged in the charge sheet or the date that the members found the appellant guilty by exceptions and substitutions. Accordingly, we will set aside the finding of guilty as to Specification 1.[20]

It is important to note that these results are predicated only upon *the particular facts of this case* and how the Government chose to charge the offense. In this case, the Government built a strong circumstantial web that the appellant searched for, downloaded, viewed, and possessed child pornography video files; however, the web contained no connective tissue to the specific date

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[20] Because we set aside the finding as to Specification 1 as legally insufficient, this obviates our need to consider whether the military judge gave a fatal variance instruction. *See United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014) (holding that the test for material variance is whether the variance "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense") (citation and internal quotation marks omitted).

in question.[21]

5. *Images **[*40]** 8 and 9*

The appellant argues that because only two digital images of child pornography were found on his portable hard drive in allocated space amongst thousands of adult pornography images, the evidence is factually and legally insufficient to prove knowing possession. We disagree.

Based on our review of the record, the appellant's 2009 LimeWire download, the fact that he viewed videos in the .mov and .qt video format containing titles highly suggestive of child pornography, and the fact that he had four video files of child pornography that had at one point been extant on his computer, we conclude that images 8 and 9 were not inadvertently downloaded by mistake or through a massive download of adult pornography. Ms. SH testified that the images of child pornography on the portable hard drive had been downloaded from the appellant's laptop. Accordingly, we reject the appellant's argument that he did not knowingly possess Images 8 and 9, which were located in *allocated* space on his portable hard drive.

Factual and Legal Sufficiency of Images 8 and 9

In appellant's third assignment of error, he alleges that Images 8 and 9 found on the Western Digital hard drive do not meet the statutory **[*41]** definition for child pornography.

The Government charged that the appellant knowingly possessed child pornography in violation of *Article 134*, UCMJ, clause (2). Although it is not required to do so under clause (1) and (2), the Government chose to allege child pornography as defined by *18 U.S.C. § 2256(8)*, the Child Pornography Prevention Act (CPPA). The military judge instructed the members as to the definition of child pornography that mirrored *18 U.S.C. § 2256(8)*.[22]

In *United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006)*, the CAAF adopted ***HN11***[↑] the factors outlined in *United States v. Dost* in determining whether an image portrays a "lascivious exhibition."[23] We review the *Dost* factors with an overall consideration of the totality of the circumstances. *Roderick, 62 M.J. at 430*. Furthermore, it is the prerogative of the fact-finder to decide whether images of child pornography contain actual minors. *United States v. Wolford, 62 M.J. 418, 423 (C.A.A.F. 2006)*. That decision may also be made based on a review of the images alone, without expert assistance. *Id.*

Image 8 in PE 1

Image 8 depicts a young girl who is clearly a minor receiving cunnilingus. It is clear from the young girl's physical and facial features that she is a minor. Additionally, it is apparent from the image that a sexual act is occurring and the image itself provides sufficient evidence to enable a reasonable fact-finder to find guilt beyond a reasonable doubt. *Wolford, 62 M.J. at 423*.

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[21] We express no opinion as to whether digital evidence found and retrieved in unallocated space can be used to circumstantially prove constructive possession.

[22] "Again, 'child pornography' is defined as means of any visual depiction including any photograph, film, video, picture or computer, or computer-generated image or picture, whether made or produced by electronic, mechanical or other means of sexually explicit conduct where: A. the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

'Minor' and 'child' mean any person under the age of 18 years.

'Sexually-explicit conduct' means actual or simulated of the following:

> (a) Sexual intercourse or sodomy including genital-to-genital, oral-to-genital, anal-to-genital, or oral-to-anal, between persons of the same or opposite sex;
>
> (b) Bestiality;
>
> (c) Masturbation;
>
> (d) Sadistic or masochistic abuse; or,
>
> Lascivious (e) lascivious **[*42]** exhibition of the genitals or pubic area of any person."

Record at 1762.

[23] *United States v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986)*, *aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987))*. ***HN12***[↑] The "*Dost* factors" are: "(1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Roderick, 62 M.J. at 429* (quoting **[*43]** *Dost, 636 F. Supp. at 832*).

The appellant concedes that image 8 depicts a sexual act. Expert testimony was not necessary for a panel of competent members to come to a conclusion that the female pictured in image 8 is a minor based on viewing the image and listening to the military judge's instruction on the definition of child pornography. We are likewise convinced beyond a reasonable doubt that the sexual act depicted in image 8 meets the CPPA definition of child pornography as defined by the military judge's instruction.

Image 9 in PE 1

Image 9 depicts at least four fully nude young girls with what appears to be two more nude girls bending over behind them forming a pyramid. The appellant concedes that the girls depicted are minors. From the manner in which the girls are positioned, their breasts and genital areas are clearly and fully displayed **[*44]** and their genitals appear to be the focal point of the image. We agree with the assertion of both parties that this appears be a cheerleader pyramid. *See* Appellant's Brief at 56-57; Government Brief of 21 Apr 2014 at 26. Furthermore, we agree with the Government's assertion that cheerleaders and school-age girls are well-known subjects of hypersexual fantasy and are widely depicted in various forms in adult pornography. Government's Brief at 26. Accordingly, image 9 satisfies the majority of the *Dost* factors and based on the "totality of the circumstances," *Roderick, 62 M.J. at 430*, a reasonable fact-finder could conclude beyond a reasonable doubt that the image meets the definition of "sexually explicit conduct" under the CPPA. Additionally, we are convinced beyond a reasonable doubt that image 9 meets the definition of child pornography.

Failure to Instruct on Definition of "Lascivious"

In his fourth assignment of error, the appellant argues that the military judge erred when he failed to further define the word "lascivious." ***HN13***[] Because the appellant did not object to the military judge's instruction, we review for plain error. *See United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)*. To meet his plain error burden, the appellant must show that: "(1) there was **[*45]** error; (2) the error was plain or obvious; and, (3) the error materially prejudiced [the appellant's] substantial right[s]." *Id. at 193-94* (citation and internal quotation marks omitted). Under the facts of this case, the appellant cannot meet his burden of establishing plain error.

Our plain error analysis of the military judge's failure to provide a definition of "lasciviousness" begins with a determination of whether the omission was error. The military judge provided instructions to the members by reading the CPPA statutory definition of child pornography. Record at 1762. He further instructed the members that they could ask any questions about definitions in his instruction. Absent any indication from the members that there was confusion on the specific term "lascivious," we find that there was no error on the part of the military judge for failing to *sua sponte* provide a definition of the term. Furthermore, the appellant provides no evidence that the term "lascivious" was outside the common understanding of the members. Thus, if error it was not obvious.

Assuming *arguendo* that the military judge erred in failing to provide a definition of "lascivious" and that it was obvious error, no substantial **[*46]** right of the appellant was materially prejudiced. Unlike the facts in *United States v. Barberi, 71 M.J. 127, 129 (C.A.A.F. 2012)*, the appellant in this case never claimed at trial that the images in question were not child pornography. Trial defense counsel's theory at trial was that the images were downloaded accidentally as part of a mass download of adult pornography. Thus, the appellant cannot meet his burden to demonstrate plain error.

Sentence Reassessment

Because of our action on the findings and the principles outlined in *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, *United States v. Cook, 48 M.J. 434, 438 (C.A.A.F. 1998)*, and *United States v. Sales, 22 M.J. 305, 307-09 (C.M.A. 1986)*, conducting a reassessment of the sentence would not be an appropriate option within the context of this case. ***HN14***[] "A 'dramatic change in the penalty landscape' gravitates away from the ability to reassess" the sentence. *United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)* (quoting *United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003))*.

We find that there has been a dramatic change in the penalty landscape and do not believe that we can reliably determine what sentence the members would have imposed. *Riley, 58 M.J. at 312*.

Conclusion

The finding of guilty to Specification 1 of the Charge is set aside and that specification is dismissed. The

findings of guilty to the Charge and Specification 2 of the Charge are affirmed. The sentence is set aside. We return the record to the Judge Advocate General for remand to an appropriate CA with a rehearing **[*47]** on the sentence authorized.

Chief Judge MITCHELL and Judge FISCHER concur.

APPENDIX J

United States v. Kamara

United States Navy-Marine Corps Court of Criminal Appeals

May 21, 2015, Decided

NMCCA 201400156

Reporter
2015 CCA LEXIS 214 *

UNITED STATES OF AMERICA v. ARNOLD C. KAMARA, GUNNERY SERGEANT (E-7), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 5 December 2013. Military Judge: LtCol Eugene H. Robinson, Jr., USMC. Convening Authority: Commanding General, 1st MAW, Okinawa, Japan. Staff Judge Advocate's Recommendation: Maj J.M. Hackel, USMC.

Core Terms

images, child pornography, drive, unallocated, space, files, possessed, external, sentence, hard drive, Specification, knowingly, depict, sexual, constitutionally protected, general verdict, devices, thumb

Case Summary

Overview

HOLDINGS: [1]-Two specifications alleging that a servicemember possessed child pornography, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*, had to be modified on appeal before the servicemember's convictions could be affirmed because a DVD that was used to convict the servicemember and was part of the record could no longer be read and the Government's evidence did not show that the servicemember knowingly possessed child pornography on any device other than an external hard drive; [2]-There was no merit to the servicemember's claim that his convictions had to be set aside because the panel returned a general verdict of guilty without specifically indicating which pieces of evidence they relied upon to reach their decision; [3]-The sentence that was approved by the convening authority was appropriate because changes the court made did not dramatically alter the sentencing landscape.

Outcome
The court modified both specifications charging the servicemember with possession of child pornography, affirmed the modified specifications and the charge, reassessed the servicemember's sentence, and affirmed the sentence of a dishonorable discharge and confinement for ten years that the convening authority approved.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Offenses > General Article > General Overview

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > ... > Trial Procedures > Instructions > Elements of the Offense

HN1[] **Courts Martial, Court-Martial Member Panel**

In United States v. Piolunek, the United States Court of Appeals for the Armed Forces ("CAAF") held that its decision in *United States v. Barberi, 71 M.J. 127, 2012 CAAF LEXIS 594*, "was wrongly decided." In Piolunek, which dealt with a general verdict where the evidence contained both proscribed and constitutionally protected

material, the CAAF recognized that properly instructed members are well suited to assess the evidence and make a factual determination whether an image does or does not depict the genitals or pubic region, and is, or is not, a visual depiction of a minor engaging in sexually explicit conduct. Furthermore, absent an unconstitutional definition of criminal conduct, flawed instructions, or evidence that members of a court-martial panel did not follow a military judge's instructions, there is simply no basis in law to upset the ordinary assumption that members are well suited to assess the evidence in light of the judge's instructions.

Evidence > Inferences & Presumptions > Presumptions > Creation

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Presumptions, Creation**

The question of whether a record of trial that is prepared following a trial by court-martial is incomplete is a matter of law which the United States Navy-Marine Corps Court of Criminal Appeals reviews de novo. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Judicial Review, Courts of Criminal Appeals**

Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, states that a military court of criminal appeals may affirm findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN4 **Judicial Review, Standards of Review**

The United States Navy-Marine Corps Court of Criminal Appeals reviews questions of legal and factual sufficiency de novo. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. The test for factual sufficiency is whether the court of criminal appeals is convinced of an appellant's guilt beyond a reasonable doubt, allowing for the fact that it did not personally observe the witnesses.

Military & Veterans Law > Military Offenses > General Article > General Overview

HN5 **Military Offenses, General Article**

The United States Court of Appeals for the Armed Forces has recognized that "knowing possession" as it relates to child pornography means "to exercise control of something." Manual Courts-Martial pt. IV, para. 37c(2).

Counsel: For Appellant: Maj Jason R. Wareham, USMC.

For Appellee: Capt Matthew M. Harris, USMC; LT James M. Belforti, JAGC, USN.

Judges: Before F.D. MITCHELL, K.J. BRUBAKER, M.C. HOLIFIELD, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A panel comprised of both officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*.

The members sentenced the appellant to confinement for ten years and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and ordered it executed.[1]

The appellant now raises three assignments of error (AOEs):

> 1. that the appellant's conviction should be overturned because a general verdict cannot be upheld when the evidence offered to support **[*2]** the charge also includes constitutionally protected content;
> 2. that the appellant's conviction for possessing 14 DVDs containing child pornography cannot be sustained without amendment since one of the DVDs is not viewable; and,
> 3. that the files recovered from "unallocated space" are legally and factually insufficient to sustain the appellant's conviction.

After careful consideration of the record of trial and the submissions of the parties, we find merit in the appellant's second and third AOEs. We will grant relief in our decretal paragraph. We are convinced the findings as amended and the sentence are correct in law and fact and that no error material prejudicial to the substantial rights of the appellant remains. *Arts. 59(a)* and *66(c)*, UCMJ.

Background

On 8 November 2012, an agent of the Naval Criminal Investigative Service (NCIS) executed a valid search authorization in the appellant's workplace and residence. He seized a laptop computer, an external hard drive labeled "G drive," a tower computer, an Iomega external hard drive, and several thumb drives. These devices contained video clips and images of both adults and children engaged in sexual activity. The NCIS agent also retrieved **[*3]** a safe from the appellant's residence; inside were 14 DVDs allegedly containing child pornography.

The contraband uncovered in the appellant's possession depicted children as young as five engaging in oral, vaginal, and anal sex, as well as digital and object penetration of their vaginas and anuses. While some of the evidence also depicted adult pornography and nudist images, the agent estimated at trial that approximately 70% of the images found were child pornography. Record at 459.

Specification 1 of the Charge was based upon images allegedly found on the "external hard drives, computers, and thumb drives." Charge Sheet. The "G drive" contained these images as saved files. The images found on the other devices were located in "unallocated space."[2] The second specification concerned the 14 DVDs. The members received all of the electronic evidence, but it is unknown which DVDs or CDs they viewed during deliberations. One of the DVDs, Prosecution Exhibit 16, will no longer open for viewing.

Prior to closing arguments, the military judge properly instructed the members, *inter alia*, on the definitions of "child pornography," "sexually explicit conduct," and "lascivious." Record at 661-62. He instructed that the evidence must go beyond mere child nudity, and must be "sexually suggestive" and "designed to elicit a sexual response in the viewer." *Id.* at 662. During argument, trial counsel acknowledged that there was adult pornography mixed in with the child pornography, and urged the members to appropriately distinguish between the two when reaching a decision. *Id.* at 692-94. The members returned a general verdict of guilt without specifically indicating which pieces of evidence they relied upon to reach their decision.

Other facts necessary to address the assigned errors will be provided below.

General Verdict

Relying on *United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012)*, the appellant contends that his conviction should be overturned because the members returned a general verdict where the evidence presented contained both child pornography and constitutionally protected material (adult pornography and non-prurient nudist pictures). He claims that, given the possibility the members may have **[*5]** based their verdict on constitutionally protected images, this court cannot affirm the conviction.

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[1] To the extent the CA's action purports to execute the dishonorable discharge, it is a legal nullity. ***United States v. Bailey, 68 M.J. 409 (C.A.A.F. 2009)***.

[2] "Unallocated Space" was defined by the Government's expert as that portion of a disc drive "not currently occupied by file in the systems" and which "often retains information that was previously in **[*4]** a file that has since then been deleted." Record at 587.

We may have found merit in this argument if *Barberi* was still an accurate reflection of the law. HN1[] In United States v. Piolunek, No. 14-0283 & 14-5006, 74 M.J. 107, 2015 CAAF Lexis 313 at *3, (C.A.A.F. Mar. 26, 2015), the Court of Appeals for the Armed Forces (CAAF) held that Barberi "was wrongly decided." In *Piolunek*, which, like the instant case, dealt with a general verdict where the evidence contained both proscribed and constitutionally protected material, the CAAF "recognize[d] that properly instructed members are well suited to assess the evidence and make the . . . factual determination . . . whether an image does or does not depict the genitals or pubic region, and is, or is not, a visual depiction of a minor engaging in sexually explicit conduct." Id., at *8. Furthermore, "[A]bsent an unconstitutional definition of criminal conduct, flawed instructions, or evidence that members did not follow those instructions . . . there is simply no basis in law to upset the ordinary assumption that members are well suited to assess the evidence in light of the military judge's instructions." Id., at *3-4.

Here, the prosecution offered hundreds of images and videos to prove the appellant possessed child pornography. While **[*6]** there was some amount of constitutionally protected content mixed in with the contraband, there is no reason to second-guess the ability of the members to distinguish between the two when reaching a verdict, particularly when the record shows that the military judge instructed them properly and trial counsel cautioned the members to be careful in making the distinction. Accordingly, we are confident that the members were able to properly identify child pornography and distinguish it from other content.

Malfunctioning DVD

Although not styled as such, the appellant's second AOE is a question of whether the record of trial is incomplete. HN2[] This is a matter of law we review *de novo*. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." Id. at 111 (citations omitted).

We find our inability to view Prosecution Exhibit 16 to be tantamount to the DVD being missing from the record, and we find this "omission" to be substantial. HN3[] *Article 66, UCMJ*, states that this court "may affirm findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the **[*7]** entire record, should be approved." The contents of Prosecution Exhibit 16 go to the very heart of the charged misconduct. Without the ability to view the exhibit, we cannot determine whether it did indeed contain child pornography.

In its Answer, the Government claims any prejudice is remedied by the fact it provided this court with copies of all 14 DVDs admitted at trial, including Prosecution Exhibit 16. We cannot agree, as we are unable to discern which of the images in the copies reflect those contained in Prosecution Exhibit 16. The Government also argues that the pictures on the DVD wrapper are sufficient to show that Prosecution Exhibit 16 contains images of child pornography. The pictures are small and of very poor quality. Even if we could find an adequate connection between the wrapper images and the contents of the DVD, the wrapper's pictures do not clearly depict child pornography.

As there is no other substitute for, or sufficient description of, the unviewable DVD, we find the Government has failed to rebut the presumption of prejudice. Accordingly, we cannot affirm a finding of guilt to the specification insofar as it alleges the appellant possessed 14 DVDs containing **[*8]** child pornography.

Files in Unallocated Space

The appellant claims that his conviction of Specification 1 cannot stand as it is based, in part, on files extracted from the unallocated space on the Iomega hard drive, and the Government failed to prove he knowingly possessed those files. We agree, but only to the extent the specification alleges knowing possession of child pornography images on any electronic device other than the "G drive" external drive.

HN4[] We review questions of legal and factual sufficiency *de novo*. United States v. Winckelmann, 70 M.J. 403, 406 (C.A.A.F. 2011). The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987); United States v. Reed, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally

observe the witnesses. *Turner, 25 M.J. at 325*.

1. *The Images*

At trial, the Government's expert testified she reviewed 25 images provided by the NCIS agent. Of those, 19 were in saved files on the appellant's "G drive" external drive. The remaining six were located in unallocated space on the Iomega external **[*9]** drive. The expert also located possible images of child pornography in unallocated space on one thumb drive and the laptop computer. Using evidence of search terms used on 18 September 2012, the expert was able to link the images on the "G drive" to the laptop computer. She was also able to show that the "G drive" and Iomega drives were at some point connected to the laptop. However, due to her inability to discern the filenames of the images in unallocated space on the Iomega drive, the expert could not say when or whether these files were accessed.

2. *Legal Sufficiency*

The elements of possessing child pornography, as charged in the present case, are: (1) that the accused knowingly and wrongfully possessed child pornography; and, (2) that under the circumstances, the conduct of the appellant was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 68b. The Government charged the appellant with possessing the child pornography in question "between on or about 7 October 2012 and on or about 8 November 2012." Charge Sheet.

Viewing the evidence in the light most favorable to the Government, we find that the testimony of the **[*10]** NCIS agent and the Government's computer forensic expert, as well as the images contained in Prosecution Exhibit 1, support a finding that the appellant knowingly possessed child pornography in files found on his "G drive" external drive when it was seized on 8 November 2012. Thus, we find the evidence to be legally sufficient for the images on that electronic device.

We cannot do the same with regards to images found on the other devices. ***HN5***[↑] The CAAF has recognized that "knowing possession" as it relates to child pornography means "'to exercise control of something.'" *United States v. Navrestad, 66 M.J. 262, 267 (C.A.A.F. 2008)* (quoting MCM, Part IV, ¶ 37c(2)). Here, the Government's expert testified she would be unable to view the files found in unallocated space without using some sort of forensic device. The Government presented no evidence to show the appellant possessed or knew how to use such a forensic device. Thus, the existence of the images in unallocated space on the thumb drives, IOMEGA external drive and computers is, alone, legally insufficient to prove the appellant exercised "dominion and control" over the files on the date NCIS seized these devices. *Id.; see United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006)* (holding that in situation in which "a defendant lacks knowledge about **[*11]** the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control").

We find no other evidence in the record to overcome this shortcoming. While the record includes circumstantial evidence indicating the appellant downloaded these images, this evidence does nothing to show the appellant "knowingly possessed" the image during the period charged. *See United States v. Flyer, 633 F.3d 911, 919-20 (9th Cir. 2011)* (citing *Navrestad* and holding that evidence was legally insufficient to prove knowing possession of child pornography in his computer's unallocated space on or about the date charged in the indictment). The Government charged a specific, month-long period during which the appellant allegedly possessed child pornography. However, they produced no evidence to indicate when the appellant accessed the images found in unallocated space. Accordingly, we find the evidence to be legally insufficient to prove the appellant knowingly and wrongfully **[*12]** possessed images depicting child pornography on any devices other than the "G drive" external hard drive.

3. *Factual sufficiency*

Based on a careful review of the record, we are convinced beyond a reasonable doubt both that the appellant knowingly possessed child pornography on the "G drive" external hard drive and that such possession was of a nature to bring discredit upon the armed forces.

Sentence Reassessment

We find no reason to alter the appellant's punishment in this case. Setting aside one of the 14 DVDs and the images found in unallocated space does not dramatically alter the sentencing landscape. *See United*

States v. Buber, 62 M.J. 476 (C.A.A.F. 2006). The remaining evidence includes many dozens of videos involving young children engaging in sexual activity. The nature and gravity of the offenses has not changed. There is no lessening of the appellant's punitive exposure. Applying the analysis set forth in *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, and *United States v. Cook, 48 M.J. 434, 438, (C.A.A.F. 1998)*, we are convinced the members would have imposed the same sentence in the absence of the fourteenth DVD and unallocated space images, and find that the sentence imposed is appropriate.

Conclusion

Accordingly, the finding as to the charge is affirmed. The finding as to Specification 1 is affirmed, excepting the words **[*13]** "external hard drives, computers and thumb drives," substituting therefore the words "his 'G drive' external hard drive." The finding as to Specification 2 is affirmed, excepting the numeral "14" and substituting therefor the numeral "13." The sentence as approved by the CA is affirmed.

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