

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

U N I T E D	S T A T E S,	)	RESPONSE BRIEF ON BEHALF OF
	Appellee	)	APPELLEE
		)	
	v.	)	Crim. App. Dkt. No. 20090446
		)	
Specialist		)	<b>USCA Dkt. No. 12-0099/AR</b>
<b>MATTHEW J. MCCLAIN</b>		)	
United States Army,		)	
	Appellant	)	

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Granted Issue

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO  
SUPPORT APPELLANT'S CONVICTION FOR POSSESSING CHILD  
PORNOGRAPHY.

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

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PORNOGRAPHY

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).<sup>1</sup> This Court has jurisdiction under Article 67(a)(3), UCMJ.<sup>2</sup>

Statement of the Case

A military judge convicted appellant, contrary to his pleas,<sup>3</sup> of possession of child pornography and distribution of visual depictions of minors engaging in sexually explicit conduct to internet users in violation of Article 134, Uniform Code of Military Justice [hereinafter UCMJ].<sup>4</sup> The military judge sentenced appellant to be reduced to the grade of E1, confinement for 14 months and to be discharged from the service with a bad-conduct discharge.<sup>5</sup> The convening authority reduced

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<sup>1</sup> 10 U.S.C. § 866.

<sup>2</sup> 10 U.S.C. § 867(a)(3).

<sup>3</sup> JA 173, 353-54.

<sup>4</sup> Charge Sheet.

<sup>5</sup> JA 355.

appellant's period of confinement to 13 months but otherwise approved the adjudged sentence.<sup>6</sup>

On August 19, 2010, the Army Court affirmed the finding of guilty as to Specification 1 of the Charge, and set aside and dismissed Specification 2 of the Charge.<sup>7</sup>

On December 20, 2011 this Honorable Court partially granted appellant's petition for review.<sup>8</sup>

### Statement of Facts

Appellant raised two pretrial motions prior to entering his pleas. Appellate Exhibit V was a *Motion In Liminie [to] Preclude Government Witness from Rendering Opinions*. Appellate Exhibit IV was a *Motion In Liminie [to] Suppress Results of Search*.<sup>9</sup> The military judge indicated that he would not rule on Appellate Exhibit V when raised, because the government stated that they did not intend to elicit expert testimony from Special Agent [hereinafter "SA"] Sean Devinny on the merits.<sup>10</sup> Appellant's trial defense counsel agreed that the issue was not

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<sup>6</sup> JA 375 Action, (automatic forfeitures were deferred until Action at which time they were waived for a period of six months for the benefit of appellant's dependants).

<sup>7</sup> JA 5.

<sup>8</sup> Appellant requested that this Court grant "The evidence is legally insufficient to support appellant's conviction of possessing child pornography because the fact-finder relied upon Special Agent Devinny's expert testimony, which was erroneously admitted under Military Rule of Evidence 701."

<sup>9</sup> JA 21, 25.

<sup>10</sup> JA 22-24.

ripe at that time and that he would object on the merits if necessary.<sup>11</sup>

After hearing the evidence concerning Appellate Exhibit IV, the military judge questioned SA Devinny concerning his qualifications to discuss SHA1 values.<sup>12</sup> Upon hearing SA Devinny's answers the military judge sua sponte raised the issue of whether SA Devinny was an expert witness and determined that withholding ruling on defense's written motion [Appellate Exhibit V] until the merits was "untenable at th[at] time."<sup>13</sup> The next sixteen pages of the record contain a discussion between the military judge, trial counsel, and trial defense counsel concerning potential expert testimony provided by SA Devinny, notice of expert testimony, and defense argument for the potential of future improper lay testimony.<sup>14</sup> At the end of the discussion, the trial counsel averred that, the government did not intend to qualify SA Devinny as an expert.<sup>15</sup> Even though the trial counsel did not intend to offer SA Devinny as an expert witness, the military judge asked questions to assess

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<sup>11</sup> JA 24.

<sup>12</sup> JA 152-53 (SHA1 value is a 32 digit alpha numeric code that is unique to an individual computer file. Thus if a file is changed in anyway the SHA1 value will also change. JA 33-35).

<sup>13</sup> JA 154.

<sup>14</sup> JA 154-70.

<sup>15</sup> JA 169.

his qualifications to discuss SHA1 values and computers during an Article 39a hearing.<sup>16</sup>

After the aforementioned discussion concerning expert testimony and improper lay testimony, the trial defense counsel confirmed that he had no objection to SA Devinny's previous testimony given during the Article 39a.<sup>17</sup> The military judge then heard argument and issued a ruling on the motion to suppress.<sup>18</sup> Following that ruling, the military judge, again, stated that trial counsel did not intend to submit expert testimony, but if the government attempted to do so, the defense could object and he would rule on it at that time.<sup>19</sup>

SA Devinny provided lay testimony on the **merits**. During his testimony the government introduced and the military judge admitted five videos that contained child pornography.<sup>20</sup> Four of the five videos are specifically charged in Specification 1 of the Charge. During the testimony the military judge sustained a defense objection as to SA Devinny's characterization of the videos as child pornography on the grounds that he was not

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<sup>16</sup> JA 152-53.

<sup>17</sup> JA 170.

<sup>18</sup> JA 170.

<sup>19</sup> JA 172-73 (In addition to not raising an objection at the conclusion of the Article 39a hearing the trial defense counsel did not object during the testimony of SA Devinny at the Article 39a hearing that he was providing improper lay or expert testimony.).

<sup>20</sup> JA 219, 223-25, 232-33, 229-32, 234-35, 232-239.

qualified as an expert in child pornography.<sup>21</sup> The four videos that are the subject of Specification 1 of the Charge were not downloaded directly from appellant's Limewire share folder, but were exact copies of the files located in appellant's shared folder.<sup>22</sup> SA Devinny testified that he believed the copies were the same because each of the files were the same size and file type, and each had the same long title and SHA1 value.<sup>23</sup> SA Devinny did not testify on the merits concerning the scientific significance of any of the similarities. His testimony merely confirmed the similarities. The military judge sustained a defense objection as to the meaning of SHA1 values, stating that the testimony would only be considered to show that the numbers matched.<sup>24</sup> The military judge indicated to trial defense counsel that he could argue that the matching numbers did not mean anything "because there's no expert testimony in front of the court [stating that the SHA1 values do mean anything]."<sup>25</sup>

In addition to SA Devinny's testimony the government introduced evidence showing that the internet protocol (IP) used in this case belonged to appellant, that the downloads occurred while he was assigned to Schofield Barracks, Hawaii, that appellant admits to possession of the four child pornography

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<sup>21</sup> JA 210-11.

<sup>22</sup> JA 211.

<sup>23</sup> JA 214, 219-20, 230-32.

<sup>24</sup> JA 211.

<sup>25</sup> JA 212.

videos listed in Specification 1 of the Charge and possession of such material is likely to bring discredit upon the Armed Forces.<sup>26</sup>

Additional facts necessary for the disposition of the assigned errors are outlined below.

### **Summary of Arguments**

Appellant petitioned this Court to grant one assignment of error that conflated two separate and distinct alleged legal errors with two separate and distinct remedies.<sup>27</sup> This Court should consider all admitted evidence pursuant to the standard for legal sufficiency review set forth in the clear jurisprudence of this Court.<sup>28</sup> In doing so, the Court should determine that the evidence is legally sufficient as to Specification 1 of the Charge, because appellant confessed to downloading the four charged videos of child pornography; the government introduced copies of those videos and connected the videos to appellant's computer and internet connection.<sup>29</sup> Moreover, appellant's in-court testimony concerning his prior sworn statement should not be given any weight as it is stunningly inconsistent and self-serving.

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<sup>26</sup> JA 300, 246, 276-79, 324, 326, 358.

<sup>27</sup> See Supplement to Petition for Grant of Review *United States v. McClain*, dated October 24, 2011 at 2.

<sup>28</sup> See e.g. *United States v. Oliver*, 70 M.J. 64 (C.A.A.F. 2011); *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

<sup>29</sup> JA 356-57, 362 (PE 5), 300, 204.

Lastly, if this Court determines that the alleged evidentiary error raised by appellant outside of the granted issue, then it should determine that issue separate and apart from the legal sufficiency review and determine that the evidence was properly admitted because no expert testimony was offered by the government on the merits. Alternatively, if this Court determines that the evidence was erroneously admitted appellant was not prejudiced in light of the other strong evidence against him.

### **Issue Presented and Argument**

#### **Granted Issue**

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR POSSESSING CHILD PORNOGRAPHY.

#### **Standard of Review and Applicable Law**

The standard of review for questions of legal sufficiency is *de novo*.<sup>30</sup>

The test for legal sufficiency is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>31</sup> In resolving questions of legal sufficiency, this Court is "not limited to

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<sup>30</sup> *United States v. Harmon*, 68 M.J. 325, 327 (C.A.A.F. 2010).

<sup>31</sup> *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995), cert. denied, 516 U.S. 1075 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (internal quotations omitted)).

appellant's narrow view of the record."<sup>32</sup> To the contrary, "this Court is bound to draw every inference from the evidence of record in favor of the prosecution."<sup>33</sup> Such a limited inquiry reflects the intent of this Court to "give[] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."<sup>34</sup> Thus, the standard articulated by *Jackson* alleviates this Court from determining how "lists of circumstantial evidence or negating factors stack up against each other," but rather directs inquiry into "whether reasonable factfinders could have drawn inferences one way or another under a given set of circumstances."<sup>35</sup>

### **Additional Law and Argument**

#### **A. The Appellant's Evidentiary Error is not Before this Court**

Appellant petitioned this Court to grant one assignment of error that conflated two separate and distinct legal errors with two separate and very different remedies.<sup>36</sup> In granting that assignment of error this Court removed the alleged evidentiary

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<sup>32</sup> *Cauley*, 45 M.J. at 356 (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)).

<sup>33</sup> *McGinty*, 38 M.J. at 132 (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

<sup>34</sup> *Oliver*, 70 M.J. 64 (quoting *Jackson*, 443 U.S. at 319).

<sup>35</sup> *Id.*

<sup>36</sup> See Supplement to Petition for Grant of Review *United States v. McClain*, dated October 24, 2011 at 2.

error implicit in the appellant's request.<sup>37</sup> As such, this Court should not consider the merits of evidentiary error alleged in appellant's brief, but should only consider whether the evidence admitted (including SA Dev inny's testimony) is legally sufficient to support Specification 1 of the Charge.<sup>38</sup>

By combining two separate allegations of error, appellant tries to gain a more advantageous remedy than should be granted if the testimony of SA Dev inny was erroneously admitted. If this Court does consider the merits of the alleged evidentiary error and finds that the military judge did abuse his discretion in admitting testimony, then the proper remedy is to allow a rehearing.<sup>39</sup> Thus, even though appellant has raised this issue under the guise of a legal sufficiency assignment of error, it is, if meritorious, a "legal error" and not one that is resultant from the government's failure to bring forth proper evidence at trial. The Supreme Court in *Lockhart v. Nelson*, stated that when an "appellate court vacates a conviction on an error in the trial proceeding, the government is generally free

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<sup>37</sup> See Order Granting Review, *United States v. McClain*, dated 20 December 2011.

<sup>38</sup> See generally *United States v. Hart*, 25 M.J. 143, 146-47 citing *Jackson*, 443 U.S. at 318-19 (indicating that a reviewing court must review all the evidence admitted at trial in determining legal sufficiency of the evidence).

<sup>39</sup> *United States v. Ellyson*, 326 F.3d. 522, 532 (4th Cir. 2003); R.C.M. 1203 and 10 U.S.C. § 867 (Article 67(d)).

to retry the defendant.”<sup>40</sup> This is different from when the government fails to bring forth enough evidence to prevail on a legal sufficiency attack, because the underlying rationale to these claims is that the finding of guilt at trial was incorrect due to a lack of evidence not erroneously admitted evidence.<sup>41</sup>

This distinction is especially important in this case because had the trial judge not allowed SA Devinny to make his comparison to lay the evidentiary foundation to the videos, the government could have qualified him as an expert and elicited the even more damaging testimony of what SHA1 values actually mean.<sup>42</sup>

#### **B. The Evidence as Admitted is Legally Sufficient**

Viewing the evidence in the light most favorable to the government the evidence is legally sufficient to prove the elements contained in Specification 1 of the Charge. In order to prevail the government must prove that:

1. On or about 11 March 2008 at Schofield Barracks, Hawaii, land owned by the United States Government;
2. Specialist Matthew McClain, a member of the United States Army;

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<sup>40</sup> *Lockhart v. Nelson*, 488 U.S. 33, 38-39 (1998).

<sup>41</sup> See *Ellyson*, 326 F.3d. at 532 citing *Burks v. United States*, 437 U.S. 1, 18 (1978) and *United States v. Akpi*, 26 F.3d 24, 25 (4th Cir. 1994).

<sup>42</sup> See generally JA 91 (SA Devinny articulating that SHA1 value has a 1 in 9.2 quintillion accuracy rate during a motion on an interlocutory matter prior to trial).

3. Knowingly possessed four specific videos of child pornography;<sup>43</sup> and

4. Such conduct was likely to bring discredit upon the armed forces.<sup>44</sup>

The government charged this case under alternate theories of liability under Clause 1, 2, and 3 of Article 134.<sup>45</sup> The military judge found appellant not guilty of Clause 1 of Article 134.<sup>46</sup>

The government established that appellant's conduct occurred on or about 11 March 2008 at Schofield Barracks, Hawaii, land owned by the United States Government through both testimony and documentary evidence. First, the government admitted portions of appellant's enlisted record brief establishing that he was a member of the United States Army and was assigned to Schofield Barracks, Hawaii on 11 March 2008.<sup>47</sup> Appellant admits in his sworn statement that he was assigned to Hawaii when he downloaded the "4 videos."<sup>48</sup> Moreover, SA Marc Smith who took appellant's statement testified that appellant stated that he was in his assigned barracks room when he viewed

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<sup>43</sup> See JA 7 for specific titles of the videos.

<sup>44</sup> Appellant does not contest the sufficiency of the last element and thus it is not addressed in this brief.

<sup>45</sup> JA 7.

<sup>46</sup> JA 354.

<sup>47</sup> JA 289, 361.

<sup>48</sup> JA 358 (PE 3), see also JA 299 (appellant admitting assignment to Schofield Barracks during charged period).

the "four files."<sup>49</sup> The government further established that appellant had an internet connection and a personal computer in his barracks room on post on that date, appellant later confirms this same internet connection in his testimony.<sup>50</sup> SA Devinny confirmed, without defense objection, that the location of the barracks room was on land under control of the United States Government.<sup>51</sup> During appellant's testimony he admitted that Schofield Barracks is an Army post.<sup>52</sup> When viewing this evidence and the resultant inferences in favor of the government it is clear that a reasonable trier of fact could find the first two elements beyond a reasonable doubt.

Appellant's primary contention appears to be that the government's case is legally insufficient with regard to knowing possession of child pornography. Appellant's averments that there was no connection between the admitted video and himself, that child pornography was not defined to him before admitting possession, that there was no proof of access to the files, that the videos were not moved from the original download location, and that the U.S. Naval Criminal Investigative Service Report

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<sup>49</sup> JA 280.

<sup>50</sup> JA 362 (PE 5), 300-02.

<sup>51</sup> JA 253.

<sup>52</sup> JA 324.

(hereinafter "NCIS Report") was not admitted, are without merit or not necessary for the government to meet their burden.<sup>53</sup>

First and foremost, appellant admitted in a sworn statement taken by SA Marc Smith to possessing "a couple [sic] files that had underage porn on them." He knew "it was a mistake..." and "didn't say anything before because [he] was scared didnt [sic] want people to think of [him] as one of those people that are on the news that take **kids** and do whatever to them."<sup>54</sup> Appellant is then asked during the interview, "[why] did you download those four child pornography files onto your computer while you were stationed in Hawaii?" He responded "When I was downloading pornography I saw there was child pornography and I was curious."

Appellant's choice of words here is instructive and severely undercuts the appellant's argument that he did not know the difference between adult pornography and child pornography at the time he gave his statement.<sup>55</sup> He clearly draws a distinction between adult pornography and pornography that involves "kids." Appellant believed that reporting what he discovered would land him in the news as "one of those people...that take kids."<sup>56</sup> Appellant freely adopted the term

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<sup>53</sup> See Appellate Brief (AB)19-21.

<sup>54</sup> JA 357 (PE 3) (emphasis added).

<sup>55</sup> AB 21.

<sup>56</sup> JA 357 (PE 3).

child pornography in his statement, appeared to understand what child pornography was and did not ask SA Smith what child pornography was or deny that the pornography that he downloaded contained children during the statement.<sup>57</sup> When viewing the evidence in the light most favorable to the prosecution, appellant's own words and admissions give rise to the inference that he knew what child pornography was and knowingly downloaded it to his computer.

Second, appellant's argument that he did not know what four videos he was admitting to possessing in his sworn statement, is without merit.<sup>58</sup> During SA Smith's testimony, he was shown a copy of the NCIS Report and directed to Section 20 by the military judge.<sup>59</sup> Section 20 of the NCIS report contains the four specific files charged and a description of the videos. In response to the military judge's questions and without objection, SA Smith confirmed that he showed those same four video titles to appellant from the report and appellant admitted to downloading them.<sup>60</sup> When combining the sworn statement with the in court testimony of SA Smith the government clearly established appellant knowingly downloaded and thus possessed

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<sup>57</sup> JA 357-59 (PE 3), 279, 281-82, 285.

<sup>58</sup> AB 21.

<sup>59</sup> JA 364-74 (PE 6 for Identification), 276-79.

<sup>60</sup> JA 276-79, 357 (PE 3), see also JA 282.

the four charged videos. Moreover, appellant believed them to be child pornography.

Appellant argues however, that this Court should look to his denial of possession from his trial testimony to find Specification 1 of the Charge legally insufficient.<sup>61</sup> In light of his statement and the testimony of SA Smith, appellant's trial testimony concerning the nature of the downloaded videos seriously lacks credibility. Appellant testified at trial that he only downloaded one video "possibly containing a sixteen to eighteen year old girl" and he deleted it by clicking the "red X" in the Limewire program.<sup>62</sup> According to his trial testimony, appellant downloaded this video as part of a contest where he and his roommate "would always try to one up each other" with "bizarre sex" videos.<sup>63</sup> This is in stark contrast to his admission of downloading four videos because he was "curious."<sup>64</sup> Moreover he repeatedly referred to the videos as "them" and "those" in his sworn statement and felt "disgusted" with himself for viewing them.<sup>65</sup> The military judge revisited this testimony on the record, pointing out that he previously referred to the videos in the plural, and that appellant had previously lied

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<sup>61</sup> AB 20.

<sup>62</sup> AB 20, JA 310, 313, 327.

<sup>63</sup> JA 313 (emphasis added).

<sup>64</sup> JA 358 (PE 3).

<sup>65</sup> JA 358 (PE 3), 328-29.

under oath.<sup>66</sup> This line of questioning eliminates any confusion that somehow appellant misspoke during his statement and was now just merely clarifying what he previously meant. Moreover, it is simply not relevant as appellant argues that he only viewed the child pornography once, the facts remain - that appellant had child pornography, admitted to viewing it, and then did not delete it or report accidental possession to his chain of command or law enforcement.<sup>67</sup>

Third, appellant's argument that the "quality and materiality" of SA Devinny's testimony alone led to his conviction is without merit.<sup>68</sup> Considering all evidence admitted, as required, SA Devinny's lay opinion testimony concerning the foundation of the admitted videos corroborated appellant's confession along with SA Smith's testimony concerning the confession.<sup>69</sup> SA Devinny was able to see the long video titles, type, size and SHA1 number of the files on appellant's Limewire share folder.<sup>70</sup> While he was unable to download or view the files from appellant's computer, he was able to find other files with the exact same characteristics, which he then downloaded and saved. Those copies were admitted

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<sup>66</sup> *Id.*

<sup>67</sup> AB 20, JA 356-57, 328.

<sup>68</sup> The government addresses the admissibility of the appellant's lay testimony from an evidentiary perspective in Part C. of this brief.

<sup>69</sup> *Hart*, 25 M.J. at 146-47.

<sup>70</sup> JA 214, 219-20, 230-32.

as Prosecution Exhibit (PE) 1, a compact disk with various folders. The evidence is located on that disk in a folder titled "CP videos" with folder "share folder as of 20080311."<sup>71</sup> As admitted these four videos are clearly child pornography especially when drawing all reasonable inferences in favor of the government.

Even if this Court gives little weight to the admitted videos, the testimony of SA Devanny alone corroborates appellant's confession. Mil. R. Evid. 304(g) provides that an accused's extrajudicial admissions or confessions must be corroborated by independent evidence if they are to be considered "on the question of guilt or innocence."<sup>72</sup> Independent evidence is evidence that is not itself derived from the admission or confession being corroborated.<sup>73</sup> Corroborating evidence "need not confirm each element of an offense, but rather must corroborate the essential facts admitted to justify sufficiently an inference of their truth."<sup>74</sup> "Moreover, while the reliability of the essential facts must be established, it need not be done beyond a reasonable doubt or by a preponderance

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<sup>71</sup> JA 215-16.

<sup>72</sup> Mil. R. Evid. 304(g).

<sup>73</sup> *United States v. Arnold*, 61 M.J. 254, 256 (C.A.A.F. 2005) (citing *Opper v. United States*, 348 U.S. 84, 93 (1954)).

<sup>74</sup> *Id.*, 61 M.J. at 257 (quoting Mil. R. Evid. 304(g)) (quotations omitted).

of the evidence."<sup>75</sup> Instead, the quantum of corroborating evidence necessary is "very slight."<sup>76</sup> Mil. R. Evid. 304(c)(2) defines "admission" as a "self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." A "confession" is defined as an "acknowledgment of guilt."<sup>77</sup>

Here SA Devinny's testimony that he was able to observe certain files in the accused's share folder corroborates appellant's confession that he downloaded the four videos of child pornography onto his computer.<sup>78</sup> That is to say, the appellant admitted to downloading four specific videos to SA Smith. Prior to the statement, SA Devinny was able to observe and identify the same four videos (type (videos) and size, and had the same long titles, and same series of numbers (which happened to be called SHA1 values)) on appellant's computer remotely using Limewire.<sup>79</sup> Even though he did not actually view the contents, that observation and subsequent testimony alone provides the "slight evidence" to corroborate appellant's

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<sup>75</sup> *United States v. Seay*, 60 M.J. 73, 79 (C.A.A.F. 2004) (quoting *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997)) (quotations omitted).

<sup>76</sup> *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988).

<sup>77</sup> Mil. R. Evid. 304(c)(1).

<sup>78</sup> JA 209-15.

<sup>79</sup> JA 214, 219-20, 230-32.

confession and provides a separate basis to find Specification 1 of the Charge legally sufficient.<sup>80</sup>

Appellant's attempt to analogize this case to *United States v. Narestad*, is misplaced. In that case, this Court held that possession of a hyperlink on a public computer does not constitute possession of child pornography because the link did not contain "data that is 'capable of being converted' into visual images."<sup>81</sup> The case at bar, is different in both the type and quantum of evidence produced at trial and as such there are no "unknown contingencies" for the Court to deal with.<sup>82</sup> No matter what the government did in *Naverstad*, the hyperlink admitted as the basis for child pornography was not going to be child pornography under the definition in the statute. Whereas in our case, the appellant both admitted to possessing child pornography and the government admitted the videos he admitted to possessing. The Court is required to view the admitted evidence in the light most favorable to the government, which leads to the sole conclusion that the admitted videos are in fact the same videos downloaded or alternatively the confession made to SA Smith in PE 3 is an admission to downloading the videos that SA Deviny saw in appellant's share folder.

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<sup>80</sup> *Melvin*, 26 M.J. at 146.

<sup>81</sup> *United States v. Navrestad*, 66 M.J. 262, 266 (C.A.A.F. 2008) (quoting 18 U.S.C.A. § 2256).

<sup>82</sup> AB 20.

Based on the foregoing Specification 1 and the Charge is legally sufficient.

**C. SA DeVinny's Testimony was Properly Before the Military Judge**

If this Court determines that the evidentiary error raised by appellant is properly before it, then it should determine the evidentiary issue separately from the granted legal sufficiency error.<sup>83</sup>

SA Devinny's testimony was properly admitted because the military judge limited his testimony to that of a lay witness, the witness's testimony relied only on his perceptions and more importantly SA Devinny did not tell the military judge what conclusions to draw based on his perceptions. Because the testimony elicited on the merits concerning SHA1 values is admissible the evidence is the alleged evidentiary error is without merit.

A military judge's evidentiary ruling regarding Military Rule of Evidence (Mil. R. Evid.) 701 is reviewed for an abuse of discretion.<sup>84</sup> Lay opinion testimony is admissible if the "opinions or inferences . . . are (a) rationally based on the perception of the witness, (b) helpful to clear understanding of the witness' testimony or the determination of fact in issue, and (c) not based in scientific, technical, or other specialized

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<sup>83</sup> AB 12-17.

<sup>84</sup> *United States v. Byrd*, 60 M.J. 4, 6 (C.A.A.F. 2004).

knowledge within the scope of Rule 702."<sup>85</sup> The Court must look to the testimony before the fact finder on the merits to determine whether testimony provided by a witness amounts to improper lay opinion.<sup>86</sup> During a trial by military judge alone, the military judge is presumed to know that law.<sup>87</sup> When that judge indicates "he will not consider inadmissible evidence, including expert opinion testimony" a presumption that he will do as he says is created.<sup>88</sup> This presumption can be strengthened by the actions of the military judge.<sup>89</sup> If this Court finds that testimony was improper then it must determine whether appellant was prejudiced.<sup>90</sup>

SA Devinnny's testimony was rationally related to his own perceptions concerning the videos presented to the court. Like the shoe comparison testimony presented in *United States v. Davis*, the testimony here was just a comparison perceived by the

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<sup>85</sup> Mil. R. Evid. 701; see also *Byrd*, 60 M.J. at 11 (Crawford, J., concurring in the result).

<sup>86</sup> See *Generally Discussion Rule for Courts-Martial 803* (Providing that certain interlocutory matters not appropriate for the members should be conducted during an Article 39a session outside of the members' presence. Thus it can be concluded that information offered and obtained in an Article 39a hearing is not before the fact-finder to make a determination of guilt.).

<sup>87</sup> *United States v. Hill*, 62 M.J. 271, 276 (C.A.A.F. 2006).

<sup>88</sup> *United States v. Davis*, 44 M.J. 13, 17 (C.A.A.F. 1996).

<sup>89</sup> *Hill*, 62 M.J. at 276.

<sup>90</sup> *United States v. Roberson*, 65 M.J. 43, 47-48 (C.A.A.F. 2007).

witness.<sup>91</sup> The discovery of the videos and subsequently identifying the duplicates that were admitted in court was done entirely by SA Devinny.<sup>92</sup> As such, SA Devinny was the logical person qualified to lay the foundation to admit the duplicate videos that form the basis of the charged conduct, because he personally conducted the investigation. He presented no testimony on the merits that purports to be expert analysis. In essence, he told the court that he thought the files were the same because they were the same type (videos) and size, and had the same titles, and same number series of numbers (which happened to be called SHA1 values).<sup>93</sup> The military judge made clear that defense could argue SA Devinny's comparison did not mean anything and he was considering the testimony solely as a lay opinion.<sup>94</sup>

Appellant's reliance on the Second and Third Circuit cases *United States v. Throckmorton* and *United States v. Garcia* is misplaced as both cases are distinguishable from appellant's

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<sup>91</sup> *Davis*, 44 M.J. at 17 (In this case, a military police investigator compared the sole of a shoe from an inmate to a footprint taken from an air vent tunnel at the Disciplinary Barracks at Fort Leavenworth, KS through which the appellant was attempting to escape. His testimony established that the shoe print "matches by eye." The Court held that this type of comparison was not expert testimony.).

<sup>92</sup> JA 211-12.

<sup>93</sup> JA 214, 219-20, 230-32.

<sup>94</sup> JA 212-13.

case.<sup>95</sup> In *Garcia*, the witness gave a conclusion (that a criminal partnership existed) based not just on his "personal perceptions but drew on the total information developed by all the officials who participated in the investigation."<sup>96</sup> In the case sub judice, SA Devinny merely stated that he downloaded files that he thought were the same based on several characteristics that do not require any specialized knowledge or scientific or technical ability to observe.<sup>97</sup> He relied on his own observations not the observations of others.

In *Throckmorton*, the witness testified about "owe sheets"<sup>98</sup> and what they are generally, not what he actually perceived. Whereas here, SA Devinny actually observed the similarities between the videos and presented what he perceived to the court. He did not rely on any existing knowledge about the videos to present the testimony. As discussed on the record, SA Devinny's testimony is no different than a witness describing the similarities between copies of the same music CD as he observed them, then saying I thought they were the same because they had the same name.<sup>99</sup> SA Devinny did not testify that the videos were

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<sup>95</sup> See AB at 15-16; *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Throckmorton*, 269 Fed. Appx. 233 (3d Cir. 2008).

<sup>96</sup> *Garcia*, 413 F.3d at 212.

<sup>97</sup> JA 214.

<sup>98</sup> *Throckmorton*, 269 Fed. Appx. at 235 (describing "owe-sheets" as accounting records kept by drug dealers).

<sup>99</sup> JA 212.

the same within any degree of certainty on the merits and thus the military judge was free to make that determination himself. Furthermore, the trial counsel specifically argued he was not offering the titles or the SHA1 values to mean anything specific.<sup>100</sup>

SA Devinny's testimony was helpful to the fact finder and was not considered for an improper purpose. Appellant overstates the testimony of SA Devinny, arguing his testimony "included inferences that draw on the significance of SHA1 values."<sup>101</sup> SA Devinny never indicated that it was his expert opinion that the files were the same. In fact, the military judge ameliorates this argument by clearly limiting the testimony to a comparison stating "I'll sustain the objection as to what SHA1 values mean."<sup>102</sup> The military judge then told trial defense counsel "[n]ow, you can certainly argue that that doesn't mean anything, because there is no expert testimony in front of the court that it does."<sup>103</sup> Each time this issue was raised, the military judge reaffirmed either that he would not consider expert testimony or that the testimony given was permissible lay testimony.<sup>104</sup>

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<sup>100</sup> JA 233.

<sup>101</sup> AB at 16.

<sup>102</sup> JA 211.

<sup>103</sup> JA 212.

<sup>104</sup> JA 212-13, 225-26, 254-55.

These rulings and explanations by the military judge should be weighed in favor of the government. This Court presumes the military judge knows the law and applies it correctly.<sup>105</sup> That presumption is only strengthened by his express statement that there was no expert testimony before the court and further that he was only accepting evidence for the lay purpose of showing that the numbers were identical.

The military judge clearly understood the issue presented by the juxtaposition between testimony received pursuant to Mil. R. Evid. 701 and testimony received pursuant to Mil. R. Evid. 702.<sup>106</sup> Because SA Devinny's testimony was limited by the military judge it amounted to a contemporaneous comparison of two items and did not rely on "scientific, technical, or other specialized knowledge."<sup>107</sup> While it is certainly possible that SA Devinny could have testified as an expert,<sup>108</sup> he did not in this case. Thus, unlike the testimony in *United States v. Oriedo*, *United States v. Grinage*, and *Bank of China v. NBM LLC*, where the witnesses brought their wealth of professional experience to bear on their observations and thus indicated what conclusions to draw from their observations for the jury, the military judge here limited SA Devinny from crossing that line

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<sup>105</sup> *Hill*, 62 M.J. at 276.

<sup>106</sup> JA 154-70, 254-55 (military judge recognizing that witness went into expert testimony and thus disregarded the testimony).

<sup>107</sup> Mil. R. Evid. 701.

<sup>108</sup> JA 152-53.

by accepting only lay testimony. In doing so, the military judge explained that there is no expert testimony before the court, specifically stating how he would consider the evidence and that he would disregard the evidence that he believed crossed the line.<sup>109</sup>

Even if this Court finds that the military judge did abuse his discretion in allowing SA Deviny to testify concerning SHA1 values, appellant was not prejudiced. Prejudice is assessed by "weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."<sup>110</sup> Any prejudicial impact is blunted by the fact that the finder of fact was a military judge and thus the impact of such testimony is substantially less than it could have been before panel members.<sup>111</sup>

The government's case is strong because appellant admits to possessing child pornography.<sup>112</sup> Furthermore, even without the purported expert testimony, SA Deviny still laid the foundation to admit copies of the videos based purely on the lay opinion testimony that they were the same size and type, and had the

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<sup>109</sup> *United States v. Oriedo*, 498 F.3d 593, 603 (7th Cir. 2007); *United States v. Grinage*, 390 F.3d 746, 750 (2nd Cir. 2004); *Bank of China v. NBM LLC*, 359 F.3d 177, 180 (2nd Cir. 2004) see e.g. JA 173, 211-13, 225, 255.

<sup>110</sup> *United States v. Roberson*, 65 M.J. 43, 47-48 (C.A.A.F. 2007).

<sup>111</sup> *United States v. Cobb*, 45 M.J. 82, 87 (C.A.A.F. 1996).

<sup>112</sup> JA 357-58 (PE 3), JA 276-79.

same name.<sup>113</sup> Second, the strength of the defense case remains the same. The defense had an expert assigned to their defense team.<sup>114</sup> The defense was able to attack the evidentiary foundations of the videos<sup>115</sup>, argue that the videos in appellant's share folder were different from the admitted videos,<sup>116</sup> and attack the credibility of appellant's written admissions.<sup>117</sup>

As presented on the merits, the testimony concerning SHA1 values was just one factor considered by the military judge. Nowhere on the **merits** does SA Devinny articulate the numerical significance of the SHA1 values, thus its value as presented was rather low. Since this information is not before the finder of fact it is unlikely that a lack of testimony on the topic would

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<sup>113</sup> JA 219, 223-25, 229-30, 231-32, 234-35, 232-239.

<sup>114</sup> JA 18 (Pretrial Allied Papers, Memorandum, BG Kevin W. Mangum, to CPT Jeremy Larchik, subject: Request for Appointment of an Expert Consultant in the Field of Forensic Analysis to Assist the Defense in United States v. SPC Matthew A. McClain).

<sup>115</sup> See e.g. JA 199 (defense objection to lack of personal knowledge of the witness), JA 210 (defense objection to characterization of the videos as child pornography), JA 212 (defense objection to foundation of videos), JA 247 (only 90 percent of one of the admitted files came directly from appellant's computer), JA 249 (files in the share folder could have been corrupt).

<sup>116</sup> See e.g. JA 211-12 (defense objection to the meaning of SHA1 values and military judge acknowledgment that there is no expert testimony before the court) JA 255 (defense objection that if the file did not come from appellant's share folder it does not come into evidence).

<sup>117</sup> See e.g. JA 271-72 (indicating that not everything discussed was in the statement), JA 274 (appellant did not actually see the video during the interview).

have a material impact on the defense case. Additionally, the military judge stated that he does not consider SA Devinny an expert, limited his testimony, told the defense they could argue SHA1 values mean nothing, and disregarded inappropriate evidence.<sup>118</sup>

### Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the Army Court of Criminal Appeals and uphold the findings and sentence.

  
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<sup>118</sup> JA 211 (military judge acknowledging SA Devinny is not an expert in child pornography), JA 256 (military judge sustaining defense objection and disregarding testimony of SA Devinny that went into expert testimony of a technological nature).

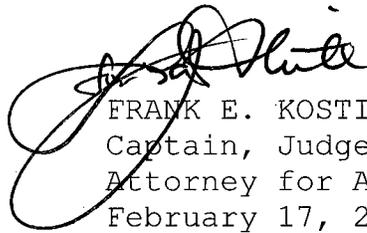
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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing RESPONSE BRIEF ON BEHALF OF APPELLEE was filed electronically with the Court on the 21 day of February 2012 and was delivered to appellate military counsel by electronic means on the 21 day of February 2012.

  
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