IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	) BRIEF ON BEHALF OF APPELLEE
v.	) Crim. App. Dkt. No. 20100112
Sergeant (E-5) **PAUL R. JASPER,** United States Army, Appellant	) USCA Dkt. No. 13-0013/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals [the Army Court] reviewed this case pursuant to Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2008) [hereinafter UCMJ].[1] This Honorable Court has jurisdiction over this matter under Article 67(a), UCMJ.

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of indecent acts with a child and one specification each of indecent acts with another, possession of child pornography, enticing another to engage in sexually

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[1] Joint Appendix [JA] 1-3; Article 66(b), UCMJ.

explicit conduct, receiving child pornography, and obstructing justice, in violation of Article 120 and 134, UCMJ.[2] The panel sentenced appellant to be reduced to the grade of E-1, to forfeiture of all pay and allowances, to be confined for twenty-three years, and to be dishonorably discharged from the service. The military judge credited appellant with ten days of confinement against the sentence to confinement. The convening authority approved only so much of the sentence extending to reduction to E-1, confinement for eighteen years, forfeiture of all pay and allowances, and a dishonorable discharge.[3]

On July 13, 2012, the Army Court affirmed the findings and sentence and amended the convening authority's action by crediting appellant with ten days of confinement against the sentence to confinement. Appellant petitioned this Court for review on September 11, 2012. This Court granted appellant's petition for review on February 5, 2013.

Statement of Facts

A. The Clergy-Penitent Privilege

During pretrial preparations, the trial counsel contacted Pastor Ron Ellyson, a clergyman at the victim's church in Ohio, regarding a 2007 conversation he had with the victim, BK, and

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[2] JA 8-12, 291.
[3] JA 1.

her mother, AJ. Pastor Ellyson disclosed to the trial counsel that BK told him, in effect, that she fabricated allegations against appellant in an attempt to get attention.[4] The trial counsel disclosed that information to the defense counsel on January 15, 2010.[5] On January 26, 2010, appellant requested that the government produce Pastor Ellyson as a witness.[6] The government denied that request based on, *inter alia*, the "priest-penitent privilege" under Military Rule of Evidence [Mil. R. Evid.] 503.[7] On January 30, 2010, appellant moved to compel production of Pastor Ellyson.[8]

At the motions hearing, the trial counsel stated she received the information at issue from Pastor Ellyson, not BK or AJ.[9] She further stated that, at this point, "[t]here hadn't been a discussion with the witnesses in this case about the nature of their contact with Pastor Ellyson, only that [AJ and BK] had talked with [him]."[10] The trial counsel said that after she talked to Pastor Ellyson, she and the assistant trial counsel had "spoken with the witnesses [who] were made aware

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[4] JA 21.
[5] JA 27, 307.
[6] JA 297, 303.
[7] JA 307.
[8] JA 294.
[9] JA 26-27.
[10] JA 27.

that they actually do have a privilege."[11] The defense counsel stated that she had also spoken with Pastor Ellyson.[12] Pastor Ellyson told the defense counsel that he had spoken with BK and AJ and obtained their "permission to speak with anybody regarding [the conversation at issue]."[13] Neither the trial counsel nor the defense counsel indicated that they spoke directly with AJ or BK regarding waiving the privilege.

The military judge informed the parties that he could not "decide this issue without a factual predicate from everybody."[14] To that end, Pastor Ellyson testified telephonically, and AJ and BK testified in person. AJ testified that Pastor Ellyson asked her for permission to speak with the trial counsel and defense counsel.[15] She further testified that Pastor Ellyson never explained to her what it meant "to give him that permission" or that she had a privilege not to disclose the contents of the communication.[16] AJ then asserted the clergy-penitent privilege:

> Q: [Did Pastor Ellyson] tell you that you have a privilege not to disclose that information?
>
> A: No, sir.
>
> Q: Do you understand now that you have a privilege not to disclose that information?

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[11] JA 27.
[12] JA 22.
[13] JA 22.
[14] JA 30.
[15] JA 38.
[16] JA 38-39.

A: I do now.

Q: Do you assert that privilege?

A: Yes, sir.[17]

BK also testified that Pastor Ellyson did not explain that she had a privilege not to disclose the contents of their communication or what the implications of her consenting to disclosure were.[18] BK, too, asserted the clergy-penitent privilege:

> Q: Okay. Now -- and if this is confusing, please let me know if the question is confusing. Since that time in your discussions with myself and/or [the trial counsel], do you understand that you could have told [Pastor Ellyson] not to talk to anybody? That you have a privilege where the communications you made with him could have been kept confidential. Do you understand that?
>
> A: I don't know. I don't really understand what you're saying.
>
> Q: Okay. Do you understand that it is up to you whether or not you want him to be able to talk about the things you told him?
>
> A: Yes.
>
> Q: And you have a privilege to not have him say those things?
>
> A: Yes.
>
> Q: Do you assert that privilege?

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[17] JA 38-39.
[18] JA 41.

A: Yes.[19]

Pastor Ellyson testified that his first contact regarding this case was with the trial counsel.[20] In that conversation, Pastor Ellyson and the trial counsel discussed obtaining consent to disclose from BK and AJ.[21] Pastor Ellyson called his attorney and was advised he needed to get consent from AJ and BK before he could discuss the communication at issue.[22] Based on that advice, Pastor Ellyson called AJ and asked for consent to speak about their communications.[23] AJ "gave [him] permission to tell what [he] knew."[24] Pastor Ellyson admitted, though, that he did not discuss with her what it meant to give permission to disclose the communication at issue, nor did he tell AJ to whom he would be speaking or for what purpose.[25] BK called Pastor Ellyson and left a message "giving [Pastor Ellyson] permission."[26] However, Pastor Ellyson never spoke directly with BK regarding disclosure of their communications.[27] or subsequently spoke with the trial counsel or defense counsel regarding the contents of his communications with BK and AJ.

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[19] JA 41-42.
[20] JA 36.
[21] JA 36.
[22] JA 36.
[23] JA 34, 37-38.
[24] JA 34.
[25] JA 34, 36.
[26] JA 34.
[27] JA 35, 41.

The only issue during this hearing was whether the clergy-penitent privilege was "waived." The military judge and defense counsel engaged in the following exchange:

> MJ: Defense, let me ask you. Do you believe the privilege applies or doesn't apply?
>
> DC: I think it does, Your Honor.
>
> MJ: Okay, so it's a question of whether it's waived or not waived?
>
> DC: Yes, Your Honor.
>
> MJ: Okay, so no dispute about that.
>
> DC: No, Your Honor.

Additionally, the defense counsel agreed that an individual cannot voluntarily waive a privilege that one does not know about.[28] After Pastor Ellyson, BK, and AJ testified, the defense attorney again confirmed her agreement that the privilege was established and that waiver was the only issue.[29] The military judge then ruled that "any testimony of what [BK and AJ] said to Pastor Ellyson in the course of his clergy duties is privileged" and was inadmissible.[30]

B. The Terminal Element

The government charged appellant with six specifications of

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[28] JA 25.
[29] JA 43.
[30] JA 43-44.

violating Article 134, UCMJ.[31] Specification 1 of Charge II and Specifications 1 and 2 of the Additional Charge do not expressly allege the terminal element. During AJ's direct examination, AJ testified about the photographs that formed the basis for Specifications 3 and 4 of Charge II and Specification 2 of the Additional Charge and a text message about the photographs that appellant sent to her.[32] At the end of AJ's direct examination, the following exchange occurred:

> Q: And what do you think about a Soldier in the United States Army doing these things with his stepdaughter?
>
> ADC: Objection.
>
> MJ: Sustained.
>
> ATC: Your Honor, one of the elements the government has to prove is service discrediting. I would think this witness' opinion ----
>
> MJ: That's something the members can infer that element [sic]. Opinion testimony on that by this witness or any witness, I don't believe is appropriate. Objection sustained.[33]

At no point during the trial did the defense counsel object that the specifications at issue failed to state an offense or

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[31] JA 8, 11. While the charge sheet lists two Additional Charges, the Specification of Additional Charge I was amended to allege an Article 134, UCMJ, offense, and became Specification 1 of the Additional Charge. The Specification of Additional Charge II became Specification 2 of the Additional Charge. JA 5 n.3, 18.
[32] JA 92-96.
[33] JA 96-97.

move for a finding of not guilty under Rule for Courts-Martial [R.C.M.] 917.

C. The Child Pornography Offenses

Specifications 2 and 4 of Charge II initially referenced a federal statute, 18 U.S.C. § 2252A - in addition to charging appellant with violating clauses 1 and 2 of Article 134.[34] At arraignment, the government amended those specifications by deleting the statutory language, leaving the specifications as strictly clause 1 and 2 offenses.[35]

At an Article 39(a), UCMJ, session, the military judge and the parties discussed panel instructions. The military judge announced his intent to define "child" as having a "cutoff [age] of 18" for Specifications 2 and 4 of Charge II.[36] The defense counsel objected to that proposed definition.[37] After a long discussion, the military judge ruled that he would instruct the panel that the "cut off age" for child pornography was 18 years old.[38]

Any additional facts necessary to resolve the assignments of error are contained in the argument below.

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[34] JA 8-10.
[35] JA 19-20.
[36] JA 227.
[37] JA 226-27.
[38] JA 233.

Summary of Argument

The military judge did not err in holding that BK's conversation with Pastor Ellyson was privileged and that the privilege was not waived. The defense counsel conceded that the conversation was privileged, so the issue of whether the conversation was privileged is extinguished on appeal. Nevertheless, all three elements of the privilege were met. The Army Court correctly affirmed the military judge's ruling. In doing so, it did not impose a "knowing" element upon Military Rule of Evidence [Mil. R. Evid.] 510(a) as appellant claims.[39] Instead, the Army Court examined the circumstances of the case and properly found that even if a disclosure was made, it was not "under such circumstances that it would be inappropriate to allow the claim of privilege."[40]

With regard to the deficient pleadings, the government erred in failing to expressly allege the terminal element in Specification 1 of Charge II and the Specifications of the Additional Charge. However, appellant is not entitled to relief because he has failed to prove material prejudice to a substantial right. There is notice of the missing element extant in the record, and the terminal element was essentially uncontroverted at trial. Also, while appellant claims material

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[39] Appellant's Br. at 28.
[40] JA 4.

prejudice, he has failed to show how his trial strategy would have changed or how the result would have been different had the terminal element been expressly alleged.

Finally, the military judge did not err in defining "child" with respect to Specifications 2 and 4 of Charge II as a person under eighteen years of age. Although those specifications alleged violations of clauses 1 and 2 of Article 134, the military judge was permitted to refer to federal civilian law in crafting his instructions. Additionally, the UCMJ does not have a universal definition of "child."

Argument

I. WHETHER THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE ACCUSER TO RECLAIM A REGULATORY PRIVILEGE AFTER PREVIOUSLY WAIVING THAT PRIVILEGE AND DISCLOSING THAT THE ACCUSER ADMITTED FABRICATING SOME OF THE ALLEGATIONS AGAINST APPELLANT.

II. WHETHER THE ARMY COURT ERRED WHEN IT CREATED A CONSTITUTIONAL "KNOWING" ELEMENT TO MILITARY RULE OF EVIDENCE 510(a) REQUIRING A PRIVILEGE HOLDER TO BE INFORMED OF THE REGULATORY PRIVILEGE IN ORDER FOR THE DICLOSURE TO BE DEEMED VOLUNTARY.[41]

Standard of Review

A military judge's decision to admit or exclude evidence is

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[41] Because these assignments of error overlap, they are discussed together.

reviewed for an abuse of discretion.[42] Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo.[43] "When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, '[this court] typically [has] pierced through that intermediate level' and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling."[44]

Law and Argument

A. BK's Communication with Pastor Ellyson was Privileged

> In the military justice system, the clergy privilege is one of the most sacred privileges. This privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.[45]

The military judge correctly concluded that BK's communication with Pastor Ellyson was privileged. First, the issue of whether the communication was ever privileged is waived, as appellant twice conceded that the initial communication was privileged. Second, AJ's presence at the

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[42] *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)).
[43] *Id.*
[44] *Id.* (citing *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)).
[45] *Id.* at 33 (quoting *United States v. Benner*, 57 M.J. 210, 212 (C.A.A.F. 2002) (internal quotation marks omitted)).

counseling session between BK and Pastor Ellyson did not vitiate the clergy-penitent privilege.

First, appellant waived the issue of whether BK's communication with Pastor Ellyson was privileged from the outset. When an appellant waives an issue at trial, that issue is extinguished and no longer subject to appellate review.[46] Waiver exists when an appellant intentionally relinquishes or abandons a known right.[47] Here, the military judge twice asked the defense counsel whether she believed the clergy-penitent privilege applied to the communication.[48] The defense counsel stated she thought the privilege applied and that the issue was whether the privilege was waived.[49] By affirmatively stating that she believed the privilege applied, the defense counsel waived that issue, and it is not subject to review.

Because appellant conceded that the communications between BK and Pastor Ellyson were privileged, there was no need to litigate further the issue of whether the government proved the elements of the clergy-penitent privilege. However, assuming *arguendo* that appellant did not waive the issue of whether the privilege initially applied, the government still proved the

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[46] *United States v. Harcrow*, 66 M.J. 154, 156-57 (C.A.A.F. 2008).
[47] *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Olano*, 507 U.S. 725 (1993)).
[48] JA 22, 43.
[49] JA 22, 43.

elements of the clergy-penitent privilege. For that privilege to apply, the following elements must be satisfied:

> (1) the communication must be made either as a formal act of religion or as a matter of conscience;
>
> (2) it must be made to a clergyman in his capacity as a spiritual advisor or to his assistant in his official capacity; and
>
> (3) the communication must be intended to be confidential.[50]

The record contains sufficient evidence to find that the government established the elements of the privilege. AJ testified that she understood Pastor Ellyson to be "[t]he pastor of the Gilead Friends church where we attended."[51] Additionally, the defense counsel and assistant trial counsel both referred to and addressed Pastor Ellyson as "Pastor Ellyson."[52] There is no dispute that Pastor Ellyson is a clergyman. Pastor Ellyson testified that he "needed to get consent to be able to share what [he] recall[ed] from our counseling sessions[.]"[53] That statement shows that Pastor Ellyson was communicating with AJ and BK in his capacity as a clergyman or spiritual advisor. Finally, Pastor Ellyson's testimony regarding the necessity of obtaining consent from AJ and BK and AJ and BK's invocation of the privilege shows that the communications were intended to

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[50] *Shelton*, 64 M.J. at 37.
[51] JA 38.
[52] JA 239, 240, 242-44, 246-47.
[53] JA 36.

remain confidential. Therefore, even if appellant had not waived the issue, the military judge still properly would have found that the communication between BK and Pastor Ellyson was privileged.[54]

B. The Privilege Was Not Waived

Appellant failed to meet his burden to establish waiver of the clergy-penitent privilege. In the alternative, even if BK waived the privilege, that waiver was a nullity because it was not made "under such circumstances that it would be inappropriate to allow the claim of privilege."[55]

1. Appellant failed to establish waiver

There was no waiver because appellant failed to prove that the privilege was waived. Once the party asserting the privilege establishes the existence of that privilege, the burden then "shifts to the opposing party to overcome the presumption of confidentiality."[56] No military court has specifically addressed the issue of which party carries the

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[54] AJ's presence at the counseling sessions did not vitiate the privilege. *See Shelton*, 64 M.J. at 39 ("[T]his privilege is preserved where there is a 'relationship by blood or marriage' as well as a 'commonality of interest'" between the penitent and the third party who was present.) (quoting *In re Grand Jury Investigation*, 918 F.2d 374, 385-88 (3d Cir. 1990)).

[55] Mil. R. Evid. 510(a).

[56] *United States v. McCollum*, 58 M.J. 323, 337 (C.A.A.F. 2003) (internal citations omitted).

burden of overcoming the presumption of confidentiality with respect to the clergy-penitent privilege. However, in *McCollum*, this court addressed that issue with respect to the marital communications privilege. First, this court examined the elements of the spousal communications privilege.[57] Those elements are:

> (1) there must be a communication;
>
> (2) the communication must have been intended to be confidential; and
>
> (3) it must have been made 'between married persons not separated at the time of the communication.'[58]

After examining the elements of the marital communications privilege, this Court wrote that "once the party asserting the marital communications privilege establishes the existence of a private communication between spouses who are not separated, the burden of production shifts to the opposing party to overcome the presumption of confidentiality."[59]

The reasoning of *McCollum* can reasonably be extended to cover the clergy-penitent privilege. The elements of the clergy-penitent privilege and the marital communications privilege are, for all intents and purposes, the same. Both share the purpose of fostering honest communications between

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[57] *Id.* at 336 (citing *United States v. McElhaney*, 54 M.J. 120, 131 (C.A.A.F. 2000)).
[58] *Id.* (citing *McElhaney*, 54 M.J. at 131).
[59] *Id.* at 337.

parties who enjoy a relationship society recognizes as sacrosanct. Both privileges require there to have been a communication between certain parties that was intended to be confidential.[60] The definition of confidentiality is essentially the same for both privileges.[61] Because of those strong similarities, the clergy-penitent privilege should be interpreted in the same manner as the marital communications privilege. Once the clergy-penitent privilege is established, the burden should reasonably shift to the opposing party to establish waiver or another exception to the privilege.

Because appellant conceded that BK's communication with Pastor Ellyson was privileged, there was no further need to litigate that issue and the privilege was established. The burden then shifted to appellant to overcome the presumption of confidentiality. Appellant could have, but did not, overcome that presumption by establishing four critical facts. First, appellant could have asked AJ what she told BK about the nature of Pastor Ellyson's request. Second, appellant could have inquired into the scope of the "permission" that BK gave to Pastor Ellyson - for example, what substantive content from counseling sessions Pastor Ellyson could reveal. Third,

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[60] Mil. R. Evid. 503; Mil. R. Evid. 504(b); *Shelton*, 64 M.J. at 37; *McCollum*, 58 M.J. at 336.
[61] Mil. R. Evid. 503(b)(3); Mil. R. Evid. 504(b)(2).

appellant could have asked BK whether she knew that Pastor Ellyson had disclosed her statement to the trial counsel before calling her or AJ. Finally, appellant could have asked Pastor Ellyson whether he disclosed the privileged communication to the trial counsel or the defense counsel after BK gave "permission."

Appellant did not ask the necessary questions to establish those facts. Without those facts, it would have been unreasonable for the military judge to have found that the privilege was waived or, at the very least, that any waiver extended to the information appellant sought to introduce at trial. Therefore, appellant failed to meet his burden to establish a waived privilege. Because appellant failed to meet that burden, the clergy-penitent privilege was still intact and the contents of BK's communication to Pastor Ellyson were inadmissible.

2. The Army Court correctly held that based on the evidence presented, there was no waiver in accordance with Mil. R. Evid. 510(a)

The Army Court correctly held that the privilege was not waived.[62] While appellant claims that the Army Court imposed a "constitutional 'knowing' element" upon its waiver analysis,[63] a reading of the full opinion shows that not to be the case.

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[62] JA 4.
[63] Appellant's Br. at 28.

Instead, the Army Court held that privilege was not waived "based on the evidence presented" because any disclosure that may have existed did not meet the requirements of Mil. R. Evid. 510(a).[64]

Under the plain language of Mil. R. Evid. 510(a), a voluntary disclosure or consent to disclosure does not, standing alone, waive a privilege. Rather, such a disclosure or consent to disclosure waives a privilege only if made "under such circumstances that it would be inappropriate to allow the claim of privilege."[65] In other words, a privilege may still apply to a communication *even in the event of voluntary disclosure* or consent to disclosure, and such a determination depends on the circumstances of the particular case.

Here, the Army Court correctly held that under the circumstances and "based on the evidence presented . . . [t]he military judge did not abuse his discretion" in ruling that the privilege was not waived.[66] First, as discussed *supra*, appellant failed to meet his burden of establishing waiver of the privilege. The Army Court's acknowledgment that the issue was "based on the evidence presented" indicates that evidence of waiver was lacking.

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[64] JA 4.
[65] Mil. R. Evid. 510(a).
[66] JA 4.

Second, the privilege was not waived due to BK and AJ's lack of awareness that they possessed such a privilege and about the legal implications of any disclosure. Under those circumstances, it would *not* be a situation where it was "inappropriate to allow the claim of privilege" under Mil. R. Evid. 510(a). AJ testified that Pastor Ellyson did not explain "what it meant . . . to give him that permission" and did not inform her that she "ha[d] a privilege not to disclose that information."[67] BK testified that Pastor Ellyson never actually spoke to her and, therefore, (1) he never advised BK why consenting to disclosure was important or (2) to whom he would speak.[68] At the motions hearing, BK still did not appear to comprehend the privilege issue. The assistant trial counsel asked BK if she understood "[t]hat [she had] a privilege where the communications . . . could have been kept confidential."[69] BK answered, "I don't know. I don't really understand what you're saying."[70] The assistant trial counsel had to ask two more questions to clear up BK's confusion before asking her if she asserted the privilege.[71]

Pastor Ellyson likewise testified that he never spoke to

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[67] JA 38-39.
[68] JA 41.
[69] JA 42.
[70] JA 42.
[71] JA 42.

BK.[72] He further testified that when he spoke to AJ, he never told her to whom he would speak or for what purpose, and he did not discuss with her what it meant for her to "[give] that permission."[73] On cross-examination, when asked if AJ understood that she had the right not to consent to disclosure, Pastor Ellyson said "probably not" and that he and AJ "didn't talk about that."[74] Pastor Ellyson confirmed that testimony on redirect.[75]

The record, therefore, is clear that neither AJ nor BK understood at the time they spoke to Pastor Ellyson that their communications with him were privileged. Therefore, they did not authorize any disclosure of those communications based on a full - or any - understanding of the privilege or the implications of disclosure. Appellant even conceded that waiver in such a situation would be "a non-voluntary waiver."[76]

While the Army Court noted that neither AJ's nor BK's actions "demonstrate a knowing intent to make the information public[,]" it is incorrect to claim that such a statement imposes a constitutional "knowing" element upon Mil. R. Evid. 510(a). Rather, such a statement, taken in context with the

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[72] JA 35.
[73] JA 34.
[74] JA 36.
[75] JA 37.
[76] JA 25.

rest of the court's discussion, shows that the Army Court considered AJ's and BK's lack of knowledge as one of the "circumstances" within the ambit of Mil. R. Evid. 510(a). Even if there was consent to disclose in this case, based on the lack of knowledge and appellant's concession that an unknowing waiver is not a voluntary waiver, the Army Court correctly held that neither AJ nor BK "voluntarily consented 'to disclosure . . . under such circumstances that it would be inappropriate to allow the claim of privilege.'"[77]

C. Appellant's Rights to Confrontation and to Present a Defense

Because the military judge correctly concluded that BK and AJ did not waive the clergy-penitent privilege, there is no error with respect to appellant's rights to confront the witnesses against him or present a defense. Assuming *arguendo* that the military judge did err and that BK and AJ did waive the privilege, that error was not harmless beyond a reasonable doubt with respect to Specification 1 of Charge II and Specification 1 of the Additional Charge. However, that error was harmless beyond a reasonable doubt with respect to the remaining charges and specifications.

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[77] JA 4.

1. Appellant's Right to Confront

The Confrontation Clause protects an accused's rights "physically to face those who testify against him [and to] conduct cross-examination."[78] However, the right to cross-examine is not unlimited, as "the right to present relevant testimony . . . may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[79] Rather, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[80] A Confrontation Clause issue is not raised unless the trial court "limit[s] the scope and nature of defense counsel's cross-examination in any way."[81] "Normally[,] the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses."[82]

In this case, the military judge did not explicitly limit appellant's ability to cross-examine BK. The military judge's exact ruling was:

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[78] *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see also Crawford v. Washington*, 541 U.S. 36, 57 (2004) (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).
[79] *United States v. Gaddis*, 70 M.J. 248, 252 (C.A.A.F. 2011) (citing *Rock v. Arkansas*, 484 U.S. 44, 55 (1987)).
[80] *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985); *Gaddis*, 70 M.J. at 256 (quoting *Fensterer*, 474 U.S. at 20).
[81] *Id.* at 19.
[82] *Ritchie*, 480 U.S. at 53 (citing *Fensterer*, 474 U.S. at 20).

> The court agrees that there's been no waiver of the privilege. They've invoked and the privilege belongs to the penitent -- if that's the proper term -- and, as such, any testimony of what they said to Pastor Ellyson in the course of his clergy duties is privileged. Proof has been asserted. Therefore, any testimony that Pastor Ellyson would have would be inadmissible; therefore, the government does not need to produce Pastor Ellyson.[83]

The ruling is clear that the government was not required to produce Pastor Ellyson as a witness, as *Pastor Ellyson's* testimony would have been inadmissible.[84] However, the ruling did not limit appellant's ability to cross-examine *BK* about her motivations for testifying. For example, the defense counsel could have asked BK whether she made the allegations up as a way to get attention or as a way to remove appellant from her life. The defense counsel elected not to ask such a question of BK, nor did she ask the military judge for permission to ask such a question. Because the defense counsel did not ask, and the military judge placed no limitation on asking, such a question, appellant's right to confront BK was not infringed.

Furthermore, BK underwent extensive and effective cross-examination.[85] Almost every page of BK's cross-examination includes some sort of impeachment or bias evidence. For

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[83] JA 43-44.
[84] Moreover, it is difficult to conceive of a scenario - and appellant has not offered one - in which appellant could call Pastor Ellyson for the purpose of impeaching BK without touching on the privileged content of his conversation with BK and AJ.
[85] JA 168-82, 184-85.

example, BK admitted that during a forensic interview that occurred on or about August 27, 2009, she did not talk about other incidents of sexual abuse.[86] Specifically, BK did not tell the forensic interviewer about appellant attempting to perform oral sex on her on or about August 21, 2009, and admitted she did not bring up such an allegation until the Article 32 investigation.[87] BK admitted that she did not remember how she testified at the Article 32 investigation regarding certain aspects of the August 21, 2009, offense.[88] With respect to the August 21, 2009, offense, BK admitted not telling other persons about appellant's crimes despite having opportunities to do so.[89] With the exception of the August 21, 2009, offense - which BK did not tell the forensic interviewer about - BK admitted never screaming, yelling for help, or trying to escape from appellant as he molested her.[90] BK did not tell AJ about the photographs she sent to appellant; instead, AJ discovered the photographs and called BK about them.[91] Finally, BK admitted she had a "bad" relationship with appellant.[92]

In short, the defense counsel conducted an extensive cross-

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[86] JA 168-69, 175.
[87] JA 175-76.
[88] JA 169-71.
[89] JA 171-72.
[90] JA 172-73, 176-77.
[91] JA 181-82.
[92] JA 179-80.

examination of BK and exposed several significant inconsistencies and omissions that suggested BK's allegations were untruthful and that BK had a motive to fabricate the allegations. While the defense counsel never asked BK the ultimate question of whether she was fabricating the allegations, her failure to do so was not based on any limitations imposed by the military judge. Because the military judge did not limit appellant's cross-examination of BK in any way, appellant's Confrontation Clause rights were not violated.

2. Appellant's Right to Present a Defense

Likewise, appellant's right to present a defense was not violated. Appellant's defense consisted in part of impeaching BK through cross-examination, other evidence of motive, and counterintuitive behavior. For example, BK testified that she never sat on appellant's lap in the presence of other persons.[93] However, BK's sister, TJ, testified that BK had sat on appellant's lap in the presence of AJ and TJ.[94] BK also testified that appellant physically struck her head in AJ's presence.[95] AJ, though, testified that while appellant "gets angry" and "has a temper," "doesn't hit [them]."[96] In other

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[93] JA 178-79.
[94] JA 204-05.
[95] JA 179-80.
[96] JA 103.

words, BK's mother and sister both testified inconsistently with BK with respect to those details.

Additionally, both TJ and Adam Fellhoelter, a local tattoo artist, testified that on the evening of August 21, 2009, BK was not acting out of the ordinary, did not appear upset, scared, or confused, and appeared to have no concerns or issues about leaving the tattoo parlor with appellant.[97] AJ also testified that BK was upset about an upcoming permanent change of station (PCS) to Mississippi,[98] and admitted that at the Article 32 investigation, she testified that BK and appellant "would hate each other."[99]

In sum, appellant was able to present evidence that BK was untruthful and, therefore, put forth a defense that BK was fabricating the allegations. Appellant did so by impeaching BK on cross-examination, by eliciting testimony from BK's mother and sister that contradicted parts of BK's testimony, by eliciting testimony from appellant's mother that showed BK had motive to fabricate, and by eliciting testimony from BK's sister and a disinterested witness that BK was not acting as one would expect a recently-molested victim to act.

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[97] JA 206-07, 210.
[98] JA 99-100.
[99] JA 103.

Appellant cites *United States v. McAllister*[100] and *United States v. Collier*[101] in support of his claim that his right to present a defense was violated.[102] However, both cases are distinguishable because the military judges in those cases *erred* in excluding evidence, and those errors prevented the appellants from presenting their respective defenses.[103] In the case sub judice, though, the military judge *did not err* in concluding that the clergy-penitent privilege was not waived. Because the military judge's ruling, unlike those from *McAllister* and *Collier*, possessed "an articulated or supportable legal basis," it was correct. Because there was no error, appellant's right to present a defense was not violated.

III. WHETHER THE GOVERNMENT'S FAILURE TO ALLEGE THE TERMINAL ELEMENT IN SPECIFICATION 1 OF CHARGE II AND THE SPECIFICATIONS OF THE ADDITIONAL CHARGE RESULTED IN MATERIAL PREJUDICE TO APPELLANT'S SUBSTANTIAL RIGHT TO NOTICE.

Standard of Review

An appellant's claim that a specification fails to state an offense is reviewed de novo.[104] However, when an appellant fails to object at trial that a specification fails to state an

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[100] 64 M.J. 248 (C.A.A.F. 2007).
[101] 67 M.J. 347 (C.A.A.F. 2009).
[102] Appellant's Br. at 25.
[103] *McAllister*, 64 M.J. at 249, 252-53; *Collier*, 67 M.J. at 352-56.
[104] *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012).

offense, the issue is reviewed for plain error.[105]

Under a plain error standard, appellant has the burden to prove "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused."[106] Failure to allege the terminal element is plain and obvious error.[107] With respect to material prejudice to a substantial right, this court looks "to the record to determine whether notice of the missing element is somewhere extant in the trial record or whether the element is 'essentially uncontroverted.'"[108]

Law and Argument

Appellant is not entitled to relief because he suffered no prejudice. First, appellant was on notice of the missing element. Second, the terminal element was essentially uncontroverted. Finally, appellant has not stated, let alone shown, how his trial strategy would have changed had the government expressly alleged the terminal element in Specification 1 of Charge II and both specifications of the Additional Charge.

First, the record of trial shows that appellant was on

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[105] *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012).
[106] *Humphries*, 71 M.J. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).
[107] *Id.*
[108] *Id.* at 215-16.

notice of the missing element. During AJ's testimony, the assistant trial counsel asked her what she thought "about a Soldier in the United States Army doing these things with his stepdaughter."[109] The defense counsel objected to the question, and the trial counsel stated that AJ's opinion would help prove the service-discrediting element.[110] The military judge sustained the objection, stating that "the members can infer that element" and that "[o]pinion testimony on that by this witness *or any witness*, I don't believe is appropriate."[111]

The trial counsel's question to AJ shows that the government was pursuing a service-discrediting theory of guilt. BK was the only direct witness to the offense alleged in Specification 1 of Charge II and Specification 1 of the Additional Charge. Therefore, BK would have been the appropriate party to testify to the terminal elements with respect to those offenses. However, AJ's testimony preceded BK's.[112] The military judge specifically stated that testimony "by any witness" regarding the terminal element was not appropriate.[113] Because of the military judge's broad (and incorrect) ruling, the trial counsel was precluded from asking

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[109] JA 96.
[110] JA 96-97.
[111] JA 97 (emphasis added).
[112] JA 61, 126.
[113] JA 97.

BK whether she believed appellant's conduct to be service-discrediting.[114] While the trial counsel was not able to ask BK about the terminal element, his question to AJ was sufficient to alert appellant to the government's theory of criminality.

Even if the notice in the record is insufficient to satisfy appellant's constitutional right, appellant never states how his trial strategy would have changed had the terminal element been alleged. In fact, appellant employed the same defense - attempting to establish reasonable doubt by discrediting BK and the CID investigation - with respect to the specifications that *did* allege the terminal element. If appellant put forth a reasonable-doubt defense as to those specifications, it is unreasonable to think he would have put forth a different defense to the specifications that did not allege the terminal element. Therefore, even if there is insufficient notice elsewhere in the record, appellant has not proved material prejudice and is not entitled to relief.

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[114] The invited error doctrine, *see, e.g., United States v. Raya*, 45 M.J. 251 (C.A.A.F. 1996), may also prevent appellant from seeking relief on this issue. The government clearly attempted to provide notice, through testimony, of the terminal element. Appellant objected to the government's question, and the military judge sustained the objection, thereby preventing the government from providing another form of notice as to the terminal element through any witness. Appellant cannot claim prejudice resulting from lack of notice when he sought a ruling that, *ipso facto*, contributed to the alleged prejudice. *See Raya*, 45 M.J. at 254 ("Appellant cannot create error and then take advantage of a situation of his own making.").

Appellant also suffered no prejudice because the terminal element was essentially uncontroverted. The Supreme Court addressed a similar issue in *United States v. Cotton*.[115] There, the defendant was charged with conspiring to distribute and possess with intent to distribute a "detectable amount" of powder and crack cocaine.[116] The defendant received an enhanced sentence based on the trial court's finding that the conspiracy involved at least fifty grams of crack cocaine.[117] However, the indictment failed to allege the quantity of drugs involved.[118] Applying the plain error test, the Court found that the evidence adduced at trial regarding drug quantity was "overwhelming" and "essentially uncontroverted."[119] Therefore, the Court held, "the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of [crack cocaine]."[120]

Cotton - to which this court cited in *Humphries*[121] - applies to this case. The specifications at issue allege the offenses of indecent acts against a child and obstructing justice.[122] Essentially, appellant was charged with sexually molesting his

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[115] 535 U.S. 627 (2002).
[116] *Id.* at 628.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 633.
[120] *Cotton*, 535 U.S. at 633.
[121] 71 M.J. at 213-14.
[122] JA 8, 11.

stepdaughter. Such offenses are a far cry from adultery, which, at its core, criminalizes sexual intercourse between two consenting adults. It is easy to conceive of a situation where adulterous conduct is neither prejudicial to good order and discipline nor service-discrediting and, therefore, not a violation of Article 134, UCMJ. It is highly difficult, if not impossible, to conceive of a situation where committing indecent acts against one's seventeen-year-old stepdaughter is not, at least, service-discrediting.

To that end, appellant mounted a defense that consisted of impeaching BK's testimony, eliciting contrary testimony from AJ and TJ, eliciting BK's motives to fabricate, and by putting forth testimony from two officers and a senior non-commissioned officer of appellant's good military character.[123] At its core, appellant's defense was that BK was lying and that her lies created reasonable doubt. Appellant's defense was *not* one where he (a) admitted caressing BK's breast and buttocks, touching and digitally penetrating BK's vagina, and deleting the photographs but (b) argued that those actions were not service-discrediting.

Had the terminal element been expressly alleged, there is no reasonable possibility that appellant would have changed his trial strategy. If appellant contested the terminal element but

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[123] JA 212-25

admitted having caressed BK's breasts and buttocks, touching and digitally penetrating BK's vagina, and deleting the photographs, the panel certainly would have found appellant guilty of those elements of the offenses. Having found those elements were satisfied, the panel surely also would have found that the terminal element was satisfied. Therefore, as in *Cotton*, appellant suffered no material prejudice to a substantial right, and he is not entitled to relief on this issue.

IV. WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL MEMBERS THAT IN ORDER TO FIND APPELLANT GUILTY OF POSSESSION OF CHILD PORNOGRAPHY IN VIOLATION OF ARTICLE 134, CLAUSE 1 AND 2, THE IMAGES MUST BE OF A CHILD UNDER THE AGE OF EIGHTEEN, INSTEAD OF UNDER THE AGE OF SIXTEEN AS THE UCMJ DEFINES CHILD.

Standard of Review

The issue of whether a panel was properly instructed is reviewed de novo.[124]

Law and Argument

The military judge did not err in instructing the panel members that with respect to child pornography, "child" means "any person under the age of 18 years."[125] Child pornography offenses may be charged under clauses 1 and 2 of Article 134

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[124] *United States v. Maynulet*, 60 M.J. 374, 476 (C.A.A.F. 2010).
[125] JA 244.

instead of under clause 3.[126]

When a child pornography offense is charged under clauses 1 and/or 2, a military judge may still elect to define "child pornography" and other relevant terms with reference to an analogous federal civilian statute. For example, in *United States v. Barberi*, the appellant was charged with and convicted of possessing child pornography in violation of Article 134, clauses 1 and 2.[127] The specification did not reference federal civilian law.[128] The military judge, "although . . . *not required to do so*," defined "child pornography" and "sexually explicit conduct" by referring to the definitions contained in the Child Pornography Prevention Act of 1996 (CPPA).[129] This court reversed appellant's conviction because some of the images the appellant possessed did not meet the definitions of "sexually explicit conduct" and "child pornography" that the

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[126] *United States v. Barberi*, 71 M.J. 127, 129-31 (C.A.A.F. 2012); *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006); *United States v. Medina*, 66 M.J. 21, 29 n.1 (C.A.A.F. 2008) (Stucky, J., dissenting) ("It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3").

[127] 71 M.J. at 129.

[128] *Id.* The specification in alleged that Barberi "did . . . knowingly possess child pornography, which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces." *Id.*

[129] *Id.* at 129-30 (emphasis added).

military judge provided.[130] In so holding, this court at least implicitly approved of the military judge referring to the CPPA to craft panel instructions.

Appellant cites *Barberi* for the proposition that "charging child pornography possession under clause 1 or 2 of Article 134, UCMJ, without reference to the [CPPA], creates a 'completely different set of elements required for conviction.'"[131] Appellant also claims that *Barberi*'s instructions were proper only because neither party there objected to them. Further, appellant seems to argue that because he objected in this case, the military judge was somehow precluded from relying on the CPPA to define "child" and "minor."[132]

Appellant misreads *Barberi*. Under appellant's reading, a specification that does not reference the CPPA creates "a completely different set of elements required for conviction."[133] However, the specification in *Barberi* did not explicitly reference the CPPA - it merely alleged that the appellant "knowingly possess[ed] child pornography" in a manner that was prejudicial to good order and discipline or service-discrediting.[134] The military judge defined "child pornography"

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[130] *Id.* at 130.
[131] Appellant's Br. at 44 (quoting *Barberi*, 71 M.J. at 131).
[132] Appellant's Br. at 44.
[133] *Barberi*, 71 M.J. at 131.
[134] *Id.* at 129.

and "sexually explicit conduct" by referring to the CPPA's definitions of those terms.[135] This Court reversed appellant's conviction because four of the images he possessed did not meet the definitions the military judge provided.[136] Therefore, this Court implicitly affirmed the military judge's use of the CPPA definitions.

When read in its proper context, then, *Barberi* permits a military judge to define relevant terms by referring to the CPPA when a child pornography offense is charged under clauses 1 or 2 of Article 134, UCMJ.

Appellant also misreads the UCMJ's "definitions" of child. The term "child" is specifically defined only in one place in the UCMJ. Article 120b(h)(4), UCMJ, provides that "*[i]n this section* . . . the term 'child' means any person who has not attained the age of 16 years."[137] By its own terms, this definition of "child" only applies to Article 120b, UCMJ. Appellant claims that other articles, including Articles 125, 128, and 134, UCMJ, specifically define "child" as a person under sixteen years of age. However, the texts of those statutes do not specifically *define* "child." The elements and

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[135] *Id.* at 129-30.
[136] *Id.* at 130.
[137] Emphasis added. This definition was also contained in the version of Article 120 in effect at the time of appellant's trial. *Manual for Courts-Martial, United States* (2008 ed.) [*MCM*], pt. IV, ¶ 45.a.(t)(9).

explanations for those offenses *reference* children, but in doing so, they use the words "child . . . under the age of 16,"[138] "child under the age of 16 years" and "child under 16 years,"[139] and "child under the age of 16 years."[140] Those words are not meant as definitions of "child," but rather as delineations marking out the more egregious forms of those crimes.

If the Article 120 definition of "child" were meant to apply to the entire UCMJ, that definition would not include the express limitation "in this section."[141] Additionally, if "child" were limited to mean persons under sixteen, there would be no need for the elements and explanations of the other Articles to refer to "child under 16 years," as the words "under 16 years" would be excessive. Because that language is included in the explanations for other articles, it is clear that just as a child can be under sixteen years old, a child can also be a person sixteen or older. A plain reading of the UCMJ, therefore, shows that "child" does not have a universal, one-size-fits-all definition.

Based on *Barberi* and a plain reading of the UCMJ, appellant's claim that the military judge erred by relying on the CPPA's definition of "child" and "minor" instead of Article

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[138] *MCM*, pt. IV, ¶ 51.b.(3).
[139] *Id.* at ¶¶ 54.b.(3)(c), 54.b.(4), 54.c.(3)(c).
[140] *Id.* at ¶ 68a.b.(2).
[141]

120's definition of "child" is meritless and warrants no relief.

Conclusion

The military judge did not err in concluding that BK's communication with Pastor Ellyson was privileged. Appellant, by twice conceding the issue at trial, has extinguished that issue for review. In any event, the government proved the elements of the privilege. The burden then shifted to appellant to prove the privilege was waived. Appellant failed to do so. As such, the military judge correctly concluded that the communication was privileged and inadmissible.

The Army Court correctly affirmed the military judge's ruling. In doing so, it did not impose a "knowing" element upon Mil. R. Evid. 510(a). Instead, based on the evidence presented, it found that there was no disclosure "under such circumstances that it would be inappropriate to allow the claim of privilege."[142]

Regarding Specification 1 of Charge II and the specifications of the Additional Charge, appellant was not prejudiced by the government's failure to allege the terminal element. Appellant was on notice of the missing element based on the assistant trial counsel's question to AJ, and the terminal element was essentially uncontroverted at trial.

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[142] JA 4 (quoting Mil. R. Evid. 510(a)).

Finally, the military judge did not err in referencing the CPPA to define "child" with respect to Specifications 2, 3, and 4 of Charge II. Child pornography offenses may be charged under clauses 1 and 2 of Article 134, UCMJ, and in those cases, the military judge is free to, but is not required to, reference the CPPA in crafting appropriate definitions and instructions. Additionally, the UCMJ does not contain a universal definition of "child," and there was no offense-specific definition of "child" under Article 134.

The Government respectfully requests that this Court affirm the Army Court's opinion and approve the findings and sentence in this case.

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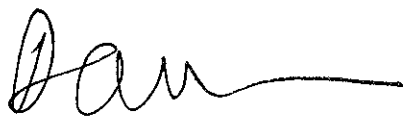

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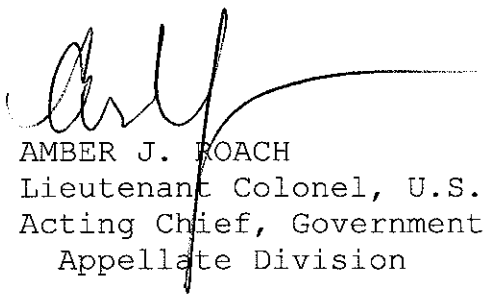

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I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on April 4, 2013, and delivered to appellate defense counsel, MAJ Jacob Bashore, at jacob.bashore@us.army.mil.

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