1 July 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Master Sergeant (E-7), TIMOTHY L. MERRITT, SR. USAF, *Appellant.*	)))))))))	ANSWER TO GRANTED ISSUES Crim. App. No. 37608 USCA Dkt. No. 13-0283/AF

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Master Sergeant (E-7), TIMOTHY L. MERRITT, SR. USAF, *Appellant.*	)))))))))	ANSWER TO GRANTED ISSUES Crim. App. No. 37608 USCA Dkt. No. 13-0283/AF

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

Issues Presented

I.

WHETHER THE APPELLANT'S CONSTITUTIONAL RIGHT TO FAIR NOTICE THAT AN ACT IS CRIMINAL WAS VIOLATED IN SPECIFICATION 2 OF THE CHARGE, WHERE THE ALLEGED OFFENSE OCCURRED IN MAY 2006 BUT CONGRESS DID NOT CRIMINALIZE THE INTENTIONAL VIEWING OF CHILD PORNOGRAPHY UNTIL OCTOBER 2008.

II.

WHETHER APPELLANT'S DUE PROCESS RIGHT TO TIMELY APPELLATE REVIEW WAS VIOLATED WHERE THE AIR FORCE COURT DECIDED APPELLANT'S CASE ONE THOUSAND AND TWENTY-FOUR DAYS AFTER IT WAS DOCKETED.

Statement of the Case

Appellant's statement of the case is accepted.

Statement of Facts

The United States offers the following table for information on the pertinent appellate processing time lines in the case, which are germane to Issue II.

Date	Event	Days	Comments
Brief			
24 Feb 10	Appeal Docketed at JAH	0	
13 Aug 10	App'nt 1st Enlargement	170	30 - to 19 Sep 10, citing time needed for new civ counsel
23 Aug 10	Brief Orig'l Due Date	180	
13 Sep 10	App'nt 2nd Enlargement	201	30 - to 19 Oct 10, citing civ counsel Cassara needs more time
12 Oct 10	App'nt 3nd Enlargement	230	30 - to 18 Nov 10, citing civ counsel needs more time.
10 Nov 10	App'nt 4th Enlargement	259	30 - to 18 Dec 10, citing civ counsel needs more time. (Gov't files general opposition on 12 Nov 10.)
09 Dec 10	App'nt 5th Enlargement	288	30 – to 17 Jan 11, citing civ counsel needs more time. (Gov't files general opposition on 13 Dec 10.)
10 Jan 11	App'nt 6th Enlargement	320	30 – to 16 Feb 11, citing civ counsel needs more time. (Gov't files general oppositions on 11 Jan 11.)
16 Feb 11	App'nt Brief Filed	357	Total time to Brief = 357 days
Answer			
17 Mar 11	App'ee 1st Enlargement	386	7 – to 25 Mar 11[1], citing counsel (Col C) workload
18 Mar 11	App'ee Answer Due	387	
18 Apr 11	App'ee 2nd Enlargement	418	30 – to 25 May 11, citing counsel (Col C) workload
18 May 11	App'ee 3rd Enlargement[2]	448	30 – to 24 Jun 11, citing counsel (Col C) workload, TDY
13 Jun 11	App'ee 4th Enlargement	474	30 – to 25 Jul 11, citing counsel (Col C) workload, TDY
25 Jul 11	App'ee 5th Enlargement	516	21 – to 15 Aug 11, citing counsel (Col C) workload, manning
11 Aug 11	App'ee Answer Filed	533	Total time to Answer: 533 – 357 = 176 days
Reply			
16 Aug 11	App'nt 1st Enlargement	538	7 – to 25 Aug 11, citing civ counsel needs more time. (Gov't opposes on 17 Aug 11.)
18 Aug 11	App'nt Reply Due	540	
25 Aug 11	App'nt Reply Filed	547	Total time to Reply: 547 – 533 = 14 days
02 Sep 11	Confinement Period Ends	555	Appellant's adjudged & approved confinement is completed
Supp Brief			
10 Aug 12	App'nt Supp Brief Filed	898	
10 Aug 12	App'nt Mtn Exp Review	898	Appellant's first request for expedited appellate review
Answer			
04 Sep 12	App'ee 1st Enlargement	923	30 – to 10 Oct 12, citing reservist issues and workload.
10 Sep 12	App'ee Supp Answer Due	929	
10 Sep 12	Court grants enlargement	929	
1 Oct 12	App'ee Supp Answer Filed	950	
2 Oct 12	App'nt Reply Filed	951	
11 Oct 12	CAAF Denied Pet's Ex Writ		
14 Dec 12	AFCCA issued pub decision	1024	

[1] Although the government requested only a seven-day enlargement to 25 March 11, the Court had earlier granted a 30-day enlargement in all cases due to anticipated disruption from a command-wide relocation to Joint Base Andrews, MD. (*See* Court Order, 18 Mar 11). Thus, the effective due date of the government's Answer after the first enlargement was 25 April 2011.

[2] This was erroneously labeled as the government's second enlargement request when in fact it was the third such request (*See* Appellee's Motion for EOT, 18 May 11).

ARGUMENT

I.

APPELLANT HAD FAIR NOTICE THAT VIEWING CHILD PORNOGRAPHY WAS CRIMINAL.

Standard of Review

Whether the military judge correctly understood and applied the proper legal principle in denying Appellant's motion to dismiss for violating his right to fair notice is reviewed de novo. United States v. Hughes, 48 M.J. 214, 216 (C.A.A.F. 1998).

Law and Analysis

In 1995, this Court addressed fair notice in United States v. Sullivan, 42 M.J. 360, 366 (C.A.A.F. 1995) and held that "any reasonable officer would know that asking strangers of the opposite sex intimate questions about their sexual activities, using a false name and a bogus company as a cover, is service discrediting conduct under Article 134."

In resolving the granted issue concerning fair notice in this case, the Court should emphatically conclude that any reasonable Airman would know that viewing child pornography is service discrediting conduct and subject to criminal sanction.

It is well settled that conduct that is not specifically listed in the MCM may be prosecuted under Article 134. United States v. Vaughn, 58 M.J. 29, 31 (C.A.A.F. 2003). In Vaughn, an Airman stationed at Spangdahlem Air Base Germany left her 47-day-

old child alone in her crib for six hours while she went to a club located a ninety-minute drive away. Id. at 30. The appellant was charged with child neglect under Article 134 and asserted that she did not have notice that her conduct was subject to criminal sanction. Id. In exploring fair notice, the Court explained that "criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." Vaughn at 32 (Citing Parker v. Levy, 417 U.S. 733, 757 (1974)). The Court has found notice can be provided from various sources such as the MCM, federal law, military case law and military custom and usage and military regulations. Vaughn, at 31. The standard for fair notice does not require that the crime could be prosecuted in a separate sovereign; it only requires notice of the criminality of an act. In Vaughn, the Court explored all of these areas and found the appellant did have fair notice that leaving the child alone at home unattended would subject her to criminal sanction. When the Court looks at these same sources, it is clear Appellant was also on fair notice here.

THERE IS NO SANCTUARY FROM FAIR NOTICE IN GERMANY.

Before proceeding, it is necessary to dispatch Appellant's notion that fair notice from state law did not apply in Germany. Appellant asserts that "state laws are wholly inapplicable" to the issue of fair notice since the state statutes would not

apply there. (App. Br. 14.) Of course, since the federal statutes would not apply in Germany that logic would prevent notice from federal law as well. See United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005). Being abroad does not inoculate Airmen against fair notice. If it did, general Article 134 offenses would be potentially eliminated overseas leaving commanders unable to utilize this vital disciplinary tool. Fortunately, Appellant's assertion has been previously disposed of by this Court.

State statutes can provide fair notice overseas and in particular in Germany. In Vaughn, this Court reminded the appellant that state statutes provided her fair notice in Germany. "The locus of the charged conduct does not change the measure of notice. Appellant was not charged through assimilation of a state statute in Germany, but through application of Article 134, with uniform application worldwide." Vaughn, 58 M.J. at 32. So clearly state law is wholly relevant to the issue of fair notice.

STATE LAW

State law provided Appellant fair notice that viewing child pornography could subject him to criminal sanction. All fifty states had statutes that criminalized child pornography long before May of 2006. State legislatures announced their intention to eliminate the market for child pornography, to

eradicate the use of minors and to prevent the continuing harm caused to minors each time the exploitation was viewed. The published findings by states throughout the country provide clear notice that states were not establishing a preferred method to consume child pornography; they were instead criminalizing all aspects of it. This provided Appellant with fair notice that viewing child pornography could subject him to criminal sanction. In May of 2006, laws throughout the country focused on various actions all throughout the life cycle of child exploitation to protect our children. Laws made a panoply of acts associated with child pornography criminal to include the following: make, solicit, produce, reproduce, print, distribute, disseminate, transport, send, promote, depict, transmit, exchange, use, purchase, control, access, possess, receive, store, play, display, exhibit, enter, and view. A number of state laws specifically made it criminal to "view" child pornography providing the clearest form of fair notice. The Supreme Court affirmed statutory bans on viewing, which enhanced Appellant's notice. Other states made synonymous acts criminal such as play, enter, display, which provided equally clear fair notice. Yet other statutes made every conceivable route Appellant could take in order to intentionally view child pornography illegal by making actions like control, use, access, enter and receive subject to criminal sanction, just to name a

few. Since there was no way to wrongfully view without committing one or several of the other criminal acts along the way, Appellant had fair notice that viewing child pornography could subject him to criminal sanction by virtue of the predicate criminal acts. Nowhere in the past or current legislation can the government find the words peruse, browse, scrutinize. However, any reasonable Airman knows that he could not commit any of these acts without exposing himself to criminal sanction because they are synonymous with conduct specifically criminalized by law, they require predicate acts which are specifically criminalized by law, and they involve contraband proscribed in every state. The specific means and methods used to criminalize child exploitation have evolved over the years. In order to address Appellant's feigned ignorance that viewing was criminal could subject him to criminal sanction, it is helpful to review the state of the law as it existed in 2006.

1. **ALABAMA**

Long before 2006, the Alabama statute made property used to view child pornography subject to forfeiture by the state. The statute made any matter depicting minors engaged in obscene acts contraband. The Alabama forfeiture statute for child pornography was in effect in May 2006 and provided notice of the criminality of viewing child pornography.

> **Any** article, equipment, machine, materials, matter, vehicle or **other thing whatsoever used in the** commercial production, transportation, dissemination, **display** or storage **of any obscene matter displaying or depicting a person under the age of 17 years engaged in any of the obscene acts** described in Sections 13A-12-191, 13A-12-192, 13A-12-196 and 13A-12-197 **shall be contraband and shall be forfeited to the State of Alabama.** The manner, method and procedure for the forfeiture and condemnation of such thing shall be the same as that provided by law for the confiscation or condemnation or forfeiture of automobiles, conveyances or vehicles in which alcoholic beverages are illegally transported.

Ala. Code 1975 § 13A-12-198; emphasis added. Otherwise, Alabama law in 2006 focused on the possession portion[3] of the distribution chain to criminalize such conduct, which also serves to provide notice of the criminal nature of child pornography in general. See Ala. Code 1975 § 13A-12-192.

2. <u>ALASKA</u>

Current Alaska criminal law prohibits "access with intent to view" within the statute entitled "Possession of child pornography." See Alaska St § 11.61.127. However, the version

---

[3] (a) Any person who knowingly possesses with intent to disseminate any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony. Possession of three or more copies of the same visual depiction contained in obscene matter is prima facie evidence of possession with intent to disseminate the same.
(b) Any person who knowingly possesses any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct shall be guilty of a Class C felony. Ala.Code 1975 § 13A-12-192

of that law in effect in May of 2006 focused on the possession aspect of child pornography, which provided fair notice of the general criminality of child pornography.[4] Appellant also had fair notice of the criminality regarding viewing child pornography from the Alaska forfeiture law in 2006, which states property used for indecent viewing can be forfeited to the state.

> a) Property used to aid a violation of AS 11.61.123 [Indecent Viewing] — 11.61.127 [Possession of Child Pornography] or to aid the solicitation of, attempt to commit, or conspiracy to commit a violation of AS 11.61.123 — 11.61.127 may be forfeited to the state upon the conviction of the offender.
>
> (b) In this section, "property" has the meaning given in AS 11.41.468.

Alaska Statute §11.61.129 (effective 2006 enacted 2003). Furthermore, Alaska law specifically criminalized indecent viewing of the genitals or breasts of a person without their consent or the consent of the parents of a minor. The Alaska law was approved in May 1995, was current in May of 2006, and was a felony for indecent viewing of minors, which provided fair notice of the criminal nature of viewing child pornography.

[4] Alaska Statute § 11.61.127. Possession of child pornography "(a) A person commits the crime of possession of child pornography if the person knowingly possesses any material that visually or aurally depicts conduct described in AS 11.41.455(a) knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct."

(a) A person commits the crime of indecent viewing or photography if, in the state, the person knowingly views, or produces a picture of, the private exposure of the genitals, anus, or female breast of another person and the view or production is without the knowledge or consent of

(1) the parent or guardian of the person viewed, or who is shown in the picture, if the person who is viewed or shown is under 16 years of age; and

(2) the person viewed or shown in the picture, if the person viewed or shown is at least 13 years of age.

(b) Each viewing of a person, and each production of a picture of a person, whose genitals, anus, or female breast are viewed or are shown in a picture constitutes a separate violation of this section.

(c) This section does not apply to viewing or photography conducted by a law enforcement agency for a law enforcement purpose.

(d) In a prosecution under this section, it is an affirmative defense that the viewing or photography was conducted as a security surveillance system, notice of the viewing or photography was posted, and any viewing or use of pictures produced is done only in the interest of crime prevention or prosecution.

(e) In this section,

(1) "picture" means a film, photograph, negative, slide, book, newspaper, or magazine, whether in print, electronic, magnetic, or digital format; and

(2) "private exposure" means that a person has exposed the person's body or part of the body in a place, and under circumstances,

> that the person reasonably believed would not result in the person's body or body parts being (A) viewed by the defendant; or (B) produced in a picture; "private exposure" does not include the exposure of a person's body or body parts in a law enforcement facility, correctional facility, designated treatment facility, or a juvenile detention facility; in this paragraph, "correctional facility" has the meaning given in AS 33.30.901, "designated treatment facility" has the meaning given in AS 47.30.915, and "juvenile detention facility" has the meaning given in AS 47.12.990.
>
> (f) Indecent viewing or photography is a
>
> (1) class C felony if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, a minor;
>
> (2) class A misdemeanor if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, an adult.

AS §11.61.123.

3. **Arizona**

In 2006, Arizona law proscribed exhibiting child pornography as an offense of "Sexual exploitation of a minor." As an individual would need to exhibit child pornography on a computer in order to view it, the statute provides fair notice of the criminality of viewing.

> A. A person commits sexual exploitation of a minor by knowingly:
>
> 1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in

> exploitive exhibition or other sexual conduct.
>
> 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
>
> B. If any visual depiction of sexual exploitation of a minor is admitted into evidence, the court shall seal that evidence at the conclusion of any grand jury proceeding, hearing or trial.
>
> C. Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-705.

Arizona Statute §13-3553 (2006).

Admittedly, the verb "exhibit" could be interpreted more narrowly as limited to the act of showing the child pornography to another rather than viewing it for himself. Even if that is true, the law in Arizona provided fair notice of the general criminality of child pornography by criminalizing a list of over twelve individual actions associated with child pornography targeting the entire life cycle of child pornography.

4. ARKANSAS

In 2006, the law in Arkansas specifically proscribed viewing a child engaging in sexually explicit conduct. Arkansas legislated against viewing child pornography as early as March 19, 1991. The Arkansas legislature included section 2 of the

statute to make clear that they were amending the law in an attempt to **ERADICATE** the use of children in pornography.

> SECTION 2. It is the express intent of this act to eradicate the use of children as subjects of pornographic materials. This act seeks to protect victims of child pornography and to destroy a market for the exploitative use of children. **The use of children as subjects of pornographic material is harmful to the physical and psychological health of children**. Thus, this state has a compelling **interest in penalizing those who** solicit, receive, purchase, exchange, possess, **view,** distribute or control **such material.**

AR ST § 5-27-304 Legis 607 (1991)(Emphasis added).

Arkansas made viewing children engaged in sexually explicit conduct a crime as early as 1991. Two criminal statutes in Arkansas (both current in May of 2006) provided Appellant with fair notice of the criminality of viewing child pornography. First, the law prescribes the viewing of any medium containing minors in sexually explicit conduct as a violation of AR St 5-27-304 in May of 2006.

> § 5-27-304. Sexually explicit conduct, children
>
> (a) With knowledge of the character of the visual or print medium involved, no person shall do any of the following:
>
> . . .
>
> Knowingly solicit, receive, purchase, exchange, possess, **view,** distribute, or control any visual or print medium depicting

> a child participating or engaging in sexually explicit conduct.
>
> (b) Any person who violates subdivisions (a)(1) or (2) of this section is guilty of a:
>
> (1) Class C felony for the first offense; and
>
> (2) Class B felony for a subsequent offense.

Second, the law proscribed the viewing of sexually explicit conduct involving a child as a violation of AR St § 5-27-602 in May of 2006.

> § 5-27-602. Distributing, possessing, or **viewing** matter depicting sexually explicit conduct involving a child
>
> (a) A person commits distributing, possessing, or **viewing** of matter depicting sexually explicit conduct involving a child if the person knowingly:
>
> . . .
>
> (2) Possesses or **views** through any means, including on the internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.
>
> (b) Distributing, possessing, or **viewing** of matter depicting sexually explicit conduct involving a child is a:
>
> (1) Class C felony for the first offense; and
>
> (2) Class B felony for any subsequent offense.

AR ST § 5-27-602; emphasis added.

5. COLORADO

Colorado legislated against the sexual exploitation of children in an act that became effective 1 July 2003. The general assembly found "that each time [child pornography] is shown or viewed the child is harmed." CO ST § 18-6-403. It found that mere possession or control of [such] sexually exploitative material results in continuing victimization of our children" Id. The assembly strove to "exclude all such materials from the channels of trade and commerce," through their legislation.[5] Id. In that same statute, Colorado made it

---

[5] **§ 18-6-403. Sexual exploitation of a child** (1) The general assembly hereby finds and declares: That the sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen years is incapable of giving informed consent to the use of his or her body for a sexual purpose; and that to protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.

(1.5) The general assembly further finds and declares that the mere possession or control of any sexually exploitative material results in continuing victimization of our children by the fact that such material is a permanent record of an act or acts of sexual abuse of a child; that each time such material is shown or viewed, the child is harmed; that such material is used to break down the will and resistance of other children to encourage them to participate in similar acts of sexual abuse; that laws banning the production and distribution of such material are insufficient to halt this abuse; that in order to stop the sexual exploitation and abuse of our children, it is necessary for the state to ban the possession of any sexually exploitative materials; and that the state has a compelling interest in outlawing the possession of any sexually exploitative materials in order to protect society as a whole, and particularly the privacy, health, and emotional welfare of its children. . . .

(3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: . . .

a crime to "control any sexually exploitive material for any purpose." CO St 18-6-403(3)(b5). The crime provides fair notice of the criminality of viewing child pornography since control of it is a condition precedent to knowing wrongful viewing and in accord with the legislative intent.

6. DELAWARE

In Delaware, it was a crime at the relevant time to (among other things) "access" or "enter" data or a visual depiction of a child in a prohibited sex act. Access and enter violated DE St § 1109, unlawfully dealing child pornography.[6] That statute became effective July 27, 1998 and was in effect in May of 2006 providing Appellant with fair notice of the criminality of viewing child pornography from Delaware. See 71 Del Laws 1997 c. 467, eff. July 17, 1998.

(b.5) Possesses or controls any sexually exploitative material for any purpose; . . .

[6] A person is guilty of dealing in child pornography when: . . .

(4) The person, intentionally compiles, **enters, accesses,** transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses any photograph, **image, file, data or other visual depiction of a child engaging in a prohibited sexual act** or in the simulation of such an act. For the purposes of this subsection, conduct occurring outside the State shall be sufficient to constitute this offense if such conduct is within the terms of § 204 of this title, or if such photograph, image, file or data was compiled, entered, accessed, transmitted, received, exchanged, disseminated, stored, made, printed, reproduced or otherwise possessed by, through or with any computer located within Delaware and the person was aware of circumstances which rendered the presence of such computer within Delaware a reasonable possibility; or . . . DE ST 11 § 1109.

7. GEORGIA

The Georgia criminal code also provided Appellant fair notice that viewing child pornography could result in criminal sanction. The code does not mention view or access. Instead, it makes it a crime to "control any material which depicts a minor or a portion of a minors body engaged in any sexually explicit conduct."[7] GA ST § 16-12-100 (b)(8) (2006). In order for Appellant to intentionally view "material which depicts a minor engaged in sexually explicit conduct" as alleged, he would need to control it making it criminal under Georgia's law against sexual exploitation of children. GA ST § 16-12-100 (b)(8) (2006).

8. ILLINOIS

The Illinois statute proscribes possession without specifically addressing viewing or access. See IL ST CH 38 ¶ 11-20.1.

Nonetheless, under similar facts, the Illinois Court of Appeals has found viewing can satisfy the charge of possession as it existed in 2006. See People v. Josephitis, 914 N.E.2d 607 (Dist Ct of Ill 2009).

> Defendant argues that "the mere viewing" of pornographic images of children is insufficient to establish possession under

[7] Ga. Code Ann., § 16-12-100 (2006)
(b)(8) It is unlawful for any person knowingly to possess or **control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.**

> section 11-20.1(a)(6). While this assertion may be true under certain factual scenarios, for example a patron attending a theater showing a film containing child pornography, we find that defendant's actions in viewing child pornography under the circumstances in the instant case constitutes "possession" within the meaning of the statute. Defendant was convicted of child pornography based on his possession of any "photograph or other similar visual reproduction or depiction by computer of any child" engaged in the activity described in subsections (i) and (vii) of section 11-20.1(a)(6). 720 ILCS 5/ 11-20.1(a)(6) (West 2006).

Id. at 612-13.

Reviewing the nature of his conduct, the Court determined that while the appellant had the ability to copy, print, or send the images constituted possession as proscribed by the statute in 2006. Id. at 613. Thus the statute provided fair notice of the criminality of viewing child pornography because as the type of viewing at issue is considered punishable under the 2006 law proscribing possession. After a thorough survey of the case law delineating possession including federal and military cases, the Court held the Appellant's viewing constituted possession and concluded with an observation about the statutory purpose which is applicable here.

> Defendant and others who pay for access and view these images support an industry which exploits the most vulnerable people in the world, an industry which the statute attempts to destroy. Any other finding would completely frustrate the purpose of the child pornography statute.

People v. Josephitis, 914 N.E.2d 607, 617 (Dist Ct of Ill 2009).

9. MASSACHUSETTS

The Massachusetts criminal code banned the possession and purchase of child pornography without reference to access or intent to view. See M.G.L.A. 272 § 29C. This provides general notice of the criminality associated with child pornography. In addition, the specific findings of the Massachusetts legislature in approving this emergency act approved in 1997 provides additional notice. In that act, they found that "each time such material is viewed the child is harmed."[8]

10. NEW JERSEY

New Jersey law specifically made it criminal to "view" child pornography as early as 1992.

[8] St.1997, c. 181, § 2, an emergency act, was approved Nov. 26, 1997. Section 1 of St. 1997, c. 181, provides:

"The general court hereby finds: (1) that the sexual exploitation of children constitutes a **wrongful invasion of a child's right to privacy** and results in social, developmental and emotional injury to such child and that to protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce; (2) that the mere possession or control of any sexually exploitative material results in continuing victimization of children as such material is a permanent record of an act or acts of sexual abuse or exploitation of a child and that **each time such material is viewed the child is harmed**; (3) that such material is used to break the will and resistance of other children so as to encourage them to participate in similar acts; (4) that laws banning the production and distribution of such material are insufficient to halt this abuse and exploitation; (5) that to stop the sexual abuse and exploitation of children, it is necessary to ban the possession of any sexually exploitative materials; and (6) that the commonwealth has a compelling interest in outlawing the possession of any materials which sexually exploit children in order to protect the privacy, health and emotional welfare of children and society as a whole."

> Endangering welfare of children
>
> (5)(b) Any person who knowingly possesses or **knowingly views** any photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, including on the Internet, is guilty of a crime of the fourth degree.
> N.J.S.A. 2C:24-4.

The New Jersey law provided Appellant fair notice that viewing child pornography could subject him to criminal sanction. In addition, as early as 1992 the Assembly in New Jersey published their rationale in a committee statement further clarifying the notice for Appellant.

> This bill would amend N.J.S.A. 2C:24-4 to make it a crime of the fourth degree to knowingly possess or knowingly view such material. . . .
>
> The committee wishes to note that the purpose of this bill is to stop trafficking in child pornography. The rationale underlying the provision is to break the cycle of child pornography by attempting to destroy the market for this material which exploits children. The committee believes the criminalization of knowing possession or viewing of this kind of material is justified by a compelling interest in protecting minors.

New Jersey, Assembly Judiciary, Law and Public Safety committee statement Assembly, No. 263—L1992, C.2.; emphasis added.

11. NEW YORK

In New York, the law as it existed in May of 2006

criminalized possession of child pornography without reference to view or access. See NY Penal §263.16. This coupled with the findings provided by the legislature in 1977 provide fair notice of the general criminal nature of child pornography and show the statutory goal was complete eradication of sexual performance with minors, not some limited restrictions on its safe use.

> "The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. **The public policy of the state demands the protection of children from exploitation through sexual performances.**
>
> The legislature further finds that the sale of these **movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society** that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act [this article].

L.1977, c. 910, § 1, eff. on the 90th day after Aug. 11, 1977; emphasis added.

The current NY Penal code added access with intent to view specifically in 2012. See NY Penal § 263.16.

12. OHIO

The law in Ohio as it existed in May of 2006 specifically criminalized viewing child pornography. See OH ST § 2907.323

Illegal use of a minor in nudity-oriented material or performance. Therefore the law coupled with the Supreme Court opinion Osborne v. Ohio, 495 U.S. 103 (1990) upholding the same, provided Appellant with fair notice that viewing child pornography was subject to criminal sanction.

> 2907.323 Illegal use of a minor in nudity-oriented material or performance
>
> (A) No person shall do any of the following:
> . . .
> 3) Possess or **view** any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
> . . .
> (B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. . . .

OH St §2907.323 (2006); emphasis added.

13. UTAH

The law in Utah criminalized child pornography without specific reference to view or access providing fair notice of the general criminality of child pornography. See U.C.A. 1953 § 76-5b-102. Moreover, the legislative intent to eliminate the sexual exploitation of minors in child pornography is made clear in their findings.

> (1) The Legislature of Utah determines that:
> (a) the sexual exploitation of a minor is excessively harmful to the minor's physiological, emotional, social, and mental development;

. . .

> (e) prohibition of and punishment for the distribution, possession, possession with intent to distribute, and production of materials that sexually exploit a minor, or a vulnerable adult who lacks the capacity to consent to sexual exploitation, is necessary and justified to eliminate the market for those materials and to reduce the harm to the minor or vulnerable adult inherent in the perpetuation of the record of the minor's or vulnerable adult's sexually exploitive activities.

See U.C.A. 1953 § 76-5b-102.

On May 12, 2009, Utah added a specific proscription by making it a crime to intentionally view child pornography. UT ST § 76-5b-201(1)(a)(ii) formerly UT ST § 76-5a-3. In 2006, there was no specific mention of view or access in the child exploitation statutes, which provided general notice of the criminality of child pornography.

14. WISCONSIN

In 2006, it was illegal to exhibit or play a recording of child pornography which provides fair notice that viewing child pornography could subject a person to criminal sanction. In order to knowingly and wrongfully view the same, they would need to play the recording.

> **948.12. Possession of child pornography**
> (1m) Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances may be penalized under sub. (3):

. . .

> (2m) **Whoever exhibits or plays a recording of a child engaged in sexually explicit conduct**, if all of the following apply, may be penalized under sub. (3):
> (a) The person knows that he or she has exhibited or played the recording.
> (b) Before the person exhibited or played the recording, he or she knew the character and content of the sexually explicit conduct.
> (c) Before the person exhibited or played the recording, he or she knew or reasonably should have known that the child engaged in sexually explicit conduct had not attained the age of 18 years. . . .

On 24 April 2012, the state went further and made access with intent to view illegal as well. W.S.A. 948.12; emphasis added.

Every remaining state proscribed child pornography providing notice of its general criminality. All states had laws which addressed the fact that child pornography was illegal in 2006. Specific states criminalized viewing in 2006, and the Supreme Court highlighted viewing as a specific crime by upholding it as valid in our highest Court. Child pornography involves a patchwork quilt blanketing the spectrum of child exploitation. Appellant would have to claim he scrutinized the laws of all fifty states to find an act legally available to him in the continuum of exploitation. If he searched, Appellant surely would have found the state laws proscribing viewing and access outlined above and the Court's opinion affirming it. If he relied on a general awareness of the law, he would have known

child pornography was criminal and contraband in nature. Either way, Appellant had fair notice viewing child pornography could subject him to criminal sanction under Article 134. Later in time, the District of Columbia, Florida, Idaho, Maine, Michigan, Oregon, Pennsylvania, and Washington all specifically proscribed access or viewing in their respective statutes.[9] Additionally the Congressional record provided notice to the accused.

CONGRESSIONAL PUBLICATIONS PROVIDED FAIR NOTICE

The United States Congressional findings also provided Appellant with fair notice that viewing child pornography could subject him to criminal sanction. In 1994, Congress urged every state to enact legislation to address child pornography.[10] In 1996, Congress found that child pornography permanently recorded a victim's abuse and "its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years." In 1996, Congress published a finding that outlined the societal benefits of prohibiting

[9] See DC Code 22-2201; DC Code 22-302(2010);FL ST § 827.071(Effective October 2011); ID ST § 18-1507(Eff. July 2012); ME ST 17-A §284 (April 2011); MI ST § 750.145c (March 2013); OR St § 163.684; OR St § 163.686; OR St § 163.687 (June 2011); Pa.C.S.A. §6312 (Sept 2009); WA ST § 9.68A.

[10] 1994 SEC. 160002. SENSE OF CONGRESS CONCERNING STATE LEGISLATION REGARDING CHILD PORNOGRAPHY. It is the sense of the Congress that each State that has not yet done so should enact legislation prohibiting the production, distribution, receipt, or simple possession of materials depicting a person under 18 years of age engaging in sexually explicit conduct (as defined in section 2256 of title 18, United States Code) and providing for a maximum imprisonment of at least 1 year and for the forfeiture of assets used in the commission or support of, or gained from, such offenses.

possession and **viewing** of child pornography. Id. at 12. The published notice of the benefit of prohibiting viewing provided Appellant fair notice that viewing could subject a person to criminal sanction. This is particularly true when considering the publication of these findings in conjunction with the State laws in place and the Supreme Court decision upholding a statutory ban on viewing. The last Congressional finding stated "(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the . . . **viewing** of visual depictions of children engaging in sexually explicit conduct. . ."[11] In 1998, Congress continued to emphasize the

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[11] 1996 SUBSECTION 1. FINDINGS.
Congress finds that—
(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, **is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;**
(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;
. . . .
(7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;
. . . .
(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and
(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and

urgency of the situation by stating that “(6) there has been an explosion in the use of the Internet in the United States, further placing our Nation's children at risk of harm and exploitation at the hands of predators on the Internet and increasing the ease of trafficking in child pornography.” In April of 2003, Congress found “[t]he Government has a compelling state interest in protecting children from those who sexually exploit them’ including child pornographers.” PL 108-21. Further Congress found that “this interest extends to **stamping out** the vice of child pornography **at all levels in the**

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distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;
(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and
. . . .
(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;
<u>(12) prohibiting the **possession and viewing of child pornography** will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and</u>
(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or **viewing** of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct. (Emphasis added.)

distribution chain."[12] (Emphasis added.)

The Congressional findings outline the evils of child pornography, encourage the prohibition of all aspects of it, specifically discuss the benefits of prohibiting people from viewing child pornography and states that there is a compelling government interest in prohibiting the viewing of child pornography. These public proclamations coupled with the Supreme Court upholding a law criminalizing viewing child pornography, states banning viewing, accessing, entering, or playing child pornography, states banning control of child pornography, and every state in the union outlawing child pornography in some fashion demonstrates Appellant had clear notice that viewing child pornography would subject him to

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[12] PL 108–21 (S 151) April 30, 2003 PROSECUTORIAL REMEDIES AND TOOLS AGAINST THE EXPLOITATION OF CHILDREN TODAY ACT OF 2003 (PROTECT ACT) 2003
(1) Obscenity and child pornography are not entitled to protection under the First Amendment under Miller v. California, 413 U.S. 15 (1973) (obscenity), or New York v. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.
(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," New York v. Ferber, 458 U.S. 747, 757 (1982), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne v. Ohio, 495 U.S. 103, 110 (1990).
(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Ferber, 458 U.S. at 760.

criminal sanction.

Fair notice requires a person know that something is criminal and is not an element-by-element notification. In Saunders, this Court recognized that specific intent was required for the federal and many of the state stalking statutes. Regardless, the Court stated it did not require notice of specific elements set down in writing before the offense is committed, only fair notice that it was criminal. United States v. Saunders, 59 M.J. 1, 8 (C.A.A.F. 2003). The required "fair notice of the criminality of conduct charged as service discrediting under article 134, which does not necessarily require published notice of the precise wording of the elements." Id. at 9.

Thus, the question presented in Saunders was not whether there is a difference between state statutes, but whether the state statutes would have placed a reasonable soldier on fair notice that harassment, as charged in that case, was service discrediting. Saunders at 10.

The question presented here is whether the panoply of statutes, both state and federal, that proscribe child exploitation through child pornography would have placed reasonable Airmen on fair notice that viewing child pornography, as charged in this case, was service discrediting and criminal.

In United States v. Boyett, 42 M.J. 150 (C.A.A.F. 1995), the

Court noted that "criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." (Citing Parker v. Levy, 417 U.S. 733, 756 (1974)). Said another way, Appellant would need to believe that he could view child pornography with impunity in order to assert he was not on notice. Such an argument is belied by both common sense and Appellant's guilt-ridden confession. Appellant's own words from his written confession are strong evidence he knew it was wrong to view child pornography: "These images I have tried to forget . . . I am deeply a shamed (sic) for having even looked at such images . . . it is with great horror that (sic) have to recall these images that I tried so hard to forget seeing . . ." (J.A. 105; Pros. Ex. 1 at 4.) The standard for notice that "ordinary people can understand what conduct is prohibited" is more than satisfied by here where any ordinary person knows viewing child pornography is prohibited. Boyett, 42 M.J. at 154. Lawyerly loopholes and caveats are not the stuff of notice, and here all that was required was that Appellant knew looking at child porn was prohibited in order for it to be punishable under Article 134. In Boyett, Specification 5 alleged that the appellant had "engage[d] in a close personal social relationship, including sexual intercourse," with an enlisted

person who did not work for him. Boyett, 42 M.J. at 151. There was no mention of fraternization or any other criminal statute, and the appellant was on notice because, despite any parlor tricks or sleight of hand, he knew what he did was prohibited. In our case, it would be pure chicanery to say that Appellant believed he had legal permission to view child pornography while Boyett was on notice that his relationship was proscribed.

In Landstuhl Germany, Private Sanchez penetrated a chicken in August of 1957. The private was charged with the offense under Article 134, and the defense tried to state there was a failure to state an offense because by trying to show that the specification satisfied neither sodomy nor lascivious acts with another and therefore did not state an offense at all. "Having thus excluded those two offenses by the process of claiming one element is missing from each, the defense sums up its position by asserting there is no offense alleged. The argument may be ingenious but it misses the point of importance. We are not here concerned with determining whether the specification sets out all the elements of either of the mentioned offenses." United States v. Sanchez, 29 C.M.R. 32, 33 (C.M.A. 1960). "[W]hen [Congress] enacted the general article, Congress intended to proscribe conduct which directly and adversely affected the good name of the service. And most assuredly, when an accused performs detestable and degenerate acts which clearly

evince a wanton disregard for the moral standards generally and properly accepted by society, he heaps discredit on the department of the Government he represents." Sanchez, 29 C.M.R. 32, 33-34. Unsurprisingly, the Court had no trouble finding that Private Sanchez satisfied the touchstone requirement of conduct of such a nature to bring discredit upon the armed forces when he violated the chicken in Landstuhl. It should be far more clear that this Appellant heaped discredit upon the government he represented when he contributed to the exploitation of children by viewing child pornography in nearby Ramstein.

The act of viewing child pornography is another act along the criminal distribution chain of child pornography. Viewing child pornography is intertwined with possession, receipt, distribution, and all of the interdependent crimes that inhabit the continuum of child exploitation. To view the image is an integral part of each of those offenses and at the same time is the end desire which fuels demand side of the child exploitation industry. Discussing how viewing is inextricably intertwined with receipt, the Eleventh Circuit held that when an accused intentionally views child pornography he has committed the offense of knowingly receiving child pornography. United States v. Pruitt, 638 F.3d 763 (11th Cir. 2011). The Court stated, "[u]nder this statute's 'knowingly receives' element, an

intentional viewer of child pornography images sent to his computer may be convicted whether or not for example, he acts to save the images to a hard drive, to edit them, or otherwise to exert more control over them." This case preceded the 2008 amendment to the statute. The Pruitt case made clear that intentional viewing was punishable as knowing receipt which further illustrates how Appellant was on notice of the criminality of viewing. Appellant attempts to confuse the issue by stating that his "actual crime" was receipt. (App. Br. 13.) Notice that intentional viewing could subject him to criminal sanction by receipt or any other name is due process fair notice. As pointed out by the Court in Pruitt. Nor does the case need to actionable under a federal statute in order to be punishable under Article 134.

THIS COURT AFFIRMED CASES UNDER CLAUSE 1 AND 2 THAT COULD NOT BE AFFIRMED UNDER CLAUSE 3.

In United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004), this Court found that the receipt of child pornography could not stand after the Supreme Court decision in the Free Speech coalition case. The specification of a clause three offense failed because the offense could not be tried under the CPPA. Yet, this Court affirmed the conviction for an offense of child pornography receipt that could not be tried under the federal statute. This case and the series of cases where clause 3 offenses for child

pornography were upheld as provident under clause 2 of Article 134 demonstrate that an Article 134 offense can stand even when a federal prosecution of the same would fail. This Court explained "[w]hile the issue as to whether the images are virtual or actual may have potentially dispositive effect in prosecutions under the CPPA in both civilian and military settings, it is not inherently dispositive of the impact on the esteem of the armed forces or good order and discipline. Those are the yardsticks by which the criminality of conduct under clauses 1 and 2 are measured." Mason, 60 M.J. at 20. Measuring the conduct of viewing child pornography by that yardstick of criminality demonstrates this offense is criminal and should stand under a clause 1 and 2 prosecution regardless of what would occurred under a state or federal statute.

VIEWING CASES

This Court affirmed a conviction that alleged the accused did "wrongfully and knowingly view or possess child pornography" in December of 2006. United States v. Garner, 71 M.J. 430, 431 (C.A.A.F. 2013)(emphasis added). This Court addressed issues surrounding sentencing and in doing so affirmed a conviction where one theory of liability included viewing child pornography in December of 2006. The notion that a person would not be subject to criminal sanction for viewing child pornography was absent in Garner. That is because people of average and

reasonable intelligence are not confused by the notion that viewing child pornography is criminal. Indeed, this Court has previously addressed how obvious this is by stating that "[i]t is intuitive that the viewing of child pornography discredits those who do it, as well as the institutions with which the person are identified." United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008).

The notion that Appellant could not have realized there was anything criminal about looking at child pornography is absurd. A more honest survey of the argument is that he wants to escape the consequences of his crime because the word "view" did not appear in the federal statute. An accused cannot sneak into a crack in the statutory language or hide in a syllogistic crevice when he is charged under Article 134 clause 1 or 2, even if he could do so outside of the UCMJ. Article 134 is not so constrained by the language or elements of similar or related federal or state statutes. If actually required, such religious adherence to the other statutes would eliminate the need for and utility of Article 134. Under Article 134 "our moral horizon is not bound by the civil code of Tennessee." Parker v. Levy, 417 U.S. 733, 764 (1974). To claim an accused could be aware that child porn and all acts associated with it were criminal and not know that viewing it was criminal is, to borrow a phrase, "a distinction of statutory tracing," and not the moral relativism

that applies under Article 134. Id.

At trial, Appellant was found guilty of receipt of child pornography and viewing child pornography, which is important for two reasons. First, if the Appellant was on notice that it was criminal to receive child pornography, which he clearly was, the argument that he did not realize looking at child pornography could subject him to criminal sanction become even more incredulous. Second, it is important to note that the military judge merged the charge of receipt of child pornography with viewing for purpose of sentencing. (J.A. 99) Therefore the Court could decide the issue based upon a complete lack of any possible prejudice alone. Appellant's claim and request for relief should be denied.

II.

ALTHOUGH THE POST-TRIAL PROCESSING PERIOD EXCEEDED 18 MONTHS[13], THE DELAY IN PROCESSING WAS NOT UNREASONABLE, APPLYING THE FOUR-FACTOR ANALYSIS ENUNCIATED IN BARKER v. WINGO, 407 U.S. 514 (1972) AND UNITED STATES v. MORENO, 63 M.J. 129 (C.A.A.F. 2006). IN ANY EVENT, THERE IS NO EVIDENCE OF ANY PREJUDICE TO APPELLANT.

Standard of Review

"Whether an appellant has been denied the due process right to a speedy post-trial review and appeal, and whether

[13] Appellant's comments chiding AFCCA for calculating a delay of only 540 days is misguided. (App. Br. at 6, fn. 3.) In fact, AFCCA correctly noted on page 9 of its published decision that Appellant's cases had an "overall delay of more than 540 days between the trial and completion of [AFCCA's] review." (JA at 9.)

constitutional error is harmless beyond a reasonable doubt are reviewed de novo." United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006) (internal citations omitted). *See also*, United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011); United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

When evaluating post-trial due process complaints of delay, this Court has adopted the United States Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972). Moreno, 63 M.J. at 135. The four factors set forth in Barker were: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice.[14] Moreno, 63 M.J. at 135 (*citing* Barker, 407 U.S. at 530). The Barker factors are to be balanced and none of the factors is dispositive. Instead, all factors are to be considered together along with the relevant circumstances. Id. at 136. *See also*, Toohey, 63 M.J. at 359. *But see*, United States v. Dearing, 63 M.J. 478, 487 (C.A.A.F. 2006) (*citing* Moreno, 63 M.J. at 138-41, for the proposition that prejudice is the most important factor, noting "we are most sensitive to this final factor that relates to any prejudice either personally to

[14] The factors listed in Barker are not exhaustive, rather they are factors to be taken into consideration with other relevant facts of the case, such that courts must engage in "a difficult and sensitive balancing process" when evaluating both governmental and societal interests against the defendant's constitutional rights. Barker, 407 U.S. at 533.

Appellant or the presentation of his case that arises from the excessive post-trial delay.")

This Court in Moreno held that it would presume facially unreasonable delay in a case if there was a delay of more than 18 months between the docketing of the case before a Court of Criminal Appeals and the completion of appellate review.[15] Moreno, 63 M.J. at 142. If post-trial delay is facially unreasonable, constitutional due process concerns are implicated and all four Barker factors will be considered to determine if a constitutional due process violation actually occurred. Id. at 135-36. In the case *sub judice*, more than 18 months (540 days) have elapsed from the date the case was docketed with AFCCA to the date of its decision. Thus, a presumption of unreasonable delay is triggered, requiring a four-part Moreno/Barker analysis.

Nevertheless, this Court has routinely held that an appellate court may assume error, and proceed to a harmless beyond a reasonable doubt analysis. *See* Arriaga, 70 M.J. at 56; Allison, 63 M.J. at 370. At best, Appellant can only argue that a technical violation of the Moreno appellate review standard occurred. The government does not concede that this minimal delay caused a constitutional due process violation to occur and

[15] This 18-month time standard is hereinafter referred to as the "appellate review" standard.

this Court can resolve the issue in favor of the government under a harmless beyond reasonable doubt analysis.[16]

This Court has issued decisions instructive on the harmless beyond a reasonable doubt analysis.[17] To the extent that this Court wishes to perform the formal four-part Moreno analysis, the United States offers the following discussion.

a. Length of Delay

Under Moreno, there is "a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen month of docketing of the case before the Court of Criminal Appeals." Moreno, 63 M.J. at 142. Because the appeal below took more than eighteen months since its docketing, the delay is presumptively unreasonable under Moreno. However, this does not conclusively establish unreasonable delay but rather only triggers inquiry into the remaining three Barker/Moreno factors. Id. The first factor weighs against the government.

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[16] This Court noted that the harmless-beyond-reasonable-doubt analysis requires an analysis of "prejudice" separate and apart from the Moreno/Barker prejudice analysis. United States v. Ashby, 68 M.J. 108, 125 (C.A.A.F. 2009) (*citing* United States v. Bush, 68 M.J. 96, 102-03 (C.A.A.F. 2009).

[17] *See* United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011) (holding that 11-year post-trial delay from date of completion of trial to CCA decision was harmless beyond a reasonable doubt considering totality of the circumstances and fact that appellant's assertions of error had no merit); United States v. Ashby, 68 M.J. 108, 125 (C.A.A.F. 2009) (holding that over 10 years delay from trial to C.A.A.F. appeal was harmless beyond a reasonable doubt because appellant demonstrated no prejudice by the delay); United States v. Harrow, 65 M.J. 190, 206 (C.A.A.F. 2007) (holding that 1,467-day post-trial delay from completion of trial to appellate review was facially unreasonable but was harmless beyond a reasonable doubt); United States v. Young, 64 M.J. 404, 408-09 (C.A.A.F. 2007) (holding that 1,637-day post-trial delay was facially unreasonable but harmless beyond a reasonable doubt).

b. Reason for the Delay

The government may overcome the presumption of unreasonable delay by providing legitimate reasons for the delay. *See* United States v. Arriaga, 70 M.J. 51 (C.A.A.F. 2011); Moreno, 63 M.J. at 138.

The time period from docketing of the case to the present may be broken down into three sub-categories: time attributable to Appellant; time attributable to the government; and, time attributable to the Court.

1. Time Attributable to Appellant

As shown in the chart in the government's Statement of Facts, *supra*, 357 days elapsed between the docketing of the case on 24 February 2010 and the filing of Appellant's Brief on 16 February 2011. An additional fourteen days elapsed between the filing of the government's Answer on 11 August 2011 and the filing of Appellant's Reply on 25 August 2011. Thus, the total time initially attributable to Appellant for filing of the initial pleadings was 371 days, obviously more than one year. Turning to Appellant's Supplemental Brief, one could argue that none of the time spent drafting this pleading was attributable to Appellant because this time period was co-extensive with the time when the original pleadings were under consideration by the Court. Thus, under a view most favorable to Appellant, 371 days

of delay are attributable to him.[18]

In Moreno, this Court declined to hold the appellant responsible for the time period during which he was preparing his appellate pleadings. Moreno, 63 M.J. at 137. The Court rested its decision in this matter on two factors: First, the Court found no evidence that Moreno himself benefited from his counsel's enlargement requests or even was consulted about and agreed to them. Id. Second, the Court concluded that "other case load commitments," the reason given for the requested enlargements, in reality reflected a "lack of institutional vigilance" on the part of the government in fulfilling its duty to adequately staff the Appellate Defense function and manage the overall appellate case processing. Id.

Appellant's 371-day delay in the instant case must be counted totally against him because neither of the concerns articulated in Moreno are present here. On the first matter, it is clear that Appellant personally agreed to each enlargement filed by his civilian counsel and that he benefited from such action. The final paragraph of each of Appellant's six enlargement requests contained the following language:

> Mr. William Cassara has been retained by

[18] However, as it does in virtually all cases where the Moreno standards are implicated, AFCCA certainly would have analyzed the appellate delay issue in this case regardless of whether Appellant filed his supplemental assignment of error complaining of appellate delay. So, filing the additional issue only served to prolong the appellate process and delay the case from being joined and ready for AFCCA's decision.

> Appellate Defense Counsel, and he assumes primary responsibility for the brief. Mr. Cassara has indicated he will need additional time to review the record of trial and file the necessary brief. *Appellant continues to want Mr. Cassara to serve as lead counsel and wants his military appellate counsel to withhold filing a brief until Mr. Cassara files an assignment of errors on his behalf.*

(*See* Appellant's Motions for Enlargement of Time, 13 Aug 10, 13 Sep 10, 12 Oct 10, 10 Nov 10, 9 Dec 10, 10 Jan 11, para. D; JA 119-47.) (emphasis supplied).

On the second matter, the articulated basis for the requested enlargements, rather than being a mere generalized concern about "other case load concerns," instead focused specifically on the case at hand and the need for civilian appellate counsel, Mr. Cassara, to fully review the record and file the brief. As such, it did relate in some measure to the complexity of Appellant's case. *Compare* Moreno, 63 M.J. at 137 ("[T]here was no evidence demonstrating that the enlargements were directly attributable to Moreno or that the need for additional time arose from other factors such as the complexity of Moreno's case.")

Moreover, in the instant case, unlike Moreno, it cannot be said that the government bears any supervisory responsibility over Appellant's civilian defense counsel or that the six enlargements filed by Mr. Cassara were emblematic of a "lack of

vigilance" on the part of the government. To the contrary, exerting the only authority it had over Appellant's adherence to the Moreno time standards, the government entered its general opposition to each of Appellant's final three enlargement requests. (*See* Government's General Oppositions to Appellant's Motion for Enlargement of Time, 12 Nov 10, 13 Dec 10, 11 Jan 11; JA 119-47.) For these reasons, the burden of Appellant's 371-day delay rests solely with Appellant, and not with the government in any way.

2. Time Attributable to the Government

Returning to the government's chart, *supra*, the government commenced work on its Answer on Day 357 and filed it with the Court on Day 533, some 176 days later. Regarding Appellant's supplemental pleading, the government commenced work on its Supplemental Answer on Day 898 and filed it with the Court on 1 October 2012, accounting for an additional 52 days. Therefore, the total period of delay attributable to the government is 228 days. This equates to just under six months for the Answer (as compared to over one year for Appellant's initial brief and reply brief) and just 52 days for the Supplemental Answer.

While the government does not dispute accountability for these 228 days, we respectfully submit that this period of delay should not be weighed significantly against the government because both the Answer and Supplemental Answer were diligently

drafted and the enlargements for each were for requested for justifiable reasons. In particular, counsel of record for the original Answer was the Chief of the Government Trial and Appellate Counsel Division, responsible for overseeing all Air Force trial and appellate counsel worldwide.

These competing obligations of counsel justified the five enlargements granted, particularly in view of the complex nature of the Appellant's five assignments of error which encompassed a wide range of legal issues. Appellant himself had absolutely no concern with these enlargements, for he did not file a single motion in opposition to any of the government's enlargement requests. (JA at 148-69.)

During the supplemental pleadings, responsibility for drafting the government's Supplemental Answer was given to an experienced reservist augmenting the office. The government's lone request for an enlargement relating to its Supplemental Answer was predicated on that counsel of record's assignment to the case United States v. Witt, the Air Force's first death penalty appeal in over a decade. Given the impending oral argument date in Witt (11 October 2012), counsel requested the enlargement to ensure sufficient time in the month of September to thoroughly assist the government in preparing for the Witt argument. Appellant opposed this request, arguing that after 30 months from the date of docketing with the Court, one additional

month would exacerbate a due process violation. (*See* Appellant's Opposition to Government's Motion for Enlargement of Time, 6 Sep 12; JA 163-69.)

In sum, while the referenced 228 days are attributable to the government, they reflect neither an unreasonable delay nor a denial of Appellant's right to due process. Moreno, 63 M.J. at 135. Accordingly, this portion of the delay should not be weighed significantly against the government.

3. Time Attributable to the Court

The period of time arguably attributable to the Court in this case ran from 25 August 2011, the date of filing of Appellant's Reply brief, to 10 August 2012, the date of filing of Appellant's Supplemental Assignment of Error. During this period, the original pleadings had been filed and the Court was presumably pending deliberation on the original five issues. This period ran from Day 547 to Day 898, a total of 351 days.

In Moreno, the Court applied "a more flexible review" of a period of 197 days between submission of briefs to the Navy-Marine Corps Court of Criminal Appeals and rendering of a final decision. The Court concluded that "a period of slightly over six months is not an unreasonable time for review by the Court of Criminal Appeals." Moreno, 63 M.J. at 137-38.

However, the government submits this issue was mooted when Appellant filed his Supplemental Brief on 10 August 2012. From

that date to the present date, the Air Force Court was precluded from resolving the appeal due to the pendency of Appellant's Supplemental Assignment of Errors. Ironically, had the Air Force Court issued its ruling in the period between 25 August 2011 and 10 August 2012, Appellant would have been denied his opportunity to file a claim before this Court of unreasonable delay in the post-trial and appellate processing of his case. In this way, the Court's failure to issue a ruling during the original 351-day time period facilitated Appellant's assertion of this issue. Finally, it is axiomatic that, whatever the reason for this Court's delay, the government had no control over the Court's activities. For these reasons, the 351 days during which the original pleadings were on file with the Court should be excluded from the calculation of delays attributable to the government; the same is true for the time from the date of the government's answer to Appellant's supplemental assignment of error to the date of the Air Force Court's published decision.

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

As in Moreno, Appellant here "did not object to any delay or assert his right to timely review and appeal prior to his arrival at this court." Moreno, 63 M.J. at 138. However, citing Barker v. Wingo, 407 U.S. 514, 531-32 (1972), the Moreno Court went on to note that a defendant who fails to demand

speedy post-trial review does not necessarily waive his right to such review. Id.

In Moreno, the Court of Appeals for the Armed Forces declined to count the appellant's failure to request a timely review and appeal as a significant factor against the appellant. Instead, the Court again placed the ultimate burden of ensuring a timely appeal upon the government. Id. According to the Court, Moreno was not required to complain in order to receive timely appellate review, because, even absent his complaint, it was reasonable to assume that he (and any other appellant) would naturally desire a prompt resolution of his appeal. Id. Under this reasoning, the Court applied only a slight weight against Moreno on this factor.

Underlying the Court's reasoning on this third factor was the concern that Moreno himself may have felt intimidated by the prospect of complaining to his counsel about appellate delay. The following excerpt displays the Court's concern:

> We also recognize the paradox of requiring Moreno to complain about appellate delay either to his appellate counsel who sought multiple enlargements of time because of other case commitments or to the appellate court that granted the enlargements on a routine basis.

Moreno, 63 M.J. at 138 (*referencing* Harris v. Champion, 15 F.3d 1538, 1563 (10th Cir. 1994) (Court could not fairly expect petitioners to have raised the issue of delay in state court

where they could only speak through their counsel who in most cases were responsible for the delay.)) Following this logic, the Court was reluctant to penalize Moreno for not having lodged a complaint requesting speedy post-trial processing.

In the instant case, this same concern is not present, as Appellant's is drastically distinguishable from Moreno. First, given the language quoted above from paragraph D of Appellant's motions for enlargement of time, it is evident that Appellant worked well with his counsel, had full confidence in his civilian appellate counsel, Mr. Cassara, and personally agreed with and supported each of the five enlargements counsel submitted in his behalf.[19] There is simply no evidence of any strain in Appellant's relationship with his appellate team nor of any conflicting interests.

Unlike in Moreno, this Court need not ponder whether Appellant's failure to file an early request for speedy post-trial processing stemmed from fearfulness or hopelessness on his part. Instead, the sequence of events in the post-trial phase of Appellant's case paints a clear picture of someone who originally chose not to assert a request for speedy post trial processing and then hastily made the request at the last minute in an effort to fill a square in the Moreno/Barker analysis.

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[19] To find otherwise would require a conclusion that appellate defense counsel lied to this Court in articulating their reasons for the requested enlargements, a conclusion for which there is no support, whatsoever.

d. Prejudice

In the context of post-trial delays, prejudice is evaluated in terms of three sub-factors: 1. Prevention of oppressive incarceration; 2. Minimization of anxiety and concern; and 3. Limitation of possible impairment to the appellant's grounds for appeal and defenses in the event of reversal or remand. Moreno, 63 M.J. at 138 (*citing* Rheuark v. Shaw, 628 F.2d 297, 303, n. 8 (5th Cir. 1980)). Each of these is discussed separately below.

1. Oppressive incarceration pending appeal

First and foremost, on the date Appellant filed his reply brief on 25 August 2011, Appellant would have been released from confinement assuming he committed no misconduct while in prison. It follows then that Appellant simply could not have suffered any oppressive confinement while he waited for AFCCA to issue its decision he now complains about with vigor. Also, the Moreno Court noted, "This sub-factor is directly related to the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay even though it may have been excessive." Id. at 139 (*citing* Cody v. Henderson, 936 F.2d 715, 720 (2d Cir. 1991)).

Appellant's original brief contained five assignments of error, each without merit. This Court only granted review of one of those issues.

Issue I above alleges that Appellant was denied fair notice, under the Fifth Amendment's Due Process Clause, that viewing child pornography was subject to criminal sanction. As noted above, Appellant's contention that he was not on notice that viewing child pornography was service-discrediting and criminal is simply implausible – there is no basis for relief on this claim.

For the foregoing reasons, there is no realistic possibility that this Honorable Court will grant Appellant relief on the granted issue. Accordingly, if even this Court were to find excessive delay in the appellate review process, Appellant "would be in no worse position due to such delay." Moreno, 63 M.J. at 139.

Additionally, on the sub-factor of oppressive confinement, it is important to note that Appellant's approved confinement term of 24 months was completed not later than 2 September 2011, two years after Appellant's sentence was adjudged by the court-martial. Referring to the government's chart, *supra,* 2 September 2011 fell some eight days after the filing of the initial pleadings in this appeal, when Appellant filed his Reply brief on 25 August 2011. Accordingly, any "oppressive incarceration" would have had to have occurred during the parties' preparation of the initial pleadings.

However, as discussed above, during this period, Appellant requested and was granted six separate enlargements to file his

original Brief and then sat by idly without objection as the government requested and was granted five enlargements to file its Response. Indeed, Appellant's very first indication that he objected to the timeliness of the processing of his appeal did not come until 10 August 2012, the same day Appellant filed his Motion for Expedited Review. By this date, Appellant had already been freed from confinement for at least eleven months, and likely earlier. Under these circumstances, Appellant has failed to demonstrate the existence of any "oppressive confinement" under Moreno or Cody and this sub-factor heavily favors the government.

2. Anxiety and Concern

This sub-factor requires the appellant to show a "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." Moreno, 63 M.J. at 140. In Moreno, our superior Court held that the appellant's concern of being required to register as a sex offender prior to the completion of appellate review of his case constituted a "particularized anxiety or concern." Id.

In his brief before this Court, Appellant neither shows nor even alleges any "particularized anxiety or concern" as required by Moreno. Instead, Appellant simply manufactures completely implausible prejudice in the form of loss of "a significant

amount of retirement income" (App. Br. at 25) and being required to register as a sex offender (App. Br. at 26). Neither claim has any merit because Appellant seems to forget that he will remain convicted of Specification 1, receiving child pornography, regardless of the outcome of his appeal. Appellant's suggestion that he is going to retire from the Air Force and avoid sex offender registration with his (partial or complete) child pornography conviction intact is entirely unreasonable and unrealistic.

Because Appellant has shown no particularized anxiety or concern flowing from the alleged unreasonable delay in appellate processing of his case, this sub-factor heavily favors the government.

3. Impairment of the Ability to Present a Defense at a Rehearing

This sub-factor, like the first, turns on the merit of the appeal itself. "If an appellant does not have a meritorious appeal, there obviously will be no prejudice arising from a rehearing." Moreno, 63 M.J. at 140. As discussed above, each of Appellant's five assignments of error lacks merit and there is no reasonable possibility this Court will grant relief on any of them.

Additionally, as with the second sub-factor, the burden is upon Appellant to show prejudice. In particular, Appellant must

"specifically identify how he would be prejudiced at rehearing due to the delay. Mere speculation is not enough." Moreno 63 M.J. at 140-41 (*citing* United States v. Mohawk, 20 F.3d 1480, 1487 (9th Cir. 1994)).

Once again, Appellant's brief before this Court neither alleges nor shows any reasonable prejudice, whatsoever. To the contrary, given that Appellant himself requested over one year of the initial delay, failed to object to the government's five enlargements, extended the appellate process unnecessarily, and only requested expedited appellate review some twenty-nine months after the docketing of his case, it is clear that Appellant was not prejudiced by any delay. Accordingly, this third sub-factor also heavily favors the government.

In summary, the Moreno/Barker prejudice analysis strongly favors the government because there was no oppressive incarceration and because Appellant has failed to show (or even allege) any particularized anxiety or concern or any impairment of his ability to present a defense at a re-hearing. Most importantly, because Appellant's substantive grounds for his appeal are not meritorious, Appellant "is in no worse position due to the delay even though it may have been excessive." Moreno, 63 M.J. at 139 (*citing* Cody, 936 F.2d at 720).

Also, the government notes that a court may find a due process violation in the absence of prejudice, but only when

balancing information from the other three factors causes the court to believe that "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey v. United States, 63 M.J. 353, 362 (C.A.A.F. 2006). However, there is no evidence in this case supporting non-prejudicial constitutional error. Accordingly, this Honorable Court can be convinced that the post-trial delay was harmless beyond a reasonable doubt. United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). This issue also lacks merit, and Appellant's claim should be denied.

Finally, this Court should firmly reject Appellant's unfounded and regrettable claim that "the Air Force Court's system is utterly broken." As mentioned in the United States' motion to strike Appellant's improper attempt to supplement the record dated 18 June 2013, Appellant has failed to establish this Court's jurisdiction to review and Appellant's standing to complain about 126 other completed Air Force cases and 46 pending Air Force Court cases in support of his claim that his case was unconstitutionally delayed. There is no factual, legal, or logical nexus between any other case and Appellant's case and that information is not properly before this Court. Appellant certainly enjoys the right to complain about the processing of his own case, but the law does not permit him to

litigate the facts of these other 172 cases through the petition and granted issues presently before this Court. Appellant's unfounded, unsupported, and incorrect claim must be rejected.

CONCLUSION

AFCCA's decision upholding Appellant's findings and sentence should be affirmed.

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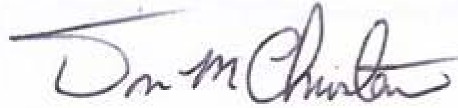

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to the Air Force Appellate Defense Division, and to Mr. Cassara on 1 July 2013.

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