IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JAVON C. RICHARD,
Airman Basic (E-1), USAF
Appellant

Crim. App. No. 39918

USCA Dkt. No. 22-0091/AF

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

WHETHER THE EVIDENCE OF PREJUDICE TO GOOD ORDER AND DISCIPLINE FOR THE ARTICLE 134, UCMJ, OFFENSES WAS LEGALLY SUFFICIENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

From September 30-October 1, 2019, and from January 6-10, 2020, a general court-martial composed of officer and enlisted members tried Appellant, Airman Basic (AB) Javon Richard, at Davis-Monthan Air Force Base (AFB), Arizona. Contrary to his pleas, the panel convicted AB Richard of one charge and specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928, and one

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[1] All references to the punitive articles are to the *Manual for Courts-Martial, United States* (2016 ed.) [2016 *MCM*]. Unless otherwise stated, all other references to the UCMJ, and all references to the Rules for Courts-Martial (R.C.M.) and the Mil. R. Evid., are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

charge and three specifications involving child pornography (wrongful possession, wrongful distribution, and wrongful production, each on divers occasions) in violation of Article 134, UCMJ, 10 U.S.C. § 934.[2] (JA at 32–36, 179.) The panel sentenced AB Richard to a bad-conduct discharge and 30 days' confinement. (JA at 191.) The convening authority took no action on the findings or the sentence. (JA at 37.) The Air Force Court affirmed the findings and sentence. (JA at 28.) This Court granted review on February 24, 2022. *United States v. Richard*, No. 22-0091/AF, 2022 CAAF LEXIS 150 (C.A.A.F. February 24, 2022).

STATEMENT OF FACTS

1. Background

In October 2016, then 20-year-old AB Richard was stationed at Ramstein Air Base (AB), Germany, when he met a 16-year-old German national, IB, on the over-18 dating application Tinder. (JA at 55, 79.) AB Richard and IB began a relationship of sorts: IB considered it dating,

[2] The panel acquitted AB Richard of willful and wrongful destruction of property; wrongful use of marijuana, lysergic acid diethylamide (LSD), and psilocybin; wrongful distribution of LSD; three specifications of assault consummated by a battery; wrongful communication of a threat; and obstruction of justice, in violation of Articles 109, 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 909, 912a, 928 & 934. (Joint Appendix (JA) at 32–36, 179.)

while AB Richard considered it "talking," which was something short of dating. (JA at 105.) The relationship was on and off during AB Richard's deployment to Qatar from January to July 2017. (JA at 53, 56, 110.) The relationship renewed upon his return, even continuing after AB Richard relocated to Davis Monthan AFB, yet it remained rocky as IB discovered AB Richard's relationships with several other women. (JA at 110–12, 116, 119.) One of those women, KL, reported AB Richard for an assault, of which he was acquitted. (JA at 149, 179.) Shortly after KL reported, IB sent KL a message stating: "Hey girl, do you want to get [AB Richard] kicked out of the Air Force or even in jail? I will help you." (JA at 124.)

2. The Video and Images

The Government charged AB Richard under Article 134, UCMJ, with possession, production, and distribution of child pornography on divers occasions based on images and videos of IB obtained with her consent. (JA at 31.) Each specification alleged conduct "to the prejudice of good order and discipline in the armed forces." (*Id.*) The Government did not allege the charged conduct was "of a nature to bring discredit upon the armed forces." (*Id.*)

At trial, the Government introduced four items of alleged child

pornography. First, there was a video-recorded sexual encounter between AB Richard and IB from August 20, 2017. (JA at 40.) Both the sexual activity and the recording were consensual. (JA at 107.) Second, the Government introduced 31 screenshots, created in January 2018, allegedly depicting IB's genitalia. (JA at 41, 66–68.) IB voluntarily sent these pictures to AB Richard. (JA at 129.) Third, the Government presented a video extracted from AB Richard's phone that captures a user viewing those same images and sending messages from IB's Snapchat account. (JA at 49–51, 137–38.) The video, recorded on November 7, 2017, briefly shows AB Richard's face reflected on the screen. (JA at 49–51, 138.) Finally, the Government introduced three nude images of IB it alleged were screenshots of IB's Snapchat account taken from AB Richard's phone. (JA at 52, 140.)

3. Distribution

IB alleged that AB Richard sent close-up pictures of her genitalia to her mother on December 2, 2017. (JA at 46–47, 94–96, 126–27.) IB also claimed that AB Richard posted nude images of her on her Snapchat Story (which is accessible to people she knew), then changed her password. (JA at 94, 190.) These images, found in Prosecution Exhibit 6,

are close-up shots of female genitalia that do not readily identify IB. (JA at 41, 97.) IB claimed that she became aware of the posts because people began contacting her. (JA at 94.) IB acknowledged that she took screenshots regularly, and attested that friends had sent her screenshots of the nude photos from Snapchat; however, she no longer possessed any of the screenshots her friends purportedly sent her nor any of what AB Richard allegedly posted. (JA at 121.) The only evidence she maintained of such communications was a screenshot from "somebody" texting that she had "nudes in [her] story." (JA at 122.) But IB conceded that this message was sent to her from an anonymous account.[3] (JA at 122.) The military judge later rejected an exhibit that purported to show this message. (JA at 54, 188–89.) Ultimately, the Government failed to produce any evidence that anyone saw the posted nude pictures, other than IB's hearsay testimony.

4. Court-Martial

During its case-in-chief, the Government offered no direct evidence of how AB Richard's conduct prejudiced good order and discipline. In

[3] The Government sought to introduce this exhibit in presentencing. (JA at 180.) The Government never provided the Defense a copy of the message before trial, generating discovery concerns. (JA at 185–89.)

closing argument, the Circuit Trial Counsel (CTC) mentioned good order and discipline only once while reciting the elements for the possession of child pornography offense. (JA at 164.) In response, the Circuit Defense Counsel (CDC) argued that while "the Government spent a lot of time . . . talking about the first few elements of the [child pornography] charge . . . they didn't touch at all about the last one." (JA at 175.) She added how "there has to be some kind of military nexus," and then asked, "[u]nder the circumstances, was it prejudicial to good order and discipline?" (JA at 176.)

The CTC attempted to address the omission in rebuttal:

> And finally, with respect to prejudicial to good order and discipline, let me get this right. That it's okay -- this is what the defense argument is, it's okay to have child pornography on your phone as a military member, just that nobody knows about it, so it's certainly not prejudicial to good order and discipline. It is prejudicial to good order and discipline to have child pornography on your phone. We do not allow our members to commit crimes and have criminal possessions on our phone. That's – the argument that for some reason, you know, that is not prejudicial to good order and discipline for our members to commit crimes as long as it's quiet and in secret, we would all agree that what you do on your private time matters. We're held accountable for what we do [in] our private [time]. And to get up here and say, Members, to have child pornography on your phone and distribute is not prejudicial to good order and discipline (indiscernible) this, was her mama the military, no, but the people he was distributing these messages -- these images to in the military,

> no. How does that look? How does that look? It's not prejudicial to good order and discipline because, I don't know, you know, because he had it but it was just on his phone, it doesn't hurt us, it's not -- it doesn't impact the military, it's ridiculous. It's ridiculous. Keep that line. Keep that line. Do not get smudged.

(JA at 177–78.)

The panel found AB Richard guilty of production, possession, and distribution of child pornography, each on divers occasions. (JA at 179.)

5. The Air Force Court's Opinion

AB Richard challenged the factual and legal sufficiency of his child pornography convictions before the Air Force Court on several bases, including that the Government failed to introduce evidence of how the conduct was prejudicial to good order and discipline. In response, the Government pointed to *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988), wherein this Court's predecessor stated that an offense under the common law or "most statutory criminal codes" is "prejudicial to good order and discipline or is service-discrediting for the very reason that it is (or has been) generally recognized as illegal." (JA at 7 (emphasis removed).) Thus, the Government argued that the generally recognized criminal nature of AB Richard's conduct "sufficiently established prejudice to good order and discipline." (JA at 8.) The Air Force Court

noted that this Court has not overruled *Davis*, but recognized it was in tension with this Court's much later decision in *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011), which held that the terminal element in an Article 134, UCMJ, offense "must be proved beyond a reasonable doubt like any other element" and "cannot be conclusively presumed from any particular course of action." (JA at 7–9.)

The Air Force Court ultimately determined that the tension between *Davis* and *Phillips* was immaterial to its analysis, as it concluded the Government introduced sufficient evidence that AB Richard's conduct was prejudicial to good order and discipline. (JA at 9.) Specifically, it wrote:

> Appellant possessed, distributed, and produced child pornography while stationed and living on Ramstein AB, Germany, an installation on foreign soil regulated by international agreements; moreover, Appellant's status as a member of the United States forces stationed in Germany was also regulated by such agreements. His possession, distribution, and production of child pornography specifically involved a minor who was a citizen of the host nation. Appellant not only retained sexually explicit images of this minor, but he sent sexually explicit images of the minor to her mother, who was also a German resident. In addition, Appellant manipulated the minor's Snapchat account to display sexually explicit images of her genitals such that they were viewable by other Snapchat users in Germany and beyond.

(JA at 9.) The Air Force Court subsequently affirmed the findings and sentence. (JA at 28.)

SUMMARY OF THE ARGUMENT

The Government made no effort to prove the charged conduct was prejudicial to good order and discipline. It offered no witnesses or other evidence indicating any military member was even aware of AB Richard's alleged actions, let alone how these actions had a "direct and palpable" impact on good order and discipline, as clause 1 offenses under Article 134, UCMJ, require. The Government first addressed its burden in *rebuttal* findings argument, where—instead of refuting any evidentiary failures—the CTC contended that AB Richard's conduct was *per se* prejudicial to good order and discipline because he possessed illegal images on his phone. While this may suffice for service discrediting offense under clause 2 of Article 134, UCMJ, the same cannot be said for the statute's first clause. The Air Force Court nevertheless affirmed AB Richard's conviction based solely on reasoning applicable to clause 2 cases.

Given the failure to introduce evidence of prejudice to good order and discipline, no reasonable factfinder could conclude the Government

met its burden to prove AB Richard's guilt beyond a reasonable doubt. Nor can conclusive presumptions of prejudice to good order and discipline excuse this failure. Before the Air Force Court, the Government argued that under *Davis*, 26 M.J. at 448, courts may presume prejudice to good order and discipline because child pornography is generally illegal. Not only has this Court specifically rejected such presumptions of the terminal element, *Phillips*, 70 M.J. at 166, but more broadly it has rejected the notion that the Government may escape its burden to plead and prove *every* element beyond a reasonable doubt. *See, e.g.*, *United States v. Fosler*, 70 M.J. 225, 229–30 (C.A.A.F. 2011).

The Supreme Court, and this Court, unequivocally require notice to an accused through the charging document. With respect to the child pornography specifications, the Government provided AB Richard only such notice that his conduct was prejudicial to good order and discipline. AB Richard justifiably relied on that notice in preparing a defense. And yet he stands before this Court convicted of crimes the Government did not charge—"conduct of a nature to bring discredit upon the armed forces" in violation of clause 2 of Article 134, UCMJ.

Because the Government failed to prove prejudice to good order and discipline, and because conclusive presumptions cannot substitute for evidence, this Honorable Court should hold AB Richard's Article 134, UCMJ, convictions legally insufficient.

ARGUMENT

THE EVIDENCE OF PREJUDICE TO GOOD ORDER AND DISCIPLINE FOR THE ARTICLE 134, UCMJ, OFFENSES WAS LEGALLY INSUFFICIENT.

Standard of Review

This Court reviews legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

1. Legal Sufficiency and the Article 134, UCMJ, Offenses

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

The elements of production, possession, and distribution of child pornography, as charged, are as follows:

Production of Child Pornography

(a) AB Richard knowingly and wrongfully produced child pornography on divers occasions; and

(b) Under the circumstances, AB Richard's conduct was to the prejudice of good order and discipline in the armed forces.

Possession of Child Pornography

(a) AB Richard knowingly and wrongfully possessed child pornography on divers occasions; and

(b) Under the circumstances, AB Richard's conduct was to the prejudice of good order and discipline in the armed forces.

Distribution of Child Pornography

(a) AB Richard knowingly and wrongfully distributed child pornography to another on divers occasions; and

(b) Under the circumstances, AB Richard's conduct was to the prejudice of good order and discipline in the armed forces.

See MCM, pt. IV, ¶¶ 68b.b.(1), 68b.b.(3), 68b.b.(4) (JA at 199–200); (JA at 31). The age of consent for sexual acts under the UCMJ is 16. *See* Article 120b(g), (h)(4), 10 U.S.C. § 920b(g), (h)(4) (JA at 193). However, the age of a minor for the purposes of child pornography is 18. *See MCM*, pt. IV, ¶ 68b.c.(4) (JA at 200).

2. The Terminal Element in Article 134, UCMJ, Offenses

Article 134, UCMJ, makes punishable three categories of offenses, each with a different terminal element: (1) "disorders and neglects to the prejudice of good order and discipline in the armed forces," or clause 1 offenses; (2) "conduct of a nature to bring discredit upon the armed forces," or clause 2 offenses; and, (3) noncapital offenses in violation of Federal law, or clause 3 offenses. *MCM*, pt. IV, ¶ 60.c.(1) (JA at 196). For clause 1 offenses, the terminal element "to the prejudice of good order and discipline" is limited to acts "*directly prejudicial* to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense." *MCM*, pt. IV, ¶ 60.c.(2)(a) (JA at 196) (emphasis added). Since "[a]lmost any improper act could be regarded as prejudicial in some remote or indirect sense," clause 1 offenses are "confined to cases in which the prejudice is reasonably direct and palpable." (*Id.*)

Although not charged here, conduct of a nature to bring discredit on the armed forces must have "a tendency to bring the service into disrepute or [] tend[] to lower it in the public esteem." *MCM*, pt. IV, ¶ 60.c.(3) (JA at 196); *see also United States v. Caldwell*, 72 M.J. 137, 141 (C.A.A.F. 2013) (citations omitted).

"The three clauses of Article 134 constitute three distinct and separate parts." *Fosler*, 70 M.J. at 230 (citation omitted) (internal quotation marks omitted). "For example, 'disorders and neglects to the prejudice of good order and discipline' is not synonymous with 'conduct of a nature to bring discredit upon the armed forces.'" *Id.* Although some conduct may support a conviction under more than one clause, *id.*, "a violation of any of the three clauses of Article 134, UCMJ, 'does not necessarily lead to a violation of the other clauses.'" *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012) (quoting *Fosler*, 70 M.J. at 230).

3. Notice Pleading and the Terminal Element

"The military is a notice pleading jurisdiction." *Fosler*, 70 M.J. at 229. "No principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . ." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). "The charge sheet provides the accused notice that he or she will have to defend against any charged offense and specification." *See United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018); *see also United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) ("[T]he Due Process Clause of the Fifth Amendment also does not permit convicting

an accused of an offense with which he has not been charged." (citations omitted)). The Government has "complete discretion" over how to charge an accused and "accept[s] the risk" that an appellant may not be criminally liable based upon how the charging scheme connects with the evidence. *United States v. Mader*, 81 M.J. 105, 109 (C.A.A.F. 2021).

"The requirement to allege every element expressly or by necessarily implication ensures that a defendant understands what he must defend against." *Fosler*, 70 M.J. at 229. "As [this Court] recently and unanimously stated in [*United States v. Reese*], '[*t*]*he defense* [*is*] *entitled to rely on the charge sheet* and the government's decision not amend the charge sheet prior to trial.'" *United States v. Simmons*, 2022 CAAF LEXIS 164, at *16–17 (C.A.A.F. February 24, 2022) (emphasis and third and fourth alteration in original) (quoting *Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017) (other citation omitted).

Although the terminal element of Article 134, UCMJ, may be charged in three different ways, it is "an actual and distinct element of" the statute and, "like any element of any criminal offense, must be separately charged and proven." *Ballan*, 71 M.J. at 33 (citations omitted). "The exceptionally broad statutory language [of Article 134,

UCMJ] and potential for abuse is balanced, in large part, by this Court's duty to constrain it." *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020) (citing *Parker v. Levy*, 417 U.S. 733, 754 (1974) (other citation omitted).

4. Conclusive Presumptions and the Terminal Element

In *Davis*, this Court's predecessor discussed two types of offenses under Article 134, UCMJ:

> As the Government points out in its brief, Article 134 would appear to encompass two general classes of conduct: First, that which is or generally has been recognized as illegal under the common law or under most statutory criminal codes; and, second, that which -- however eccentric or unusual -- would not be viewed as criminal outside the military context. The former category is prejudicial to good order and discipline or is service-discrediting for the very reason that it *is* (or has been) generally recognized as illegal; such activity, by its unlawful nature, tends to prejudice good order or to discredit the service. On the other hand, the latter category of conduct is illegal solely because, *in the military context, its effect* is to prejudice good order or to discredit the service.

26 M.J. at 448 (emphasis in original). This Court later addressed a related issue in *Phillips*, which involved the wrongful possession of child pornography in violation of clause 2 of Article 134, UCMJ.[4] 70 M.J. at

[4] In *Phillips*, the appellant was convicted under clauses 1 and 2, but the Court of Criminal Appeals (CCA) only affirmed based on clause 2, stating "we leave for another day the matter of whether like conduct would be prejudicial to good order and discipline, a clause 1 violation, without

163. This Court rejected the conclusive presumption that conduct was service discrediting simply because it involved the possession of child pornography. *Id.* at 165. It wrote that "[t]he use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact." *Id.* at 164–65 (citing *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)) (other citations omitted). Thus, this Court held that:

> The terminal element in a clause 1 or 2 Article 134 case is an element of the offense like any other. Conduct need not be violative of any other criminal statute to violate clause 1 or 2. [*Davis*, 26 M.J. at 448.] The terminal element must be proved beyond a reasonable doubt like any other element. Whether any given conduct violates clause 1 or 2 is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action.

Id. at 165.

This Court then analyzed the legal sufficiency of the conviction based on appellant's conduct. The appellant argued *inter alia* that the evidence was legally insufficient because his conduct was wholly private.

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specific proof of the terminal element." *United States v. Phillips*, 69 M.J. 642, 646 (N.M. Ct. Crim. App. 2010), *set aside by Phillips*, 70 M.J. 161.

Id. This Court disagreed that public knowledge was necessarily required, reasoning that "[t]he focus of clause 2 is on the 'nature' of the conduct, whether the accused's conduct *would tend* to bring discredit on the armed forces *if known* by the public, not whether it was in fact so known." *Id.* at 165–66 (emphasis modified). This Court ultimately upheld the conviction because the charged conduct "would have tended to bring discredit upon the service had the public known of it." *Id.* at 166–67 (citation omitted).

Analysis

The Government at trial neglected to prove prejudice to good order and discipline. On appeal, the Air Force Court highlighted evidence applicable only to clause 2 offenses; nothing in its analysis speaks to actual prejudice to good order and discipline. Because the Government presented no evidence the charged conduct was prejudicial to good order and discipline, and because conclusive presumptions of such prejudice are impermissible and unconstitutional, this Court should set aside and dismiss AB Richard's Article 134, UCMJ, convictions.

1. Article 134, UCMJ, offenses require the Government to properly plead and prove the terminal element.

The Government exercised its discretion to charge AB Richard with child pornography offenses solely under clause 1 of Article 134, UCMJ. In doing so, it established four fundamental conditions. First, it obligated itself to prove beyond a reasonable doubt that AB Richard's conduct was prejudicial to good order and discipline. *Phillips*, 70 M.J. at 165 ("The terminal element in a clause 1 or 2 Article 134 case is an element of the offense like any other . . . [and] must be proved beyond a reasonable doubt like any other offense."). Second, because the statute's terminal elements are not interchangeable—a "[v]iolation of one clause does not necessarily lead to a violation of the other clauses"—the Government precluded itself from securing AB Richard's conviction based on a clause 2 violation. *Fosler*, 70 M.J. at 230; *see also United States v. Medina*, 66 M.J. 21, 26–28 (C.A.A.F. 2008) (declining to affirm a conviction on clauses 1 and 2 where the accused was charged with violating clause 3 because the three clauses are alternative theories of liability). Third, and relatedly, the Government provided AB Richard notice of exactly what he had to defend himself against: *only* a clause 1 offense. *See Armstrong*, 77 M.J. at 469 ("The charge sheet provides the accused notice that he or she will have to

defend against any charged offense . . . . .”). By choosing only clause 1, the Government bore the risk that the evidence would fail to meet the charging scheme. *See Mader*, 81 M.J. at 109. Fourth, the charging decision constrains the appellate courts in affirming the decision. *Medina*, 66 M.J. at 27 (“[A]n appellate court may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt.”).

2. The Government did not attempt to prove prejudice to good order and discipline in this case.

A. Conduct unknown to the military cannot have a direct and palpable effect upon good order and discipline.

The *MCM* cautions that disorders and neglects to the prejudice to good order and discipline involve more than merely prejudice “in a remote or indirect sense,” but rather must be “reasonably direct and palpable.” Pt. IV, ¶ 60.c.(2)(a) (JA at 196); *see also Parker*, 417 U.S. at 753 (citations omitted). This guidance implicitly requires *some* awareness of the offense by someone in the military. An act cannot have a direct impact on good order and discipline if it is unknown; prejudice requires actual impact. Here, the Government failed to establish any awareness within the military environment, let alone a direct and palpable impact.

While this Court has not directly spoken on the evidence required to prove prejudice to good order and discipline, several cases are instructive. The first is *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008). In *Wilcox*, a soldier posted racist messages on various online fora. *Id.* at 445–446. When evaluating whether the Government met its burden to prove the terminal element, this Court found no evidence of a reasonably direct and palpable effect on the military, in part because no evidence showed the messages were directed towards the military, or that a military member would likely find them. *Id.* at 451. This Court wrote that:

> The lower court supported the legal sufficiency of the Article 134, UCMJ, offense by postulating that Appellant's speech . . . undermined good order and discipline because "[y]oung, immature soldiers surfing the internet and discovering a U.S. Army paratrooper's profile advocating anti-government sentiments and extreme racist views could believe such disloyalty and racial intolerance is entirely acceptable conduct in our Army". . . . The mere possibility, assumed by the CCA and unsupported by the record, that a servicemember or member of the public might stumble upon Appellant's expression of his beliefs, believe he was in the military, and attribute his views to the military is so tenuous and speculative as to be legally insufficient to support the second element of the charged violation of Article 134, UCMJ.

Id. (quoting *United States v. Wilcox*, No. ARMY 20000876, 2006 CCA LEXIS 439, at *17 (A. Ct. Crim. App. December 22, 2006) (unpub. op.)).

Although *Wilcox* differs in that it involves the intersection of the First Amendment[5] and Article 134, UCMJ, it nonetheless aligns with the *MCM*'s language implying that awareness is required for prejudice to good order and discipline.

United States v. Gaskins, 72 M.J. 225 (C.A.A.F. 2013)[6] and *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) also help demonstrate the type of evidence required. Both cases involved the failure to allege any terminal element, which was plain error that this Court assessed for material prejudice. *Gaskins*, 72 M.J. at 232; *Goings*, 72 M.J. at 207. In *Goings*, this Court found no prejudice because there was clear notice and the appellant defended himself throughout trial against clause 1 and clause 2. 72 M.J. at 208–09. Of note, this Court pointed to the testimony of two senior non-commissioned officers who opined that appellant's conduct was both prejudicial to good order and discipline and service discrediting. *Id.* at 209. In *Gaskins*, however, the Government failed to

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[5] U.S. CONST. amend. I.

[6] Footnote 6 on page 21 of AB Richard's Supplement to the Petition for Grant of Review, which made a similar argument to this paragraph, erroneously stated the case name of a citation as *Goings* instead of *Gaskins*. The citation, however, correctly pointed to *Gaskins*, and the content of the argument was unaffected. Counsel apologizes for the error.

"proffer any physical evidence or witness testimony as to how Appellant's acts might have affected either his unit or the public's opinion of the armed forces . . . ." 72 M.J. at 234–35. These cases—although focused on a different underlying issue—support the proposition that awareness by the military is required for conduct to be prejudicial to the good order and discipline of that military. More simply, acts cannot "have affected [AB Richard's] unit" if nobody in his unit knew.

B. The Government failed to meet its burden to prove prejudice to good order and discipline.

Good order and discipline was literally not mentioned until instructions. (JA at 162.) The Government called no military witnesses who were aware of the images or videos in this case, nor did the Government ask anyone how such images would impact good order and discipline. The Government's case focused on whether AB Richard was aware of IB's age. (*See, e.g.*, JA 164–74 (the CTC's closing argument, which discussed evidence of IB's age at length, but failed to address good order and discipline).)

The CDC, in findings argument, was the first party to discuss whether the charged child pornography offenses prejudiced good order and discipline. (JA at 175–76.) This demonstrates the importance of the

Government's charging decision and the Defense's reliance thereupon. The Defense waited for the Government to offer evidence of prejudice to good order and discipline; when that evidence never came, the Defense justifiably highlighted the failure of proof to the members. (*Id.*)

The CTC's rebuttal argument only underscores the dearth of evidence on prejudice. The CTC restated the Defense's argument as "it's okay to have child pornography on your phone as a military member, just that nobody knows about it, so it's certainly not prejudicial to good order and discipline." (JA at 177.) Instead of highlighting any *actual* prejudice, the CTC offered this conclusory and erroneous argument: "It is prejudicial to good order and discipline to have child pornography on your phone." (JA at 177–78.) The CTC then recited the people who were aware, explicitly acknowledging that *none* of whom were in the military. (JA at 178.) He continued by asking: "How does that look? It's not prejudicial to good order and discipline because . . . he had it but it was just on his phone, it doesn't hurt us . . . it doesn't impact the military, it's ridiculous . . . . Keep that line. Keep that line. Do not get smudged." (*Id.*)

Of course, argument is not evidence, *see United States v. Bodoh*, 78 M.J. 231, 238 (C.A.A.F. 2019), and this Court reviews legal sufficiency *de*

novo. *Washington*, 57 M.J. at 399. But this Court can take three key points away from the CTC's argument. First is that the Government at trial could point to *zero evidence* that anyone in the military was even aware of the offenses, let alone show any direct and palpable impact. Similar to *Wilcox*, the case for prejudice to good order and discipline here, if any, rests only on the hypothetical possibility that: (1) someone in the military became aware of the images; and (2) that such awareness somehow resulted in direct and palpable impact on good order and discipline. As in *Wilcox*, the evidence here is "so tenuous and speculative as to be legally insufficient." 66 M.J. at 451.

Second, the CTC embraced the problematic *per se* approach to the terminal element that this Court invalidated in *Phillips*. 70 M.J. at 164–65. The CTC contended, "[i]t is prejudicial to good order and discipline to have child pornography on your phone." (JA at 177.) As in *Gaskins*, the "Government relied solely on evidence of the bad acts, the first element of Article 134, UCMJ, to prove the offenses at trial." 72 M.J. at 234.

A third point is that, without correction, the field may continue such impermissible blending of clause 1 and clause 2 conduct. The CTC's

argument—"[h]ow does that look?"—resonates only in a service-discrediting conduct case, a different offense than the one the Government charged.

This is not an abstract concern. Nor is it isolated to a single CTC; the Air Force Court made the same error. On appeal, it pointed to AB Richard's possession, distribution, and production that occurred while on Ramstein AB, a base regulated by international agreements; that AB Richard's status as a military member further subjected him to the regulations of international agreements[7]; that IB was a citizen of the host nation; that AB Richard sent an image to IB's mother, also a German citizen; and that he made sexually explicit images viewable to others on Snapchat. (JA at 9.) Respectfully, none of those points address whether there was a "direct and palpable" impact on good order and discipline. *MCM*, Pt. IV, ¶ 60.c.(2)(a) (JA at 196). Such arguments may be apt for clause 2 cases, but are inapposite here.

[7] Whether AB Richard was subject to international agreements, and what regulations those agreements imposed, are not in the record.

C. This Court should not apply a "low evidentiary threshold" to its legal sufficiency analysis of the terminal element.

The Air Force Court's decision rested, in part, on this Court's statement in *Goings* that there is a "low evidentiary threshold" when evaluating the terminal element under Article 134, UCMJ. (*See* JA at 9 (citing *Goings*, 72 M.J. at 206 n.5).) AB Richard maintains that the evidence here cannot satisfy either a "low evidentiary threshold" or standard legal sufficiency review. Respectfully, he further urges this Court to reject the notion that the terminal element is a special category meriting lower scrutiny.

First, the underlying authority cited in *Goings* does not support application of the "low evidentiary threshold" to clause 1 cases. In a footnote, this Court wrote "that Appellant's conviction is supported by legally sufficient evidence is particularly true in light of the low evidentiary threshold that this Court has applied to Article 134, UCMJ's terminal element." *Goings*, 72 M.J. at 206 n.5. This Court then cited to *Phillips* to support this proposition; however, *Phillips* was a clause 2 case.

This Court next cited to its decision in *United States v. Irvin*, 60 M.J. 23, 26 (C.A.A.F. 2004), noting it had found "a sufficient factual basis" to support both clause 1 and 2 despite no awareness of the misconduct

among servicemembers. *Goings*, 72 M.J. at 206 n.5. However, *Irvin* was a guilty plea case where this Court specified two issues to determine whether *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003) impacted his plea. 60 M.J. at 24. Having decided that *Free Speech Coalition* and *O'Connor* only affect clause 3 cases, this Court turned briefly to the plea's providence. *Id.* at 25–26. This Court found the plea provident due to the appellant's acknowledgment—in both a stipulation of fact and during the plea colloquy—that his conduct was service discrediting and prejudicial to good order and discipline. *Id.* at 26.

The *Goings* footnote itself even recognized the ethereal nature of the "low evidentiary threshold," stating that "[t]o the extent we should revisit the question whether a more exacting standard of proof should be required to support the terminal elements of Article 134, UCMJ, we leave that issue for a case in which it is properly raised and briefed." 72 M.J. at 206 n.5 (citation omitted).

Drawing these threads together, to the degree the footnote in *Goings* has any force, it is limited to clause 2 cases. Counsel has located only two cases applying this "low evidentiary threshold" to a solely

clause 1 case, and the facts of each case make clear the "low evidentiary threshold" played no role.[8] Although AB Richard does not concede a low evidentiary threshold should apply to *any* terminal element, the principle arguably carries more force in service discrediting cases where awareness and impact are not necessarily required. *See Phillips*, 70 M.J. at 163. Nevertheless, it should not apply in a case where "direct and palpable impact" is required.

Second, the notion of a "low evidentiary threshold" for the terminal element is at odds with this Court's duty to police Article 133 and 134 offenses for abuse. In *Parker v. Levy*, the Supreme Court held Articles 133 and 134 survived a "void for vagueness" challenge, highlighting the role the Court of Military Appeals (CMA) played in curtailing the scope

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[8] In *United States v. Brown*, NMCCA 201300020, 2013 CCA LEXIS 911, at *16–17 (N.M. Ct. Crim. App. October 31, 2013) (unpub. op.) (JA at 224–25), the lower court used a *see also* cite to reference the *Goings* footnote before unsurprisingly finding the evidence of unlawful entry satisfied clause 1 where the appellant broke into another's barracks room and sodomize a sleeping victim. In *United States v. O'Connor*, No. ACM 38240, 2015 CCA LEXIS 47, at *36–37 (A.F. Ct. Crim. App. February 12, 2015) (unpub. op.) (JA at 216–17), the lower court cited the *Goings* footnote before, equally unsurprisingly, finding the clause 1 conviction factually sufficient where the appellant, an officer, had sexual intercourse with an enlisted member of his crew while on a mission, leaving bruises that other crew members saw.

of each article. 417 U.S. at 752–53. Specifically, the Court explained that both Articles "ha[ve] been construed by the [CMA] or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope."[9] *Id.* at 752–53. This Court has explained that the "potential for abuse" in Article 134, UCMJ, an "expansive, flexible, and amorphous prosecutorial tool," is "balanced, in large part, by this Court's duty to constrain it." *Rice*, 80 M.J. at 41. This Court has repeatedly acknowledged this responsibility. *See, e.g.*, *United States v. Gleason*, 78 M.J. 473, 476 (C.A.A.F. 2019); *United States v. Tucker*, 78 M.J. 183, 186 (C.A.A.F. 2018). Accordingly, a "low evidentiary threshold" is irreconcilable with this Court's authority and responsibility to police Article 134, UCMJ, for excess.

3. Under this Court's clear precedent, conclusive presumptions of prejudice are impermissible and cannot overcome the evidence's legal insufficiency.

At the Air Force Court, the Government cited *Davis*, 26 M.J. at 448, to support its argument that child pornography is inherently prejudicial

[9] *See also id.* at 754 ("The effect of these constructions . . . has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover.").

to good order and discipline. (JA at 8–9.) In *Davis*, this Court's predecessor wrote that Article 134, UCMJ, "would appear" to contain two types of offenses: (1) that which is generally recognized as criminal and thus "prejudicial to good order and discipline or [] service-discrediting for the very reason that it is (or has been) generally recognized as illegal"; and (2) offenses that are not criminal outside the military context. 26 M.J. at 448 (emphasis removed). *Davis* involved the failure to state an offense where the specification did not contain words of criminality and the conduct was *not* inherently unlawful (i.e., would fall into the second category in *Davis*). *Id.* at 446–47. Thus, *Davis*' discussion of whether certain *crimes* are inherently prejudicial to good order and discipline was arguably dicta unnecessary to the decision, contained no elaboration beyond a quotable line, and does not answer the question presented in this case.

More importantly, this aside in *Davis* is plainly at odds with this Court's jurisprudence on the terminal element. The most immediate conflict, as the Air Force Court acknowledged, is with *Phillips*. At issue in *Phillips* was whether the appellant's possession of child pornography violated clause 2 of Article 134, UCMJ. 70 M.J. at 163. This Court

emphatically rejected the constitutionality of conclusive presumptions, stating that "[w]hether any given conduct violates clause 1 or 2 is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action." *Phillips*, 70 M.J. at 165.[10]

Phillips is not an outlier; instead, it is but one of many cases recognizing the importance of pleading and proving the terminal element. As this Court detailed in *Fosler*, courts and practitioners once found it unnecessary to explicitly allege the terminal element. 70 M.J. at 227. This practice became problematic in light of *United States v. Schmuck*, 489 U.S. 705 (1989), where the Supreme Court adopted the elements test to assess whether an offense is a lesser included offense (LIO) of the charged offense. *Id.* at 228. In light of *Schmuck* and its progeny, this Court abandoned the historical practice of presuming that any enumerated offense would meet the terminal element in an Article

[10] *Phillips* cited *Davis* in the same paragraph as this quotation, but on a different point of law. *Id.* This was the last time this Court has cited the *Davis* opinion.

134, UCMJ, offense. *Id.* at 228–29.[11] This Court has more recently affirmed this principle. *United States v. Coleman*, 79 M.J. 100, 103–04 (C.A.A.F. 2019) (citations omitted) (explaining that over the last decade this Court has "repeatedly held that the terminal element of an Article 134, UCMJ, offense is not inherently included within other elements and is instead a separate and distinct element that the government must prove").

While this Court has not overruled *Davis*, doing so here would purge an anomaly in an otherwise uniform progression towards requiring proof of the terminal element. Despite this inescapable movement away

[11] *See also Gaskins*, 72 M.J. at 233 (rejecting the assertion that predicate acts were "intuitive[ly]" prejudicial to good order and discipline as the terminal element is a "discrete element of a criminal offense"); *United States v. McMurrin*, 70 M.J. 15, 17 (C.A.A.F. 2011) (finding clear and obvious error where the court-martial convicted the appellant of negligent homicide under Article 134 as an LIO of involuntary manslaughter); *Girouard*, 70 M.J. at 9 (holding negligent homicide under Article 134 is not an LIO of premeditated murder); *United States v. Jones*, 68 M.J. 465, 473 (C.A.A.F. 2010) (holding an indecent act under Article 134 is not an LIO of rape); *United States v. Miller*, 67 M.J. 385, 388–89 (C.A.A.F. 2009) (holding simple disorder under Article 134 was not an LIO of resisting apprehension); *Medina*, 66 M.J. at 24–25 (holding possession of child pornography under clause 2 is not an LIO of possession of child pornography under clause 3, even where the appellant testified in the *Care* inquiry about the service-discrediting nature of his conduct).

from *Davis*, the Government argued before the Air Force Court that the commonly recognized unlawful nature of child pornography "sufficiently established prejudice to good order and discipline." (JA at 7–8.) In an effort to salvage the convictions, the Government seeks to revive *Davis* to support a theory that would, in essence, eviscerate the need to prove the terminal element in child pornography cases. This dramatic expansion of presumptions is inconsistent with *Phillips*, *Fosler*, the *MCM*, and the constitutional requirement that an accused has his or her guilt proven beyond a reasonable doubt.

In sum, this Court's jurisprudence makes clear that a conclusive presumption of prejudice to good order and discipline is impermissible. Such presumptions cannot relieve the Government's failure to introduce evidence of the terminal element.

4. Conclusion

Even KP, the Government's digital forensics expert who had experience with hundreds of child exploitation cases, recognized that "this isn't a true child pornography case." (JA at 69–71.) The underlying images and videos were produced consensually from lawful sexual activity between a 20-year-old and a 16-year-old; as charged, they are

only unlawful if they are to the prejudice of good order and discipline.

At trial, the Government failed to produce evidence that anyone in the military saw the child pornography or was affected in any way. The *MCM* cautions that prejudice to good order and discipline is not prejudice "in a remote or indirect sense" and must be "reasonably direct and palpable." Pt. IV, ¶ 60.c.(2)(a) (JA at 196). The Government made the decision to charge this case only as prejudicial to good order and discipline, not service discrediting, and then failed the requirement to prove the terminal element beyond a reasonable doubt. *See Phillips*, 70 M.J. at 165. Given the paucity of evidence provided, no reasonable factfinder could conclude that AB Richard's actions were to the prejudice of good order and discipline in the armed forces. Additionally, under *Phillips,* a conclusive presumption of the terminal element is unavailable to forgive the failure to introduce evidence. For these reasons, this Honorable Court should find the Article 134 offenses legally insufficient and dismiss with prejudice.

WHEREFORE, Appellant respectfully requests this Honorable Court dismiss Specifications 1, 2, and 3 of Charge IV.

Respectfully submitted,

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I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on March 25, 2022.

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