IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39918
Airman Basic (E-1), JAVON C. RICHARD, USAF, *Appellee.*	)	USCA Dkt. No. 22-0091/AF

BRIEF ON BEHALF OF THE UNITED STATES

BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36187

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellant Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

NAOMI P. DENNIS, Colonel, USAF
Chief
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 32987

INDEX OF BRIEF

TABLE OF AUTHORITIES

SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

STATUTES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39918
Airman Basic (E-1), JAVON C. RICHARD, USAF, *Appellee.*	)	USCA Dkt. No. 22-0091/AF

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

ISSUE PRESENTED:

I.

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 (AFCCA) reviewed this case under Article 66(d), UCMJ, 10 U.S.C § 866(d) (2019). This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

STATEMENT OF THE CASE

Appellant was tried by a general court-martial composed of officer and enlisted members. (JA at 032.) Charge I and its specification involved the destruction of property, under Article 109, UCMJ; Charge II and its specifications

involved various drug related offenses under Article 112a, UCMJ; Charge III and its specifications involved various assault offenses against two victims under Article 128, UCMJ, including IB; and Charge IV involved three specifications of the production, distribution, and possession of child pornography under Article 134, UCMJ. (JA at 029-031.) The specifications under Charge IV stated:

> Specification 1: In that [Appellant] . . . did within the continental boundaries of Europe and at or near Davis-Monthan Air Force Base, Arizona, between on or about 1 October 2016 and on or about 1 May 2018, knowingly and wrongfully possess child pornography, on divers occasions, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces.
>
> Specification 2: In that [Appellant] . . . did within the continental boundaries of Europe and at or near Davis-Monthan Air Force Base, Arizona, between on or about 1 October 2016 and on or about 1 May 2018, knowingly and wrongfully distribute child pornography, on divers occasions, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces.
>
> Specification 3: In that [Appellant] . . . did at or near Ramstein Air Force Base, Germany, between on or about 1 October 2016 and on or about 1 May 2018, knowingly and wrongfully produce child pornography, on divers occasions, to wit: a digital video of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces.

(JA. At 031.) All of the sexually explicit images and videos in the above charge

were of IB.

Appellant was convicted of all three specifications under Article 134, UCMJ, and one specification under Article 128 when he unlawfully struck, grabbed, and shoved IB. (JA at 032.) The convening authority took no action in the case. (JA at 037.) Appellant raised six assignments of error at AFCCA. (JA at 002.) AFCCA found no error materially prejudiced Appellant's rights, and affirmed the findings and sentence. (Id.)

STATEMENT OF FACTS

Appellant's Convicted Offenses

Appellant first met IB over the dating application, Tinder, in October of 2016 when Appellant was stationed at Ramstein Air Base (AB), Germany. (JA at 055, 079.) Tinder is a social media application which requires users to be over the age of 18. (JA at 079, 579.) Despite only being 16 years old, IB had a Tinder profile. (JA at 079.) After meeting with Appellant in person on two occasions, IB texted Appellant and confided that she was only 16 years old. (JA at 079, 080.) Appellant informed IB "he really [did not] care about" her age and they continued to spend time together. (JA at 080.) From the very beginning of their relationship, Appellant asked IB to send him sexually explicit photographs of herself, despite knowing that IB was only a teenager. (Id.) The photographs were of IB's genitalia. (Id.)

Four months into their relationship, Appellant deployed for six months. (JA

at 082.) IB was still 16 years old when Appellant returned to Germany in July of 2017. (JA at 082, 083.) They continued to see one another and spend time together on Ramstein AB. (JA at 106.) Appellant always wanted to spend time with IB on the base and in his dorm room. (JA at 083, 106.) Since IB did not have base access, Appellant would sponsor IB every time she came on base. (JA at 135.) Along with Appellant's sponsorship, IB was required to provide her identification card and fill out a paper with her personal information with the Security Forces Squadron. (JA at 134-135.)

Sometime after Appellant returned from his deployment, he confessed to IB that he had recorded the two of them having sexual intercourse without her knowledge in his dorm room. (JA at 083.) Appellant explained to IB that he connected his computer to his television on his desk in his dorm room in order to record himself having sexual intercourse with IB. (JA at 084.) Appellant recorded IB without her knowledge because he wanted her to "be more natural" in the recording. (Id.) IB was shocked that Appellant recorded her and asked him to delete the video. (JA at 083-084.) In August of 2017, Appellant recorded another video of him and IB having sex in his on-base dorm room using his GoPro camera. (JA at 038-040, 084.) IB was still only 16 years old when Appellant produced this video. (JA at 044, 078.) The video was 12 min and 10 seconds in duration and showed Appellant having sexual intercourse with IB from multiple angles and different sexual positions while IB's hands were tied in front of her. (JA at 040.)

Throughout the video, Appellant used the furniture in his government quarters to aid in the production of the video. (Id.) Appellant can be seen having sexual intercourse with IB on his dorm room bed. Later in the video, he used a shelf at the head of the bed to place the GoPro in a positon to capture the sexual activity. (Id.) While Appellant was recording the sexual activity, his dorm room window was open. (Id.) Appellant later transferred the child pornography he recorded from the GoPro to his cellphone. (JA at 063.)

In November of 2017, Appellant accessed IB's Snapchat account and recorded himself scrolling through a text conversation IB had with another individual named Gio. (JA at 051.) In the recording, Appellant is shown accessing the text conversation between IB and Gio and opening and closing photographs IB sent to Gio within the text conversation. (JA at 051, 138, 142-143.) The images were sexually explicit photographs of IB's genitalia. (JA at 142-143.) IB originally created those photos at Appellant's request, and the images had been sent to Appellant before IB sent the photographs to Gio. (JA at 129.) During the recording, Appellant could also be seen communicating with Gio, pretending he was IB, in an attempt to confirm whether IB and Gio had a physical relationship. (JA at 142.)

This was not the only time Appellant accessed IB's Snapchat account. While at Ramstien AB, Appellant asked a fellow airman, SSgt NA, if he could borrow his phone to access IB's Snapchat account. (JA at 057-058.) Appellant

told SSgt NA he wanted to see if IB was speaking to any other men. (JA at 058.) SSgt NA allowed Appellant to use his phone to access IB's Snapchat account. (Id.) SSgt NA testified that he watched Appellant take screenshots of IB's Snapchat account, but Appellant had "wiped" everything when Appellant returned the phone to him. (JA at 059.)

In January 2018, following Appellant's Permanent Change of Station (PCS) from Ramstein AB to Davis-Monthan AFB, Arizona, Appellant again accessed IB's snapchat conversation with Gio. (JA at 088, 144.) During this review, Appellant took a screenshot of the same conversation thread and sexually explicit photos of IB's genitalia and saved the images to his phone. (JA at 052, 145-146.)

After Appellant's PCS to Davis-Monthan AFB, he and IB, who was now 17 years old, continued to speak via FaceTime. On five separate days, Appellant took screenshots of his phone while he and IB were engaged in sexual acts over FaceTime. The screenshots captured both his and IB's genitalia. (Id.) He then saved the images to his phone. (JA at 041.) In most of the images, Appellant was on his bed in his government quarters at Davis-Monthan AFB. (JA at 041, R. at 478.) The images also depicted portions of military owned furniture, including a desk and dresser. (JA at 041). IB was not aware Appellant took the screenshots and saved them to his phone. (JA at 097.)

In December of 2017, Appellant became angry with IB and sent her mother, a German resident, "close up" images of IB's genitalia. (JA at 096.) Appellant

told his friend he "sent the nudes to [IB's] mom." (JA at 152.) IB's mother was angry Appellant sent her sexually explicit photographs of her daughter. (JA at 127.) IB was only 16 or 17 years old in the images. (JA at 096.)

In addition to distributing child pornography to IB's mother, Appellant also posted sexually explicit images of IB on social media. (JA at 094.) While stationed at Davis-Monthan AFB, Appellant accessed IB's snapchat account and posted the images he captured during his January 2018 video calls with IB. (JA at 041, 097, 124.) At trial, IB tearfully testified that when Appellant posted the child pornography to IB's snapchat story, he enabled "everybody" to see the sexually explicit images. (JA at 094.) Through Snapchat, IB had multiple contacts, including at least one military member. (JA at 156.) That airman, SrA JB, regularly viewed IB's snapchat story. (JA at 156-157.) Although SrA JB testified that he did not see any of the explicit images, IB's other contacts saw the images and reached out to inform IB. (JA at 094, 156-157.) Because Appellant had changed her password, IB was unable to immediately access her account. (JA at 048, 094.) Eventually, Appellant sent her the new password, "Ktownslut1." The password Appellant had created was in reference to a German town, Kaiserslautern, near Ramstein AB. (JA 048, 086.) Even though IB was eventually able to remove the sexually explicit photographs from her account, she continued to receive messages from people who would taunt her about seeing the images on her Snapchat story. (JA at 122.)

The Air Force Office of Special Investigations (AFOSI) at Davis-Monthan, AFB initially discovered that Appellant possessed child pornography when a civilian, who had dated Appellant in Arizona, reported that she saw sexually explicit photographs of IB on Appellant's phone. (JA 061, 149.)

SUMMARY OF ARGUMENT

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," a "rational trier of fact could have determined that the evidence at trial" proved Appellant produced, distributed, and possessed child pornography and that such conduct was prejudicial to good order and discipline beyond a reasonable doubt. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019); United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011). Appellant used his military status to sponsor IB, then a 16-year-old German national, onto a military installation to which she would not have otherwise had access. Appellant also used government-owned quarters and furniture to aid in the commission of the production, distribution, and possession of child pornography. Good order and discipline is a cornerstone for a well-disciplined military. Of course, the proof necessary to establish prejudice to good order and discipline cannot be met by per se conduct; instead, it must be demonstrated by the facts and circumstances of the misconduct. United States v. Phillips, 70 M.J. 161, 165 (C.A.A.F. 2011). And, some misconduct, while not "conclusively presumed to violate" Clause 1 or Clause 2 of Article 134, UCMJ, may tend to violate either of the clauses due to conditions

surrounding the unlawful conduct. United States v. Davis, 26 M.J. 445, 448 (C.M.A 1988). It has long been recognized that if the misconduct was "committed on a military reservation, or other ground occupied by the [military] . . . or if the offender use[s] his military position . . . such facts would be sufficient to make it prejudicial to military discipline." Major General George B. Davis, A Treatise on the Military Law of the United States Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals, 3d edition, 476 (1915).

The specific circumstances of Appellant's production, possession, and distribution of child pornography – committed on both an overseas and stateside military installation by using government-owned property and Appellant's military status to sponsor a host-nation teenager – made his conduct prejudicial to good order and discipline. The "surrounding circumstances have more to do with making the act prejudicial than the act itself in many ways." United States v. Free, 14 C.M.R. 466, 470 (C.M.A. 1988). There is no good order and discipline when military members commit crimes on military installations against host-country children while using their military status and government property, as Appellant did, to perpetuate the crimes because "all improper treatment of an inhabitant by a [military member is] destructive of good order and discipline." United States v. Solorio, 483 U.S. 485, 445 n. 10 (1987) (quoting 14 Writings of George Washington 140-141 (J. Fitzpatrick ed. 1936)).

Given the "low evidentiary threshold" this Court has applied "to Article 134, UCMJ's terminal element" and that this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution," a reasonable factfinder could have determined Appellant's production, distribution, and possession of child pornography prejudiced good and order discipline because of where he committed the crimes and his use of his military status and government-owned property. United States v. Going, 72 M.J. 202, 206 n.5 (C.A.A.F. 2013); United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001).

ARGUMENT

I.

APPELLANT'S CONVICTION FOR THE PRODUCTION, POSSESSION, AND DISTRIBUTION OF CHILD PORNOGRAPHY UNDER ARTICLE 134, UCMJ, IS LEGALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. Article 66(c), UCMJ; United States v. Turner, 24 M.J. 324 (C.M.A. 1987); King, 78 M.J. at 221.

Law

1. Legal Sufficiency

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." King,

78 M.J. at 221 (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). This Court's decision "does not hinge on whether or how the parties' lists of circumstantial evidence or negating factors stack up against each other." United States v. Norman, 74 M.J. 144, 151 (C.A.A.F. 2015) quoting Oliver, 70 M.J. at 68. Instead, it "hinges on whether reasonable factfinders could have drawn inferences one way or the other under a given set of circumstances." Id.

Legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted). This Court has long recognized that the government is free to meet its burden of proof with circumstantial evidence. King, 78 M.J. at 221. And this Court further recognized the ability to rely on circumstantial evidence is especially important in cases involving child pornography, where the offense is normally committed in private. Id.

2. Article 134, UCMJ, conduct prejudicial to good order and discipline

To establish a violation of Article 134, UCMJ, the Government is required to "prove beyond a reasonable doubt both that the accused engaged in certain conduct and that the conduct satisfied at least one of the three listed criteria" under the article." United States v. Fosler, 70 M.J. 225, 226 (C.A.A.F. 2011). This

Court has applied "a low evidentiary threshold . . . to Article 134, UCMJ's terminal element." Going, 72 M.J. at 206 n.5.

The first of the listed criteria, Clause 1, criminalizes "disorders and neglects to the prejudice of good order and discipline in the armed forces." Manual for Courts-Martial (MCM) pt. IV, para. 60.c.(2)(a). Conduct that is prejudicial to good order and discipline "refers only to acts directly prejudicial to good order and discipline and not [] acts which are prejudicial only in a remote or indirect sense." Id. To be prejudicial to good order and discipline such conduct must "be reasonably direct and palpable." Id. While the MCM addresses the amount in which, or degree to which, a service member's conduct must prejudice good order and discipline, it fails to specify what good order and discipline actually is. For many years, scholars, including a previous chief judge of this Court, have stated, "that the general article, particularly the prohibition against conduct prejudicial to good order and discipline, operates with 'awesome generality' such that its 'true meaning might baffle the examination of the most skilled lawyer.'" Jeremy Weber, What Happened to Good Order and Discipline, 66 Clev. St. L. REV. 123, 131 (2017) (quoting Robinson O. Everett, Article 134, Uniform Code of Military Justice – A Study in Vagueness, 37 N.C. L. REV. 142, 142 (1958). This Court's predecessor likewise found that, while it "do[es] not perceive in the Article['s] vagueness or uncertainty to an unconstitutional degree," there is a "conceivable

presence of uncertainty in the first two clauses." United States v. Frantz, 7 C.M.R 37, 39 (C.M.A. 1953).

Yet, despite the lack of a clear definition for the term "good order and discipline," conduct that violates Clause 1 is readily identifiable, and a consensus has developed over the years that crimes committed against civilians or on military installations prejudice good order and discipline. Dating back to 1779, three years after our country's inception, our nation's first president, George Washington, issued a General Order that explained the importance of maintaining military jurisdiction over offenses against civilians. In the General Order, he recognized that "[a]ll improper treatment of an inhabitant by an officer or soldier" is "destructive of good order and discipline." Solorio, 483 U.S. at 445, n. 10. (quoting 14 Writings of George Washington 140-141 (J. Fitzpatrick ed. 1936)).

Further historical reviews demonstrate that if misconduct was committed on a "military reservation, or ground occupied by the [armed forces]" or "if the offender use[d] his military position . . . for the purpose of intimidation . . . or object" than those "facts would be sufficient to make it prejudicial to military discipline within the meaning of the 62d Article of War.[1]" Major General George

[1] The language of Clause 1 under Article 134 is remarkably similar to its statutory predecessor, the sixty-second Article of War, which stated "[a]ll crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline . . . are to be taken cognizance of by a general or a regimental, garrison, or field officers' courtmartial, according to the nature and degree of the offense, and punished at the discretion of such court."

B. Davis, A Treatise on the Military Law of the United States Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals, 3d edition, 476 (1915). In a dissenting opinion, Justice Harlan explained that these types of crimes – "commission of offenses against the civil order" – "manifests qualities of attitude and character equally destructive of military order and safety." O'Callahan v. Parker, 395 U.S. 258, 281 (1969) (Harlan, J. dissenting.) In United States v. Solorio, the Supreme Court echoed the dissent's perspective in O'Callahan and identified that "military authorities read the general article to include crimes 'committed upon or against civilians . . . at or near a military camp or post.'" Solorio, 483 U.S. at 445. (quoting William Winthrop, Military Law and Precedents, 1124, 1126, n. 1. (2d ed. Government Printing Office 1920.))

Analysis

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the evidence was sufficient to prove that the specific circumstances of Appellant's misconduct was prejudicial to good order and discipline beyond a reasonable doubt for the offenses of production, distribution, and possession of child pornography.

62nd Article of War, U.S. Rev. Stat. § 1342.

1. Appellant's conduct, when he produced, distributed, and possessed child pornography, was prejudicial to good order and discipline when he committed acts of lawlessness on a military installation, and he used his military status and government-owned property to commit his crimes.

Appellant alleges the "Government presented no evidence the charged conduct was prejudicial to good order and discipline." (App. Br. at 18.) This is not accurate. Throughout its case in chief, the Government presented facts and circumstances which demonstrated Appellant's misconduct caused a reasonably direct and palpable injury to good order and discipline. MCM pt. IV, para. 60.c.(2)(a). As with any element of a crime, the "terminal element must be proved beyond a reasonable doubt." Phillips, 70 M.J. at 165. And, "[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." Id. In Appellant's case, the Government was required to, and did, prove the terminal element for all offenses beyond a reasonable doubt. Specifically, Appellant's misconduct violated Clause 1 because he used his military status and the resources he received from the military to effectuate the commission of his crimes.

Addressing first the production and possession specifications of Charge IV, Appellant created two videos of himself and IB having sexual intercourse. (JA 038, 040, 083-084.) When Appellant met IB, an underage German teenager, he was stationed and living at Ramstein AB, Germany. (JA at 055.) Appellant only

lived in Germany by virtue of his military service. (Id.) When Appellant, twice, recorded himself having sexual intercourse with an underage teenager, he chose to do so in quarters provided to him by the military and on a military installation. (JA at 083-084.) In order for Appellant to even have IB in his dorm room, he was required to use Security Forces' resources because IB, on her own, did not have access to the military installation. IB's admittance to Ramstein AB was dependent upon Appellant's use of his military status to actively sponsor her onto the military installation. (JA 134-135.) The process involved interacting with Security Forces personnel whose duties required them to verify IB's identification. (Id.) Appellant's purpose in bringing IB on base, at least in part, was to perpetuate the commission of a crime, the production and possession of child pornography. Appellant used his military status, and involved other personnel in their official capacity, to sponsor IB onto an installation she would not otherwise have had access to, so that he could record himself having sexual intercourse with a host nation teenager in his dorm room. Just as disconcerting, Appellant used his government quarters, filled with military-owned furniture, to aid in the production of the child pornography. (JA at 040, 084.) During the first video, IB described Appellant's use of his television and computer which sat upon a government owned desk to record IB without her knowledge. (JA at 083-084.) The second time Appellant recorded IB, the video footage showed Appellant and IB in his dorm room, having sexual intercourse, and using the dorm room furniture to aid in

the commission of the crime. (JA at 040.) Specifically, Appellant directed IB to get on the dorm room bed so they could have sexual intercourse. He then placed his GoPro on a shelf at the head of the bed to ensure he could continue to capture himself having sexual intercourse with IB. (JA at 040.)

When Appellant produced, possessed, and distributed the screenshots from his video phone calls with the German teenager, he was no longer stationed at Ramstein AB. (JA at 041.) Instead, he had moved to Davis-Monthan AFB in Arizona while IB remained in Germany. Appellant did not dispose of the child pornography he created in Germany when he received orders and traveled to Davis-Monthan, AFB. Instead, he continued to possess the sexually explicit photographs of a teenager throughout his military move, which was funded by the United States Air Force. In United States v. Derosier, No. ACM 37285, 2009 CCA LEXIS 279, at *6 (A.F. Ct. Crim. App. Aug. 18, 2009), AFCCA held similar conduct was directly prejudicial to good order and discipline. The court made that determination because the appellant obtained and possessed the child pornography while on official temporary duty for the Air Force in a foreign country, he attempted to import the child pornography into the United States while he was traveling on military orders, and identified as an Air Force military member and officer.

Additionally, the distance between IB and Appellant did not prevent Appellant from producing, distributing, and possessing more child pornography

while he used military property to do so. When Appellant and IB would engage in sexual activity over video phone calls, Appellant took screenshots which showed Appellant on a government-owned bed in his dorm room. (Id.) Once again he used military property and quarters to give him the privacy he needed to commit his crimes. King, 78 M.J. at 221. Appellant later distributed those very pictures, which displayed military dorm room furniture, over IB's Snapchat account. (JA at 041, 097, 124.)

Because Appellant produced and possessed the child pornography on military installations, both overseas and stateside, while using military property to aid in the crime and then distributed images depicting the conduct, his actions were prejudicial to good order and discipline. This is because the United States has a vital interest in ensuring the success of the military mission and "maintain[ing] a disciplined and obedient fighting force." Parker v. Levy, 417 U.S. 733, 763 (1974) (Blackmun, J. concurring). And lawless behavior on a military installation and the improper use of government resources – to produce, possess, and distribute child pornography – threatens that mission and "manifests qualities of attitude and character equally destructive of military order and safety." O'Callahan, 395 U.S. at 281. (Harlan, J. dissenting.). This is especially true of illegal behavior conducted on a military base overseas or against a host-nation foreign national where the erosion of good order and discipline could harm the force's posture in a foreign country and compromise the overall mission.

Appellant's conduct was not conclusively presumed to violate Clause 1 simply because the misconduct involved child pornography. Phillips, 70 M.J. at 165. Instead it was that the facts and circumstances of Appellant's conduct which had more to do "with making the act prejudicial than the act itself." Free, 14 C.M.R. at 470. Appellant might have a better argument if the same conduct had been committed under different circumstances – perhaps in a case where there is absolutely no military nexus. Perhaps then, he could more persuasively argue that the conduct would be too remote or indirect to injure good order and discipline. In a different type of situation, there might not be a risk or harm to the accomplishment of the mission but each case must be determined on case-by-case basis. *See* United States v. Wilcox, 66 M.J. 442 (C.A.A.F. 2008) discussed below. However, those are not the facts of Appellant's case. Appellant used his access to sponsor a 16-year-old foreign national onto an overseas base for the purpose of creating child pornography. And he misused government property to do so. The success of the American military depends on maintaining good order and discipline in everything it does, and the United States cannot have a disciplined military when its members are using military facilities to commit crimes, especially against host-country nationals.

Despite these facts, Appellant argues the only case that can be made for prejudice to good order and discipline "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." (App. Br. at 25.) Not only does this view misstate the law, as discussed below, but it also fails to take into account that Appellant used military property and installation access to accomplish his crimes. This Court has found that the use of military property and official position for personal gain amounts to conduct that is prejudicial to good order and discipline. *See generally* United States v. Alexander, 12 C.M.R. 102 (C.M.A. 1953) (an appellant's use of a Government vehicle to transport a Korean national for a price constituted conduct that was prejudicial to good order and discipline); United States v. Bey, 16 C.M.R. 239 (C.M.A. 1954) (an appellant's use of his official position to approve a day pass for a price constituted conduct that was prejudicial to good order and discipline.). Appellant's conduct may not have been for financial gain, but his use of his status to sponsor IB onto base and the use of his government quarters and furniture was for his personal gain – his own sexual gratification. The use of military resources to perpetuate a crime is not what is expected of a well-disciplined military. Appellant's conduct prejudiced good order and discipline because airmen are expected to use military installations and property to meet the mission and engage in appropriate off-duty activities for morale and welfare purposes, not to use the installation to perpetuate crimes involving child pornography.

Since 1952, this Court has held that the phrase "good order" should not be so narrowly tailored as to only criminalize conduct that somehow interferes with the

performance of military duties. United States v. Snyder, 4 C.M.R. 15, 18 (C.M.A 1952). This Court's predecessor recognized a broader application of the rule – "good order" can also include injury, wrongs, or crimes inflicted upon civilians or breaches of public peace in the civil community. Id. (quoting William Winthrop, Military Law and Precedents, 723 (2d ed. Government Printing Office 1920.)) (emphasis added). This sentiment holds equally true today as it did 70 years ago when this Court decided Snyder. The military maintains a vital role in fostering good relations with civilian communities and has an obligation not to harm or wrong civilians. And when such harm occurs, it can affect the "order of the military service." Id. The Court further distinguished conduct that is committed wholly in private as opposed to conduct that "as a general thing, involve[d] or touch other persons. Id. at 9. For example, language used purely in private differs from "language used in the presence of other members of the armed forces, [that] action may, under certain circumstances, be prejudicial to good order and discipline." Id. Here Appellant's conduct very clearly "touched" another person. He inflicted injury upon a German teenager when he produced, distributed, and possessed sexually explicit images of her. The mistreatment of an individual by a military member is conduct the Supreme Court has quoted as "being destructive of good order and discipline" and a "breach of military law." Solorio, 483 U.S. at 445, n. 10. The harm and injury to IB was abundant. As a minor involved in a relationship with an American military service member, IB was a member of a

vulnerable population, and Appellant took advantage of her misplaced love and trust. (JA at 130.) Appellant argues that his case is not a "true" child pornography case. (App. Br. at 34.) But the law criminalizing child pornography does not make allowances for the production, possession, or distribution of sexually explicit images of a minor just because an individual is lawfully permitted to engage in a sexual relationship with the minor. The law recognizes that even though 16 and 17 year olds may be able to consent to sex, society should protect them from having images and recordings of their sexual activities produced, possessed and distributed in perpetuity. IB, as a 16 year old and later 17 year old, was a teenager whom the law is meant to protect. Regardless of the legalities of Appellant's and IB's sexual relationship, Appellant's actions in the production, distribution, and possession of sexually explicit images of IB caused her injury. There are now sexually explicit images of IB that exist in the world when they should not. A teenager does not have the emotional intelligence or maturity to understand all of the long term repercussions that the existence of these photos will have. The distribution of the sexually explicit images especially injured IB. IB's distress could be seen in her testimony as she cried while she explained the distribution of the images on her social media account. (JA at 094.) The harm Appellant caused affected the "order of the military service" when he used his military status and government property to commit the crime that caused the harm. Snyder, 1 C.M.A. at 18. When viewed in this light, and under the low threshold required for legal

sufficiency, a reasonable factfinder could have drawn an inference that the evidence was sufficient to prove the order of the military was palpably disrupted by Appellant's actions beyond a reasonable doubt. Norman, 74 M.J. at 151. (C.A.A.F. 2015).

Appellant concedes that this Court "has not directly spoken on the evidence required to prove prejudice to good order and discipline." (App. Br. at 21.) The Government agrees and posits that the above historical descriptions demonstrate this Court, and its predecessor, has determined that Clause 1 of Article 134 encompasses a broad variety of conduct. In United States v. Choate, this Court found an appellant's behavior prejudicial to good order and discipline when he "mooned," or exposed his buttocks to his neighbor. 32 M.J. 423, 426 (C.A.A.F. 1991). The neighbor was the wife of a fellow service member. Id. The "mooning" occurred on base, it was part of a continuing course of conduct, and the appellant followed up the exposure with lewd comments. Id. Although this Court's analysis was focused on whether "mooning" constituted an indecent exposure, this Court still analyzed "whether the charged conduct was 'palpably prejudicial to good order and discipline.'" Id. at 425 (quoting Snyder, 4 CMR at 18.) Answering in the affirmative, this Court found the above "circumstances suggest an offense akin to abusing a female on post or communicating indecent language to a female, which have long existed as disorder offenses under military law." Id. While the circumstances in Choate are not identical to Appellant's case,

the misconduct is of a similar vein. Like Choate, Appellant's crimes occurred on base, involved the abuse of another and included a continuing course of conduct. Misconduct that occurs on base using one's military status is conduct that is frequently deemed to prejudice good order and discipline. As noted above, the Supreme Court in Solorio also highlighted "that military authorities read the general article to include crimes 'committed upon or against civilians . . . at or near a military camp or post.'" Solorio, 483 U.S. at 445. (quoting William Winthrop, *Military Law and Precedents*, 1124, 1126, n. 1. (2d ed. Government Printing Office 1920.)). The reasoning seems obvious: good order and discipline, as well as the safety and security of the community is threatened by crimes committed on a military installation using military resources. In Appellant's case, the harm is the creation of and proliferation of child pornography within that community.

This Court has further held that crimes involving child pornography are prejudicial to good order and discipline; although many of the cases do not discuss why such conduct is prejudicial to good order and discipline. In United States v. Mason, this Court found a guilty plea provident when the appellant accessed and downloaded images of child pornography on his government computer. 60 M.J. 15, 17 (C.A.A.F. 2004). The only evidence to support Clause 1 was the appellant's admissions that his conduct was prejudicial to good order and discipline and service discrediting because "he had viewed pictures of 'minors doing lascivious poses' and [] images of 'child pornography' on his government computer." Id. at

19. This Court identified that the above colloquy with the military judge was sufficient to support a conviction under Clause 1 and Clause 2 of Article 134, UCMJ. Id. at 16. *See also* United States v. Brisbane, 63 M.J. 106, 117 (C.A.A.F. 2006) (concluding that an appellant's possession of child pornography, which he disclosed to his neighbor and showed to his teenage stepdaughter "was prejudicial to good order and discipline and service-discrediting."). Appellant in this case similarly used government property to effectuate his crimes. When drawing "every reasonable inference from the evidence in favor of the prosecution" Appellant's behavior under the circumstances of this case was prejudicial to good order and discipline. Barner, 56 M.J. at 134.

Finally, Appellant, overlooking the admitted evidence in the case, claims that since the Government did not call any military witnesses who were aware of the child pornography or who could testify about how the sexually explicit images prejudiced good order and discipline, the Government failed to prove the terminal element. (App. Br. at 23.) Although not directly on point, this Court, when addressing Clause 2, has held the Government is not "required to specifically articulate how the conduct is service discrediting. Rather, the government's obligation is to introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction." Phillips, 70 M.J. at 166. Additionally, "[p]roof of the conduct itself may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was

of a nature to bring discredit upon the armed forces." Id. at 163. The same reasoning is true for Clause 1. The Government was not required to articulate how Appellant's conduct prejudiced good order and discipline. The Government was only required to admit evidence that proved the terminal element beyond a reasonable doubt, and it did so.

2. Awareness by military personnel is not required for Clause 1 to be proven beyond a reasonable doubt.

Appellant argues an "act cannot have a direct impact on good order and discipline if it is unknown," and the MCM "implicitly requires *some* awareness of the offense by someone in the military." (App. Br. at 20.) Despite Appellant's assertions, Clause 1 of Article 134, UCMJ, does not have a higher burden of proof than Clause 2. And the Government was not required to show that a service member was aware of Appellant's misconduct in order to prove Appellant's conduct violated good order and discipline.

This Court, in Phillips, explained it was not necessary for the Government to "present evidence that anyone witnessed or became aware of" an appellant's possession of child pornography when analyzing whether the appellant's conduct would bring discredit on the armed forces. Phillips, 70 M.J. at 166. However, Appellant argues Clause 1 should be treated differently and requires awareness by a military member. Appellant is essentially arguing that Clause 1 should have a higher burden of proof than Clause 2. To support his argument, Appellant asserts

the language of the MCM and its description of what behavior prejudices good order and discipline implies that awareness is necessary. (App. Br. at 20.) Appellant highlights the portion of the MCM that states conduct must not be prejudicial "in a remote or indirect sense" and must instead be "reasonably direct and palpable." (Id.); MCM pt. IV, para. 60.c.(2)(a). But a reading of the description of Clause 2, which defines the term "discredits" to mean "to injure the reputation of" and is conduct which "has a tendency to bring the service into disrepute or which tends to lower it in public esteem," could also be deemed to imply awareness of the conduct is necessary. MCM pt. IV, para. 60.c.(3). Despite the cited language, this Court has ruled there is no such requirement for Clause 2. Phillips, 70 M.J. at 166. Nor should this Court be swayed to apply a higher standard to Clause 1 by requiring awareness by military personnel in order for conduct to prejudice good order and discipline. Instead, this Court should align Clause 1 with Clause 2 and make clear that awareness by military personnel is not necessary to prove Appellant's misconduct prejudiced good order and discipline.

Further, the cases Appellant cites to in support of his position should not persuade this Court. Appellant argues this Court's ruling in Wilcox, 66 M.J. at 442, "aligns with the MCM's language implying that awareness is required for prejudice to good order and discipline." (App. Br. at 22.) In Wilcox, this Court found there was not a direct and palpable effect on good order and discipline when the appellant advocated for racial views on an internet site that no military member

saw and which were not directed at any military member. Id. at 450. But, Wilcox is distinguished from Appellant's case in many respects. The appellant in Wilcox did not use his military status to aid in the commission of a crime. He did not use military property to further his criminal conduct. His actions did not affect the good order of the military by causing direct injury to someone. The appellant in that case spread his extremist views and identified as a service member, but he did not need to use his position as a service member or use government property to log onto to the internet to accomplish his crime. Wilcox, 66 M.J. at 445. By contrast, Appellant both used his military status and government property to commit his offenses.

Appellant's case also differs from Wilcox in that Appellant's misconduct involved more than a "mere" possibility that other service members would "stumble" onto his crime. Wilcox, 66 M.J. at 451. Appellant distributed child pornography on IB's social media account and the evidence showed that all of IB's contacts could view the sexually explicit images if they viewed her story. (JA at 094.) IB's contacts included at least one military member who viewed her account on a regular basis. (JA at 156-157.) While this member testified that he did not see any sexually explicit images, these facts show how easily a military member could have seen the child pornography Appellant had distributed, which differs from Wilcox where the misconduct occurred on an obscure internet forum.

Finally, Appellant's proposed military awareness test is unworkable. Many

crimes punishable under Article 134 will not have any military witnesses when they are committed, and no military members will know of them until the crimes are discovered. Does that mean the crimes cannot directly harm military readiness, good order, and discipline at the time they are committed? It is inconceivable that Clause 1 was only meant to punish crimes with military witnesses. Appellant does not explain when military members must become aware of a service member's crimes in order for the crimes to prejudice good order and discipline. Surely, by the time Appellant was court-martialed many members of his unit were aware of his crimes, as will be true of most any military member who faces court-martial. Since Appellant's proposed military awareness requirement addresses none of these concerns, this Court should reject it in favor of looking at the individual facts and circumstances of every offense.

In sum, there is not a higher burden for Clause 1 and this Court should not find that awareness by a military member was necessary for the Government to prove Appellant's conduct prejudiced good order and discipline.

3. United States v. Davis is still good law and should not be overturned.

Appellant asks this Court to overturn Davis, 26 M.J. at 449, which held conduct that is generally recognized as illegal "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." Appellant's claims overturning

Davis would "purge an anomaly in an otherwise uniform progression towards requiring proof of the terminal element." (App. Br. at 33.) This Court analyzes requests to overrule its prior precedents under the doctrine of *stare decisis*. United States v. Cardenas, 80 M.J. 420, 423 (C.A.A.F. 2021) (citing United States v. Blanks, 77 M.J. 239, 241-42 (C.A.A.F. 2018)).

Appellant argues that Davis is "plainly at odds with this Court's jurisprudence on the terminal element." (App. Br. at 31.) It is not. In Davis, this Court's predecessor held that conduct which "has been recognized as illegal . . . 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." Davis, 26 M.J. at 448 (emphasis added.) The Court did not say illegal conduct is *always* prejudicial to good order and discipline, but instead explained illegal conduct *tends* to prejudice good order and discipline. This concept was further explored in United States v. Littlewood, where this Court stated a father's indecent acts with multiple minors to be misconduct that is "virtually always . . . [] prejudicial to good order and discipline." 53 M.J. 349, 354 (C.A.A.F. 2000) (quoting Davis, 26 M.J. at 449.) Again, while the term "virtually always" seems all-encompassing, it is still dependent on the facts and circumstances of a case. This is because "proof of the conduct itself may be sufficient for a rational trier of fact to conclude whether the terminal element was met" and the determination will still be based

upon all the facts and circumstances of the case. Norman, 74 M.J at 146 (quoting Phillips, 70 M.J. at 163). For instance, the production, distribution, and possession of child pornography is unlawful conduct that could virtually always be prejudicial to good order and discipline or service discrediting, but it still depends on the specific facts the case.

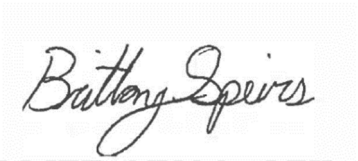
The facts and circumstances of Appellant's case establish that his conduct prejudiced good order and discipline. As Davis is not in conflict with Phillips, there is no compelling reason for this Court to overturn Davis when the law favors "adherence to precedent . . . because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Id. (internal quotation marks omitted) (quoting Blanks, 77 M.J. at 242).

Even if this Court overturns Davis, a reasonable factfinder would still find that the Government proved Appellant's production, distribution, and possession prejudiced good and discipline beyond a reasonable doubt. Appellant's conduct did not prejudice good order and discipline solely because his crimes involved child pornography. His conduct prejudiced good order and discipline because of the facts and circumstances surrounding his misconduct. At bottom, maintaining good order and discipline depends on military members behaving lawfully while living in government quarters on an overseas or stateside military installation. Appellant did not behave lawfully. He used his government quarters for the

privacy he needed to commit his child pornography crimes against a host-country national. It was the surrounding circumstances that made his misconduct prejudicial, not just the act. Free, 14 C.M.R. at 470. Appellant's convictions were legally sufficient.

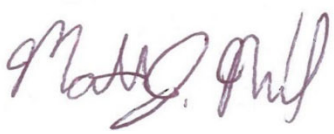
CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of Air Force Court of Criminal Appeals.



BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 36187

MARY ELLEN PAYNE
Associate Chief, Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 34088

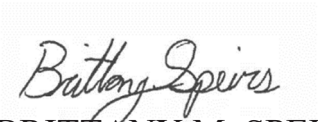


MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 34156

NAOMI P. DENNIS, Col, USAF
Chief, Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 32987

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 April 2022.



BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36187

MARY ELLEN PAYNE
Associate Chief,
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule

☒ 24(c) because: This brief contains approximately

9,001 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a proportional type using Microsoft Word Version 2013 with 14 point font using Times New Roman.

/s/

BRITTANY M. SPEIRS

Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 25 April 2022

APPENDIX

Cited Unpublished Opinions