IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

AUSTIN J. VAN VELSON,
Second Lieutenant (2d Lt),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0225/AF

Crim. App. Dkt. No. ACM 40401

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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

Issues Presented

I.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS PROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO CONDUCT A HEIGHTENED PLEA INQUIRY REGARDING SECOND LIEUTENANT VAN VELSON'S FIRST AMENDMENT RIGHTS.

II.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE, A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE, IS CONSTITUTIONAL, PROVIDENT, OR LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT.

III.

WHETHER 18 U.S.C. § 922 CAN CONSTITUTIONALLY APPLY TO SECOND LIEUTENANT VAN VELSON, WHO STANDS CONVICTED OF NONVIOLENT OFFENSES, WHERE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" UNDER *N.Y. STATE RIFLE & PISTOL ASS'N V. BRUEN*, 597 U.S. 1 (2022).

Statement of Statutory Jurisdiction

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

Statement of the Case

On October 3, 2022, at Laughlin Air Force Base (AFB), Texas, a military judge sitting as a general court-martial convicted Second Lieutenant (2d Lt) Austin J. Van Velson, consistent with his pleas, of one specification of possession of child pornography and one specification of communication of indecent language, in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 93. The military judge sentenced 2d Lt Van Velson to 24 months of confinement and a dismissal. R. at 236.

[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the versions included in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

The convening authority took no action on the findings or sentence. Convening Authority Decision on Action. On July 12, 2024, the Air Force Court issued its unpublished opinion in the case. Appendix.

Statement of Facts

1. The indecent language charged was "describing lewd acts with a child." No evidence of the specific language used was presented during findings.

The Government charged 2d Lt Van Velson with "communicating in writing . . . certain indecent language, to wit: language describing lewd acts with a child, which was of a nature to bring discredit upon the armed forces." Charge Sheet. During the *Care*[2] inquiry, the military judge read the standard definitions pertaining to indecent language. R. at 79-81. When the military judge asked 2d Lt Van Velson to articulate why he was guilty, 2d Lt Van Velson said he messaged someone who was "an adult male with minor children." R. at 82. 2d Lt Van Velson represented himself as "an adult female with minor children." *Id*. 2d Lt Van Velson is not female and does not have children. Pros. Ex. 1. The two chatted about hypothetical sexual activity with the minor children. R. at 82.

2d Lt Van Velson said his language was indecent "because it was grossly offensive to decency and propriety and would shock the morals of a member of the

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

community. It was vulgar, disgusting, and was meant to incite lustful thoughts." *Id*. He told the military judge that his language was service discrediting because

> [Detective] M.H., who was a civilian, found out that I was an Air Force officer; that I engaged in an offensive sexual discussion of this nature. That harmed the reputation of the Air Force and lower [*sic*] it in public esteem because officers are supposed to set the example in behavior and conduct.

Id. The military judge asked, "Do you believe that upon learning that you were in the Air Force that that might lower [Detective M.H.'s] opinion of the Air Force? R. at 88. 2d Lt Van Velson responded in the affirmative. *Id.*

This was a private communication between 2d Lt Van Velson and Detective M.H. R. at 83. When the military judge asked what the "exact language" was, 2d Lt Van Velson answered, "language concerning participating in sexual activities with minor children." *Id.* In follow-up questions, 2d Lt Van Velson said he asked Detective M.H.'s "persona" what he had "done" with his minor children. R. at 84. When the military judge asked 2d Lt Van Velson why he believed his language violated community standards, he responded, "Because sex with children is both illegal and immoral." R. at 86. The actual language used by 2d Lt Van Velson was not elicited by the military judge nor offered by the Government prior to findings being announced. R. at 82-89. In sentencing, Detective M.H. conceded that the chat was "an untrue fantasy" since neither 2d Lt Van Velson nor himself were the persons they purported to be. R. at 103.

2. The Air Force Court agreed that the military judge did not conduct a heightened inquiry, but found it was not necessary since the misconduct did not involve protected speech.

The Air Force Court found the military judge "did not conduct a heightened inquiry addressing the distinction between constitutionally protected speech and the alleged criminal conduct." Appendix at 5. The Air Force Court ruled speech involving indecency was synonymous with obscenity. *Id.* It found this case analogous to *United States v. Meakin*, 78 M.J. 396 (C.A.A.F. 2019), given the speech was communicated through the Internet, outside the home, and to an anonymous third party. *Id.* (citing 78 M.J. at 401-02). The Air Force Court concluded that, contrary to *United States v. Kim*, 83 M.J. 235, 239 (C.A.A.F. 2023), there was no constitutional gray area. *Id*.

ARGUMENT

I.

SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS NOT PROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO CONDUCT A HEIGHTENED PLEA INQUIRY REGARDING SECOND LIEUTENANT VAN VELSON'S FIRST AMENDMENT RIGHTS.

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion and the questions of law arising from a guilty plea de novo. *Kim*, 83 M.J. at 238 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

Law and Analysis

This Court should grant review of this case because the Air Force Court decided a question of law—that a heightened inquiry was not required for indecent speech cases—in conflict with this Court's decision in *Kim*. C.A.A.F. R. 21(b)(5)(B)(i). The Air Force Court did not address the military judge's failure to elicit the specific language used that amounted to the allegedly indecent conduct during findings and incorrectly applied *Kim* by not requiring a heightened inquiry.

1. The military judge did not elicit the facts necessary to determine whether the speech was protected under the First Amendment during the findings portion—and the Air Force Court refused to address it.

The First Amendment prohibits the Government from making a law that abridges the freedom of speech. U.S. CONST. amend I. Content-based restrictions of speech are presumed unconstitutional. *United States v. Alvarez*, 467 U.S. 709, 716-17 (2012). However, there are limited categories of unprotected speech including obscenity. *Id.* at 717. A court's analysis of indecent language and free speech must start with the actual words spoken and then move to the context in which they are spoken. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over *the content* of messages expressed by private individuals." (emphasis added)); *FCC v. Pacifica Found*, 438 U.S. 726, 744 (1978) ("[B]oth *the content* and the context of speech are critical elements of First

Amendment analysis." (emphasis added)); *United States v. Hullett*, 40 M.J. 189, 191 (C.A.A.F. 1994) ("The test for determining whether language is indecent is whether *the particular language* is calculated to corrupt morals or excite libidinous thoughts." (emphasis added)).

However, the military judge never elicited the exact language, words, or phrases that 2d Lt Van Velson said. While it is true that the military judge elicited that the conversation was "about adults having sex with minor children," that is not sufficient for a First Amendment analysis. R. at 82. The military judge should have selected a few discrete statements to see and understand the actual language used. This is especially needed in this case since 2d Lt Van Velson and Detective M.H. were using fictional personas and engaging in talk that amounted to "an untrue fantasy." R. at 106. The military judge's failure to analyze the "particular language," used in a private conversation, is an abuse of discretion—a point the Air Force Court was silent on. *Hullett*, 40 M.J. at 191.

2. <u>The military judge failed to address during the plea colloquy the relevant distinction between constitutionally protected behavior and criminal conduct.</u>

The military judge did not "adhere to the heightened standard outlined" in *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2001), which this Court reaffirmed in *Kim*. 83 M.J. at 239 (citing *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014) (stating that "[w]ithout a proper explanation and understanding of

the constitutional implications of the charge, [a]ppellant's admissions in his stipulation and during the colloquy regarding why he personally believed his conduct was service discrediting and prejudicial to good order and discipline do not satisfy *Hartman*")). In *Hartman*, the military judge described the offense of sodomy using definitions, which included various forms of sexual conduct between two people. 69 M.J. at 468-69. The military judge asked additional questions about the location of the act, presence of anyone else during the act, and the military relationship between the two involved in the sexual act of sodomy. *Id.* at 469. However, the military judge failed to explain the significance of the questions, nor did he ask the appellant whether the appellant understood the distinction between constitutionally protected behavior and criminal conduct. *Id.* The military judge in 2d Lt Van Velson's case did not have such a conversation with him either.

This Court re-affirmed the requirements of *Hartman* in *Kim* and overturned a conviction for indecent conduct for the appellant. There, the Government alleged that the appellant committed indecent conduct by "conducting an internet search for 'rape sleep' and 'drugged sleep,' and that said conduct was of a nature to bring discredit upon the armed forces." 83 M.J. at 237. While the military judge in *Kim* conducted a thorough plea colloquy and the appellant appreciated the nature of the videos he searched for—including why he watched them as well as the service discrediting nature of his actions—the military judge did not communicate with the

appellant regarding his First Amendment rights. *Id*. at 239. This Court explained that the appellant's behavior in *Kim* occupied a "constitutional gray area similar to that at issue in *Hartman*." *Id.* Accordingly, this Court concluded there was a substantial basis in law for questioning the plea, the guilty plea was improvident, and the military judge abused his discretion in accepting it. *Id.*

In 2d Lt Van Velson's case, the military judge was thorough in his questions regarding the elements of the offense, but that was not enough to find the plea provident. The military judge also needed to discuss "the relevant distinction between constitutionally protected behavior and criminal conduct" with 2d Lt Van Velson. 83 M.J. at 239 (citing *Hartman*, 69 M.J. at 469). In other words, the military judge never mentioned the possibility that 2d Lt Van Velson's language could have been protected by the First Amendment. This is required because a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id*. at 238 (quoting *Care*, 40 C.M.R. at 251).

Furthermore, 2d Lt Van Velson's case does fall into a constitutional gray area. 2d Lt Van Velson is aware of no law stating that private, obscene conversations are illegal. In every case where a Government's speech restriction has been upheld as constitutional by the Supreme Court under the obscenity doctrine, the subject speech was of a non-private nature. For example, in *Miller*, the supreme court found an unsolicited mass mailing campaign to advertise the sale of "adult" material was not

protected speech. *Miller v. California*, 413 U.S. 15, 16-17 (1973). In *FCC v. Pacifica Found*, the supreme court found a radio station's broadcast of a monologue containing indecent language at about 2 o'clock in the afternoon on a Tuesday over public airways was not entitled to absolute protection under the First Amendment. 438 U.S. at 729. In *Ginsberg v. New York*, the supreme court upheld a New York criminal statute prohibiting the sale of sexually explicit material to minors even though the material would not be obscene to adults since such exposure might be harmful to the minors. 390 U.S. 629, 631 (1968). There the appellant operated a public lunch counter selling, among other things, sexually explicit material to the public. *Id.* And, in *Renton v. Playtime Theaters*, the supreme court reversed the appeals court's decision that a city zoning ordinance was unconstitutional, because the ordinance did not ban movie theaters from broadcasting "feature-length adult films" altogether—instead where such theaters could be located. 475 U.S. 41, 43-45 (1986).

The Department of Justice publishes the "Citizen's Guide To U.S. Federal Law On Obscenity" where it lists relevant federal laws on obscenity. Department of Justice, *Citizen's Guide To U.S. Federal Law On Obscenity*, https://www.justice.gov/criminal/criminal-ceos/citizens-guide-us-federal-law-obscenity (last visited Sep. 11, 2024). Not one law listed prohibits private, obscene conversations between two consenting adults. *Id*. Furthermore, at the state level,

"general use of profane and obscene language is a legal gray area." World Population Review, *Profanity Laws by State 2024*, https://worldpopulationreview.com/state-rankings/profanity-laws-by-state (last visited Sep. 11, 2024). When conduct is in a "constitutional gray area" a heightened inquiry is required. *Kim*, 83 M.J. at 239. Even if there were laws that prohibit private, obscene conversations between two consenting adults, the question would remain whether 2d Lt Van Velson's language "may" implicate both criminal and protected language. *Hartman*, 69 M.J. at 468.

The heightened inquiry was needed in this case because 2d Lt Van Velson and Detective M.H. were using private speech to engage in "an untrue fantasy." R. at 106. A heightened inquiry was required even if the military judge were to have ultimately found that the indecent language fell outside of the scope of the First Amendment protections. *Kim*, 83 M.J. at 239 ("As a result, the plea colloquy should have established why possibly constitutionally protected material could still be service discrediting in the military context."). The Air Force Court incorrectly applied *Kim* and as such this Court should grant review. C.A.A.F. R. 21(b)(5)(B)(i).

3. The Air Force Court's reliance on *Meakin* was misplaced.

The Air Force Court disposed of this issue in a single paragraph with nearly no analysis citing to *Meakin* a single time. Appendix at 5-6. It disagreed that a heightened inquiry was needed and found this case to be parallel to *Meakin* since "the speech was communicated outside the home, through the Internet, and to an

anonymous third party. Appendix at 5 (citing 78 M.J. at 401-02). However, the question in *Meakin* was whether the appellant's litigated conviction was legally sufficient, not whether the military judge should have used a heightened plea inquiry—a requirement only in guilty pleas. 78 M.J. at 398. *Meakin* is also distinguishable. There, the explicit conversations were presented in findings and the communications were with seventeen separate people. 78 M.J. at 398-99, 402 ("Appellant engaged in a series of online conversations where he described in lurid detail the abuse, molestation, and rape of children with individuals through email, chat rooms, and instant messaging."). "The descriptions were vivid." *Id.* at 399. Here, the "exact language" garnered during the plea colloquy was that the communication was "language concerning participating in sexual activities with minor children." R. at 83.

Therefore, even assuming *Meakin* is relevant to some degree, that does not mean *Meakin* extinguishes *Kim*'s requirement of the heightened inquiry. As such, this Court should grant review of this case, because the Air Force Court decided this issue in conflict with this Court's decisions in *Kim* and *Hartman*. C.A.A.F. R. 21(b)(5)(B)(i).

WHEREFORE, 2d Lt Van Velson respectfully requests that this Honorable Court grant review of his case.

II.

SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE, A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE, IS NOT CONSTITUTIONAL, PROVIDENT, OR LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT.

Standard of Review

The standard of review under Issue I, *supra*, applies here as well.

Law and Analysis

In March 2023, this Court heard argument in *United States v. Wells*, 84 M.J. 113 (C.A.A.F. 2023). The issue granted in that case was whether "Appellant's conviction for a Clause 2, Article 134, UCMJ, offense [was] legally insufficient as to the terminal element." *Id.* Although that case dealt with a litigated specification, 2d Lt Van Velson asks this Court to grant review in his case as well. *Wells* provided this Court with an opportunity to revisit its jurisprudence to ensure its precedent meets constitutional requirements. C.A.A.F. R. 21(b)(5)(D). There, the appellant asked this Court to find Clause 2 unconstitutional and overrule *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011). 84 M.J. 113; Brief on Behalf of Appellant at 14, *United States v. Wells*, No. 23-0219 (C.A.A.F. Dec. 15, 2023). As such, 2d Lt Van Velson asks this Court to grant review of his case as a trailer to *Wells* to revisit this Court's jurisprudence on the terminal element under clause 2.

WHEREFORE, 2d Lt Van Velson respectfully requests that this Honorable Court grant review of his case.

III.

18 U.S.C. § 922 CANNOT CONSTITUTIONALLY APPLY TO SECOND LIEUTENANT VAN VELSON, WHO STANDS CONVICTED OF NONVIOLENT OFFENSES, WHERE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

Additional Facts

After his conviction, the Government determined that 2d Lt Van Velson's case met the firearm prohibition under 18 U.S.C. § 922. Entry of Judgment. The Government did not specify why, or under which section his case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law and Analysis

1. Section 922's firearms ban cannot constitutionally apply to 2d Lt Van Velson.

2d Lt Van Velson faces a lifetime ban on possessing firearms—despite a constitutional right to keep and bear arms—for wrongful possession of child pornography and communicating indecent language. The Government cannot

demonstrate that such a ban, even if it were limited temporally, is "consistent with the nation's historical tradition of firearm regulation." *Bruen*, 579 U.S. at 24.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. (quoting *United States v. Konigsberg*, 366 U.S. 36, 50 n.10 (1961)).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to 2d Lt Van Velson, who stands convicted of nonviolent offenses. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense is, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. For example, under the 1926

Uniform Firearms Act, a "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, larceny, burglary, and housebreaking." *Id.* at 701 (cleaned up) (citing Uniform Act to Regulate the Sale & Possession of Firearms (Second Tentative Draft 1926)). 2d Lt Van Velson's conduct falls completely outside these categories. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that Section 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years confinement. *Range v. AG United State*s, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (June 21, 2024)). Evaluating Section 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to violent criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In light of *Bruen*, Section 922 is unconstitutional as applied to 2d Lt Van Velson.

2. This Court has the power to act with respect to a "judgment" by a military judge.

This Court in *Williams* held that it was ultra vires for a Court of Criminal Appeals (CCA) to modify the statement of trial results to change sex offender registry using its power under Article 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019–2022). *United States v. Williams*, __M.J.__, 2024 CAAF LEXIS 501, at *14–15 (C.A.A.F. Sep. 5, 2024).[3] But this Court's authority under Article 67, UCMJ, is different, as this Court recognized. *Id.* at *10. Because this Court may act with regard to a "judgment" by a military judge, it may act to correct an entry of judgment where a CCA cannot. *See* Article 67(c)(1)(B), UCMJ (Supp. III 2019–2022). This Court left open this possibility when it wrote that, "at a minimum," it has the power under Article 67(c)(1)(B) to vacate a CCAs decision modifying an STR. *Williams*, 2024 CAAF LEXIS 501, at * 10. This case presents the vehicle to answer that question.

WHEREFORE, 2d Lt Van Velson respectfully requests that this Honorable Court grant review of his case.

[3] 2d Lt Van Velson acknowledges this Court's holding in *Williams*, but nevertheless maintains his argument, for the purpose of preserving the issue, that a CCA can modify the STR and EOJ to correct errors in applying 18 U.S.C. § 922.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on September 17, 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Rd, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE
WITH RULES 21(b), 24(d), AND 37

This Supplement complies with the type-volume limitation of Rule 21(b) because it contains 3,870 words. This Supplement complies with the typeface and type style requirements of Rule 37.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

Appendix

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40401

UNITED STATES
Appellee

v.

Austin J. VAN VELSON
Second Lieutenant (O-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 12 July 2024

Military Judge: Thomas A. Smith.

Sentence: Sentence adjudged 3 October 2022 by GCM convened at Laughlin Air Force Base, Texas. Sentence entered by military judge on 14 December 2022: Dismissal and confinement for 24 months.

For Appellant: Major Alexandra K. Fleszar, USAF; Major Spencer R. Nelson, USAF.

For Appellee: Lieutenant Colonel J. Pete Ferrell, USAF; Major Olivia B. Hoff, USAF; Captain Kate E. Lee, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, MASON, and KEARLEY, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge KEARLEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

MASON, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of possession of child

pornography and one specification of communication of indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] Appellant was sentenced to a dismissal and confinement for 24 months. Appellant requested relief from the convening authority as to "any portion [of his] sentence" as he deemed appropriate. The convening authority considered Appellant's request as a request for deferment and waiver of automatic forfeitures and denied the request, ultimately taking no action on the findings or sentence. Subsequently, the military judge ordered correction of the convening authority's decision on action, specifically, that the convening authority consider Appellant's request for relief also as a request for deferment of Appellant's sentence to confinement. The convening authority considered the request as directed and again took no action on the findings or sentence.

Appellant challenges the providency of his guilty plea to the indecent language specification, arguing that (1) the military judge failed to conduct a heightened plea inquiry regarding Appellant's First Amendment[2] rights; (2) the military judge failed to ensure that in this case, there was a direct and palpable connection between Appellant's speech and the military mission or military environment; and (3) the plea inquiry did not establish the terminal element of the specification.

Additionally, Appellant alleges error in that the Government cannot prove that 18 U.S.C. § 922 is constitutional because it cannot demonstrate that here, where Appellant was not convicted of a violent offense, the statute is consistent with the nation's historical tradition of firearm regulation. We have carefully considered this issue. As we recognized in *United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *22–25 (A.F. Ct. Crim. App. 28 May 2024), and *United States v. Lepore*, 81 M.J. 759 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to provide the requested relief regarding the 18 U.S.C. § 922 prohibition notation on the staff judge advocate's indorsement to the entry of judgment or Statement of Trial Results.

As to the providency of his plea, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

Appellant entered active duty in February 2021. Shortly after, he arrived at Laughlin Air Force Base, Texas (Laughlin), for training. Within days of his arrival, Appellant began downloading child pornography on his phone and

[1] Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

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

laptop computer. The images depicted actual minors aged 10 years or younger engaged in various sexual acts with adults.

Approximately four months after his arrival at Laughlin, Appellant engaged in a chat on an Internet chat website. Appellant pretended to be a single female with minor children. He began chatting with another person on the site who portrayed themself as an adult male with minor children. Unbeknownst to Appellant, the person with whom he was chatting was a civilian law enforcement detective. Following their conversation on the website, Appellant exchanged text messages directly with the detective. Appellant described their conversations as "concerning participating in sexual activities with minor children." Specifically, Appellant and the detective discussed adults having sex with minor children.

At some point after these chat and text conversations with the detective, Appellant's digital media was seized and analyzed. Evidence of Appellant's knowing possession of child pornography was recovered. At trial, the Government presented seven images of child pornography that were specifically charged in this case.

Appellant pleaded guilty to the possession of child pornography and the communication of indecent language specifications. Before accepting Appellant's pleas of guilty, the military judge did not conduct a "heightened inquiry" that discussed the communications in the context of free speech protections.[3] While discussing the communication of indecent language specification, Appellant agreed that the contents of the conversations with the detective were "grossly offensive" and would "shock the moral sense of the community because [they were] vulgar, filthy, and disgusting." Appellant also agreed that they violated community standards "[b]ecause sex with children is both illegal and immoral." He stated, "What I was talking about would reasonably tend to corrupt morals and incite offensive sexual thoughts."

The indecent language specification alleged that the communication of indecent language was conduct of a nature to bring discredit upon the armed forces. On this point, Appellant stated,

> My conduct was of a nature to bring discredit upon the armed forces because [the detective], who was a civilian, found out that I was an Air Force officer; that I engaged in an offensive sexual discussion of this nature. That harmed the reputation of the Air Force and lower[ed] it in public esteem because officers are supposed to set the example in behavior and conduct. And this

[3] However, as discussed *infra*, the military judge's inquiry was nonetheless complete because Appellant's speech was not protected.

> civilian was seeing that I, as an Air Force officer, did not behave in that expected manner; but, instead I behaved in a way that was very offensive. That looked terrible for the Air Force and the military. I had no legal justification or excuse for engaging in this offensive sexual discussion.

The military judge inquired further into this area. In response, Appellant repeated that he believed that the communications were conduct of a nature to bring discredit upon the armed forces because the detective was a civilian, and given Appellant's conduct, that might lower the detective's opinion of the Air Force.

Upon completion of his questions, the military judge asked the parties if they believed further inquiry was necessary. Trial counsel stated, "No, Your Honor." Trial defense counsel stated, "No, Sir."

II. DISCUSSION

A. Law

A military judge's decision to accept a guilty plea is reviewed for abuse of discretion, and questions of law arising from the guilty plea are reviewed de novo. *United States v. Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

"We give the military judge broad discretion in the decision to accept a guilty plea because the facts are undeveloped in such cases." *Id*. To provide relief, the pertinent question is whether "the record as a whole show[s] a substantial basis in law and fact for questioning the guilty plea." *Id.* (citing *Inabinette*, 66 M.J. at 322 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.A.A.F. 1991))).

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." *Id.* (quoting *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011)). Under those circumstances, a military judge must conduct a "heightened" inquiry, explaining the distinction between constitutionally protected behavior and criminal conduct and ensuring the accused understands the differences. *See United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014) ("Without a proper explanation and understanding of the constitutional implications of the charge, [a]ppellant's admissions in his stipulation and during the colloquy . . . do not satisfy *Hartman*.").

The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

The United States Supreme Court has recognized that while servicemembers are not excluded from First Amendment protection,

> the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible with the military that which would be constitutionally impermissible outside of it.

Parker v. Levy, 417 U.S. 733, 758 (1974).

"It is well-settled law that obscenity is not speech protected by the First Amendment, regardless of the military or civilian status of the 'speaker.'" *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019) (citing *United States v. Williams*, 553 U.S. 285, 288 (2008)).

Our superior court "has long held that 'indecent' is synonymous with obscene." *Id.* (citing *United States v. Moore*, 38 M.J. 490, 492 (C.A.A.F. 1994)).

"[R]epugnant sexual fantasies involving children" that appeal "to the prurient interest" and are transmitted from a home computer to an anonymous third party online are not protected speech. *Id.* at 401–02 (citation omitted).

If the Government attempts to use the second clause of Article 134, UCMJ, to punish "speech that would be impervious to criminal sanction in the civilian world," the Government must prove a "direct and palpable connection between the speech and the military mission or military environment." *United States v. Grijalva*, No. 21-0215, __ M.J. __, 2024 CAAF LEXIS 358, *7 (C.A.A.F. 26 Jun. 2024) (alteration omitted) (quoting *United States v. Wilcox*, 66 M.J. 442, 447–48 (C.A.A.F. 2008)).

B. Analysis

The military judge in this case did not conduct a heightened inquiry addressing the distinction between constitutionally protected speech and the alleged criminal conduct. Appellant alleges that this was error in light of *Kim*. We disagree.

Immediately following his explanation of the elements and definitions relevant to the communication of indecent language specification, the military judge asked Appellant why he believed he was guilty of this offense. Appellant's description of his conduct—"grossly offensive," "vulgar, filthy, and disgusting" speech involving adults having sex with minor children—made abundantly clear that his speech was not protected speech. Rather, the speech involved indecency, which is synonymous with obscenity. Analogous to *Meakin*, the speech was communicated outside the home, through the Internet, and to an anonymous third party. 78 M.J. at 401–02. This was no "constitutional gray

area." *Kim*, 83 M.J. at 239. As the misconduct did not involve protected speech, a "heightened" inquiry was not required in this case.

Appellant next alleges that in light of *Wilcox*, the guilty plea was improvident because a "direct and palpable connection between [Appellant's] speech and the military mission or military environment" was not established. 66 M.J. at 448. However, the requirement for this matter to be resolved is not triggered in every case where an accused utters words, be it orally, written, or typed online. Instead, the issue arises only when the Government attempts to use the second clause of Article 134, UCMJ, to punish speech that would be "impervious to criminal sanction in the civilian world." *Id.* at 447. "In some cases, the question of whether the First Amendment would or would not protect speech in a civilian context is not complicated." *Grijalva*, 2024 CAAF LEXIS 358, at *12. As indecent language, synonymous with obscenity, is not protected speech for either civilians or servicemembers, this matter was not at issue. Thus, the military judge was not required to ensure a direct and palpable connection between Appellant's speech and the military mission or military environment was established prior to acceptance of Appellant's guilty plea.

Finally, Appellant alleges that his guilty plea to the communication of indecent language specification is unconstitutional, legally insufficient, or improvident with regards to the terminal element alleged. We disagree. First, it is well-settled that Clause 2 of Article 134, UCMJ, is constitutional. *Parker*, 417 U.S. at 758. Next, "[b]ecause [Appellant] pleaded guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). Lastly, Appellant's plea is provident with regards to the terminal element. In his sworn statements to the military judge, Appellant conveyed that he was an Air Force officer engaging in, by his own admission, indecent conduct, and that conduct was uncovered by a civilian. Appellant stated, "And this civilian was seeing that I, as an Air Force officer, did not behave in that expected manner; but, instead I behaved in a way that was very offensive. That looked terrible for the Air Force and the military." The military judge did not abuse his discretion in finding Appellant's explanation adequate to meet this element of the offense.

Reviewing the inquiry as a whole, there is not a substantial basis to question Appellant's guilty pleas. The military judge did not abuse his discretion in accepting the pleas.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court