IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant* v. Senior Airman (E-4) EASTERLY, CHASE J., USAF, *Appellee.*	) BRIEF IN SUPPORT OF THE) CERTIFIED ISSUE))) USCA Dkt. No. 19-0398/AF))) Crim. App. No. 39310)

UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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

ISSUE CERTIFIED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT THE MILITARY JUDGE COMMITTED PLAIN AND PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE PANEL *SUA SPONTE* REGARDING THE IMPACT OF A PUNITIVE DISCHARGE ON APPELLEE'S POTENTIAL PERMANENT DISABILITY RETIREMENT, WHERE APPELLEE DID NOT REQUEST SUCH AN INSTRUCTION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

Appellee was tried by a general court-martial at Joint Base Pearl Harbor-Hickam, Hawaii. (JA at 2, 37.) A panel of officer members convicted him of attempted premeditated murder, in violation of Article 80, UCMJ. (JA at 2, 106.) The members found Appellee not guilty of communicating a threat, in violation of Article 134, UCMJ. (JA at 2, 106.) The panel sentenced Appellee to confinement for seven years, a dishonorable discharge, reduction to the grade of E-1, and forfeiture of all pay and allowances. (JA at 2, 107.) The convening authority approved the sentence as adjudged. (JA at 2.)

On 12 April 2019, the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings in this case and rejected all Appellee's assignments of error. United States v. Easterly, No. ACM 39310, 2019 CCA LEXIS 175, at *46 (A.F. Ct. Crim. App. Apr. 12, 2019) (unpub. op.) (JA at 1). Appellee did not raise the issue of the forfeited retirement instruction in his assignment of error; instead, AFCCA specified the issue. (JA at 23, 77.) On the specified issue, a majority opinion found the military judge committed plain error by failing to instruct the members, *sua sponte*, on how a punitive discharge impacts permanent disability retirement benefits (the retirement instruction). (JA at 23-27.) Judge Posch

concurred with the majority in affirming the findings and in rejecting Appellee's assignments of error, but dissented on the specified issue. (JA at 29-31.)

On 9 May 2019, the Government moved for reconsideration of AFCCA's decision *en banc*. (JA at 78.) On 28 May 2019, AFCCA denied *en banc* reconsideration in a 7-1 decision. (JA at 94.) A panel of three judges voted against reconsideration of the substantive issue in a 2-1 decision. (JA at 94.)

STATEMENT OF FACTS

Appellant planned and attempted "to commit the perfect murder," that is, to stab a sixty year-old woman to death with a knife, pour bleach all over the crime scene, douse her corpse and her apartment in lighter fluid, and then burn the entire home to the ground.[1] (JA at 106, 214, 269.)

While stationed at Joint Base Pearl Harbor-Hickam, Hawaii, Appellee met a woman named EE using an online website. (JA at 165, 261.) Appellee was twenty-two years old and EE was sixty at the time. (JA at 178.) Soon after meeting online, they arranged to meet in person. (JA at 165, 170.)

[1] The victim lived on the 18th floor of an apartment building. (JA at 298.) It is unclear whether the fire would have affected the rest of the apartment building or its inhabitants.

Appellee and EE went on three dates together. (JA at 170-78.) The first two dates went well, but the third did not. (JA at 170-71, 173.) They had planned to go for a moonlight hike, but Appellee's car broke down on the way. (JA at 174-75.) Appellee became upset and EE helped Appellee arrange a towing service to pick up his car. (JA at 175-76.) Eventually the two went to EE's apartment. (JA at 177.)

While in EE's home they began quarrelling about whether or not a Hollywood actor actually assaulted his girlfriend, and in the course of their dispute Appellant offended EE. (JA at 176.) He tried to apologize for offending her and offered to perform oral sex on her. (JA at 178.) EE initially accepted, but quickly decided that she was not enjoying it. (JA at 178.) She "sat up like the Exorcist" and said to Appellee, "I hope someone's having fun because I'm not." (JA at 178.) Appellee looked "blue" in the face and began stuttering badly. (JA at 178.) Appellee said he wanted to go for a "short walk" to collect himself, but EE suggested Appellee take "a long walk." (JA at 178.) Appellee left EE's apartment and went home. (JA at 178.)

The next day, EE left a voicemail for Appellee asking if he still planned to help her assemble an "armoire" as they had previously discussed. (JA at 179.) EE

also offered to help Appellee pick up his car. (JA at 179.) EE did not hear back from Appellee so she left him another message calling him a "coward." (JA at 179-80.) Appellee became angry with EE about this turn of events. (JA at 260.) He got an "urge to want to hurt" her. (JA at 260.)

On the afternoon of 28 May 2016, Appellee put on a suit and went to the Base Exchange. (JA at 139-40.) He purchased an KA-BAR knife and lighter fluid in separate transactions. (JA at 262, 420.) He paid for those items in cash. (JA at 283, 298.) He did not take receipts because he did not want his purchases to be "traced back" to him. (JA at 283, 298.) Appellee also gathered some other items from his home, including a wire, painting mask, gloves, bleach, extra clothing, and trash bags. (JA at 262, 267-68, 298.)

Soon thereafter, Appellee went to visit his friend, SrA WW. (JA at 160-61.) Appellee changed from his suit to blue jeans and a t-shirt before going to see him. (JA at 161.) Once Appellee arrived, he asked SrA WW to sharpen his knife. (JA at 161.) But SrA WW declined—telling Appellee that his knife did not need to be sharpened because it was "brand new" and still had a "factory edge." (JA at 161.) Appellee also asked SrA WW if he could borrow his car. (JA at 161.)

Appellee was planning to execute a violent crime against EE based on things he learned from watching Dexter, a television program about a forensic crime technician. (JA at 303.) Appellee intended to use the wire[2] to "choke" EE. (JA at 303.) He planned to use the gloves to avoid leaving fingerprints at the crime scene. (JA at 268.) Appellee intended to pour the bleach on the knife and "all over the apartment" to remove DNA. (JA at 268-69.) He planned to wear the painter's mask to "filter" the "fumes" from the bleach. (JA at 298.) Appellee intended to use the lighter and lighter fluid to "light the entire [place] on fire." (JA at 269, 309.) Appellee planned to change into the extra clothing after committing the crime. (JA at 277.)

Appellee then drove to EE's home in SrA WW's car. (JA at 262, 271.) He had taken his normal prescription medication, but was not under the influence of any illegal drugs or alcohol. (JA at 307.) Appellee parked the car a few blocks away. (JA at 263.) He walked to EE's apartment building carrying a Nike gym bag with the knife and other items inside. (JA at 264, 299.) He shielded his face from the complex's surveillance cameras because he did not want to "be seen" or for "the cops to know who [he] was." (JA at 147, 265, 279, 287.)

[2] Appellee told AFOSI that he did not actually take the wire with him to EE's home. (JA at 272-73.)

Appellee took the elevator to EE's "penthouse" apartment on the eighteenth floor. (JA at 289.) He knocked on EE's door. (JA at 265.) Appellee felt "nervous" as he stood at EE's door, but also a sense of "power" and "strength . . . like a thrill ride." (JA at 265.) EE was at home, but she did not answer the door because she did not want to see him. (JA at 180, 265.) Appellee tried knocking a few more times. (JA at 269.) EE listened as Appellee tried to apologize for his prior conduct, but she remained out of his sight. (JA at 180.) Appellee claimed that he had left his wallet behind the previous night, which was not true. (JA at 180.) After waiting for about twenty minutes, Appellee left EE's apartment thinking she was not home. (JA at 180, 269.) Appellee drove home and placed the bag in his bedroom. (JA at 271-72.)

Three days later, Appellee went to the chaplain and disclosed what he had done. (JA at 266.) The chaplain advised Appellee to go to mental health. (JA at 266.) On 1 June 2016, Appellee went to see Maj ER, a psychologist who had been treating him for schizophrenia for several months. (JA at 204-06, 208, 210.) Appellee disclosed to Maj ER that he had become upset with a woman who had "stood [him] up" on a date. (JA at 206.) Appellee told Maj ER that he had collected several items to take to the woman's home to harm her. (JA at 206.)

These items included a "wire" to cut the woman's throat and lighter fluid to "set the area on fire to hide the evidence." (JA at 207.) Appellee also told Maj ER that he had "stalked out the area" and "look[ed] for . . . security cameras[.]" (JA at 206.) Appellee told Maj ER that he could not go through with the "crime" as planned, however, because the woman did not answer the door. (JA at 206.) When agents from the Air Force Office of Special Investigation (AFOSI) searched Appellee's dormitory, they found a bag containing a knife, cigarette lighter, lighter fluid, mask, gloves, bleach, trash bags, and extra clothing. (JA at 110-26.)

Appellee waived his Article 31, UCMJ rights and spoke with AFOSI agents. (JA at 256.) Appellee told the agents he had contemplated using a wire "to choke her [EE]" but ultimately decided to leave the wire at home and "use the knife" instead. (JA at 273.) Appellee also discussed his intended purpose for the mask, gloves, bleach, and other items he brought to EE's home. (JA at 273.) Appellee also explained that he took various measures to avoid being "caught," including paying cash at the Base Exchange and avoiding security cameras at EE's apartment complex. (JA at 275, 283.)

Appellee was convicted of attempting "with premeditation, to murder, Ms. EE, by means of stabbing her with a dangerous weapon, to wit: a knife." (JA at 40,

106.) Appellee was charged, but acquitted of communicating a threat "to kill any doctor responsible for changing [the] diagnosis" on his disability retirement form. (JA at 40, 106.)

Prosecution Exhibits and Their Relevance

During findings, trial counsel introduced Prosecution Exhibit 23, which contained the results of Appellee's *informal* Physical Evaluation Board (IPEB) recommending zero disability retirement.[3] (JA at 421-22.) Trial counsel also introduced Prosecution Exhibit 24, which contained the results of Appellee's *formal* Physical Evaluation Board (FPEB).[4] (JA at 423-24.) This latter document recommended full disability retirement for Appellee in conjunction with his medical condition. (JA at 423-24.) The government used these exhibits to establish motive for the communication of a threat offense. (JA at 329-30.) For example, during findings argument, trial counsel stated:

> That, at the time, that the language amounted to a threat that is a clear present determination or intent to injure any doctor responsible for changing his diagnosis. Again, you have the motive, you have the paperwork, you have his interview, you have the forms. There is a reason he made that threat. He needed to make sure that that diagnosis did

[3] Specifically, Air Force Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, dated 26 April 2016. (Pros. Ex. 23.)
[4] Specifically, Air Force Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, dated 21 June 2016. (Pros. Ex. 24.)

> not change and that he can continue to . . . that his medical retirement would go through.

(JA at 329-30.)

During sentencing Appellee called Col DB, director of the forensic program at Walter Reed medical facility, to establish Appellee's need for continual medical treatment and to explain the implications of the FPEB. (JA at 362-68.) Trial defense counsel asked Col DB "when someone is found to be 100% disabled because of a mental health issue, what does that provide them in the future, generally, if you know?" (JA at 368.) Col DB testified:

> Sure, okay. So, certainly, a finding of 100% disability would suggest that a person who has that is severely disabled by their illness. What that would afford them, *in addition to disability payments* is, lifelong access to medical care and treatment through the VA system and through actually the active duty system for a part of their time as well. So, it's an acknowledgement that a person has an illness that is going to require treatment over time and that will likely interfere with their ability to lead a productive life in any occupation. And certainly, it implies that their illness has rendered them unfit for military service.

(JA at 368.)

Instructions

Neither Appellee, nor the Government, requested the military judge give a retirement instruction. The military judge instructed the members on the impact of a punitive discharge as follows:

> MJ: . . . . The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect the accused's future with regard to his legal rights, economic opportunities, and social acceptability.
>
> MJ: This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially *all benefits administered by the Department of Veterans Affairs and the Air Force establishment*. A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who, in the discretion of the court, warrants severe punishment for bad conduct.

(JA at 396-97) (emphasis added.)

Trial counsel requested a collateral consequences instruction, and the military judge advised the members:

> The consequences that flow from a federal conviction, other than the punishment, if any you impose, are collateral consequences of the conviction. The collateral consequences stemming from a federal conviction should not be part of your deliberations in arriving at a sentence.

(JA at 398.) The military judge did not indicate that disability retirement benefits amounted to a collateral consequence.

Unsworn Statements

Ms. EE elected to make an unsworn statement. (JA at 360.) Among other things she told the members:

> [Appellee] made his way home to my . . . home only to destroy the sanctuary that I had built there since 1994. Never will I open or close my door forgetting [Appellee]'s bag of torture devices sat waiting for me. [His] hidden dangers echo throughout my home constantly. Every second he has me . . . every sound has me startled and reacting defensively.
>
> Because there was no just reason for me to be his target, my mind wants an answer. I seem to be constantly looking for an answer, subconsciously seeing images of my tortured body throughout the house while trying to fill in the blanks. I was standing inside my door seconds, inches from my death. It's all so hard to comprehend. My home is no longer relaxing. And will it ever stop?
>
> A large part of me did die. My freedom and my ability to relax and enjoy my home. My ability in seeing the best in people has been replaced with fear.

> Hidden danger is the scariest danger of all and [Appellee] did successfully murder my freedom of spirit. I've lost my zest for life. [Appellee] is dangerous to society.

(JA at 360-61.)

Appellee gave a brief verbal unsworn statement explaining to the members:

> I will continue to try to get help no matter what the sentence is. I am worried though about my ability to continue to receive medication. I hope that I can continue to receive medications through the VA. I know that it will not be easy to determine what an appropriate sentence is. I ask for your leniency and mercy. I ask that you give me hope that I can continue to receive my medication once I leave jail.

(JA at 387.) He also provided a written unsworn statement, in which he stated:

> I believe with my medicine and continued treatment, I can remain myself and be a productive member of society. . . .
>
> I did not see [my Air Force career] ending so soon and I already had to come to term with it ending through an MEB but I pray that you do not discharge me through this court-martial. I hope you will allow me to be in a position where I can still receive medication through VA benefits, something I will not be entitled to with a punitive discharge.

(JA at 440-41.) Appellee never discussed retirement benefits outside of medical treatment in either unsworn statement.

Sentencing Arguments

During sentencing argument, trial counsel "submitted that the proper sentence in this case [wa]s a reduction to the grade of E-1, total forfeiture of all pay and allowances, a dishonorable discharge, and 10 years of confinement." (R. at 837.) Trial counsel justified the request for a punitive discharge as follows:

> I want to talk a little bit about our request for a dishonorable discharge. A dishonorable discharge, as the judge has defined for you, is appropriate for a serious offense. This is a serious offense. This isn't a ticky-tack offense. This isn't something where the accused deserves to maintain his position in the military, where he deserves to continue to wear the uniform. [EE] says, he's not worthy of his uniform. His actions prove that he is not worthy of wearing the uniform. That he should be dishonorably discharged from the Air Force. That alone will uphold the tenants of good order and discipline. And it is well recognized, the military judge's instructions tell you that the stigma of a punitive discharge is well-recognized in society by civilians and military alike. And the fact that [EE], the intended victim in this crime, is civilian, is something to consider. Where this happened? At her apartment, downtown, Honolulu, Waikiki, Makiki Towers. That is something to consider as well. The fact that she trusted him partially because of his military service is something else to consider in determining whether or not the accused should be dishonorably discharged from the military, and how he broke that trust.

(JA at 407.)

Trial counsel never argued that a punitive discharge was necessary to *prevent* Appellee from receiving a disability retirement from the Air Force for the rest of his life. (JA at 401-09.) Rather, the crux of trial counsel's sentencing argument was the seriousness of Appellee's offense and the effect it had on his victim. (JA at 401.) Trial counsel began his sentencing argument stating:

> If [EE] opened the door, she'd be dead. She would have been murdered with a KA-BAR knife, bleach dumped all over the room, lighter fluid splashed around, and then, the whole place lit on fire. It's a brutal and a grizzly attempted murder.

(JA at 401.) Trial counsel closed his sentencing argument stating:

> Attempted murder does have a victim. A part of [EE], in her own words, did die. There was no bloodshed, no crime scene, but he still took away that sense of trust, that sense of safety, her energy . . . we have an opportunity, not just to protect others, but to restore her lost trust. To take steps at least, to restoring her energy, her ability to trust, her ability to relax, her ability to be at home, 'cause he took that from her and we can restore that with the appropriate sentence in this case."

(JA at 410.)

Trial defense counsel argued against a punitive discharge as follows:

> The government's asked you for a punitive discharge and they've asked you for 10 years confinement and I want to

> talk to you about how that is not in the best interest of society . . . .
>
> I want to highlight the medical board, the paperwork that you have, because what the government is asking you to do is to say, disregard his diagnosis . . . .
>
> A bad conduct discharge and a dishonorable discharge makes what is going to be a very difficult life for Airman Easterly near impossible. We need him to be a productive member of society. We need...society needs him to be a productive member. So what does that entail? *A dishonorable discharge you know strips him of all his benefits. It strips him of all his Veteran Affair benefits. A punitive discharge does that.*"

(JA at 411, 414, 417) (emphasis added.)

Trial defense counsel made no reference to Appellant's retirement benefits, and the military judge gave no subsequent instructions. The members did not ask any questions about the impact of a punitive discharge on retirement benefits. Ultimately, the members sentenced Appellee, inter alia, "to be confined for seven years" and "to be discharged from the service with a dishonorable discharge." (JA at 107.)

AFCCA's Opinion

In setting aside Appellee's sentence for instructional error, AFCCA made three primary holdings: 1) there was error because the military judge did not give the retirement instruction; 2) the error was "clear and obvious" because the

military judge understood "the Air Force is prepared to retire [Appellee] with a diagnosis of schizophrenia;" and 3) the error materially prejudiced Appellee' substantial right "to have the court-martial panel members consider all of the information they were allowed to consider before they adjudged his sentence." JA at 25-26.) Judge Posch dissented on these issues stating: "I cannot conclude, after considering all of the sentencing evidence and weighing Appellee's conviction against his sentence, that, if there was error, it was prejudicial." (JA at 29.)

SUMMARY OF THE ARGUMENT

The AFCCA majority erred in each step of the plain error analysis. First, military judges are only required to give a retirement instruction when there is a sufficient factual predicate *and a party requests it*. United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001) (emphasis added). In Appellee's case, the factual predicate was insufficient because the record did not show whether his recommendation for permanent disability retirement would have carried much sway with approving officials once they learned he had been convicted for attempted premeditated murder. More importantly, Appellee never requested the instruction. Contrary the AFCCA majority's interpretation, Boyd does not suggest

that a factual predicate, by itself, creates a *sua sponte* duty to give the retirement instruction. Id. at 222.

Further, under the circumstances of this case, it was not plain and obvious to the military judge that a retirement instruction should have been given. Given the seriousness of Appellee's offense, a retirement instruction would likely have cut against Appellee, allowing the Government to persuade the members that Appellee "will get an honorable retirement *unless you give him a BCD*." United States v. Stargell, 49 M.J. 92, 93 (C.A.A.F. 1998) (emphasis added). When the defense appears to have strategic reasons for avoiding the retirement instruction, the need to instruct on the matter is not plain or obvious. *See cf.* United States v. Maynard, 66 M.J. 242, 245 (C.A.A.F. 2008) (finding a *sua sponte* Mil. R. Evid. 404(b) limiting instruction was not required because the defense made a strategic decision not to request it.")

The AFCCA majority should not have found prejudice in this case, because the question of a punitive discharge was not a "close call." *See e.g.* United States v. Luster, 55 MJ 67, 70 (CAAF 2001). The members were well-instructed on the additional stigma associated with a dishonorable discharge. (JA at 396-97.) If it was a close call whether to adjudge a punitive discharge, the members would have

given Appellee a bad conduct characterization, not a dishonorable one. The members were not only persuaded that Appellee's medical benefits needed to be severed, they determined that the additional stigma of a dishonorable discharge was necessary given the gravity of Appellee's offense. As such, even if there was plain error, it did not "substantially influence[] the adjudged sentence." United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009) (citing Boyd, 55 M.J. at 221).

ARGUMENT

THE MILITARY JUDGE DID NOT COMMIT PLAIN AND PREJUDICIAL ERROR BECAUSE THE RETIREMENT INSTRUCTION WAS NOT REQUESTED, NOR FAVORABLE TO THE DEFENSE, AND UNDER THE CIRCUMSTANCES OF THIS CASE, A PUNITIVE DISCHARGE WAS NOT A CLOSE CALL.

Standard of Review

When "the defense d[oes] not request a [retirement] instruction" military appellate courts "will grant relief only if the military judge's failure to instruct *sua sponte* was plain error." Boyd, 55 M.J. at 222. "To be plain error: (1) there must be an error; (2) the error must be plain (clear or obvious); and (3) the error must affect the substantial rights of the [Appellee]." United States v. Grier, 53 M.J. 30, 34 (C.A.A.F. 2000).

Law and Analysis

"[R]etirement-eligible servicemembers are *entitled* to place into evidence the fact that a punitive discharge would deny them retirement benefits." United States v. Sumrall, 45 M.J. 207, 209 (C.A.A.F. 1996) (emphasis added) (citing United States v. Griffin, 25 M.J. 423 (1988)). Accordingly, this Court in United States v. Boyd stated: "we will require military judges in all cases tried after the date of this opinion to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction *and a party requests it*." Boyd, 55 M.J. at 221 (emphasis added).

In this case, the military judge did not commit plain and prejudicial error by omitting the retirement instruction because: 1) the evidentiary predicate was insufficient and Appellee did not request the instruction, 2) the Appellee appeared to be avoiding the instruction for strategic reasons, and 3) there was no prejudice because a punitive discharge was not a close call in Appellee's case.

1. There was no plain error in Appellee's case because there was insufficient predicate evidence and Appellee did not request the instruction.

"To be plain error . . . there must be an error" in the first place. Grier, 53 M.J. at 34. There was no error in this case because the evidentiary predicate was insufficient and Appellee did not request the instruction as outlined Boyd.

a. The evidentiary predicate was insufficient to warrant a retirement instruction.

While there is no bright line for what qualifies as an "evidentiary predicate" for a retirement instruction, this first requirement is satisfied when a party shows "at the very least, [that] a servicemember is perilously close to retirement." United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997) (finding that service for 19 years and 10 months was "perilously close" to the 20 year retirement mark, and therefore warranted the military judge's answer to a court member's question); *compare also* United States v. Becker, 46 M.J. 141, 144 (C.A.A.F. 1997) (finding the appellant was "literally knocking at retirement's door at the time of his court-martial," having served for 19 years and 8 1/2 months); *with* United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989) (finding no error for failing to give a retirement instruction when the "Appellee was not eligible for retirement for at least 3 years and would first have to reenlist to become finally eligible.")

It is not enough for the appellant *to be* retirement eligible (or nearly so), a party must place this fact before the members. Boyd, 55 M.J. at 219 (finding "there was no factual predicate for an instruction on temporary disability retirement" because "neither defense counsel nor trial counsel presented any

evidence to the members regarding the physical evaluation board's recommendation for temporary disability retirement").

Similar threshold showings are required for other financial impact instructions. *E.g.* United States v. Perry, 48 M.J. 197, 199 (C.A.A.F. 1998). For example, in Perry this Court considered "whether the military judge erred to the substantial prejudice of Appellee when he failed to give a proposed instruction regarding the recoupment of [approximately $80,000 worth of] expenditures for Appellee's education at the U.S. Naval Academy." Id. at 198. As predicate evidence for this instruction, the appellant submitted "a memorandum from the Naval Academy Comptroller" stating:

> In accordance with PL 96-357, and effective with the Class of 1985, if any individual fails to fulfill their commitment, they may be liable to reimburse the U.S. Government for all or a portion of the costs associated with their education at the Academy.

Id. "The military judge denied the request for an instruction on the possibility of reimbursement" reasoning with trial defense counsel: "if I'm going to instruct them on this law, as you are asking me to do, then I will want to see some regulation, some implementing feature—I'd like to know a history of do they do it

in a case such as this, is there any reason to believe that will happen here." Id. at 198. The appellant could not answer this question. Id.

This Court affirmed the military judge's decision finding "there was no evidentiary predicate for the requested instruction." Id. at 199. The Court reasoned:

> Defense counsel proffered only a memorandum based on an enabling statute that *authorizes* the Secretary of the Navy to recoup educational costs but also gives the Secretary broad authority to waive the service requirement . . . . Although given ample opportunity, the defense offered no evidence that the Secretary of the Navy routinely initiated collection action or that such action was contemplated in this case.

Id. (emphasis added.) In short, simply being eligible for retirement benefits is insufficient to establish an evidentiary predicate. Id. at 199.

In this case, although Prosecution Exhibit 24 included a recommendation that Appellee receive a "permanent retirement," Appellee did not present any evidence that this recommendation would actually result in approving his permanent disability retirement, especially considering Prosecution Exhibit 23 reached a different conclusion. *But see* Boyd, 55 M.J. at 219.[5] Like the appellant

[5] To the extent the dicta in Boyd suggests that a recommendation alone is a sufficient factual predicate, the United States respectfully asks this Court to overrule that precedent.

in Perry, Appellee did not show "some regulation, some implementing feature" demonstrating that the FPEB recommendation would actually result in a retirement.

Is there any reason to assume Prosecution Exhibit 24 is a rubber stamp for retirement approval? What is the process for determining whether Appellee is, in fact, allowed to be medically retired? Prosecution Exhibit 24 offers a "recommended disposition," but who is the final disposition authority? Would that authority consider the informal recommended disposition (Prosecution Exhibit 23) in making the final determination? Regardless of whether Appellee received a punitive discharge, would the final disposition authority consider Appellee's court-martial conviction for attempted murder before making the final disposition? Appellee was charged with threatening to kill a doctor who interfered with his FPEB—was there discussion about changing that diagnosis? Appellee did not present evidence that would answer these questions. Without answers to these questions, there is insufficient information to determine whether Appellee was truly "knocking on retirement's door." Becker, 46 M.J. at 144. In short, this Court cannot determined whether Appellee was "perilously close to retirement" when it is unclear what role his court-martial (and inevitable federal conviction for

attempted murder) would have played for the disposition authority. Greaves, 46 M.J. at 139. Thus, the evidentiary predicate was insufficient to require the military judge to give a retirement instruction. At the very least, given the significant questions that remained unanswered about Appellee's retirement eligibility, failure to give a retirement instruction cannot be considered plain and obvious error.

b. No binding legal authority requires a military judge to give a retirement instruction when the accused did not request it.

Even if there was a sufficient evidentiary predicate, there was no error here because Appellee did not request the instruction—and probably for good reason. Once the members have an evidentiary predicate before them, the second part of the Boyd analysis asks whether "a party requests it." Boyd, 55 M.J. at 221. The AFCCA majority determined there was error because it found a factual predicate was "before the members, [and] the military judge did not ask the Defense about or *sua sponte* give a retirement instruction." Easterly, unpub. op. at *50. This is a misunderstanding or misapplication of what constitutes error under Boyd.

As the Boyd opinion is complicated by multiple retirement instructions and multiple standards of review, a robust analysis of the case may be beneficial. The first question (granted issue) addressed in Boyd was "whether the military judge erred by not instructing the members on the loss of retirement benefits that could

result from a punitive discharge when trial defense counsel *requested* such an instruction." Id. at 218 (emphasis added). Because the appellant requested the retirement instruction at trial, the analysis turned on "whether this appellant's 15 1/2 years of service was a sufficient evidentiary predicate to entitle him to an instruction on retirement benefits."[6] Id. at 221.

On that first question, this Court affirmed the military judge's decision not to give the retirement instruction, but the Court also established a new rule with regard to *requested* retirement instructions:

> [W]e will require military judges in all cases tried after the date of this opinion to instruct on the impact of a punitive discharge on retirement benefits, [1] *if there is an evidentiary predicate* for the instruction and [2] *a party requests it*. We expect that military judges will be liberal in granting requests for such an instruction. They may deny a request for such an instruction only in cases where there is no evidentiary predicate for it or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence.

Id. at 221 (emphasis added.)

The Court then shifted gears to address the separate, forfeited question of whether "the military judge's failure to instruct [on temporary disability

[6] Ultimately this Court resolved the issue on prejudice and did not reach the question of a factual predicate. Id. at 221.

retirement] *sua sponte* was plain error." Id. at 122. However, this issue was summarily rejected because "[f]or reasons not disclosed on the record, the defense did not present any evidence" of a factual predicate. Id. at 122. Accordingly, the opinion contains only nominal discussion of how retirement instructions are treated under plain error review. Thus, Boyd established only one thing: omitting a retirement instruction is *reviewed* for plain error. Id. It did not establish that omitting the instruction *is always* plain error. Id.

In keeping with Boyd, the Military Judge's Benchbook describes the military judge's duties as follows:

> NOTE: Effect of punitive discharge on retirement benefits. The following instruction *must* be given, *if requested* and the evidence shows any of the following circumstances exist: (1) The accused has sufficient time in service to retire and thus receive retirement benefits; (2) In the case of an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist; (3) In the case of an accused who is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge. *In other cases*, and especially if the members inquire, the military judge *should* consider the views of counsel in deciding whether the following instruction, appropriately tailored, should be given or whether the instruction would suggest an improper speculation upon the effect of administrative or collateral consequences of the sentence . . . . Even if the instruction is not required, the military judge nonetheless should consider giving the

> instruction and allowing the members to consider the matter. *See* United States v. Boyd, 55 MJ 217 (CAAF 2001); United States v. Luster, 55 MJ 67 (CAAF 2001); United States v. Greaves, 46 MJ 133 (CAAF 1997); United States v. Sumrall, 45 MJ 207 (CAAF 1996).

Military Judge's Benchbook, Department of the Army Pamphlet 27-9 at 102-03 (10 Sep 14) (emphasis added).[7] This guidance draws a clear line between what the military judge "must" do, and what the military judge "should" do. Even if it is best practice to "consider the views of counsel" before omitting the instruction, there is no authority to suggest the military judge is *required* to do so—especially when the instruction may not be beneficial to the accused. Id. This is at least some indication that it was not plain error to omit the retirement instruction when Appellee did not request it.

In sum, when an appellant requests to put on a sentencing case about preserving retirement benefits, that is his or her prerogative. Boyd, 55 M.J. at 222. However, for forfeited instructions, neither Boyd—nor any other opinion from this

[7] Although the Benchbook is not a primary source of law, it "represents a snapshot of the prevailing understanding of the law, among the trial judiciary, as it relates to trial procedure." United States v. Cornelison, 78 M.J. 739, 745 (A. Ct. Crim. App. 2019).

Court[8]—suggest that a factual predicate alone is enough to find plain error when the defense did not request the retirement instruction. Boyd, 55 M.J. at 222. This is the distinction the AFCCA majority neglected. In this case, Appellee did not request any instruction about retirement benefits. At most, this ends the inquiry into plain error. At least, it turns the focus of the plain error analysis on to the context of Appellee's trial.

2. If there was error, it was not plain and obvious to the military judge because the defense likely had strategic reasons for avoiding the instruction.

It is not enough to find error, "the error must be plain (clear or obvious)." Grier, 53 M.J. at 34. When analyzing this prong "we ask whether the error was so obvious in the context of the entire trial that the military judge should be faulted for taking no action even without an objection." United States v. Gomez, 76 M.J. 76, 81 (C.A.A.F. 2017) (quotations omitted); *see also* United States v. Frady, 456 U.S. 152, 163(1982) (finding the appellant must show the "trial was infected with error so 'plain' that the trial judge . . . w[as] derelict in countenancing it, even

[8] Perhaps the most logical explanation for why this Court has not addressed this issue is the fact that it would render the second part of the Boyd analysis futile. If a factual predicate always required a retirement instruction, then there would be no need for a party to request it. Boyd, 55 M.J. at 218, 222.

absent" objection or request.). If the retirement instruction would have been helpful to Appellee, that fact was not obvious to the military judge, and is still not obvious on appeal. *See* Easterly, 2019 CCA LEXIS 175, at *59 n. 1 (J. Posch, dissenting) ("As the Defense may have deduced, the possibility that an appellant would receive retirement benefits can be a reason for adjudging a punitive discharge.")

The AFCCA majority's position neglects the second prong of the plain error analysis by conflating the question of whether Appellee *qualified* for the retirement instruction with whether the military judge was *required* to give the instruction without a party's request. The majority found "the error was clear or obvious" because the military judge was well aware of the Prosecution Exhibit 24, which established that Appellee was recommended to receive permanent disability retirement. Easterly, unpub. op. at *51. While the military judge was aware of Prosecution Exhibit 24 and its implications, that is not the dispositive criterion for measuring whether there was plain and obvious error.

a. Context matters when determining whether the military judge had a sua sponte *duty to give the retirement instruction.*

When there is predicate evidence but no instruction request, courts must examine the context of the case to determine whether the omission was plain error.

Cf. United States v. Becker, 46 M.J. 141, 143 (C.A.A.F. 1997) ("The relevance of evidence of potential loss of retirement benefits *depends upon the facts and circumstances* of the individual accused's case . . . . We have never established a *per se* rule in this regard"). In this context, the need to issue a retirement instruction often turns on the parties' respective strategies. *Compare* Luster, 55 M.J. at 70 *with* Stargell, 49 M.J. at 93-94.

Oftentimes, appellants request the instruction as a shield to dissuade the panel from issuing a punitive discharge. *See e.g.* Becker, 46 M.J. at 142 (finding the "the military judge erred in refusing to admit defense mitigation evidence of the projected dollar amount of retirement income which [the] appellant might be denied if a punitive discharge was adjudged."); *see also* Luster, 55 M.J. at 70 (finding the military judge abused her discretion when she excluded defense's "evidence of [the] appellant's estimated retirement pay at various ranks" to show a concrete example of the extent to which a punitive discharge would impact the appellant's finances.)

At other times, appellants will strategically avoid the retirement instruction or explicitly fight against its inclusion. *See e.g.* Stargell, 49 M.J. at 93-94. In other words, depending on the nature of the crime, the possibility of receiving retirement

benefits can be a reason *for* adjudging a punitive discharge (i.e. a matter of aggravation), not a reason *against* it (i.e. a matter of mitigation). Id.

For example, in Stargell, trial counsel argued for a punitive discharge specifically because the appellant had "19 1/2 years of military service," meaning he "will get an honorable retirement *unless you give him a BCD*." Id. at 93 (emphasis added). On appeal, the defense "assert[ed] that the Government should not have been allowed to argue [the appellant] would receive honorable retirement unless he was sentenced to a bad-conduct discharge, because such evidence is so collateral as to be confusing and, thus, inadmissible." Id. (quotations omitted). This Court rejected the appellant's argument reaffirming "the impact of a punitive discharge on retirement benefits is not irrelevant or collateral." Id. However, in doing so, the Court simultaneously established the retirement instruction cuts both ways—it can used as a sword to pierce through the appellant's sentencing case, not just a shield to protect against a punitive discharge. Id.; *see also* Griffin, 25 M.J. at 423 (where the appellant challenged the military judge's decision to "instruct[] the

court members about [the] appellant's eligibility for retirement benefits" pursuant to *trial counsel's*[9] request.)

This Court reemphasized the double-edged nature of this instruction in United States v. Hall, 46 M.J. 145, 146 (C.A.A.F. 1997). In that case, the military judge gave the retirement instruction in response to a member's question. Id. On appeal, the defense alleged the instruction was error asking this Court to determine "whether Griffin means what it says, that a military judge may only answer members' questions regarding collateral consequences 'if an accused agrees.'" Id. Noting the "failure of [the] appellant to object or seek a curative instruction," this Court reviewed whether "the instruction by the military judge constituted plain error" and summarily rejected the appellant's argument that the accused must agree to the retirement instruction. Id. at 146-47 (quotations omitted). Thus, absent a request, there is no *per se* requirement to give the retirement instruction *sua sponte*; rather, plain error review requires an examination of the issues and strategies at play in a given case. *Cf.* United States v. Prather, 69 M.J. 338, 344

[9] In Boyd, this Court appears to have misread the facts of Griffith indicating the instruction came "pursuant to the request of an accused." Boyd, 55 M.J. at 220 (emphasis added.) However, in Griffin, the *accused* did not request the retirement instruction, rather "*trial counsel* requested that the court members be instructed on the effect . . . a punitive discharge would have on retirement benefits," and the defense did not object. Griffin, 25 M.J. at 424 (emphasis added).

(C.A.A.F. 2011) (explaining this Court "must evaluate the instructions in the context of the overall message conveyed to the [members].") (quotations omitted).

In the context of Appellee's case, fleshing out the retirement instruction could have cut against him—as it did in Stargell, Gifford, and Hall. It would have drawn attention to the fact that the Air Force would be cutting a check each month to a would-be murderer (and arsonist)[10] for the rest of his life. Additional emphasis on the retirement instruction might have led the government to argue or the members to infer: Appellee "will get a retirement [pension] *unless you give him a BCD.*" Stargell, 49 M.J. at 93 (emphasis added).

The fact that Appellant made a zealous case for preserving his medical treatment benefits, while remaining conspicuously silent on the question of retirement pay is telling indeed. In fact, when the AFCCA majority insisted it was "clear and obvious" to the *military judge* that Appellee qualified for the retirement instruction, it also inadvertently showed that it was "clear and obvious" to *trial defense counsel* that Appellee qualified for the retirement instruction. Yet, the defense did not ask for the instruction.

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[10] Although Appellee was not charged with arson, his express plan was to burn, not only EE's corpse, but "light the entire thing on fire." (JA at 269.) As EE lived on the 18th floor of an apartment building it is difficult to determine who else would have been affected by the fire. (JA at 298.)

The defense team was not asleep at the switch. They, like the military judge, were aware of the FPEB and its implications. Easterly, 2019 CCA LEXIS 175, at *51-52. The defense team was not comatose when "the Government argued during findings that Appellant was concerned about his retirement pay and 100 percent disability compensation when he communicated a threat to kill any doctor who changed his diagnosis." Id. at *51. It is reasonable to conclude that the trial defense team deliberately chose to avoid the retirement instruction, which is understandable under these circumstances. In fact, this issue was so unclear, Appellee did not even raise it on appeal. As such, the need to give the retirement instruction was not plain and obvious.

b. The retirement instruction should be treated like other instructions that hinge on strategy.

"Defense counsel has leeway to make strategic decisions at trial and need not request instructions inconsistent with its trial theory." Smith v. Stewart, 77 F. App'x 925, 926 (9th Cir. 2003) (quotations omitted) (finding no instructional error because "defense counsel made a tactical decision not to seek a jury instruction on a lack of sexual interest motive because he believed that arguing accidental touching would undermine [the appellant's] credibility.").

As a point of comparison, it is not plain error to forgo a *sua sponte* Mil. R. Evid. 404(b) limiting instruction when the defense appears to be avoiding the request for strategic reasons. *See e.g.* Maynard, 66 M.J. at 245 (finding the military judge did not need to give a limiting instruction *sua sponte* because "defense counsel made a tactical decision not to object in open court or request a limiting instruction because he did not want to emphasize the testimony"); *see also* United States v. Simmons, No. ACM 39342, 2019 CCA LEXIS 156, at *17 (A.F. Ct. Crim. App. 9 April 2019) (unpub. op.) (finding no plain error when the military judge did not give a limiting M.R.E. 404(b) instruction *sua sponte*); *see also* United States v. Griffing, No. ACM 38443, 2015 CCA LEXIS 101, at *37-38 (A.F. Ct. Crim. App. 23 March 2015) (unpub. op.) ("The existence of [a] reasonable basis for not wanting a limiting instruction negates any suggestion that the need for one was plain or obvious"). In fact, in Simmons, AFCCA explained when "viewed through the lens of plain error analysis, we cannot say the military judge plainly or obviously erred by omitting a limiting instruction that the Defense never sought" because the court could "perceive plausible tactical reasons for not doing so." Simmons, unpub. op. at *17.

Federal circuit courts have reached similar conclusions. For example, the appellant in United States v. Barnes was convicted for smuggling cocaine into the country. 586 F.2d 1052, 1053-54 (5th Cir. 1978). One of his co-conspirators confessed to the appellant's involvement, but recanted her confession at trial. Barnes, 586 F.2d at 1054. The prosecution impeached the co-conspirator with her earlier confession, but the defense did not request a limiting instruction. Id.

On appeal, the appellant claimed "not instructing the jury that evidence of his prior drug deals could be used only to show his state of mind, rather than to show that he was a man of bad character" was plain error. Id. at 1058. The Fifth Circuit found "the need for a limiting instruction was not obvious" because "[c]ounsel may refrain from requesting an instruction in order not to emphasize potentially damaging evidence and for other strategic reasons." Id. at 1059 (citations omitted).

Here, as in Maynard, the need to instruct was not plain nor obvious because in all likelihood "defense counsel made a tactical decision not to object in open court or request a limiting instruction because he did not want to emphasize the testimony." Maynard, 66 M.J. at 245. When "viewed through the lens of plain error analysis, [this Court should not] say the military judge plainly or obviously

erred by omitting a[n] . . . instruction that the Defense never sought" especially when it can "perceive plausible tactical reasons for not doing so." Simmons, unpub. op. at *17. In Appellee's case, "the need for a [retirement] instruction was not obvious" because trial defense "[c]ounsel may [have] refrain[ed] from requesting an instruction in order not to emphasize potentially damaging evidence and for other strategic reasons." Barnes, 586 F.2d at 1059.

As the Ninth Circuit said when reviewing the omission of a *sua sponte* hearsay instruction:

> The law wisely places upon counsel the duty to request it. For all that we know, [defense] counsel, who are experienced attorneys, may well have felt that such an instruction would tend to over-emphasize the importance of [the exhibit] in the eyes of the jury, and may have elected not to ask for the instruction for that reason. Under these circumstances there is no affirmative obligation on the trial judge in a criminal case to give such a limiting instruction when counsel does not ask for it.

Sica v. United States, 325 F.2d 831, 836 (9th Cir. 1963) *cert. denied*, 376 U.S. 952 (1964). The same is true of Appellee's case. His experienced trial defense counsel likely did not want to emphasize to the panel that Appellee would be receiving retirement pay for the rest of his life, unless they adjudged a punitive discharge. Thus, the military judge had no affirmative obligation to provide the retirement

instruction because Appellee did not ask for it, and its benefit to Appellee was not "plain (clear or obvious)." Grier, 53 M.J. at 34.

c. Omitting the retirement instruction was not plain and obvious error because the military judge had a duty not to unduly interfere with how the parties presented their cases.

"T]he military judge . . . must avoid undue interference with the parties' presentations or the appearance of partiality." R.C.M. 801(a)(3) Discussion. Without a party's request for the instruction, the military judge in this case would have run the risk of undue interference with the parties' cases. Although it is true the military judge could have established affirmative waiver of this issue in an Article 39(a) session, "judges should not even inquire why the defense follows a particular approach. Inquiry might breed distrust between lawyer and client, while providing the prosecutor with valuable information that he could not obtain via discovery . . . it is not a judge's job to assist one advocate at another's expense." United States v. Gustin, 642 F.3d 573, 575 (7th Cir. 2011) (emphasis added).

If the defense team had to explain that they did not want the retirement instruction, it might have alerted the prosecution to their strategy—emphasize Appellee's need for treatment, avoid the topic of Appellee's retirement pay. If

alerted, trial counsel may have requested the instruction themselves to be able to argue that Appellee would receive retirement pay unless he was adjudged a punitive discharge. Presumably in light of these strategic considerations, this Court held in Boyd: "we will *require* military judges in all cases tried after the date of this opinion to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction *and a party requests it*." Boyd, 55 M.J. at 221 (emphasis added). Therefore, the need for a retirement instruction in these circumstances was not "plain (clear or obvious)." Grier, 53 M.J. at 34.

3. Appellee was not prejudiced by the omitted instruction because a punitive discharge was not a close call.

"To be plain error . . . the error must affect the substantial rights of the [appellant]." Grier, 53 M.J. at 34. However, "[t]he test for prejudice in a situation like this one is whether the error substantially influenced the adjudged sentence" not whether it *could* have. United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009) (citing Boyd, 55 M.J. at 221). (C.A.A.F. 2001)). In other words, speculation about prejudicial impact is insufficient. Griffin, 25 M.J. at 425. "[T]o constitute plain error, the error must not only be both obvious and substantial, it must also have had an *unfair* prejudicial impact on the jury's deliberations." Griffin, 25 M.J.

at 425. The use of the term "unfair" has significant implications for Appellee's case. In effect, the AFCCA majority found that it was "unfair" for the members to sentence Appellee without the retirement instruction. The irony is, as described above, had the military judge instructed the members on retirement benefits, Appellee would likely be arguing that it was "unfair" to *give* the retirement instruction or even ask Appellee about it. *See* Stargell, 49 M.J. at 93.

In any event, the AFCCA majority did not evaluate "whether the error substantially influenced the adjudged sentence." Sanders, 67 M.J. at 346. Instead, it settled for a speculative, non-sequitur prejudice—finding that because Appellee had a right to the instruction, the sentence must have been affected by its omission. (JA at 25-26.) Specifically, the AFCCA majority held: "we find the error of the military judge's failure to instruct on retirement affected the substantial rights of Appell[ee], specifically, his right *to have the court-martial panel members consider all of the information they were allowed to consider* before they adjudged their sentence." (JA at 25-26.) It reached this conclusion based on "the premise articulated by CAAF that retirement pay 'is a critical matter of which the members should be informed in certain cases before they decide to impose a punitive discharge." (JA at 26 (quoting Luster, 55 M.J. at 71) (emphasis added).) Rather

than analyzing whether the omitted instruction actually influenced the adjudged sentence, in Appellee's case, the AFCCA majority seemed to conclude that such an omission was prejudicial *per se*.

AFCCA's failure to apply the correct test for prejudice was error. Ironically, Luster (the premise on which AFCCA based its decision) states unequivocally that when evaluating prejudice, "the critical question is not whether the *members* generally understood that retirement benefits would be forfeited by a punitive discharge. Instead, we must ask whether *appellant* was allowed to *substantially present* his particular sentencing case to the members on the financial impact of a punitive discharge." Luster, 55 M.J. at 72 (emphasis added). In this regard, as with improper argument, "the lack of defense [request] is relevant to a determination of prejudice." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (evaluating whether "the military judge's failure to instruct *sua sponte* was plain error" when the defense did not object to improper argument nor request a curative instruction).

A thorough review of the case law shows this Court has never found prejudice if the defense failed to request the retirement instruction at trial. *See* Boyd, 55 M.J. at 222 (reviewed whether "the military judge's failure to instruct

sua sponte" on temporary disability retirement "was plain error," but not reaching the question of prejudice because "there was no error at all, much less plain error."); Griffin, 25 M.J. at 423 (reviewed for abuse of discretion, not plain error, because the military judge gave the retirement instruction at *trial counsel's* behest); Becker, 46 M.J. at 142 (reviewed for abuse of discretion, not plain error, because the defense sought to introduce evidence and the military judge excluded it); Luster, 55 M.J. at 70 (reviewed for abuse of discretion, not plain error, because the appellant sought to introduce retirement evidence at trial and the judge excluded it); Greaves, 46 M.J. at 134 (reviewed for abuse of discretion, not plain error, because "the members join[ed] in [the appellant's] request for intelligent instruction on" the retirement implications of a punitive discharge.); Henderson, 29 M.J. at 222 (reviewed for abuse of discretion and finding insufficient evidentiary predicate to constitute error); Sumrall, 45 M.J. at 209 (not addressing instructional error, but only whether dismissal resulting in a loss of retirement benefits violates fifth amendment due process.); Stargell, 49 M.J. at 93-94 (reviewing for plain error because the appellant did not object to the retirement instruction at trial, and finding no plain error for giving the instruction at the behest of trial counsel); Hall,

46 M.J. 145, 146 (C.A.A.F. 1997) (finding no plain error when the military judge gave the instruction, despite the fact that the appellant did not agree to it).

Conversely, this Court has found prejudice only when the appellant requests the retirement instruction at trial and the punitive discharge is a "close call." *See e.g.* Luster, 55 M.J. at 67. For example, in Luster, the appellant was convicted of "a single specification of wrongfully using marijuana." Luster, 55 M.J. at 67. Not only was the crime relatively minor, but the appellant "had no record of prior convictions or non-judicial punishments (although he was not a perfect airman)." Id. at 72. Because the military judge did not allow the defense to put on evidence showing "the financial impact of a punitive discharge," the Court found the "Appellee was significantly disadvantaged." Id. at 72. Moreover, "[t]his disadvantage was exploited by trial counsel who in his closing argument asserted 'that a punitive discharge . . . *doesn't* take your money away." Id. at 72 (emphasis added). Only "in view of all the[se] circumstances" did the Court "find prejudicial error." Id. Thus, finding prejudice when the instruction was neither requested, nor patently favorable to Appellee, would be a dramatic break from this Court's well-established precedent.

In this case, the military judge did nothing to inhibit or diminish Appellee in the presentation of his sentencing case. Appellee was allowed, over trial counsel objection, to use his disability diagnosis precisely as he saw fit. (JA at 354; 362-68.) Appellee built a sentencing case around his diagnosis and need for medical treatment, but without drawing attention to the fact that the Air Force would be paying him, an attempted murderer, a pension for the rest of his life. Nothing in the record suggests Appellee was unable to present the sentencing case he intended. Therefore, Appellee cannot even show the prima facie conditions for prejudice as described by Luster.

Even if he could, Appellee's case was not a close call. Unlike Luster, where the punitive discharge was a "close call" because the underlying crime was "a single specification of wrongfully using marijuana," Luster, 55 M.J. at 67; here, Appellee was convicted of attempted murder. But for EE's instinct not to open the door to Appellee, "[s]he would have been murdered with a KA-BAR knife, bleach dumped all over the room, lighter fluid splashed around, and then, the whole place lit on fire. It's a brutal and a grizzly attempted murder." (JA at 400.) If a punitive discharge was a close call, the members would have adjudged a bad conduct discharge, and not a dishonorable one. The members were not only persuaded that

his benefits needed to be severed, they determined that the additional stigma of a dishonorable discharge was necessary given the gravity of Appellee's offense.

On the question of prejudice, Appellee's case is strikingly similar to Boyd. In that case, this Court did not find prejudice because:

> Appellant tendered no evidence pertaining to the projected value of his retirement for service. Appellant did not mention his hopes for retirement in his two unsworn statements. Neither appellant nor his defense counsel asked the court members to save appellant's retirement. The court members asked no questions about retirement benefits. Defense counsel made no mention of retirement benefits until the sentencing hearing was completed and the parties were reviewing the military judge's proposed instructions.
>
> The focus of the defense sentencing case was on preserving appellant's ability to continue with his drug rehabilitation program . . . . The focus was not on preserving the possibility of military retirement in 5 years. The defense emphasized the present, not the future. Accordingly, we conclude that any failure to instruct the members about the impact of a dismissal on future retirement benefits did not have a substantial influence on the sentence.[11]

Boyd, 55 M.J. at 221. The same is true of Appellee's case. If the appellant in Boyd (who wanted and requested the instruction) was not prejudiced by its

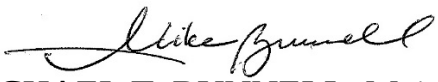
[11] Because this was a requested instruction, the Court in Boyd reviewed for prejudice under the abuse of discretion standard.

omission, then surely Appellee (who neither requested nor appeared to want the instruction) was not prejudiced either.

The AFFCA majority opinion does not address these considerations. Ultimately, the record is clear that preserving retirement benefits was not Appellee's focus at trial. He did not request the instruction and he conspicuously avoided the topic when arguing to the members. In fact, Appellee did not even raise this issue on appeal—it was specified by AFCCA. (JA at 77.) Appellee "was allowed to *substantially present* his particular sentencing case to the members on the financial impact of a punitive discharge;" he just chose not to. Luster, 55 M.J. at 72 (emphasis added). As such, he was not prejudiced by the omission.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court to reverse AFCCA's decision and find that omitting a *sue sponte* retirement instruction did not amount to plain and prejudicial error.



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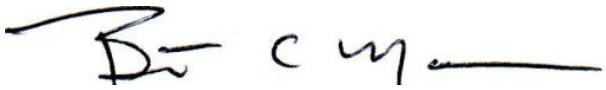

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 August 2019.

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/s/
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Date: 28 August 2019

United States v. Griffing

United States Air Force Court of Criminal Appeals

March 23, 2015, Decided

ACM 38443

Reporter
2015 CCA LEXIS 101 *

UNITED STATES v. Airman First Class DOUGLAS M. GRIFFING United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Motion granted by *United States v. Griffing, 2015 CAAF LEXIS 457 (C.A.A.F., May 18, 2015)*

Petition denied by *United States v. Griffing, 2015 CAAF LEXIS 606 (C.A.A.F., July 10, 2015)*

Prior History: **[*1]** Sentence adjudged 23 May 2013 by GCM convened at Royal Air Force Lakenheath, United Kingdom.Military Judge: Michael Coco. Approved Sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Core Terms

military, images, child pornography, specifications, sentencing, authorization, depicted, sexual, files, clearly erroneous, dormitory room, backpack, circumstances, charges, probable cause, instructions, recommendation, portable, laptop, staff, judge's determination, legal error, hard drive, factors, argues, judge advocate, trial counsel, plain error, admissible, wrongfully

Counsel: For Appellant: Captain Michael A. Schrama.

For United States: Major Daniel J. Breen; Major Mary Ellen Payne; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, HECKER, and TELLER, Appellate Military Judges.

Opinion by: TELLER

Opinion

OPINION OF THE COURT

TELLER, Judge:

The appellant was convicted, contrary to his pleas, by a panel of officer members of one specification of attempting to receive child pornography and one specification of knowingly and wrongfully accessing child pornography in violation of Articles 80 and 134, UCMJ, *10 U.S.C. §§ 880*, *934*.[1] The court sentenced him to a dishonorable discharge, 2 years' confinement, and reduction to E-1. The sentence was approved, as adjudged, on 10 September 2013.

The appellant argues that: (1) the military judge erred when he failed to suppress evidence obtained from the search of the appellant's electronic **[*2]** devices, (2) the military judge erred by failing to include certain definitions in his instructions, (3) the military judge erred when he admitted certain evidence under Mil. R. Evid. 404(b) over defense objection, (4) the military judge erred when he failed to instruct the panel members on how to consider certain evidence admitted under Mil. R. Evid. 404(b), (5) one of the images supporting his conviction was constitutionally protected, (6) the court members failed to follow instructions on voting, (7) trial counsel's sentencing argument was improper, (8) the military judge erred by failing to merge the specifications for sentencing, and (9) the staff judge advocate's recommendation failed to address legal errors raised in clemency.

Finding no error that materially prejudices a substantial right of the appellant, we affirm the findings and sentence.[2]

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[1] The appellant was acquitted of one specification of knowing and wrongful possession of child pornography in violation of Article 134, UCMJ, *10 U.S.C. § 934*.

[2] We note that the court-martial order does not include the original Specifications 2 and 3 of the Charge upon which the appellant was arraigned. *See* Rule for Courts-Martial (R.C.M.) 1114(c)(1). It also does not note the military judge's dismissal of the greater offense in the version of Specification 3 that went to the panel. We direct the promulgation of a corrected order. We note a similar deficiency in the Air Force Form **[*3]** 1359, *Report of Result of Trial*. As a full recitation of the charges upon which the appellant was arraigned is

Background

On 16 March 2012, the appellant, while at a restaurant on Royal Air Force (RAF) Lakenheath, was observed viewing images of naked children on a laptop computer. The witness, a wing commander from an adjoining base, was at the restaurant reading and watching college basketball while his children attended a birthday party. At some point when he glanced up at the television, the witness saw some images on the appellant's laptop he initially thought might be family photos of nude children. The **[*4]** witness described the photos as groups of naked children in their early teens. From his position about six to ten feet behind the appellant, he could not see enough detail to say whether the children's genitals were visible. One that drew his attention was of a child floating in a pool, with the focus of the image on the child's bare buttocks. The witness believed the appellant was accessing the photos from links on a web page, rather than his hard drive. As the witness watched the appellant scroll through the photos and return to certain images repeatedly, he began to believe that the appellant might be viewing child pornography.

After some deliberation, the witness decided to seek advice and assistance. He discreetly stepped out of the restaurant and, after failing to reach a friend who was a senior judge advocate with criminal law expertise, called his on-call judge advocate. After consulting with her, he then called the on-call agent from the Air Force Office of Special Investigations (AFOSI). The agent advised him that he would respond to the restaurant and that the witness could call security forces if he became concerned that the appellant would leave before the agent arrived. **[*5]** The witness did call security forces, and both they and the AFOSI agent responded to the restaurant. The appellant was detained as he tried to leave and was later taken to an interview room at the AFOSI detachment. The interview room was equipped with video monitoring, and the recording of the appellant at AFOSI was included in the record of trial.[3]

The appellant initially appeared agitated and afraid, saying he was "scared" and often sobbed and put his hands over his head. His breathing was noticeably accelerated, and he had a mild stutter when talking to the agents. After being advised of his rights, the appellant asked for an attorney. AFOSI then left the appellant alone in the interview room for approximately 23 minutes. By the end of that time, the appellant had calmed down and was no longer sobbing. His breathing **[*6]** and speech appeared normal.

After the appellant invoked his right to counsel, the AFOSI agents turned to the possibility of getting consent to search the appellant's dormitory room. Towards the end of the 23-minute interval, the appellant heard the agents through the door and knocked to get their attention. When agents opened the door, the appellant told them he heard them talking about a laptop, and, if it was his laptop they were talking about, that he might be willing to cooperate after talking to an attorney. An agent who had been outside the door came back into the interview room, explaining that they were discussing some paperwork she had with her.[4] She told the appellant his acting first sergeant could come over to get him to make sure he was safe and take him home, but added, "[W]e're going to need to come over to your house." She told him if he was "OK with that" then he just needed to sign the paperwork in two places. The appellant began asking questions, including whether he could go home without allowing them to search his room, and then asked the agent to explain exactly what was on the form. The agent took a short break and got the appellant some water.

When the agent returned, she told the appellant that based on their information from the witness they now had an open investigation into child pornography, and she told him, "[W]e're going to have to take your computer and we're going to have to look at it, and in addition to that, we're going to go to your house, and we're going to look at your house." The agent reaffirmed the appellant's right not to answer any questions and proceeded to go through an Air Force IMT 1364,[5] *Consent for Search and Seizure*, in detail with him. She placed the form in front of the appellant and went through the form as he read it, pointing out several provisions in the

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not required in Rule for Courts-Martial 1101, and the use of this form has been discontinued in favor of a memorandum under Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.2, (6 June 2013), we commend correction of this matter to the appropriate administrative officer. We find that the omission of the original Specifications 2 and 3of the Charge in the matters attached to the Staff Judge Advocate's Recommendation did not materially prejudice a substantial right of the appellant since they were withdrawn only after consultation with the convening authority that took action in the case.

[3] Portions of the audio from the interview room are unintelligible. Where language is quoted, the recording was sufficiently clear for the court to make a finding of fact that the quoted words were spoken. Other paraphrasing of the exchange between the appellant and the agents indicates the court's finding of fact that either those words or words to that effect were spoken.

[4] It is unclear from the **[*7]** record what paperwork she had. Evidence of her later filling out a consent form with the appellant suggests this initial paperwork was not the same form that later was appended to the record.

[5] IMT, or Information Management Tool, is equivalent to a form.

form. She read out loud the portion setting out his right to refuse consent and explaining the potential uses of any evidence found. She did not read out loud the next sentence explaining that if he refused consent they could not search without a warrant or other lawful authorization.

As they reached **[*8]** the end of the form, the agent made an unintelligible comment to the appellant, and the appellant responded that he felt "very close to physically ill right now." When the agent asked if she could do anything to help, or if he wanted to go outside to get some air, the appellant said, "I'm not sure how much that would help, um, if . . . I'm not trying to shoo you out of the room or anything, but if I would be able to have legal aid present to talk to, and possibly someone from mental services." The agent reassured the appellant that his first sergeant would be able to help him with those concerns and asked if he understood that, to which he responded "yes." She then redirected him to the form, filling out the date and time just above the signature block. The appellant, apparently prompted by the recollection that it was Friday, spontaneously commented that he had really big plans for the weekend including going to London. As he began to elaborate on what he had planned to do, he thought better of it, saying "actually, I think I'll just shut up." As he was preparing to sign the form, the appellant said in a low tone, "this is the only way I'm going home," or words to that effect, and **[*9]** then confirmed where he should sign and signed the form granting his consent.

In addition to seeking consent for a search of the appellant's room, AFOSI also sought a probable cause search authorization from the military magistrate. Because of the late hour and the appellant's likely return to his residence, AFOSI sought an immediate verbal authorization for a search of the appellant's residence and his backpack containing his laptop. The agent arranged a three-way phone conference with the base military magistrate and a judge advocate from the base legal office. During the conference, the agent recounted for the magistrate what the witness from the restaurant had told him. The magistrate was familiar with the witness from his official duties and considered him to be a credible source. Neither the AFOSI agent nor the judge advocate raised the possibility that the images constituted lawful child erotica rather than child pornography, nor did the military magistrate ask any questions about the types of details that might distinguish between child erotica and child pornography. During the conference, the judge advocate did not provide additional details or analysis but did state that he **[*10]** believed there was probable cause for a search of the backpack and the residence. The magistrate found there was probable cause to search the backpack and the dormitory room and authorized both searches.

The searches together produced all of the evidence supporting the charges in this case. The search of a portable hard drive contained in the backpack uncovered images constituting child pornography in the drive's "recycle bin" folder. The search of a desktop computer found in the appellant's dormitory room disclosed link files indicating that a user accessed certain files that contained child pornography and also disclosed cached entries in Internet browser database files indicative of searches for child pornography. There were also numerous image files found in unallocated space,[6] some of which may have constituted child pornography but most of which were child erotica.

Finally, a search of the laptop uncovered a peer-to-peer file sharing program with search terms associated **[*11]** with child pornography and incomplete downloads of files whose names were indicative of child pornography. The laptop also included the swimming pool images seen by the witness. Those files were determined not to constitute child pornography.

The appellant was ultimately convicted of two specifications involving child pornography. One specification alleged the appellant knowingly and wrongfully accessed child pornography with an intent to view it. The appellant was also convicted of attempting to knowingly and wrongfully receive child pornography. The appellant was acquitted of knowingly and wrongfully possessing child pornography on the portable hard drive.

Admissibility of Evidence from the Appellant's Dormitory Room and Backpack

The appellant argues that the military judge erred when he failed to suppress all evidence obtained as a result of the illegal search of the appellant's electronic devices. There are two searches at issue in this case, the search of the appellant's dormitory room and the search of the appellant's backpack.

At trial, the military judge found that the search authorization was valid for the search of the backpack (and the portable hard drive contained within it), **[*12]** but not for the dormitory room. He further held that even in the absence of probable cause, the evidence found in the backpack and dormitory room was admissible because the agents relied upon the authorization in good faith. Finally, the military judge ruled that the fruits of the dormitory room search would

[6] The Government expert testified that data found in unallocated space generally indicates that a file with that content was accessible at one time, but the data was no longer accessible without specialized software.

have been admissible in any event based upon the appellant's voluntary consent.

We review a military judge's denial of a suppression motion under an abuse of discretion standard and "consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Rodriguez, 60 M.J. 239, 246—47 (C.A.A.F. 2004)* (quoting *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996))*. We will find an abuse of discretion if the military judge's "findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id. at 246* (quoting *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995))* (internal quotation marks omitted).

1. Consent to search dormitory room

We first consider the military judge's finding that the appellant voluntarily consented to a search of the dormitory room since our finding on that issue will determine the scope of our review concerning the search authorization and any potential exceptions to the exclusionary rule.[7]

Our superior court recently reaffirmed the framework **[*14]** for our review of a consent search in *United States v. Piren, 74 M.J. 24 (C.A.A.F. 2015)*. A search may be conducted "with lawful consent." Mil. R. Evid. 314(e)(1). "Consent is a factual determination," and a military judge's findings "will not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous." *United States v. Vassar, 52 M.J. 9, 12 (C.A.A.F. 1999)* (quoting *United States v. Radvansky, 45 M.J. 226, 229 (C.A.A.F. 1996))* (internal quotation marks omitted). Courts evaluate voluntariness with regard to consent based on the totality of circumstances. *United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008)* (citing *Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973))*. Where the Government has prevailed on a motion to suppress, we review the evidence in the light most favorable to the Government. *United States v. Kitts, 43 M.J. 23, 28 (C.A.A.F. 1995)*.

The military judge issued a comprehensive written ruling on this aspect of the motion to suppress. While each party's pleading included a summary of the facts, neither argued that any of the military judge's findings of fact were clearly erroneous. In particular, the appellant, while arguing that this court should find the consent involuntary, has not asserted that any of the military judge's findings with regard to consent are clearly erroneous. Instead, he offers reasons why, apparently under a de novo standard of review, this court should find the appellant's consent involuntary.

Applying the standard of review specified under *Piren* and *Vassar*, we conclude **[*15]** that the military judge's finding of consent was not clearly erroneous.[8] The findings by the military judge that the appellant was in custody, had requested but not yet been provided counsel, had been advised that he had a right not to consent, and had been informed of and invoked his constitutional rights prior to agents seeking consent are not contested.

Other aspects of the military judge's findings are disputed by the appellant. The appellant argues that his mental state was inconsistent with a voluntary act of consent. The military judge found that the appellant, although crying and distraught when he was brought in, regained his composure enough to not only invoke his rights, but **[*16]** catch himself on two occasions when he began to initiate conversations with the AFOSI agents. The military judge's finding is supported by the interview video.

The appellant also asserts that the interview was coercive,

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[7] We recognize that the Air Force Office of Special Investigations (AFOSI) agents interacted with the appellant **[*13]** after he had invoked his right to counsel and ultimately procured his consent for law enforcement to search his dormitory room. Although these facts bear some similarity to those in our superior court's decision in *United States v. Hutchins, 72 M.J. 294 (C.A.A.F. 2013)*, we find that decision's ultimate holding to be inapplicable here because, unlike the appellant in that case, the appellant did not make any incriminating responses as part of or following that interaction with the AFOSI agent. Instead, he simply consented to the search. *Hutchins* does not automatically transform a post-invocation request for consent into a constitutionally impermissible event such that the fruits of that search are excluded. *See Hutchins at 299 n.9* (noting the decision does not alter the "basic proposition" that a request for consent to search itself does not implicate the *Fifth Amendment* because it is not considered "interrogation" reasonably likely to elicit an incriminating response). Instead, the focus in *Hutchins* was whether the request for consent itself, including the circumstances surrounding it, "open[ed] a more 'generalized discussion relating directly or indirectly to the investigation'" *Id. at 298* (quoting *Oregon v. Bradshaw, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983))*. That is not what occurred here.

[8] We note that the military judge's fact-finding was guided by factors identified in Mil. R. Evid. 314 and *Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)*, rather than the more concise list adopted by the Court of Appeals for the Armed Forces in *United States v. Wallace, 66 M.J. 5 (C.A.A.F. 2008)*. We have examined the factors the military judge identified and conclude that they cover at least all of the considerations identified in *Wallace*. *See Wallace, 66 M.J. at 9*. Because the judge considered all of the elements of the *Wallace* factors, we need not consider whether his finding of consent was "influenced by an erroneous view of the law." *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996)*.

pointing out that the agent told him they were going to have to look at his house and arguing that appellant's statement that granting consent was "the only way [he was] going home" reflected his belief that he would only be released if he gave his consent. The military judge reached a different assessment, pointing out the short duration of detention, the fact that AFOSI only had to ask once for consent, and that the agent who sat with him while he filled out the consent form was patient, relaxed, and explicitly told him he had the right to refuse consent. While the military judge's findings are different than those suggested by the appellant, they are not clearly erroneous. His findings are supported by the interview video and the appellant's consent form. They simply reflect a different assessment of the evidence.

Finally, the appellant suggests that fatigue, as well as a lack of experience and intelligence weigh against finding that his consent was voluntary. The **[*17]** military judge found that the appellant was of above average intelligence, and "seemed to make a calculated decision on which rights to invoke and which rights to waive." Here again, the military judge's ruling is supported by at least some evidence. The prosecution admitted the appellant's training records which show above average performance, and the video shows the appellant choosing when to speak and when to remain silent, including the appellant's re-initiation of contact with AFOSI when he heard them outside the door. While reasonable minds could differ as to how to interpret the facts related to the appellant's decision to sign the form granting consent to search his room, the interpretation by the military judge was not clearly erroneous, and we therefore will not disturb it upon appeal. *Vassar, 52 M.J. at 12*.

2. Authorization to search the appellant's backpack

We next turn to the validity of the authorization to search the appellant's backpack.

The *Fourth Amendment* requires that "no Warrants shall issue, but upon probable cause." *U.S. CONST. amend. IV*. "A military judge's decision to find probable cause existed to support a search authorization as well as to admit or exclude evidence is reviewed for an abuse of discretion." *United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010)*. "[D]etermination of probable **[*18]** cause by a neutral and detached magistrate is entitled to substantial deference." *United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996)* (quoting *United States v. Oloyede, 982 F.2d 133, 138 (4th Cir. 1993))* (internal quotation marks omitted). The military judge would not have abused his discretion when denying the motion to suppress if the magistrate had a "substantial basis" for determining that probable cause existed. *United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)* (citing *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983))*.

Probable cause exists when there is sufficient information to provide the authorizing official "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). Authorization to search may be granted by an "impartial individual," who may be a commander, military magistrate, or military judge, in accordance with the underlying constitutional requirement that a search authorization be issued by a "neutral and detached" magistrate. Mil. R. Evid 315(d); *United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996)*. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*.

Here again, neither **[*19]** party has asserted that the military judge's findings of fact pertaining to the search authorization are clearly erroneous or unsupported by the evidence. Our review finds them to be well supported, and we adopt them.

First, we consider whether the magistrate had a "substantial basis" for finding probable cause. *Id*. Part of the difficulty in determining whether there was a substantial basis in light of existing case law is that the circumstances of this case are somewhat unusual. The appellant cites numerous child pornography cases in which courts have determined that terse descriptions of images or broad generalizations are insufficient to provide a substantial basis for a warrant. The appellant even recounts one court's exhortation that the judge below "should have asked to see the image." But of course, that is the problem in this case—no investigator could produce the image for the magistrate. Accordingly, we find inapplicable the many cases the appellant cites in which our superior court analyzed what is required of an affiant who has access to a picture to accurately convey to the magistrate how that picture depicts sexually explicit conduct.

We find the court's analysis in *United* ***[*20]*** *States v. Leedy* to be much more applicable to the facts of this case. *65 M.J. 208 (C.A.A.F. 2007)*. In *Leedy*, the potential misconduct came to light when an Airman's roommate bumped the Airman's computer, disengaging the screen-saver and revealing a list of recently played file names. "One file name that [the roommate] remember[ed] was '14 year old Filipino girl,' and though [the roommate] did not remember the name of any

other files, he recalled that some mentioned ages and some mentioned acts. [The roommate] became concerned that these files included child pornography." *Id. at 212*. The court observed that they were aware of only one other case that upheld a search on the basis of file names alone, but emphasized that the "file title '14 year old Filipino girl,' does not appear in isolation. . . . [N]one of these facts are abstract pieces of evidence, but rather are properly viewed in context, through the professional lens in which they were presented to the magistrate." *Id. at 215*. In *Leedy*, the court considered additional contextual factors such as the sexually suggestive nature of the other titles, the investigator's opinion based upon experience that the names containing ages and acts were also consistent with child pornography, and that **[*21]** individuals who possess child pornography rarely voluntarily dispose of their collections. *Id. at 215—16*. The file name, in that context, was enough to constitute a substantial basis for a search authorization for the Airman's computer.

This case is similar in that, while the individual pieces of evidence are an insufficient basis for probable cause in isolation, the magistrate found them sufficient in context as a whole and that determination was upheld by the military judge.

The military judge found the following facts: (1) the witness was positioned close enough to tell that the images viewed by the appellant depicted nude children but could not see whether genitalia were visible, (2) the witness was close enough to estimate the ages of the children to be between 10 and 12 years old, (3) the witness discounted the possibility that they were family photos because of the type of directory the appellant was using to access the files and the way he scrolled through the images, (4) one of the images depicted a child's naked buttocks as the child floated in a pool, (5) the appellant returned to the group photo of the naked children several times, and (6) the manner in which the appellant scrolled **[*22]** through the pictures led the witness to believe that the appellant was viewing child pornography.

In addition, the military judge found that the appellant behaved suspiciously when he believed the witness was following him and once again when he was detained by security forces. The military judge also found as fact that the magistrate knew the witness professionally, knew he was a wing commander at an adjoining installation, and had no concerns about his credibility.

The evidence available to the magistrate, as established by the military judge's findings of fact, offered this magistrate much more to go on than the evidence in *Leedy*. The source of the information was a known, experienced, trustworthy commander with no personal or professional stake in the outcome of the case. The images clearly depicted naked children, including at least one in which the focus of the photo, the child's buttocks, suggested a sexual rather than artistic attraction. The manner in which the appellant viewed the photos was, at least to the impartial witness, also suggestive of a sexual interest. This type of direct behavioral observation is rarely available in child pornography cases. Magistrates are often **[*23]** unable to say whether images were actually viewed or whether files were deliberately acquired or simply washed over the transom with other lawful images. Indeed, in this case, the appellant argued that the Government couldn't show whether or how many times the images found in the portable hard drive were viewed. In contrast, the witness here described the appellant's behavior, lingering over some images and returning to others repeatedly. Even after viewing the images, the appellant's suspicious behavior leaving the restaurant and upon being detained indicated consciousness of guilt. Following the *Leedy* court's admonition to "apply common sense and practical considerations in reviewing probable cause determinations," *65 M.J. at 217*, we are convinced that, based solely upon the information that was available to the magistrate at the time, there was more than a fair probability that investigators would find child pornography in the appellant's backpack.

Applying the standard of review applicable under existing precedent, we uphold the military judge's finding that the appellant voluntarily consented to the search of his dormitory room and conclude that the search authorization for the appellant's backpack **[*24]** was valid. This assignment of error is without merit.

3. Good faith exception to the exclusionary rule

Applying the same abuse of discretion standard of review, we also uphold the military judge's finding that, even if the search authorization were defective, the good faith exception to the exclusionary rule would apply to both the search of the backpack and the search of the dormitory room.

In *United States v. Leon*, the Supreme Court established a good faith exception to the exclusionary rule in cases where the official executing the warrant relied on the magistrate's probable cause determination and the technical sufficiency of the warrant, and that reliance was objectively reasonable. *468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*.

The good faith exception under the Military Rules of Evidence is set out in Mil. R. Evid. 311(b)(3):

Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) The individual issuing the authorization or warrant had a substantial basis for determining the existence **[*25]** of probable cause; and

(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

Notwithstanding Mil. R. Evid. 311(b)(3), the evidence may not be admitted if any of four circumstances enumerated in *Leon* apply:

(1) False or reckless affidavit—Where the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";

(2) Lack of judicial review—Where the magistrate "wholly abandoned his judicial role" or was a mere rubber stamp for the police;

(3) Facially deficient affidavit—Where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; [or]

(4) Facially deficient warrant—Where the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

United States v. Carter, 54 M.J. 414, 419—20 (C.A.A.F. 2001) (quoting *Leon, 468 U.S. at 923*).

In this case, the military judge accurately identified and applied the law, and as a result, **[*26]** we uphold his ruling unless his findings of fact were clearly erroneous or unsupported by the record.

The military judge reasonably found that the verbal information provided to the magistrate was not false or misleading. AFOSI's characterization of the witness's description accurately relayed the testimony provided by the witness during the hearing and his stipulation offered at trial. The appellant invites us to find that the information was misleading "because the affiant withheld a critical fact that any reasonable magistrate would have wanted to know-namely, that Appellant was never observed looking at illegal images." We find that argument unconvincing on these facts because, unlike cases where an image is available at the time of application for the warrant, there was insufficient information to reasonably determine whether the images depicted a lascivious exhibition of the genitals. While hindsight reveals that the images were not illegal, the military judge's focus on the accurate conveyance of the witness's observations, rather than the absence of a legal characterization of the images was reasonable.

We also find the military judge's determination that the magistrate did not **[*27]** abandon his judicial role to be supported by the evidence. The magistrate testified that he had disagreed with the legal office on other matters in the past, and the military judge found that testimony credible. He also noted that, when provided hypothetical facts during the motion hearing, he testified that he would not have authorized a search under those circumstances. Although there was testimony indicating that the magistrate did not assertively probe the subject matter of the photos, that evidence is insufficient to find the military judge's conclusion to be clearly erroneous.

The judge's determination that the verbal information provided to the magistrate was not facially defective is also supported by the evidence. As discussed above, the information supporting the search need not rule out the possibility that the images were lawful child erotica. The witness's observation of the appellant viewing images of naked children, in combination with his description of the appellant's behavior, were sufficient to support the military judge's finding on this aspect of the good faith exception.

Finally, the military judge's determination that the search authorization itself was not facially **[*28]** defective was supported by at least some evidence. The AFOSI agent testified that, based upon his training and experience, the appellant was likely to have similar images on media in his dormitory room. The military judge ultimately found that there was an insufficient basis for this conclusion. However, that finding is not inconsistent with the military judge's determination that the agents reasonably relied on the authorization. As the military judge observed in his ruling, the magistrate was called upon to make a timely decision based upon information that was, due to the circumstances, incomplete. Although in the cold light of later review he found that decision flawed, it was still a reasonable conclusion at the time, and AFOSI's good faith reliance on the flawed authorization was also reasonable. We cannot say, based upon these facts, that the military judge's determination was clearly erroneous or unsupported by the record.

Since the military judge properly applied Mil. R. Evid. 311(b)(3), as informed by *Leon* and *Carter*, and his findings

of fact were not clearly erroneous, we uphold his ruling that even in the absence of probable cause, the good faith exception to the exclusionary rule would have applied **[*29]** and the evidence obtained through the search of the backpack and dormitory room would have been admissible.

Failure to Define "Access" and "Intent to View"

The appellant contends the military judge improperly instructed the panel when he failed to define the terms "access" and "intent to view." These words appear in one of the specifications which alleged the appellant "knowingly and wrongfully access[ed] child pornography with an intent to view, to wit: visual depictions of minors engaging in sexually explicit conduct." Trial defense counsel did not request an instruction at trial.

Whether a panel was properly instructed is a question of law reviewed de novo. *United States v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014)*. However, where counsel fails to object to omission of an instruction at trial, we review the military judge's instruction for plain error. *Id.; United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)*; R.C.M. 920(f).[9] If plain error exists, the burden shifts to the Government to show that the error was harmless beyond a reasonable doubt. *See United States v. Brewer, 61 M.J. 425, 430 (C.A.A.F. 2005)*; *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). The military judge has an independent duty to instruct the members correctly and fully on all issues raised by the evidence. *United States v. Thomas, 11 M.J. 315, 317 (C.M.A. 1981)*.

The appellant has not met his burden of demonstrating **[*30]** error. The appellant offers no evidence or argument to suggest that "access" or "intent to view" are not commonly understood terms generally, or under the specific circumstances of this case. Instead, he argues that the military judge's decision to provide definitions of other arguably commonly understood terms created a duty on the part of the military judge to, despite the lack of objection, intuit that these words should be defined as well. That argument simply proves too much. Not every word in a specification requires definition, even when the word is essential to an element of the offense. *See United States v. Glover, 50 M.J. 476, 478 (C.A.A.F. 1999)*.

Admissibility of Other Images under Mil. R. Evid. 404(b)

The appellant also contends that the military judge erred when he admitted Prosecution Exhibit 17 under Mil. R. Evid. 404(b) over defense objection. Prosecution Exhibit 17 was originally comprised of 1,388 images recovered from the appellant's electronic devices. Most of the images were recovered using forensic tools that are not generally available or methods that are not commonly known to the standard computer user, but some were found in the recycle bin where they could be retrieved by a user. Some of the images appear to be child pornography while others appear to be **[*31]** lawful child erotica. The Government argued to the military judge that the images were not offered to prove that the appellant had the propensity to commit the charged offenses, but rather that the possession of these additional images tended to show that the appellant had the requisite intent to possess, access or receive child pornography rather than obtaining it by mistake. The Government maintained that theory throughout the trial. The military judge granted the defense motion with the exception of any images found in the recycle bin which related to one of the children depicted in Prosecution Exhibits 1 through 16 (which served as the basis for two specifications in the case). On appeal, the appellant contends that the military judge erred by admitting those images.

We review a military judge's evidentiary rulings for an abuse of discretion. *United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003)*. We will not overturn a military judge's ruling unless it is "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous,'" *United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004)* (quoting *United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997))*, or influenced by an erroneous view of the law. *Id*. (citing *United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002))*.

The test for admissibility of evidence showing uncharged misconduct is "whether the evidence of the misconduct is offered for some purpose **[*32]** other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses." *United States v. Thompson, 63 M.J. 228, 230 (C.A.A.F. 2006)* (quoting *United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989))* (internal quotation marks omitted). Such permissible purposes include proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Mil. R. Evid. 404(b).

We review the admissibility of uncharged misconduct under Mil. R. Evid. 404(b) using the three-part test articulated in *United States v. Reynolds:*

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes,

[9] Although we recognize that the rule describes this as "waiver," this is in fact forfeiture. *See United States v. Sousa, 72 M.J. 643 (A.F. Ct. Crim. App. 2013)*.

wrongs or acts?
2. What fact of consequence is made more or less probable by the existence of this evidence?

3. Is the probative value substantially outweighed by the danger of unfair prejudice?

29 M.J. 105, 109 (C.M.A. 1989) (citations, quotation marks, and ellipses omitted). The military judge applied this test in reaching his ruling below. Because the judge properly applied the law, we review his ruling to see if it was arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

The military judge's determination that the evidence reasonably supported a finding that the appellant possessed **[*33]** the images in the portable hard drive's recycle bin folder was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Prior to ruling on the motion, the military judge heard expert testimony to establish whether the appellant, rather than some other user, acquired or possessed the images. The expert testified that, while he could not exclude the possibility that someone else accessed the computer, the review of Internet history did not indicate anyone else used the computer. He also testified that an average user could access files found in the recycle bin folder without specialized tools. He testified that the desktop computer found in the appellant's dormitory room contained link files showing that the portable hard drive was accessed from that computer. The military judge could reasonably have found that the expert's testimony, in conjunction with the accused's possession of the devices, would reasonably support a finding that the appellant possessed the images admitted as Prosecution Exhibit 17.

We also conclude that the military judge's determination that the images tended to prove a fact of consequence was not arbitrary, fanciful, clearly unreasonable, or clearly **[*34]** erroneous. Our superior court has cited, with approval, a decision by the United States Court of Appeals for the Third Circuit holding that in a prosecution for possession of child pornography, images of "child erotica," while legal to possess, may nonetheless be admitted to show intent to commit the charged offense. *United States v. Warner, 73 M.J. 1, 3 (C.A.A.F. 2013)* (citing *United States v. Vosburgh, 602 F.3d 512, 538 (3d Cir. 2010)*). This court has also observed that long precedent establishes "possession of [child erotica] can satisfy the second *Reynolds* prong, in that this evidence can tend to indicate knowledge of the nature of the contraband material and negate the possibility that the files were downloaded by accident or mistake." *United States v. Suwinski, ACM 38424, 2014 CCA LEXIS 867, unpub. op. at 5—6 (A.F. Ct Crim. App. Nov. 20, 2014)* (citing *United States v. Sanchez, 59 M.J. 566, 570 (A.F. Ct. Crim. App. 2003)* (allowing subscriptions "to numerous e-groups described as nude teen sites" as evidence of knowing possession of child pornography), *rev'd in part on other grounds, 60 M.J. 329 (C.A.A.F. 2004)*; *United States v. Mann, 26 M.J. 1, 2—4 (C.M.A. 1985)* (providing that possession of magazines were admissible to prove the accused's intent to satisfy his sexual desires); *United States v. Rhea, 29 M.J. 991, 998 (A.F.C.M.R. 1990)* (providing that possession of books describing sexual exploitation of young girls was probative of motive), *set aside on other grounds*, *33 M.J. 413 (C.M.A. 1991)*; *United States v. Lips, 22 M.J. 679, 682 (A.F.C.M.R. 1986)* (holding that possession of graphically **[*35]** posed photographs showing women being sexually abused was a clear indication of the appellant's penchant for sexual aberration)).

Finally, we find that the military judge's determination pursuant to Mil. R. Evid. 403 that the probative value of the images ultimately admitted was not substantially outweighed by the danger of unfair prejudice was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. The military judge limited the Government to admission of only exhibits found in the portable hard drive's recycle bin folder that depicted a child that was also depicted in one of the charged images. While the existence of the other images was prejudicial, in that it increased the total number of images presented to the members, it was not unfairly prejudicial in that it was narrowly tailored to the charged offenses and the proper purpose under Mil. R. Evid. 404(b).

Since none of the military judge's determinations were arbitrary, fanciful, clearly unreasonable, or clearly erroneous, and the military judge applied the proper legal standard, we find that the military judge did not abuse his discretion and reject this assignment of error.

Instructions Concerning Evidence Admitted under Mil. R. Evid. 404(b)

Next, the appellant argues that **[*36]** the military judge erred when his instructions failed to instruct the panel members concerning Mil. R. Evid. 404(b) and how to properly consider Prosecution Exhibit 17. Mil. R. Evid. 105 places the burden for requesting a limiting instruction squarely on the parties. Failure to object to the omission of an instruction constitutes waiver of the objection, absent plain error. R.C.M. 920(f). Since trial defense counsel did not request a limiting instruction or object to its omission, the issue is forfeited absent plain error. *See United States v. Powell, 49 M.J. 460, 463 (C.A.A.F. 1998)*; *Sousa, 72 M.J. 643, 651 (A.F. Ct. Crim. App. 2013)*. We do not find plain error.

The failure of the military judge to provide a limiting

instruction was not error. Although at one time, our case law required military judges to provide such instructions without regard to any request by the parties, that requirement was generally limited to circumstances where there was a weak nexus between the uncharged misconduct and the charged offense. *See* *United States v. Dagger, 23 M.J. 594, 597—98 (A.F.C.M.R. 1986)*. Even that requirement, however, was eliminated with the adoption of Mil. R. Evid. 105. *See* Drafter's Analysis, *Manual for Courts Martial, United States*, A22-3 (2012 ed.) (Stating that Mil. R. Evid. 105 overrules previous cases insofar as they require the military judge to give limiting instructions sua sponte). Although we could envision a case where **[*37]** trial counsel's examination of a witness or argument might give rise to a duty upon the military judge to cure any misunderstanding as to the permissible uses of evidence admitted for a limited purpose, that is not the case here. On the contrary, trial counsel was exceptionally careful to make clear that Prosecution Exhibit 17 was only being offered to show the appellant's intent or absence of mistake. On these facts, we find no error by the military judge in failing to give a limiting instruction.

Even if we found error, it would not have been plain error. Trial defense counsel sometimes choose not to request a limiting instruction to avoid emphasizing the evidence in question. *See* *United States v. Maynard, 66 M.J. 242, 245 (C.A.A.F. 2008)*. In this case, one of the primary contentions of trial defense counsel was that the Government failed to prove the intentional possession of the images found in the appellant's recycle bin folder. It would be reasonable for trial defense counsel to want to avoid having the military judge personally remind the members that they could consider Prosecution Exhibit 17 in deciding whether the appellant had the requisite intent to commit the offenses alleged. The existence of this reasonable basis for not wanting **[*38]** a limiting instruction negates any suggestion that the need for one was plain or obvious.

Whether Prosecution Exhibit 12 Constitutes Child Pornography

The appellant asserts his convictions for possession and receipt of child pornography must be set aside because Prosecution Exhibit 12 offered in support of the specifications is not child pornography and is constitutionally protected. The appellant's assertion, without any meaningful analysis of the applicable legal factors used to determine whether the image was constitutionally protected, is unconvincing. This issue is without merit.

In deciding whether an image offered in support of a general verdict is constitutionally protected, we apply the general standards of review for factual and legal sufficiency. *See* *United States v. Piolunek, 72 M.J. 830, 835 (A.F. Ct. Crim. App. 2013)*. We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))*. Moreover, "[i]n resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence of record **[*39]** in favor of the prosecution." *United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)*; *see also* *United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007)*.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, *10 U.S.C. § 866(c)*; *United States v. Bethea, 22 C.M.A. 223, 46 C.M.R. 223, 224—25 (C.M.A. 1973)*.

In this case, the appellant concedes that the image depicts the child's genitals, so the only question is whether the depiction is lascivious under *United States v. Roderick, 62 M.J. 425, 429—30 (C.A.A.F. 2006)*. In *Roderick*, our superior court held that we "determine whether a particular photograph contains a 'lascivious exhibition' by combining a review of the [factors set out in *United States v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986)]* with an overall consideration of the totality of the circumstances." *Roderick, 62 M.J. at 430*. The *Dost* factors are:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, **[*40]** considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness

or a willingness to engage in sexual activity;

(6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 429.

Prosecution Exhibit 12 depicts a prepubescent girl, clad only in a tank top. She is posed sitting on a couch with one knee up and her legs spread open. This composition places the focal point of the picture on her genitals. Her head is posed such that she looks sideways at the camera with one hand on the back of her neck. This pose, in conjunction with her facial expression, suggests sexual coyness and is unnatural for a girl of her age. Her lack of any garment below the waist is also inappropriate for her age. The composition alone suggests that the image was designed to elicit a sexual response, and that suggestion is reinforced by other charged images that were part of the same collection.[10] Under *Roderick*, we consider the totality of the circumstances of the offense along with the *Dost* factors. The plainly lascivious nature of the other files in the same collection corroborates the inference **[*41]** that the image was intended to elicit a sexual response. We need not, and specifically decline to consider any of the images contained in Prosecution Exhibit 17, since our analysis of this depiction focuses on the intent of those that crafted it, rather than the appellant's state of mind.

We find that the image, when viewed in the light most favorable to the prosecution was legally sufficient to support a finding of guilt. We also conclude beyond a reasonable doubt, based upon our own factual sufficiency review, that the image constitutes a lascivious exhibition of the genitals. We find no support for the assertion that the findings should be disapproved on this basis.

Failure to Follow Reconsideration Instructions

The appellant asserts that "the court members failed to follow the military judge's instructions on voting procedures." This assertion is based on a comment in an e-mail response **[*42]** to trial defense counsel's request to the members for post-trial feedback.[11] One member commented in his response "the second charge had to be revoted on in order to be found guilty." During the trial, the panel never reconvened in open session to discuss reconsideration as directed by the military judge's procedural instructions. Trial defense counsel raised this issue to the military judge in a post-trial motion for appropriate relief.

A military judge's decision regarding a motion for a mistrial will be reviewed for an abuse of discretion. *See United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003)*; *United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993)*. In determining whether to investigate or question court members about a verdict, the trial court maintains wide discretion, and the trial court's decision will be reviewed for an abuse of that discretion. *United States v. Lambert, 55 M.J. 293, 295—96 (C.A.A.F. 2001)*.

The military judge issued a well-reasoned written ruling noting, among other things: Mil R. Evid. 923 and 606(b); applicable case law in *United States v. Brooks, 42 M.J. 484 (C.A.A.F. 1995)*, and *United States v. Bobby, 61 M.J. 750 (A.F. Ct. Crim. App. 2005)*; and the important policy objective of protecting the sanctity of court-martial **[*43]** deliberations even when evidence of procedural irregularities exists. For the reasons set out in the military judge's ruling, we find this argument to be without merit.

Government Counsel Sentencing Argument

The appellant also argues that the sentencing argument by trial counsel was improper. We review the propriety of argument de novo. *United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011)*.

In his sentencing argument, trial counsel rhetorically asked "[a]nd why is this particular crime so serious? Because it propagates the abuse of children, as sexual . . .", at which point trial defense counsel objected on the basis that the argument asserted facts not in evidence. The military judge overruled the objection, stating that the comment was a reasonable inference. Trial counsel completed his thought, stating: "It propagates the sexual abuse of children. That's why this crime is serious." Trial counsel then proceeded to other aspects of his argument.

The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. *See United States v. Lutes, 72 M.J. 530, 535 (A.F. Ct. Crim. App. 2013)*; *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)*. It is improper for

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[10] The prosecution computer forensic expert testified that Prosecution Exhibits 4—7 and 12—14 were found in a single folder in the portable hard drive's recycle bin folder and that entries in the system database on the desktop computer indicated that the files were all obtained as a single collection.

[11] Although requests for feedback can be problematic, this particular request was coordinated with the Chief Regional Military Judge and included appropriate reminders of members' obligation to maintain the confidentiality of their deliberations.

trial counsel to seek unduly to inflame the passions or prejudices of the sentencing authority. *United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983)*. Counsel should limit their **[*44]** arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Baer, 53 M.J. at 237*. During sentencing argument "trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007)* (quoting *Baer, 53 M.J. at 237*) (internal quotation marks omitted). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley, 56 M.J. 113, 121 (C.A.A.F. 2001)*.

We are not convinced that the argument was erroneous. Deconstructing trial counsel's argument, it consisted of two assertions: that the appellant propagated something, and what he propagated was the sexual abuse of children. There is no question that the explicit sexual acts depicted in the videos and images constitute abuse under any fair meaning of the term. There's also no question that the abuse was sexual in nature.

The question, therefore, turns on the meaning of propagate as used here. Webster's dictionary sets out two general meanings for the word propagate: to multiply (especially as it relates to plant or animal reproduction and heredity) and to spread out or publicize. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 935 (10th ed. 1999). Although the appellant apparently attributes the first meaning to trial counsel's **[*45]** argument, the second meaning is equally valid and more apt on these facts.[12] The abuse inherent in child pornography is not just the act depicted but also the future vulnerability the victims face by the continued proliferation of the images. *See Lutes, 72 M.J. at 536* ("[T]he children portrayed in the materials possessed by the appellant could fear their images will be forever available for individuals like the appellant to download and possess"). The Government's computer expert testified about the way in which these files were transmitted and shared over the Internet. While one could debate whether continued dissemination of the images multiplies the abuse suffered, such dissemination clearly spreads that abuse to a wider audience. We agree with the military judge that trial counsel's argument was a reasonable inference from the evidence.

[12] Courts have sustained arguments that consumption of child pornography, by its nature, creates the demand for such images that perpetuates the abuse depicted. *See United States v. Forney, NMCCA 200200462, 2005 CCA LEXIS 235, unpub. op. at 16 (N.M. Ct. Crim. App. 19 July 2005)* (sentencing argument "reflect[ed] the realities of child pornography, simply, that so long as there is a demand for such depictions, **[*46]** children will continue to be abused."); *United States v. Hadley, ACM 35930, 2006 CCA LEXIS 43, unpub. op. at 4 (A.F. Ct. Crim. App. 16 February 2006)* ("[S]uch victimization is part of the 'black market industry' the appellant, through his conduct, was 'perpetuating and feeding.'"). We need not reach this issue since an equally valid meaning was well supported by the evidence.

Merger of Specifications for Sentencing

Next, the appellant argues that the military judge abused his discretion when he denied the appellant's motion to merge the specifications in his case for sentencing purposes. We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell, 71 M.J. 19, 22 (C.A.A.F. 2012)*.

The specifications that were ultimately under consideration during sentencing were substantially different from the five specifications originally referred to trial and on which the appellant was arraigned. These five specifications included three specifications of wrongful possession of visual depictions of minors engaging in sexually explicit conduct. The specifications differed only in respect to the media alleged—one concerning the portable hard drive, one concerning the desktop computer, and one concerning **[*47]** the laptop computer. Prior to the entry of pleas, the convening authority withdrew the possession specifications that related to the desktop and the laptop computers.

The remaining three specifications were renumbered. Specification 1 alleged the appellant knowingly and wrongfully possessed child pornography on a Hitachi external hard drive. Specification 2 alleged that he knowingly and wrongfully accessed child pornography with an intent to view it. Specification 3 alleged that he knowingly and wrongfully received child pornography.

At the close of findings, the military judge determined the receipt and possession specifications covered the same conduct and therefore dismissed the greater offense for Specification 3 (receipt of child pornography). He concluded:

> Given the way that the evidence has played out and the law on possession and receipt of these particular images, what I have determined is that the receipt and possession really duplicate and go towards the same conduct. However, as trial counsel has requested the lesser-included offense of attempted receipt, I do find that there's evidence that remains that the members could in fact find attempted receipt.

The lesser included **[*48]** offense referred to by the military judge was based on the existence of evidence of incomplete downloads of files distinct from those found on the portable hard drive. The prosecution expert testified that a user of the

appellant's laptop initiated peer-to-peer downloads of files with names indicative of child pornography. Those file names were also listed in Prosecution Exhibit 21. The Government offered this theory of liability during closing argument. The revised Specification 3 alleging the lesser included offense of attempted receipt of child pornography went to the members, who found the appellant guilty of that offense.

In determining whether charges constitute an unreasonable multiplication of charges, we consider five non-exhaustive factors: whether the appellant objected at trial, whether each charge and specification is aimed at distinctly separate criminal acts, whether the number of charges and specifications misrepresent or exaggerate the appellant's criminality, whether the number of charges and specifications unreasonably increase the appellant's punitive exposure, and whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. **[*49]** *See* United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).

We consider whether the appellant objected at trial to determine whether the issue is fairly brought under our Article 66(c), UCMJ, authority, not to determine whether it was preserved in the technical sense. *See id*. Although much of the underlying basis for the appellant's pretrial motion was rendered moot by the changes discussed above, that motion was sufficient to bring the matter under our Article 66(c) authority. Rather than applying a strict interpretation of forfeiture and preservation of error, we assess whether, under the circumstances, we should consider approving something less than the findings and sentence approved by the convening authority as relief for unreasonable multiplication of charges. In this case, the appellant's motion for relief, as pursued throughout the trial, is sufficient to justify our review under Article 66(c).

The changes in the specification also make clear that the misconduct alleged in the specifications that resulted in a conviction addressed distinctly separate criminal acts. The specification alleging accessing child pornography with an intent to view was plainly directed at Prosecution Exhibits 1 through 16, while the specification alleging **[*50]** attempted receipt was directed at the incomplete downloads indicated by Prosecution Exhibit 21. These are unquestionably distinctly separate acts.

We also find that the specifications do not misrepresent or exaggerate the appellant's criminality. Had the military judge not granted the appellant's motion with regard to access and receipt of the same images, we would have to consider whether two theories of liability for the same images exaggerate the appellant's culpability for sentencing. Those circumstances were not present in this case. The appellant invites us to construe the appellant's actual and attempted access to child pornography as one continuing course of conduct. We decline to do so when, as here, the acts occurred not only at different times, but on completely different continents. Repeated access to child pornography on different occasions, in different locations, on different devices, is simply not analogous to a series of blows constituting a single assault.

While the existence of two specifications in this case increases the appellant's punitive exposure, it does not do so unreasonably. We first note that the specifications were drafted to encompass misconduct on divers **[*51]** occasions rather than charging each image or incomplete download separately. Generally speaking, that type of charging strategy decreases, rather than increases punitive exposure. Campbell, 71 M.J. at 25. Additionally, the acts at issue in the specification alleging attempted receipt of child pornography, as narrowed by the military judge and argued by both parties, would not have been legally sufficient to prove actual access to those files. The only way to put that behavior before the members was to retain distinct specifications for sentencing.

Finally, we discern no evidence of prosecutorial overreaching or abuse in the drafting of the charges. Indeed, the Government's dismissal of two of the charges prior to entry of pleas suggests just the opposite—that the Government pursued only those specifications justified by the evidence.

We are convinced that the military judge did not abuse his discretion by refusing to merge the two specifications for sentencing.

Addressing Raised Legal Error in SJAR Addendum

The appellant also argues that this court should remand the case for a new convening authority action because the staff judge advocate's recommendation (SJAR) failed to discuss the alleged voting irregularity **[*52]** which was raised as legal error in the appellant's clemency submission.

Proper completion of post-trial processing is a question of law, which this court reviews de novo. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)). Failure to timely comment on matters in the SJAR, or matters attached to the recommendation, forfeits any later claim of error in the absence of plain error. Rule for Courts-Martial 1106(f)(6); United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005). "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced

a substantial right.'" *Scalo, 60 M.J. at 436* (quoting *Kho, 54 M.J. at 65*) (internal quotation marks omitted). Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least some "colorable showing of possible prejudice in terms of how the [perceived error] potentially affected [his] opportunity for clemency." *Id. at 437*.

R.C.M. 1106(d)(4) states:

> The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation **[*53]** of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal error is not required.

Despite this plain language, the appellant argues that the addendum failed to "properly [characterize] Appellant's allegations of legal errors and/or [provide] analysis of the legal errors."

Although the addendum did not explicitly state agreement or disagreement with the asserted legal error, it did state, "I also reviewed the attached clemency matters submitted by the defense. I recommend you approve the findings and sentence as adjudged." We find no meaningful difference between "I recommend you approve the findings and sentence as adjudged" and "in my opinion, no corrective action should be taken." Although more substantial explanation would not have been inappropriate, the SJAR addendum complies with R.C.M 1106(d)(4), and we find no error, plain or otherwise.

Even if we found the absence of further discussion constituted error, we would find no prejudice on these **[*54]** facts. Based upon the staff judge advocate's (SJA's) ultimate recommendation to approve the findings and sentence as adjudged, any further discussion would have only reinforced his position that no corrective action was necessary. The convening authority indicated in his indorsement to the addendum that he considered the appellant's clemency materials, which included the assertion of the voting irregularity. The convening authority adopted the SJA's recommendation and approved the findings and sentence as adjudged. We find no colorable basis to conclude the convening authority would have acted any differently had the SJA expanded upon his reasons for recommending exactly what the convening authority ultimately did. This assertion of error is without merit.

Conclusion

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

Accordingly, the approved findings and sentence are AFFIRMED.

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Smith v. Stewart

United States Court of Appeals for the Ninth Circuit

September 12, 2003 [**], Submitted, Pasadena, California; September 16, 2003, Filed

No. 02-17126

[**] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Reporter
77 Fed. Appx. 925 *; 2003 U.S. App. LEXIS 19248 **

RONALD WILLIAM SMITH, Petitioner - Appellant, v. TERRY L. STEWART, Respondent - Appellee.

Notice: [1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: Appeal from the United States District Court for the District of Arizona. D.C. No. CV-00-01521-EHC/DKD. Earl H. Carroll, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

ineffective assistance of counsel, defense counsel, touching, instructions, strategic

Counsel: For RONALD WILLIAM SMITH, Petitioner - Appellant: John W. Rood, Attorney at Law, Phoenix, AZ.

For TERRY L. STEWART, Respondent - Appellee: Diane M. Ramsey, Esq., Robert J. Walsh, Esq., OFFICE OF THE ATTORNEY GENERAL, Phoenix, AZ.

Judges: Before: KLEINFELD, WARDLAW, and W. FLETCHER, Circuit Judges.

Opinion

[*926] MEMORANDUM [*]

A defendant asserting that he received ineffective assistance of counsel under the *Sixth Amendment* must show 1) that counsel's performance was deficient and 2) that counsel's errors were so serious as to deprive **[**2]** the defendant of a fair trial. *Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. Defense counsel has leeway to make strategic decisions at trial and "need not request instructions inconsistent with its trial theory." *Butcher v. Marquez, 758 F.2d 373, 377 (9th Cir. 1985)*. Smith's explicit defense, stated in his own testimony at trial, was that he did not touch the private parts of the girls, either purposely or inadvertently. Smith's defense counsel made a tactical decision not to seek a jury instruction on a lack of sexual interest motive because he believed that arguing accidental touching would undermine Smith's credibility. This decision was a reasonable strategic choice and does not amount to ineffective assistance of counsel. Furthermore, Smith's counsel was aware that the jury instructions require the conduct to be "knowing." Thus, even though he did not undermine his argument that "it never happened" with the inconsistent argument that "if it did happen, it was an accident," the "knowingly" instruction would have enabled the jury to acquit if it believed that only accidental touching occurred.

We therefore **[**3]** conclude that the state court's decision that defense counsel did **[*927]** not provide ineffective assistance of counsel neither was contrary to, nor involved an unreasonable application of, clearly established federal law. *28 U.S.C. § 2254(d)*. The district court's denial of Smith's petition for habeas corpus is **AFFIRMED.**

End of Document

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

United States v. Simmons

United States Air Force Court of Criminal Appeals

April 9, 2019, Decided

No. ACM 39342

Reporter
2019 CCA LEXIS 156 *; 2019 WL 1569722

UNITED STATES, Appellee v. Jerard SIMMONS, Senior Airman (E-4), U.S. Air Force, Appellant

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Patricia A. Gruen. Approved sentence: Dishonorable discharge, confinement for 12 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence ad-judged 14 July 2017 by GCM convened at Joint Base Langley-Eustis, Virginia.

Core Terms

military, specification, sex, convening, sentence, extortion, trial counsel, confinement, plain error, convicted, pre-service, offenses, video, sexual activity, civilian, joined, sexual, defense counsel, message, child pornography, sexual assault, prejudiced, occasions, clemency, contends, advice, issues, trial defense counsel, factual sufficiency, finding of guilt

Counsel: For Appellant: Zachary D. Spilman, Esquire (argued); Major Mark J. Schwartz, USAF.

For Appellee: Captain Peter F. Kellett, USAF (argued); Lieutenant Colonel Joseph J. Kubler, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, DENNIS, and LEWIS, Appellate Military Judges. Senior Judge JOHNSON delivered the opinion of the court, in which Judge DENNIS and Judge LEWIS joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Senior Judge:

A general court-martial composed of officers convicted Appellant, contrary to his pleas, of four specifications of sexual assault of a child, one specification of extortion, and one specification of producing child pornography in violation of Articles 120b, 127, and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 920b*, *927*, *934*. The court members sentenced Appellant to a dishonorable discharge, confinement for 12 years, total forfeiture of pay and allowances, and reduction to the grade of E-1. The convening **[*2]** authority approved the adjudged sentence.

Appellant raises seven issues on appeal: (1) whether the military judge committed plain error by allowing evidence of Appellant's pre-service sexual relationships with the victims; (2) whether Appellant's conviction for extortion is legally sufficient; (3) whether the findings are factually sufficient; (4) whether Appellant's conviction for production of child pornography is legally and factually sufficient where the alleged child pornography was not introduced at trial; (5) whether the military judge erroneously permitted the Prosecution to make a major change to a specification over defense objection; (6) whether trial counsel made an improper argument on findings; and (7) whether Appellant's sentence is inappropriately severe. In addition, we specified two issues regarding the post-trial processing of Appellant's case.[1]

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[1] We specified the following issues:

> IS APPELLANT ENTITLED TO NEW POST-TRIAL PROCESSING OR OTHER APPROPRIATE RELIEF BECAUSE THE STAFF JUDGE ADVOCATE INCORRECTLY ADVISED THE CONVENING AUTHORITY THAT THE CONVENING AUTHORITY COULD NOT DISAPPROVE THE FINDINGS OF GUILT WITH RESPECT TO CHARGES I AND III AND THEIR SPECIFICATIONS, AND COULD NOT DISAPPROVE, COMMUTE, OR **[*3]** SUSPEND IN WHOLE OR IN PART APPELLANT'S ADJUDGED PUNITIVE DISCHARGE AND CONFINEMENT?
>
> CONFINEMENT? IS APPELLANT ENTITLED TO NEW POST-TRIAL PROCESSING OR OTHER APPROPRIATE RELIEF BECAUSE THE AREA DEFENSE COUNSEL'S CLEMENCY MEMORANDUM ERRONEOUSLY IMPLIED THE CONVENING AUTHORITY LACKED THE ABILITY TO REDUCE APPELLANT'S TERM OF CONFINEMENT, AND THE STAFF JUDGE ADVOCATE FAILED TO ADDRESS THIS ERROR? *SEE UNITED STATES V. ZEGARRUNDO, 77 M.J. 612 (A.F. CT. CRIM. APP. 2018)*.

We find no prejudicial error with respect to the issues raised by Appellant, but we find that post-trial errors require new post-trial processing and action.

I. BACKGROUND

In September 2012, Appellant was an 18-year-old high school senior in Norfolk, Virginia. One of his classmates in his Spanish class was CL, a 14-year-old female freshman. Friendly classroom interactions between the two led to an exchange of phone numbers, communications by text and Facebook, and other contact outside of school. Eventually Appellant and CL developed a sexual relationship, specifically CL would perform oral sex on Appellant. CL later estimated this occurred between 15 and 20 times during her freshman year. These encounters took place at CL's home and at a nearby park. Sometimes Appellant would take out his phone **[*4]** as if to take a picture of CL as she performed oral sex. Eventually Appellant sent CL such a picture of his penis in her mouth. CL later testified Appellant would refer to the picture and threaten to "post" it in order to pressure her for "bl[**]jobs." According to CL, the intimate relationship ended in the summer of 2013 after Appellant "had gotten a girlfriend."

In the meantime, in the spring of 2013 Appellant met AS, another 14-year-old girl who also lived in Norfolk but attended a different school. They met through D, a 14-year-old friend of AS and acquaintance of Appellant. Appellant and AS began communicating through text messages and Facebook. By late spring or early summer 2013, Appellant and AS developed a sexual relationship including vaginal and oral sexual intercourse. The relationship ended in late July 2013 before Appellant joined the Air Force.

Appellant joined the Air Force in August 2013. Appellant returned to Norfolk on leave between 21 December 2013 and 2 January 2014. CL later testified that at some point after Appellant joined the Air Force he resumed pressuring her to perform oral sex by referring to the picture of her that he had previously taken. As a result, **[*5]** CL testified that she "had to start giving him oral again during New Year's." CL estimated she performed oral sex on Appellant approximately five times after he joined the Air Force, "mostly" at the park near her house. CL was 15 years old at the time. CL testified this resumption of the sexual relationship ended after New Year's Day of 2014 when Appellant "just stopped talking to [her] about bl[**]jobs and stuff."

After Appellant completed basic training and technical school he was assigned to Joint Base Langley-Eustis, Virginia, near Norfolk. He returned to the Norfolk area in late March 2014 to perform recruiter assistance duty and then arrived at Langley on 5 April 2014. AS later testified that when Appellant was on recruiter assistance duty he began to meet with her again to engage in oral, anal, and vaginal sex. AS met with Appellant secretly to keep her relationship with Appellant hidden from her mother, with whom AS lived. On various occasions Appellant and AS met in a parking lot, in AS's house when her mother was not home, and late at night in the backyard of AS's house. AS estimated there were "four or five" such encounters. AS was 15 years old at the time.

On the night of **[*6]** 3-4 July 2014, AS was performing oral sex on Appellant in her backyard when she noticed that Appellant was recording a video of her with his phone. AS told Appellant she did not want him to make a video. Appellant showed her the video which was approximately ten seconds long. The video depicted Appellant's penis going inside AS's mouth. AS asked Appellant to delete the video, but he told her he "wanted to keep it" because he thought it was "funny." AS did not know if Appellant ever deleted the video.

Appellant was charged with three specifications of sexual assault of a child against AS, one specification each of penetrating her vulva, anus, and mouth with his penis on divers occasions between on or about 20 August 2013 and on or about 31 August 2014 (Charge I, Specifications 1-3). In addition, Appellant was charged with one specification of sexual assault of a child against CL by penetrating her mouth with his penis on divers occasions between on or about 20 August 2013 and on or about 30 June 2014 (Charge I, Specification 4). He was also charged with one specification of extorting CL on divers occasions to perform oral sex on him by threatening to publicize an image of CL performing **[*7]** oral sex on him; this was originally charged as occurring between on or about 2 August 2014 and on or about 31 December 2014, but during the trial the military judge permitted the Government to extend the beginning of the time frame back to on or about 27 October 2013 (Charge II and its Specification). Finally, Appellant was charged with producing child pornography between on or about 1 July 2014 and on or about 8 July 2014 (Charge III and its Specification). A panel of officer members convicted Appellant of every charge and specification, although they made exceptions and substitutions to find Appellant guilty of Charge I, Specification 4—sexually assaulting CL—on only a single occasion on or about 31 December 2013.

II. DISCUSSION

A. Appellant's Pre-Service Relationships with CL and AS

1. Additional Background

Before trial, the Government submitted a notice and motion pursuant to Military Rule of Evidence (Mil. R. Evid.) 412 to admit evidence of the victims' sexual behavior with Appellant prior to August 2013 when he joined the Air Force.[2] The motion explained the Government intended to introduce such evidence under Mil. R. Evid. 404(b) to demonstrate Appellant's motive, intent, knowledge, and absence of **[*8]** mistake as to the victims' ages, and preparation by grooming CL and AS for further sexual activity. The Defense did not submit a written response to the Government motion. At the outset of the trial the military judge asked the Defense if there was an objection "to the information that Trial Counsel wants to admit." Trial defense counsel responded "No, Your Honor."

Both trial counsel and civilian defense counsel referred to Appellant's preservice sexual behavior during their opening statements. During their testimony, both CL and AS described their recollections of their sexual activity with Appellant prior to August 2013, as summarized above. The Defense did not object on the grounds that this was impermissible propensity evidence prohibited by Mil. R. Evid. 404(b)(1), nor did the Defense request a specific instruction addressing propensity evidence.

After the Defense rested its case, trial counsel requested that the military judge instruct the court members that they could use Appellant's pre-service acts with CL and AS as propensity evidence of his guilt of the charged offenses under Mil. R. Evid. 414. In commenting on trial counsel's request, civilian defense counsel stated his understanding that evidence of **[*9]** the pre-service sexual acts "was only ever admissible for the purposes of showing [Appellant's] knowledge as to their age." The military judge denied trial counsel's request.

The military judge instructed the court members with respect to findings that, *inter alia*, Appellant may not be convicted "on evidence of a general criminal disposition."

2. Law

In general, "[w]e review a military judge's decision to admit or exclude evidence for an abuse of discretion. 'A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" *United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017)* (citation omitted) (quoting *United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015))*. However, "[w]hen an appellant does not raise an objection to the admission of evidence at trial, we first must determine whether the appellant waived or forfeited the objection." *United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)* (citation omitted). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017)* (quoting *United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009))*. We review forfeited issues for plain error, whereas "a valid waiver leaves no error to correct on appeal." *Id.* (citations omitted). To prevail under a plain error analysis, an appellant must show "(1) there was an error; **[*10]** (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007)* (citations omitted). Whether an accused has waived or merely forfeited an issue is a question of law we review de novo. *Ahern, 76 M.J. at 197* (citing *United States v. Rosenthal, 62 M.J. 261, 262 (C.A.A.F. 2005))*.

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving motive, opportunity, intent, preparation, knowledge, or absence of mistake. Mil. R. Evid. 404(b)(2). The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." *United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989)*. We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

> 1. Does the evidence reasonably support a finding by the court members that [the] appellant committed prior crimes, wrongs or acts?
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010) (alterations in original) (quoting *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989))*.

3. Analysis

[2] Mil. R. Evid. 412(b)(1)(B) provides, *inter alia*, that "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered . . . by the prosecution" is an exception to the general prohibition on evidence an alleged victim of a sexual offense engaged in other (uncharged) sexual behavior or had a sexual predisposition set forth in Mil. R. Evid. 412(a).

Appellant contends the military judge committed plain error **[*11]** because "it is clear or obvious that Appellant's pre-service sexual relationships with CL and AS are not probative of any material issue other than character, and because any probative value is substantially outweighed by the danger of unfair prejudice." The Government contends the Defense waived this issue at trial, and even if it were not waived the military judge did not commit plain error. We agree with the Government that the Defense waived this issue.

"A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009)* (quoting *United States v. Cook, 406 F.3d 485, 487 (7th Cir. 2005))*. The Defense's decision not to object was not an oversight. The Government's pretrial notice and motion, filed over four months before trial, squarely presented the Defense with the question of whether or not it objected to this evidence which the Government offered under multiple theories of admissibility pursuant to Mil. R. Evid. 404(b). The Defense not only declined to respond to the motion in writing; trial defense counsel affirmatively told the military judge the Defense did not object to the evidence. As the United States Court of Appeals for the Armed Forces (CAAF) recently explained, "under **[*12]** the ordinary rules of waiver, Appellant's affirmative statements that he had no objection to [the] admission [of evidence] also operate to extinguish his right to complain about [its] admission on appeal." *Ahern, 76 M.J. at 198* (citing *Campos, 67 M.J. at 332-33*; *United States v. Smith, 531 F.3d 1261, 1267-68 (10th Cir. 2008))*.

We recognize that "[w]hether a particular right is waivable; whether the [accused] must participate personally in the waiver; whether certain procedures are required for waiver; and whether the [accused]'s choice must be particularly informed or voluntary, all depend on the right at stake." *Id. at 197* (quoting *United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011))*. Yet we find the Defense's affirmative decision not to object to the Government's motion and evidence substantially similar to the defense's affirmative decision not to object to the Government's motion and evidence in *Ahern*, where the CAAF found "the ordinary rules of waiver" applied. *See id. at 197-98*. We do not purport to hold that every time a trial defense counsel asserts there is "no objection" to a Government motion or evidence the matter is waived on appeal, but under the particular facts of this case we do find waiver.

Assuming *arguendo* Appellant did not waive this issue at trial, we do not find the military judge committed *plain* error with respect to the evidence of Appellant's **[*13]** pre-service sexual activity with the victims. In order to obtain relief under the plain error standard, Appellant must demonstrate error that was plain or obvious in light of the three-prong test for evidence offered under Mil. R. Evid. 404(b) articulated in *Reynolds*. *See Staton, 69 M.J. at 230*. As for the first prong, Appellant concedes the evidence supports a finding that he engaged in pre-service sexual activity with CL and AS. We agree.

As for the second prong, evidence that CL performed oral sex on Appellant before August 2013 was manifestly relevant to prove the charged offense of extortion. In order for the Government to prove Appellant used a photo of CL performing oral sex to coerce her to engage in further acts, the Government needed to demonstrate Appellant had the opportunity to create such an image. Evidence that CL performed oral sex on Appellant prior to the point that he allegedly began extorting her was therefore relevant. As for AS, based on the Government's motion and the Defense's failure to object, the military judge had little reason to doubt that the parties agreed the expected evidence would be probative of such issues as Appellant's knowledge of the victims' ages, his opportunity to commit the offenses, **[*14]** and his preparation or plan for a continuing course of conduct. Viewed through the lens of the plain error standard, we cannot say the military judge plainly or obviously erred by not excluding this evidence *sua sponte*.

As for the third prong, we do not find obvious error in the military judge's failure to exclude *sua sponte* evidence of Appellant's pre-service sexual activity with the victims on the basis that the probative value was *substantially* outweighed by the danger of unfair prejudice. Again, with regard to CL, evidence of pre-service oral sex had high probative value with respect to the extortion charge. With respect to AS, the danger of unfair prejudice was mitigated to an extent by trial defense counsel's frank acknowledgement from his opening statement onward that Appellant did engage in sexual activity with AS after he joined the Air Force; the defense was based on Appellant's purported reasonable mistake of fact as to AS's age. Therefore, the impact of any improper implication of propensity to the effect that Appellant's pre-service sexual activity with AS made it more likely that he engaged in sexual activity with her after he joined the Air Force was significantly blunted. **[*15]** Additionally, evidence of pre-service sexual activity with AS had significant non-propensity probative value for the Government's case, for example as necessary context for AS's testimony about the following conversation regarding Appellant's knowledge of her age:

> One time I even asked him, I was like--we were sitting--it was before he joined the Air Force, we were sitting in his car, and I was like, I'm 14, you know, is that weird that I'm so young and you want to like mess around with me, and he was like no, because the youngest girl I'd

have sex with is 12, so he knew.

Furthermore, we do not find trial counsel made any improper propensity-based arguments to the court members during findings. Applying the plain error standard of review, we do not find the military judge plainly or obviously erred by failing to exclude *sua sponte* evidence that the Defense evidently agreed was admissible on the basis that its probative value was substantially outweighed by the danger of unfair prejudice.

Although not raised as a separate assignment of error, it is appropriate to consider separately the military judge's failure to give a limiting instruction with respect to the Government's Mil. R. Evid. 404(b) evidence. **[*16]** We do not find Appellant's waiver with regard to the admissibility of evidence of pre-service sexual activity with CL and AS extended to waiver of a possible limiting instruction. Trial defense counsel did not affirmatively decline such an instruction. However, the Defense also did not request such an instruction, and did not object to the military judge's instructions which did not include such a limiting instruction. Accordingly, we review the military judge's decision not to provide a limiting instruction for plain error. *See* United States v. McClour, 76 M.J. 23, 25 (C.A.A.F. 2017) (citation omitted).

Despite the absence of any defense request or objection, the military judge's decision not to provide a limiting instruction gives us pause. We acknowledge that evidence of uncharged misconduct has some "potential for creating inferences about an accused's guilt based on his character." United States v. Levitt, 35 M.J. 114, 119 (C.M.A. 1992). Certainly, *when requested*, the military judge has a duty to instruct court members on the proper use of such evidence. *Id.* (citation omitted); *see* Mil. R. Evid. 105 ("If the military judge admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the military judge, *on timely request*, must restrict the evidence **[*17]** to its proper scope and instruct the members accordingly." (emphasis added)). However, the Defense did not request such an instruction in this case, and we perceive plausible tactical reasons for not doing so. For example, such a limiting instruction may have invited the military judge to recount to the members the various permissible uses of such evidence. Given that the evidence of pre-service sexual activity was plainly relevant with respect to the charged extortion of CL and that the Defense did not even contest that Appellant engaged in post-accession sexual activity with AS, the perceived cost of having the military judge recapitulate how this evidence potentially supported the Government's case in her instructions may have outweighed any practical benefit.

The military judge did instruct the court members that evidence of each offense must "stand on its own" and that Appellant could not be convicted based on evidence of a "general criminal disposition." Appellant argues trial counsel improperly invoked the pre-service sexual acts during the opening statement and closing argument as "a rallying cry for the members to convict him even though he is innocent of the charged offenses." **[*18]** To the contrary, we find trial counsel's accurate statements regarding jurisdiction and the time periods that were the subject of the charged offenses simply oriented the court members to the issues that were before them for decision. Once again, viewed through the lens of plain error analysis, we cannot say the military judge plainly or obviously erred by omitting a limiting instruction that the Defense never sought regarding pre-service sexual activity.

For the foregoing reasons, we conclude Appellant waived his objection to evidence of pre-service sexual acts with the victims and, assuming *arguendo* he did not waive it, the military judge did not commit plain error by admitting the evidence of such acts. Moreover, we conclude the military judge did not plainly err by omitting a limiting instruction in the absence of a defense request or objection. Recognizing our authority to grant relief in spite of Appellant's waiver and forfeiture, *see* United States v. Hardy, 77 M.J. 438, 443 (C.A.A.F. 2018), we find such action is not warranted in this case.

B. Legal and Factual Sufficiency

1. Law

We review issues of legal and factual sufficiency de novo. Article 66, UCMJ, 10 U.S.C. § 866; United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited **[*19]** to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987) (citation omitted); *see also* United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*; *see also United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*. "The term reasonable doubt . . . does not mean that the evidence must be free from conflict." **[*20]** *Id.* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986))*.

2. Factual Sufficiency of Sexual Assault

The elements of Specifications 1 through 4 of Charge I, which allege the offense of sexual assault of a child in violation of Article 120b, UCMJ, of which Appellant was convicted, include: (1) that on the dates alleged, Appellant committed the specified sexual act—penetration of the vulva, anus, or mouth with his penis—on the named victim; and (2) that at the time the victim had attained the age of 12 years but had not attained the age of 16 years. *See Manual for Courts-Martial, United States*, pt. IV, ¶ 45b.a.(b), (2012 ed.) (2012 *MCM*). The Government was not required to prove Appellant knew CL or AS were under 16 years of age when the acts occurred. *See* Article 120b(d)(2), UCMJ, *10 U.S.C. § 920b(d)(2)*.

With regard to his conviction for sexually assaulting CL, Specification 4 of Charge I, Appellant contends that CL's memory and testimony regarding her sexual activity with Appellant after he joined the Air Force were unclear. We agree that CL's testimony regarding the exact number and overall timeframe of her encounters with Appellant after August 2013 was not clear. However, CL was clear that she engaged in oral sex with Appellant on at least one occasion **[*21]** on or about 31 December 2013, as the court members found. This testimony was bolstered by Facebook message exchanges between Appellant and CL that the Government introduced, which included the following from 27 October 2013:

> [Appellant (APP):] My d[**]k wants to talk to your mouth again.
> [ ]
> [CL:] Too bad. [ ] s[**]k it yourself lol
> [APP:] Nah. I can get you to do it when I get back in VA. [ ]
> [APP:] Lol trust me on that.
> . . . .
> [APP:] Then you'll be back s[**]king me off for Xmas. [ ]

CL's testimony was further supported by evidence that Appellant was on leave in Norfolk between 21 December 2013 and 2 January 2014.

With regard to the sexual assaults against AS, on appeal as at trial Appellant does not contend that he did not engage in sexual intercourse with AS after he joined the Air Force. AS's testimony in that regard is strongly supported by other evidence. For example, the Air Force Office of Special Investigations (AFOSI) arranged a pretext phone call from AS to Appellant in which he acknowledged having sex with her during 2014.

Instead of contesting whether sexual intercourse occurred, Appellant contends the Government "did not disprove" that Appellant had a mistake of fact as to AS's **[*22]** age. As the military judge instructed the court members, an honest and reasonable mistake as to AS's age would be a defense to Specifications 1, 2, and 3 of Charge I; however, the burden was on the Defense to establish by a preponderance of evidence that Appellant was under such a mistaken belief. Article 120b(d)(2), UCMJ, *10 U.S.C. § 920b(d)(2)*. We do not find Appellant held such an honest and reasonable mistaken belief as to AS's age. AS testified clearly that Appellant knew her age. Although they attended different schools, AS had talked with Appellant about the fact that she was a freshman when they met. In particular, as described above, AS testified that on one occasion before Appellant joined the Air Force she asked him if it was "weird" that Appellant wanted to "mess around" with her because she was only 14 years old at the time, and Appellant "was like no, because the youngest girl [Appellant would] have sex with is 12." Furthermore, Appellant knew AS's friend D through whom Appellant and AS first met; like AS, D was a 14-year-old freshman in the spring of 2013. In addition, Appellant tacitly acknowledged he knew AS was underage when she called him at AFOSI's behest on the false pretext that she **[*23]** was concerned about disease. AS asked Appellant, "I'm not trying to like put you like on the spot or anything, but like you didn't have [herpes] when I was 14, right?" Appellant responded, "No, and I don't have it at all."

Appellant cites certain conversations or exchanges AS had with Appellant as supporting a reasonable mistake on his part as to her age. Although the evidence was sufficient to warrant the military judge's instruction to the members on the defense of mistake of fact as to age, there was no evidence AS specifically lied to Appellant about her age. Moreover, for the

most part, the context and content of the exchanges about marriage, jobs, suspected pregnancy, and AS joining the military to which Appellant refers did not particularly suggest AS was at least 16 years old. Two of the exchanges were potentially more probative. In the fall of 2014, Appellant asked AS via Facebook whether she would be a junior or senior in high school that year, and AS responded that she was "supposed" to be a senior but she had failed too many classes. At trial, AS explained the context for this statement was that she had wanted to graduate early from high school after her junior year, and **[*24]** in that sense she was "supposed" to be a senior. In addition, AS acknowledged on one occasion Appellant asked her to drive to meet him, to which AS responded not that she was too young but that she did not have a car. Nevertheless, considering the weight of the evidence, and recognizing that unlike the court members we did not personally observe the witnesses, we do not find Appellant was honestly and reasonably mistaken as to AS's age. *See* *Turner, 25 M.J. at 325*.

Having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt of sexual assault beyond a reasonable doubt. Accordingly, we find Appellant's convictions of Charge I and its specifications factually sufficient. *See id.*

3. Legal and Factual Sufficiency of Extortion

The military judge instructed the court members on the elements and definitions regarding the Specification of Charge II, the offense of extortion in violation of Article 127, UCMJ, of which Appellant was convicted:

> One, that between on or about 27 October 2013 and on or about 31 December 2014, on divers occasions, within the Commonwealth of Virginia, [Appellant] communicated an intent to **[*25]** publicize an image of [CL] performing oral sex on him;
> Two, that the communication was made known to [CL];
> Three, that the language used by [Appellant] was a threat, that is, a clear and present intent to injure the reputation of another presently or in the future;
> Four, that such communication was wrongful, and without justification or excuse; and
> Five, that [Appellant] thereby intended unlawfully to obtain the performance of oral sex upon himself, which was an advantage.
> . . . .
> An intent to obtain any advantage may include an intent to make a person do an act against her will

See 2012 *MCM*, pt. IV, ¶ 53.b.; *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 712-13 (10 Sep. 2014).

Appellant concedes that obtaining the performance of oral sex upon himself constitutes an "advantage" for purposes of Article 127, UCMJ. *See* *United States v. Hicks, 24 M.J. 3, 5 (C.M.A. 1987)*. However, he points to additional language in the *Manual for Courts-Martial* clarifying that "an intent to make a person do an act against that person's will is not, by itself, sufficient to constitute extortion." 2012 *MCM*, pt. IV, ¶ 53.c.(4). Appellant contends the specification in question and the evidence in this case indicate "that [his] alleged extortion involved **[*26]** merely an alleged intent to make CL perform oral sex on Appellant against her will," and is therefore legally insufficient. We disagree.

The specification and evidence together indicate Appellant did not merely intend to have CL do something against her will; he also intended to obtain something of value—that is, CL's performance of oral sex upon him. The CAAF considered similar circumstances and argument in *United States v. Brown, 67 M.J. 147 (C.A.A.F. 2009)*. In *Brown*, the appellant used threats to publicize a recording of the victim engaging in sexual acts to try to obtain sexual favors from the victim. *Id. at 148*. The CAAF concluded:

> [I]n addition to alleging that Appellant sought to have [the victim] engage in an act against her will, the specification further alleged that Appellant intended to obtain an advantage through her participation with him in sexual relations. As such, the specification did not rely solely, or "by itself," on an allegation that Appella[nt] sought to have her engage in an act against her will.

Id. at 149. Similarly, in the instant case the specification and evidence demonstrate Appellant intended both to have CL do something against her will *and* to obtain an advantage. Appellant fails to distinguish *Brown* in any meaningful way, **[*27]** and we find the specification legally sufficient.

With regard to factual sufficiency, Appellant contends CL's testimony "reveals that there was no extortion [because] she saw the image, asked Appellant to delete it, and it was never seen again." However, it hardly follows that CL knew Appellant did not have a sexually explicit photo of her that he might threaten to publicize. To the contrary, CL testified that she asked Appellant to delete the picture and he refused. She further testified that after Appellant joined the Air Force he would "ask for bl[**]jobs and if I said no he would bring up the picture," which he threatened to "post." CL testified she believed Appellant was serious and agreed that "every time that [she] gave him a bl[**]job after he got back from the Air Force . . . he use[d] the picture every time [sic] to sort of make [her] do it." Again, CL's testimony was supported by Facebook messages, such as the exchange from 27 October

2013 quoted above and the following from 26 May 2014 and 14 June 2014:

> [CL:] What c:
> [APP:] Oh nothing, just about to post pics to [Facebook]. c:
> [CL:] No no no no!
>
> [APP:] I mean you keep blocking me, so I guess it's ok if I block you on that acct **[*28]** then post them, right? xD
> [CL:] No please don't
> . . . .
> [APP:] So about that bj! ;D
> [CL:] who said you were gonna get one
> [APP:] the pictures on my laptop. [ ]
> [CL:] dont you dare start this s[**]t again

CL testified that in addition to the Facebook messages she and Appellant also sent text messages to one another on their phones between October 2013 and May 2014, and there were "a lot more text messages" than Facebook messages. These phone text messages included "inappropriate" conversations. However, due to the lapse of time investigators could not recover these phone texts.

We acknowledge the Specification of Charge II alleges Appellant committed the offense "within the Commonwealth of Virginia." Therefore, Appellant's 27 October 2013 Facebook message, evidently sent while Appellant was in training outside of Virginia, would not itself constitute an act of extortion alleged in the Specification, although it was evidence relevant to both the charged extortion and sexual assault against CL. Similarly, we acknowledge the 26 May 2014 message about "blocking" accounts quoted above, while indicating CL reasonably believed Appellant had embarrassing photos of her, did not refer to Appellant's **[*29]** desire to have any sexual act performed and would also not qualify as an act of extortion as charged. Furthermore, we recognize the court members found Appellant guilty of only a single sexual assault against CL on or about 31 December 2013. However, we find CL's testimony that Appellant used the explicit picture to compel her "every time" she performed oral sex on Appellant after he joined the Air Force, coupled with the 14 June 2014 Facebook message that did refer to oral sex, supported by the other evidence in the case, are sufficient to support Appellant's conviction for extorting CL on "divers occasions"—that is, more than once.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence was legally sufficient to support Appellant's conviction for extorting CL on divers occasions beyond a reasonable doubt. *Barner, 56 M.J. at 134*. Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner, 25 M.J. at 325*. Appellant's conviction of Charge II and its Specification is therefore both legally and factually sufficient.

4. Legal and [*30] Factual Sufficiency of Producing Child Pornography

The military judge instructed the court members on the elements and definitions regarding the Specification of Charge III, the offense of production of child pornography in violation of Article 134, UCMJ, of which Appellant was convicted:

> One, that between on or about 1 July 2014 and on or about 8 July 2014, within the Commonwealth of Virginia, [Appellant] knowingly and wrongfully produced child pornography, to wit: a video of a minor engaging in sexually explicit conduct; and
> Two, that under the circumstances, the conduct of [Appellant] was of a nature to bring discredit upon the armed forces.
> . . . .
> "Child pornography" means material that contains a visual depiction of an actual minor engaging in sexually explicit conduct.
> . . . .
> "Sexually explicit conduct" means actual or simulated sexual intercourse or sodomy, including oral-genital, whether between persons of the same or opposite sex.

See 2012 *MCM*, pt. IV, ¶ 68b.b.(4), 68b.c.

On appeal, Appellant attacks the legal and factual sufficiency of his conviction for producing child pornography because the Government failed to introduce the alleged video of AS itself or any forensic evidence **[*31]** of it. In the absence of such evidence, Appellant contends AS's testimony is insufficiently credible to prove such a video existed. Furthermore, Appellant argues that without the video itself the evidence "fails to satisfy" the six factors developed in *United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)*, *aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987)*, adopted by the CAAF and widely employed across the federal circuits for assessing whether a particular image constitutes a "lascivious exhibition" of the genitals or pubic area. *See United States v. Roderick, 62 M.J. 425, 429-30 (C.A.A.F. 2006)*.[3] We are not persuaded by Appellant's argument.

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[3] The *Dost* factors include:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

We have previously affirmed litigated convictions for child pornography offenses **[*32]** where the Government was unable to introduce the subject images at trial. *See, e.g.*, *United States v. Harrower, No. ACM 39127, 2018 CCA LEXIS 46, at *10-12* (A.F. Ct. Crim. App. 26 Jan. 2018) (unpub. op.). "[T]he essential question is not whether the Government is able to introduce the sexually explicit images . . . rather, the question is whether the evidence that was introduced establishes each element of the offense beyond a reasonable doubt." *Id. at *11*. In this case, AS's testimony does so. AS testified that on the night of 3-4 July 2014 in Norfolk she saw Appellant record a video of her when she was performing oral sex on him. Appellant showed the video to her. It was approximately ten seconds long; on the video AS saw her face and Appellant's penis inside her mouth. AS was 15 years old at the time and Appellant knew how old she was. We readily conclude such conduct was in fact of a nature to bring discredit upon the armed forces. Thus AS's testimony establishes all of the elements of the offense as described above, including that Appellant created a visual depiction of an actual minor engaged in actual oral-genital sexual intercourse.

We do not find Appellant's challenges to AS's credibility persuasive. Appellant exaggerates the significance and disregards **[*33]** the context of certain instances of AS "lying" or failing to disclose information to Appellant during their relationship. Similarly, the fact that AS did not bring up the oral sex video during her initial interview with investigators, and that she originally estimated the video incident occurred on the night of 4 July 2014 rather than the night of 3 July 2014, are more indicative of simple mistakes or temporary memory lapses during the intervening two years than of an intent to deceive. We are unsurprised that the court members were not persuaded by these minor discrepancies; we are not persuaded either.

As for the *Dost* factors, they are inapposite. Appellant's conviction did not depend on a finding of a "lascivious exhibition." The visual depiction of a known minor engaged in actual oral-genital sexual intercourse constitutes child pornography for purposes of Article 134, UCMJ. *See* 2012 *MCM*, pt. IV, ¶ 68b.c. AS's testimony that she saw her face with Appellant's penis in her mouth on the video Appellant made demonstrates the video was in fact child pornography, regardless of an analysis of the *Dost* factors.

Drawing "every reasonable inference from the evidence of record in favor of the **[*34]** prosecution," the evidence was legally sufficient to support Appellant's conviction for production of child pornography beyond a reasonable doubt. *Barner, 56 M.J. at 134*. Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner, 25 M.J. at 325*. Appellant's conviction of Charge III and its Specification is therefore both legally and factually sufficient.

C. Major or Minor Change to Specification

1. Additional Background

At the time Appellant was arraigned the Specification of Charge II, alleging extortion in violation of Article 127, UCMJ, read as follows:

> In that [Appellant] . . . did, within the Commonwealth of Virginia, between on or about 2 August 2014 and on or about 31 December 2014, on divers occasions, with intent unlawfully to obtain an advantage, to wit, the performance of oral sex upon [Appellant], communicate to [CL] a threat to publicize an image of [CL] performing oral sex on him.

As described above, at trial CL testified that at some point after Appellant joined the Air Force in August 2013 he resumed pressuring her to perform oral sex by referring to the picture **[*35]** of her performing oral sex that he had previously taken. CL testified that as a result she subsequently performed oral sex on Appellant approximately five times. CL testified these sexual encounters ended after New Year's Day of 2014 when Appellant "just stopped talking to [her] about bl[**]jobs and stuff." The Government also introduced a number of Facebook messages between Appellant and CL, including exchanges from 27 October 2013 and 14 June 2014—quoted above in our discussion of factual sufficiency—apparently referring to Appellant's ability to pressure CL to perform oral sex. However, the Government introduced only one relatively brief text exchange from within

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> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Roderick, 62 M.J. at 429 (citing *Dost, 636 F. Supp. at 832*).

the originally-charged time frame commencing on or about 2 August 2014; dated 18 September 2014, this exchange did not refer to oral sex or to any image of CL.

After the Government rested its case on findings, trial counsel moved to make a "minor change" to the Specification of Charge II pursuant to Rule for Courts-Martial (R.C.M.) 603(c). Trial counsel explained that "evidence at trial has reflected that the start date of the timeframe of this offense should date back to 27 October 2013 to encompass the divers language as charged." The Defense objected. Civilian **[*36]** defense counsel argued that the Defense had inadequate notice of the proposed change. In addition, he argued the change was "highly prejudicial" because it extended the time frame to points in time when CL was under 16 years old, which made the offense "more serious." Civilian defense counsel also argued the change to the extortion specification aggravated the charged sexual assault against CL between on or about 20 August 2013 and on or about 20 June 2014 because it indicated CL was not only underage but non-consenting.

In an oral ruling the military judge permitted the Government to amend the specification by replacing the date "2 August 2014" with the date "27 October 2013," as requested. The military judge groused that "this is a poorly charged case" and that she did not like "the timing;" however, she found "the case law allows for changes to the charge sheet, even up through findings being announced." She further found the requested change "doesn't result in an additional or different offense" and did not "prejudice [Appellant's] substantial rights." Furthermore, she relied on *United States v. Whitt, 21 M.J. 658 (A.C.M.R. 1985), rev. denied, 22 M.J. 357 (C.M.A. 1986)*, cited by the Government, for the proposition that "this length of time, which is just **[*37]** under a year that the trial counsel wants to back up this charged timeframe, that's perfectly acceptable under the case law."[4] The court members convicted Appellant of the modified specification.

2. Law

"Whether a change made to a specification is minor is a matter of statutory interpretation and is reviewed de novo." *United States v. Reese, 76 M.J. 297, 300 (C.A.A.F. 2017)* (citing *United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016)*).

"Minor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." R.C.M. 603(a). "After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced." R.C.M. 603(c). Major changes "may not be made over the objection of the accused unless the charge or specification affected is preferred anew," regardless of any demonstration of prejudice. R.C.M. 603(d); *see Reese, 76 M.J. at 301-02*.

3. Analysis

Appellant contends the military judge erroneously permitted the Government to make a major change to the Specification of Charge II by expanding the charged time frame from "between on or about 2 August 2014 and on or about **[*38]** 31 December 2014" to "between on or about 27 October 2013 and on or about 31 December 2014" over the Defense's objection. We echo the military judge's opinion that the case was "poorly charged" in this respect and we find the events at trial betray the Prosecution's lack of familiarity with its case. Nevertheless, we are not persuaded the military judge erred by permitting the change.

The military judge may permit minor changes in a specification "*at any time before findings are announced*," provided that "no substantial right of the accused is prejudiced." R.C.M. 603(c) (emphasis added). Therefore, we must resolve whether the change was minor, and if so, whether it nevertheless prejudiced Appellant's substantial rights. The rule establishes a presumption that a change is minor unless it "add[s] a party, offenses, or substantial matter not fairly included in those previously preferred" or is "likely to mislead the accused as to the offenses charged." R.C.M. 603(a). The change at issue did not "add a party" or modify any language with respect to the location or nature of the alleged criminal acts. The only change was to the initial date of the charged time period. A change in the alleged date of an offense is **[*39]** not necessarily a major change. *See United States v. Brown, 34 M.J. 105, 110 (C.M.A. 1992), overruled on other grounds by Reese, 76 M.J. at 302* ("[T]he date of the alleged [offense] was not offense-defining and could properly be considered minor . . . ."); *Whitt, 21 M.J. at 661* ("We find that the change of date [of the alleged offense] by one year is not a major change . . . ."); *cf. United States v. Parker, 59 M.J. 195, 197 (C.A.A.F. 2003)* ("Changing the date or place of the offense [by exceptions and substitutions] may, but does not necessarily, change the nature or identity of the offense." (quoting R.C.M. 918(a)(1), Discussion)). A change in the

[4] The court in *Whitt* found "the change of the date by one year [was] not a major change resulting in a new offense," although the change did implicate the statute of limitations which required the finding of guilty to be set aside. *21 M.J. at 661-62*.

alleged date *may* be a major change in a particular case if the date is "offense-defining" or if time is somehow "of the essence" with respect to the offense. *Brown, 34 M.J. at 110* (citations omitted); *see United States v. Wray, 17 M.J. 375, 376 (C.M.A. 1984)* (finding a fatal variance where appellant was charged on the theory of larceny by taking on one date but found guilty of larceny by withholding on a later date). However, in Appellant's case the date change did not affect the nature of the offense, only the time frame in which it occurred.

We have considered whether the fact that Appellant was charged with extorting CL "on divers occasions" gave the expansion of the date range the effect of adding "offenses" to the specification. *See United States v. Stout, ARMY 20120592, 2018 CCA LEXIS 174, at *14* (A. Ct. Crim. App. 9 Apr. 2018) (unpub. **[*40]** op.), *rev. granted, 78 M.J. 93 (C.A.A.F. 2018)* ("[S]ince the specifications did not include 'on divers occasions' language, no additional offenses were alleged by the changes in the date range for the specifications.") Notwithstanding the implications of our sister court's analysis in *Stout*, we find the change did not add "offenses." First, we note that our predecessor court previously found no abuse of discretion where a trial judge permitted the expansion of the time frame of offenses alleged on divers occasions over defense objection—implying the expansion was a minor change rather than a major change. *See United States v. Hartzog, No. ACM 29055, 1992 CMR LEXIS 794, at *8-10* (A.F.C.M.R. 9 Nov. 1992) (unpub. op.). In addition, the charging of an offense on divers occasions over a number of months is inherently facially ambiguous as to the exact number and dates of the criminal acts. Expanding the date range did not "add an offense" or necessarily increase the number of criminal acts the Government sought to prove; rather, it was the same alleged offense applied to a different time period. In this case, the date was not "offense-defining." *See Brown, 34 M.J. at 110* (citation omitted); *United States v. Brown, 4 C.M.A. 683, 16 C.M.R. 257, 261 (C.M.A. 1954)* (citing alleged violations of a "Sunday 'blue law'" or statutory rape as cases where the date may be "of the essence **[*41]** of the crime"). Although a change to the alleged date may "add an offense" in some circumstances, in this case we find it did not.

Nevertheless, although the parties, offense, and substance of the specification remained the same, the change would still be a major one if it was "likely to mislead the accused as to the offenses charged." R.C.M. 603(a). At trial the Defense contended Appellant was prejudiced by surprise and the lack of notice of the change. Although we agree the Prosecution could and should have requested the change sooner, and the military judge might have refused to permit the requested change, we are not persuaded the change surprised or misled the Defense in a manner that appreciably harmed Appellant's ability to defend the case. In opposing the proposed change civilian defense counsel referred to a "notice problem" but did not articulate any specific way in which the Defense had been prejudiced with regard to the presentation of evidence. On appeal, Appellant fails to articulate what the Defense did or failed to do at trial as a result of being misled by the change. The Defense did not request to recall CL or any witness for additional cross-examination, or for a delay in order **[*42]** to further prepare its case on findings. During the presentation of evidence trial defense counsel demonstrated their familiarity with the substance of the messages between Appellant and CL spanning the modified charged time frame. Furthermore, the evidence relevant to the expanded time frame for the extortion of CL was already admissible and a matter of litigation by the parties due to its relevance to the charged sexual assault against CL. Accordingly, under the circumstances we do not find the change was "likely to mislead" Appellant with regard to what he had to defend against.

Having concluded the change was not "major," we must next determine whether the minor change nevertheless prejudiced Appellant's substantial rights and was therefore prohibited by R.C.M. 603(c). We find it did not. For the reasons stated above, we find Appellant had adequate notice to defend against the modified charge. Moreover, his punitive exposure was not increased. We are not persuaded by civilian defense counsel's arguments that the modification effectively aggravated either the charged extortion or sexual assault against CL. The same evidence was admissible regardless of the change, the nature of the offenses was **[*43]** not altered, and the modification had no impact on the maximum potential punishment. Accordingly, we find the military judge did not err by permitting the minor change to the Specification of Charge II.

D. Trial Counsel's Closing Argument

1. Additional Background

During findings argument, civilian defense counsel suggested that Appellant did not know AS's true age because, *inter alia*, they were not in the same "peer group" or "age group." During rebuttal, trial counsel attempted to counter this argument by referring to a Facebook message Appellant had sent stating that he "like[d] f[**]king with freshman [sic]." Trial counsel's argument drew an objection from civilian defense counsel that trial counsel had mischaracterized the evidence because the message in question was sent to CL rather than to AS. Trial counsel acknowledged it was a message to CL. The military judge sustained the objection.

After trial counsel's rebuttal argument, civilian defense counsel requested surrebuttal on this portion of the argument. Civilian defense counsel contended to the military judge that trial counsel had "so far mischaracterized" the evidence that it "thoroughly confus[ed]" the Defense's distinct arguments **[*44]** with respect to CL and AS, and that trial counsel had done so "on purpose." The military judge granted civilian defense counsel's request for surrebuttal argument to be followed by an opportunity for additional rebuttal argument by trial counsel. During surrebuttal, civilian defense counsel argued trial counsel erroneously used evidence of a message between Appellant and CL to argue Appellant did not have a reasonable mistake of fact as to AS's age.

Trial counsel then made the following additional rebuttal argument:

> I apologize that I said [CL]--or I'm sorry [AS] instead of [CL]. What I was rebutting was what the defense counsel said that [AS] and [her] peer group was not the same peer group as [Appellant]. And you have in [CL]'s text messages where he says, "I like f[**]king with freshman [sic]." That is what [AS] was when he met her, that is what [CL] was when he met her. *Don't fall for smoke and mirrors*.

(Emphasis added). The Defense did not object to trial counsel's additional rebuttal argument.

2. Law

Improper argument is a question of law that we review de novo. *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)* (citation omitted). When there is no objection at trial, we review the propriety of trial counsel's argument for plain **[*45]** error. *United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013)* (citation omitted). To prevail under a plain error analysis, Appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Erickson, 65 M.J. at 223* (citations omitted).

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *Frey, 73 M.J. at 248* (quoting *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000))*. "[I]t is . . . improper for a trial counsel to attempt to win favor with the members by maligning defense counsel." *United States v. Fletcher, 62 M.J. 175, 181 (C.A.A.F. 2005)* (citations omitted). "A prosecutorial comment must be examined in light of its context within the entire court-martial." *United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005)* (citation omitted). In assessing prejudice from improper findings argument, we balance three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *Fletcher, 62 M.J. at 184*. "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

3. Analysis

Appellant contends that trial counsel's **[*46]** advice to the court members not to "fall for smoke and mirrors" was an inappropriate disparagement of civilian defense counsel. Appellant argues the military judge's failure to intervene *sua sponte* to this "improper crescendo" of trial counsel's argument constituted plain error that was not harmless. We disagree.

We have previously found that a trial counsel's employment of the "smoke and mirrors" metaphor in reference to defense arguments is not inevitably prosecutorial misconduct. *See, e.g., United States v. Condon, No. ACM 38765, 2017 CCA LEXIS 187, at *47-51* (A.F. Ct. Crim. App. 10 Mar. 2017) (unpub. op.), *aff'd*, *77 M.J. 244 (C.A.A.F. 2018)* (finding trial counsel's reference to smoke and mirrors was an attempt to "highlight the weaknesses in the Defense's arguments" rather than a personal attack on counsel). Similarly, viewed in context, in this case trial counsel's reference to "smoke and mirrors" addressed the perceived weakness of civilian defense counsel's argument on the narrow point that had become the focus of the surrebuttal and additional rebuttal arguments, rather than accusing the Defense of fabrication or dishonesty. We do not find a "plain or obvious" error that required the military judge to intervene in the absence of an objection. *See Erickson, 65 M.J. at 223*.

Assuming *arguendo* the **[*47]** comment was improper, we find Appellant was not prejudiced by it. First and foremost, we find the severity of the misconduct was minimal. The phrase was a fleeting comment at the very end of an unplanned additional rebuttal rather than a theme of trial counsel's argument. The subject of the surrebuttal and additional rebuttal was not any supposed impropriety on the Defense's part, but an assertedly mistaken reference during trial counsel's rebuttal argument to which the military judge sustained an objection and for which trial counsel accepted responsibility. The "smoke and mirrors" comment went to the reasoning behind civilian defense counsel's argument rather than to his conduct or character. It is true that the military judge did not implement corrective measures *sua sponte*, but

she did provide the court members standard findings instructions that "the arguments of counsel are not evidence," and the members "must base the determination of the issues in the case on the evidence as [they] remember it and apply the law as [the military judge] instruct[s] them." Finally, the evidence supporting Appellant's convictions for offenses against AS was solid as described above in our analysis **[*48]** of factual sufficiency. Considering all factors together, we conclude that any error by the military judge was not "so damaging that we cannot be confident" that the members convicted Appellant "on the basis of the evidence alone." *Fletcher, 62 M.J. at 184*.

E. Sentence Appropriateness

1. Law

We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (citing *United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990))*. We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(c), UCMJ, *10 U.S.C. § 866(c) (2016)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)* (en banc) (alteration in original) (quoting *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam)). Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

2. Analysis

Appellant asserts his punishment—and in particular his sentence to 12 years in confinement—is inappropriately severe. He notes that he was a teenager himself when he met CL and AS, who he asserts were his "social and scholastic peers." Appellant contends trial counsel's **[*49]** sentencing argument exaggerated his criminality and that Appellant's good military record and character letters on his behalf weigh in his favor. Appellant argues we should approve no more than three years in confinement.

Although Appellant's sentence is heavy, we cannot say it is unjust as a matter of law. Appellant was convicted of serious sexual offenses against children. At the time of the offenses Appellant was a 19-and 20-year-old Airman who knew the illegality of his actions.[5] He faced a maximum punishment that included, *inter alia*, confinement for 153 years. Furthermore, Appellant's comments and messages to AS and particularly to CL suggest a lack of remorse for his actions that appears to have resonated with the court members. Having given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we cannot say the court members imposed an inappropriately severe sentence.

F. Post-Trial Errors

1. Additional Background

After trial, the acting staff judge advocate for the convening authority prepared a staff judge advocate's recommendation (SJAR) dated 31 August 2017 **[*50]** which provided, *inter alia*, the following advice:

> For Charge II, and its specification [alleging extortion of CL], you have the authority to approve or disapprove the finding of guilt as that offense occurred prior to 24 June 2014. For the remaining findings of guilt, you only have the authority to approve the findings of guilt and cannot dismiss the findings of guilt.
>
> . . . .
>
> As the convening authority, you do not have the authority to disapprove, commute, or suspend in whole or in part the punitive discharge or the confinement. You do have the authority to disapprove, commute or suspend in whole or in part the reduction in rank or the forfeitures. . . . I recommend you approve the sentence as adjudged.

Pursuant to R.C.M. 1105, trial defense counsel submitted a memorandum dated 18 September 2017 with a number of attachments on Appellant's behalf for the convening authority's consideration before taking action on the court-martial. Trial defense counsel failed to object to or correct any erroneous advice in the SJAR. To the contrary, trial defense counsel stated, *inter alia*:

> [W]e ask that [Appellant's] confinement be reduced. It is understood that under the [National Defense Authorization Act] regulations **[*51]** [sic] from the last

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[5] On 27 October 2013—the same day he told CL she would be "back s[**]king [him] off for Xmas"—Appellant informed CL he knew from his Air Force training that it was a crime to have sex with anyone under the age of 16 years.

> few years that at this time you may not be able to act on this request . . . .
>
> We ask that should it become possible, or if a higher authority has the ability, that leniency be shown by reducing [Appellant's] confinement.

Appellant did not personally submit a clemency request or statement to the convening authority.

The staff judge advocate's addendum to the SJAR dated 22 September 2017 failed to address any errors in the SJAR or the clemency submission and it advised that the "earlier recommendation remains unchanged." The convening authority approved the findings and the adjudged punishment.

2. Law

"The proper completion of post-trial processing is a question of law the court reviews de novo." *United States v. Zegarrundo, 77 M.J. 612, 613 (A.F. Ct. Crim. App. 2018)* (citing *United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000))*. Failure to comment in a timely manner on matters in or attached to the SJAR forfeits a later claim of error; we analyze such forfeited claims for plain error. *Id.* (citations omitted). "To prevail under a plain error analysis, Appellant must persuade this Court that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005)* (quoting *Kho, 54 M.J. at 65*) (additional citation omitted). "To meet this burden in the context of a [SJAR] **[*52]** error, whether that error is preserved or is otherwise considered under the plain error doctrine, an appellant must make 'some colorable showing of possible prejudice.'" *Id. at 436-37* (quoting *Kho, 54 M.J. at 65*).

The National Defense Authorization Act (NDAA) for Fiscal Year 2014 modified Article 60, UCMJ, *10 U.S.C. § 860*, and limited the convening authority's ability to grant clemency. *Pub. L. No. 113-66, § 1702, 127 Stat. 672, 955-58 (2013)*. The effective date of the change was 24 June 2014. *Id.* at 958. The modified Article 60, UCMJ, now permits the convening authority to set aside or change a finding of guilty only with respect to "qualifying offenses," specifically offenses for which the maximum imposable term of confinement does not exceed two years and where the sentence adjudged does not include a punitive discharge or confinement for more than six months.[6] *10 U.S.C. § 860(c)(3)(B)*, *(D) (2016)*. With respect to sentences, the pertinent text of the modified Article 60, UCMJ, now reads: "[T]he convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." **[*53]** *10 U.S.C. § 860(c)(4)(A) (2016)*.

However, where a court-martial conviction involves an offense committed before 24 June 2014 *and* an offense committed on or after 24 June 2014, the convening authority has the same authority under Article 60 as was in effect before 24 June 2014, except with respect to a mandatory minimum sentence under Article 56(b), UCMJ, *10 U.S.C. § 856(b)*. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, *Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3365 (2014)*. Specifically, in such cases the convening authority retains the authority to set aside any finding of guilty or to change it to a finding of guilty to a lesser included offense, to disapprove or mitigate the sentence in whole or in part, or to change a punishment to one of a different nature so long as the severity is not increased. Exec. Order 13,730, *81 Fed. Reg. 33,331* (26 May 2016).

3. Analysis

The legal advice in the SJAR provided to the convening authority was plainly erroneous. The dates of five of the six specifications of which Appellant was convicted "straddle" 24 June 2014, the effective date of the changes to Article 60, UCMJ, that curtailed the convening authority's power to grant relief with respect to **[*54]** the findings and sentence of a court-martial. Therefore, contrary to the SJAR, the convening authority in this case had the power to set aside any of the findings of guilty and the power to disapprove, mitigate, or modify the sentence in whole or in part. The acting staff judge advocate's advice in the SJAR that the convening authority could disapprove the finding on only one specification and could not modify the adjudged confinement, uncorrected and repeated by the staff judge advocate in the addendum, was simply wrong.

A related but distinct error was the staff judge advocate's failure to address trial defense counsel's evident misunderstanding of the convening authority's clemency authority. Trial defense counsel effectively conceded the erroneous advice in the SJAR that the recent changes to Article 60, UCMJ, did not allow the convening authority to grant the reduction in confinement the Defense sought. In *Zegarrundo*, we found that a staff judge advocate's failure to correct a defense counsel's erroneous advice in a clemency submission that the convening authority lacked the power to

[6] Offenses under Articles 120, 120b, and 125, UCMJ, are specifically excepted from the term "qualifying offense." *10 U.S.C. § 860(c)(3)(D)(ii) (2016)*.

disapprove confinement—even where the SJAR itself contained correct advice—was plain error. *77 M.J. at 614*; ***[*55]*** *see United States v. Addison, 75 M.J. 405 (C.A.A.F. 2018)* (mem.). This case presents a similar situation. The fact that in this case the SJAR itself provided incorrect advice perhaps makes the failure to correct the clemency submission more predictable, but no less erroneous.

The Government attempts to distinguish Appellant's situation from *Zegarrundo* on the basis that, notwithstanding the failure of the staff judge advocate and the Defense to correctly advise the convening authority, trial defense counsel nevertheless "still requested that the convening authority reduce the adjudged term of confinement" which was a request "the convening authority could actually grant." We are not persuaded. Given trial defense counsel's acquiescence to the advice in the SJAR, his request that Appellant's confinement "be reduced" had the effect of making a desire known to "higher authority" or in the event there was an unexpected change in the law. It was far less than an assertion that the convening authority could and should grant confinement relief. Therefore, the same concerns with the sufficiency of the clemency submissions in *Zegarrundo* and *Addison* are present here.

The Government further contends that Appellant was not prejudiced by these errors **[*56]** because in light of his service record, the basis for his clemency request, and the number and severity of his convictions, the convening authority simply would not have granted relief. Again, we are not persuaded. Appellant's sentence was not inappropriately severe, but it was heavy—particularly the 12-year term of confinement which was the focus of his clemency submission.[7] The SJAR advised the convening authority that he had no authority to grant the exact relief the Defense sought. In addition, in response to the issues specified by this court, Appellant has submitted a declaration stating that but for trial defense counsel's inaccurate advice to him that the convening authority could not set aside his convictions or reduce his confinement, Appellant would have written a letter to the convening authority and solicited letters on his behalf from his friends and family. Appellant also submitted a declaration from his mother stating that she had also been unaware of the convening authority's ability to grant clemency and listing a number of Appellant's family members and friends who would submit letters on his behalf. Under these circumstances, we find Appellant has made a more than **[*57]** adequate colorable showing of possible prejudice from the post-trial errors in his case. Accordingly, a new post-trial process and convening authority action are required.

[7] The court members adjudged the exact sentence trial counsel recommended during sentencing argument.

III. Conclusion

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for new post-trial processing with conflict-free defense counsel consistent with this opinion. Article 66(e), UCMJ, *10 U.S.C. § 866(e) (2016)*. Thereafter, the record of trial will be returned to this court for completion of appellate review under Article 66, UCMJ.

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