IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40222
	)	
Airman (E-2)	)	USCA Dkt. No. 23-0219/AF
DESHAUN L. WELLS	)	
United States Air Force	)	23 January 2024
Appellant.	)	

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INDEX OF BRIEF

TABLE OF AUTHORITIES .....

ISSUES PRESENTED 1

STATEMENT OF STATUTORY JURISDICTION 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 10

ARGUMENT 14

APPELLANT'S CONVICTION FOR THE OFFENSE OF EXTRAMARITAL SEXUAL CONDUCT UNDER CLAUSE 2, ARTICLE 134, UCMJ, IS LEGALLY SUFFICIENT. 14

Standard of Review 14

Law and Analysis 14

1. **Clause 2 of Article 134, UCMJ is Constitutional** 15

   A. ***This Court is Bound by the Supreme Court's Decision in Parker v. Levy, which found Article 134 as a whole to be constitutional.*** 15

   B. ***Clause 2 of Article 134, UCMJ, Is Not Unconstitutionally Vague as Applied to Appellant.*** 16

      1. *The proper standard of review for Appellant's Clause 2 challenge is an as-applied analysis.* 16

2. The Manual for Court's Martial provided Appellant with fair notice that his conduct was criminal, because his conduct fit squarely within the Presidentially narrowed offense of Extramarital Sexual Conduct 17

3. Even if some hypothetical cases of extramarital sexual conduct fall close to the line of what is service discrediting, that does not make the offense unconstitutionally vague. 20

4. It is constitutional for court members to apply their own understanding of community standards in assessing whether conduct is service discrediting. 21

5. A factfinder's analysis of the terminal element of Clause 2 is a fact-specific analysis, which takes it outside the scope of the Supreme Court's holding in Johnson v. United States. 22

C. *The President did not impermissibly expand the statutory language of the term "of a nature" by defining it to mean "has a tendency to."* 25

2. The doctrine of Stare Decisis weighs in favor of upholding this Court's decision in Phillips. 27

A. The Phillips decision is not poorly reasoned or unworkable. 28

1. The Phillips decision does not allow for conclusive presumptions, nor was Appellant convicted on the basis of a conclusive presumption. 29

2. In obtaining Appellant's conviction, the government was properly held to its burden to prove the terminal element beyond a reasonable doubt, as required by Phillips.....33

3. It is constitutionally sound for a factfinder to use the facts and circumstances of the charged conduct alone to determine the terminal element has been met......35

B. Overturning Phillips Would Harm Public Confidence in the Law......37

C. The Reasonable Expectations of Servicemembers supports upholding Phillips. 40

D. Intervening Events Support adhering to the holding in Phillips 41

3. Appellant's Clause 2 Conviction is Legally Sufficient......45

CONCLUSION.....50

CERTIFICATE OF FILING AND SERVICE.....51

CERTIFICATE OF COMPLIANCE WITH RULE 24(d).....52

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. CONST. art. II.....25

SUPREME COURT OF THE UNITED STATES

Boyce Motor Lines, Inc. v. United States
342 U.S. 337 (1952).....11, 20

Ginzburg v. United States
383 U.S. 463 (1966).....36

Halliburton Co. v. Erica P. John Fund, Inc.
573 U.S. 258 (2014).....28

Hamling v. United States
418 U.S. 87 (1974).....11, 12, 36

In re Winship
397 U.S. 358 (1970).....33

Johnson v. United States
576 U.S. 591 (2015).....22, 23, 24, 41

Paris Adult Theatre I v. Slaton
413 U.S. 49 (1973).....36

Parker v. Levy
417 U.S. 733 (1974).....*passim*

Reynolds v. United States
98 U.S. 145 (1878).....40

Roth v. United States
354 U.S. 476 (1957).....21

Sandstrom v. Montana
442 U.S. 510 (1979).....30

Smith v. United States
431 U.S. 291 (1977).....12, 21, 36

United States v. National Dairy Corp.
372 U.S. 29 (1963).....20

United States v. Petrillo
332 U.S. 1 (1947).....21

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Acevedo
77 M.J. 185 (C.A.A.F. 2018).....45

United States v. Blanks
77 M.J. 239 (C.A.A.F. 2018).....28

United States v. Cardenas
80 M.J. 420 (C.A.A.F. 2021).....28

United States v. Cary
62 M.J. 277 (C.A.A.F. 2006).....10, 16

United States v. Fosler
70 M.J. 225 (C.A.A.F. 2011).....13, 41, 42, 43

United States v. Jones
68 M.J. 465 (C.A.A.F. 2010).....19, 25, 27

United States v. King
78 M.J. 218 (C.A.A.F. 2019).....45

United States v. Martinelli
62 M.J. 52 (C.A.A.F. 2005).....40

United States v. McGinty
38 M.J. 131 (C.A.A.F. 1993).....45

United States v. Medina
66 M.J. 21 (C.A.A.F. 2008) 39

United States v. Norman
74 M.J. 144 (C.A.A.F. 2015) 46

United States v. Phillips
70 M.J. 161 (C.A.A.F. 2011) ..... *passim*

United States v. Quick
74 M.J. 332 (C.A.A.F. 2015) 11, 27, 28

United States v. Richard
82 M.J. 473 (C.A.A.F. 2022) 13, 41, 43, 44, 45

United States v. Sanchez
29 C.M.R. 32 (U.S. C.M.A. 1960) 37, 38

United States v. Vaughan
58 M.J. 29 (C.A.A.F. 2003) 17

United States v. Washington
57 M.J. 394 (C.A.A.F. 2002) 14

United States v. Wright
53 M.J. 476 (C.A.A.F. 2000) 14

United States v. Zachary
63 M.J. 438 (C.A.A.F. 2006) 25

OTHER COURTS

United States v. Davila
461 F.3d 298 (2d Cir. 2006) 26

United States v. Kirkpatrick
662 F. App'x 237 (5th Cir. 2016) 36

STATUTES

Article 134, UCMJ .....*passim*
10 U.S.C. § 836 25

OTHER AUTHORITIES

20 *Am. Jur. 2d Courts §127* 28
Cambridge Dictionary, *Tend* 26
Dept. of the Army Pamphlet 27-9 at 3a-66-1 9
Exec. Order No. 13,825 19
MCM, App. 6(c) (1951 ed.) 19, 40
MCM, pt. IV, para. 62, (2016 ed.) 19
MCM, pt. IV, para. 91 .....24, 46
MCM, pt. IV, para. 99 .....*passim*
SHEPARD'S REPORT FOR PARKER V. LEVY 38
SHEPARD'S REPORT FOR UNITED STATES V. PHILLIPS 39

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Airman (E-2) **DESHAUN L. WELLS** United States Air Force *Appellant.*	)	USC Dkt. No. 23-0219/AF

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

ISSUE PRESENTED

IS APPELLANT'S CONVICTION FOR A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ, 10 U.S.C. §866(d)[1]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (M.R.E.) are to the Manual for Courts-Martial, United States (2019 ed.) [MCM], unless otherwise noted.

STATEMENT OF THE CASE

At a general court-martial convened at Royal Air Force (RAF) Lakenheath, United Kingdom, Appellant elected trial by officer and enlisted members and entered a plea of not guilty. (JA at 40.) Contrary to his pleas, the panel found Appellant guilty of one charge and specification of assault consummated by a battery, in violation of Article 128(b), UCMJ, one additional charge and specification of obstructing justice, in violation of Article 131(b), UCMJ, and one additional charge and specification of extramarital sexual conduct, in violation of Article 134, UCMJ. (JA at 40-43.) The members acquitted Appellant of one additional specification of extramarital sexual conduct and eleven other specifications.[2] (Id.) The charged extramarital sexual conduct specifications involved two British nationals, L.W. and B.F. (JA at 42, 114, 263.) The members sentenced Appellant to a reduction to the grade of E-1, restriction to the limits of RAF Lakenheath, UK for a period of 2 months, to perform hard labor without confinement for two months, 255 days confinement, to forfeit all pay and allowances, and a bad conduct discharge. (JA at 49.) The convening authority took no action on the findings, disapproved the adjudged restriction to the limits of RAF Lakenheath and the hard labor without confinement, and took no action on the remainder of the adjudged sentence. (JA at 52.)

[2] Prior to trial, four other specifications were dismissed. (JA at 56-60.)

STATEMENT OF THE FACTS

Appellant was convicted of extramarital sexual conduct in violation of Article 134, UCMJ, as charged in Specification 1 of the Second Additional Charge I.

> [Appellant] [d]id at or near Brandon, United Kingdom, between on or about 23 November 2019 and on or about 12 January 2020, wrongfully engage in extramarital sexual conduct, to wit: sexual intercourse, with [BF] a person the accused knew was not his spouse, and that such conduct was of a nature to bring discredit upon the armed forces.

(JA at 42.)

Appellant married A1C LW on 18 July 2019. (JA at 67.) Appellant was issued a legal marriage certificate from the State of Montana on that same date. (Id.) Appellant signed the marriage license. (Id.) Neither the government nor Appellant provided any evidence of divorce or legal separation between Appellant and A1C LW during the charged timeframe.

Immediately following the government's opening statement, the military judge provided the spillover instruction to the members consistent with trial defense counsel's request. (JA at 81, 103-104.)

> An accused may be convicted based only on evidence before the court and not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming or proving that he committed

> any other offense. If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant.

(JA at 103-104.)

At trial, BF, a British national civilian, testified she and Appellant engaged in a consensual sexual relationship between 23 November 2019 and January 2020 in Bradon, United Kingdom. (JA at 114, 116-117, 120-121, 126, 167, 189, 192, 195, 197, 205.) BF testified she initially met Appellant through a dating application called Tinder. (JA at 115.) Through her communications with Appellant via Tinder and SnapChat, BF became aware Appellant was a member of the United States Air Force. (Id.) BF stated Appellant told her during their initial in-person meetings that he was divorced. (JA at 116.) BF testified Appellant met her parents and her extended family, who also lived in the United Kingdom, multiple times during their relationship. (JA at 117-118; 208.) After Appellant met her family, BF found out Appellant was still married and not divorced as he had previously told her. (JA at 119-120, 209-210.) Then at the end of their relationship, BF learned she was pregnant with Appellant's child. (JA at 120-121.) BF did not want to have Appellant's child and ultimately had her pregnancy terminated. (JA at 215-216.)

After the conclusion of their relationship, BF learned from LW, another woman who had engaged in a consensual sexual relationship with Appellant while

he was married, that Appellant had been sharing intimate videos and pictures of BF with other people. (JA at 154, 159, 263-265.) LW described a video involving a bathtub which BF knew was an occasion where she and Appellant had consensual sex. (JA at 155.) During that encounter, Appellant had his phone out, and BF had told him not to record. (JA at 155-156.) Appellant turned his phone toward BF, and she noticed he had a camera application open on his phone, but he claimed he was not recording. (JA at 156.) Appellant had consensually recorded sexual encounters with BF previously. (JA at 156-157.) BF testified that she later learned the video LW had described to her had been uploaded to PornHub[3]. (JA at 163.)

BF sent an email to the organizational box of the 48th Fighter Wing Public Affairs Office on 12 February 2020. (JA at 217.) In the email, BF identified Appellant and explained one of the wing's personnel impregnated her and lied about being divorced. (Id.) Then BF asked someone in the public affairs office to contact her about the issue. (JA at 218.) After BF sent her email, members of the Air Force Office of Special Investigations (OSI) spoke with BF and initiated an investigation. (JA at 220.)

Special Agent KH, a member of OSI testified that during his investigation into Appellant, he discovered a video on PornHub relevant to the investigation, but

[3] PornHub is a free to use Canadian-owned internet pornography video-sharing site. Users can share and download videos, post comments, and even upload their own videos.

was initially unable to identify the woman in the pornographic video. (JA at 112.) However, the woman in the video had a distinct tattoo running down her spine. (Id.) After discovering the video, SA RH learned BF had emailed another OSI agent stating Appellant had been distributing indecent images of her. (Id.) OSI met with BF and showed her a screenshot of the tattooed woman SA KH had discovered on PornHub. (JA at 113.) BF was able to identify herself as the individual in the video based on the tattoo. (Id.)

At trial, a digital forensics expert (DFE) testified regarding the digital evidence seized during OSI's investigation into Appellant. (JA at 244.) The DFE explained that the PornHub user account that posted the pornographic video of BF was linked to Appellant's email address. (JA at 245.) When Appellant uploaded the video to PornHub, he entitled it "British slut loves American BBC[4] in her ass." (JA at 246.) When Appellant uploaded the video, he set the privacy setting for the video to community, which meant that the video was available for public viewing on PornHub's website. (JA at 246.) At the time of trial, the video had 817 views. (Id.) Appellant uploaded the video on 3 March 2020, after he and BF had broken off their relationship. (JA 247.) The DFE also discovered Appellant had shared a slightly shortened version of the PornHub video depicting BF with one individual

[4] In the realm of pornography, the term BBC typically means "big black cock." (JA at 247.)

via the Kik messenger application and also to a public group chat. (JA at 256-258, 259-260.)

At trial, BF testified she did not hold Appellant's actions against the Air Force. (JA at 227.) Specifically, BF stated she did not believe it was the Air Force's job to stop someone from cheating, but it was its job to stop members from "running around getting girls pregnant." (JA at 227.)

Appellant was acquitted of a second specification of extramarital sexual conduct in violation of Article 134, UCMJ, as charged in Specification 2 of the Second Additional Charge I.

> [Appellant] [d]id within the United Kingdom, between on or about 15 July 2020 and on or about 30 November 2020, wrongfully engage in extramarital sexual conduct, to wit: sexual intercourse, with Ms. [LW], a person the accused knew was not his spouse, and that such conduct was of a nature to bring discredit upon the armed forces.

(JA at 42.)

At trial, LW, a British national civilian, testified she and Appellant engaged in a consensual sexual relationship between late July of 2020 and late October of 2020. (JA 263-265.) During their relationship LW was aware Appellant was a member of the Air Force but did not know he was married. (JA at 266.) After their relationship ended, LW discovered Appellant was married. (JA at 267.) After she learned Appellant was married, she reached out to BF, who Appellant had told LW he had dated prior to their relationship. (JA at 267-268.) LW

informed BF that Appellant had shown her images and videos of Appellant and BF. (JA at 268.) One of the videos Appellant showed LW was one of he and BF in a bathroom, similar to the one uploaded to PornHub. (JA at 270.)

LW testified that her opinion of the Air Force had not changed as a result of her relationship with Appellant. (JA at 272.)

At trial, the defense never contested that Appellant engaged in consensual sexual activity with BF and LW.

The military judge instructed the members on the elements of extramarital sexual conduct:

> [t]o find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements: One, that at or near Brandon, United Kingdom, between on or about 23 November 2019 and on or about 12 January 2020, the accused wrongfully engaged in extramarital sexual conduct, to wit: sexual intercourse with [BF]; Two, that, at the time, the accused was married to someone else, which he knew; and, Three, that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the Armed Forces.

(JA at 276.) The military judge then provided instruction on the terminal element of Article 134, UCMJ:

> [s]ervice discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem. Discredit means to injure the reputation of the Armed forces and includes extramarital sexual conduct that has a tendency, because of its open or notorious

> nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem.
>
> In determining whether the alleged extramarital sexual conduct in this case is of a nature to bring discredit upon the Armed Forces, consider all the facts and circumstances offered on this issue, including, but not limited to: [t]he accused's marital status, military rank, grade or position; [t]he military status of the accused's spouse or the co-actor's spouse, or their relationship to the Armed Forces; [w]here the extramarital sexual conduct occurred; [w]ho may have known about the extramarital sexual conduct; [w]hether the accused's marriage was pending legal dissolution, defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce.

(JA at 277-278.) The military judge provided the same terminal element instruction for both specifications alleging extramarital sexual conduct. (JA at 277-280.) The instructions provided by the military judge were standard instructions from the Military Judges' Benchbook. Dept. of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 3a-66-1 (29 February 2020).

The circuit trial counsel explained why the evidence proved the terminal element during his closing argument. (JA at 289-290.) Trial counsel first properly highlighted the fact that the terminal element does not require direct proof of harm to the service's reputation, merely that the conduct was of a nature to be service discrediting. (JA at 290.) He then argued that if U.K. nationals had been aware that an American airman was engaging in an extramarital affair with a U.K.

national in the manner Appellant did, it could have impacted their opinion of the Air Force. (Id.)

SUMMARY OF THE ARGUMENT

Appellant's conviction under Clause 2, Article 134, UCMJ for extramarital sexual conduct that was of a nature to bring discredit to armed forces was legally sufficient. This Court should decline Appellant's requests to find Clause 2 of Article 134, UCMJ to be unconstitutional and to overrule United States v. Phillips, 70 M.J. 161 (C.A.A.F. 2011).

The Supreme Court already unequivocally determined Article 134, UCMJ is constitutional, as a whole, in Parker v. Levy. 417 U.S. 733, 557 (1974). This Court has a duty to follow Supreme Court precedent. United States v. Cary, 62 M.J. 277, 280 (C.A.A.F. 2006). Applying Levy, this Court must conclude that Clause 2 of Article 134, UCMJ, is constitutional.

Clause 2 of Article 134, UCMJ, is also not unconstitutionally vague as applied to Appellant. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Levy, 417 U.S. at 756. The extramarital sexual conduct of which Appellant was convicted is an enumerated offense under Article 134, providing Appellant fair notice his conduct was proscribed. MCM, pt. IV, para. 99 (2019 ed.). Appellant's conduct fits squarely within the offense as narrowed by the President, because he conducted the relationship in an "open and

notorious" way. MCM, pt. IV, para. 99.c.(1). Not only did Appellant meet BF's parents and extended family, he also shared a pornographic video of he and BF engaging in sexual acts with various other individuals, including another paramour. Even if Appellant's conduct arguably fell close to the line of what is or is not service discrediting, it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc., 342 U.S. 337, 340 (1952). Moreover, there is no constitutional infirmity with military court members applying their own knowledge of community standards in assessing whether conduct is service discrediting. Levy, 417 U.S. at 743; *cf.* Hamling v. United States, 418 U.S. 87, 104-05 (1974).

Further, this Court should uphold its opinion in Phillips. When assessing whether prior precedent should be overturned, this Court uses the doctrine of stare decisis. United States v. Quick, 74 M.J. 332, 335 (C.A.A.F. 2015). All four stare decisis factors weigh in favor of upholding the precedent this Court established in Phillips.

Phillips was correctly decided, not badly reasoned. Phillips does not allow the government to use a conclusive presumption to prove the service discrediting element, nor does it relieve the government of the burden of proving the terminal element. Phillips, 70 M.J. at 165. The instructions in this case prove this point.

The members were told they had to determine beyond a reasonable doubt that Appellant's conduct was service discrediting. (JA at 276.) They were told that in making the determination, they must "consider all the facts and circumstances offered on the issue." (Id. at 277.) They were given a list of criteria to use in making their determination. (Id. at 277-278.) No reasonable panel that followed these instructions could have made a "per se" determination that the mere fact of Appellant's extramarital sexual conduct was automatically service discrediting. And there is nothing constitutionally unsound about the panel members using the facts and circumstances of charged conduct alone to determine whether that conduct was of a nature to discredit the service, as Phillips allows. 70 M.J. at 165. Factfinders do essentially the same thing when determining whether material is "obscene," and the Supreme Court has repeatedly found such determinations to be constitutional. *See* Smith v. United States, 431 U.S. 291, 302, 308-09 (1977); Hamling, 418 U.S. at 104-05.

As to the other stare decisis factors, overturning Phillips could harm public confidence in the law, since it could unnecessarily limit the military's ability to hold servicemembers accountable for disgraceful conduct that is not necessarily captured by Clauses 1 and 3 of Article 134. Upholding the decision would not upset any expectations of servicemembers, since Phillips has been the law for almost 13 years. Overturning the law, on the other hand, would upset the

expectations of military justice practitioners who have been trying cases and presenting evidence based on the understanding that Phillips is good law. Finally, the cases Appellant cites – United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011), and United States v. Richard, 82 M.J. 473 (C.A.A.F. 2022) –as intervening events that might call the continued viability of Phillips into question, actually reinforce, rather than undermine the holdings in Phillips. Thus, Appellant cannot meet his high burden of persuasion for this Court to overturn its prior precedent.

Finally, Appellant's conviction was legally sufficient because a reasonable factfinder, considering the evidence in the light most favorable to the government, could have found Appellant's conduct to be of a nature to discredit the armed forces. Here, the government established that (1) Appellant engaged in adulterous behavior with a local national from his host country that ultimately resulted in a pregnancy, (2) Appellant carried out this relationship in front of the local national's parents and extended family, (3) he hid his marriage from the local national he impregnated, (4) that after the local national broke off the relationship, he posted a private sexual video of the affair to a public pornographic website without the other parties consent, (5) he entitled that video in a degrading and demeaning manner, (6) he then sent the pornographic video to multiple individuals, and (7) he showed another individual he was engaged in an adulterous sexual relationship with the same video. Since a reasonable finder of fact could have found that this

flagrant, manipulative, and exploitive conduct met the service discrediting element, the Court should reject Appellant's claim of legal insufficiency.

In sum, Clause 2 of Article 134, UCMJ, is constitutional, and the Manual provided Appellant fair notice his extramarital sexual conduct was prohibited. Phillips was good law when it was decided and remains so. Therefore, this Court should apply the doctrine of stare decisis, uphold Phillips, find the conviction to be legally sufficient, and affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

APPELLANT'S CONVICTION FOR THE OFFENSE OF EXTRAMARITAL SEXUAL CONDUCT UNDER CLAUSE 2, ARTICLE 134, UCMJ, IS LEGALLY SUFFICIENT.

Standard of Review

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

The constitutionality of a statute is a question of law and is ordinarily reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

Appellant asserts that in assessing the legal sufficiency of his conviction, there are two preliminary questions this Court must answer: (1) whether Clause 2

of Article 134, UCMJ, is constitutional and (2) whether Phillips remains good law. (App. Br. at 14.) This Court should answer both questions in the affirmative.

1. Clause 2 of Article 134, UCMJ is Constitutional.

A. This Court is Bound by the Supreme Court's Decision in Parker v. Levy, which found Article 134 as a whole to be constitutional.

Appellant cites to the historical background of Clause 2 of Article 134, UCMJ, as evidence of its inherent unconstitutionality. (App. Br. at 20-29). Appellant argues that to properly evaluate the constitutionality of Clause 2 of Article 134, UCMJ, it is necessary to divorce it from its Clause 1 and 3 counterparts. (App. Br. at 22). The Supreme Court in Levy declined to do just that. 417 U.S. 733 (1974). In Levy, the Court unequivocally ruled that the appellant's challenge to Article 134, UCMJ, as "unconstitutionally vague under the Due Process Clause of the Fifth Amendment must fail." 417 U.S. at 557. The Court likewise rejected the contention that Article 134, UCMJ, was facially invalid because of its overbreadth. Id. In arriving at that conclusion, the Court acknowledged that Clause 2 was a more recent development than Clause 1 or Clause 3. Id. at 746. The Court considered the historical background of Article 134 and ultimately determined that despite the differing historical backgrounds of the various clauses, the whole of Article 134, UCMJ, was constitutional. Id. at 752-757.

In attacking the Phillips decision, Appellant essentially asks this Court to ignore the Supreme Court's ruling in Levy. This Court "has a duty to follow Supreme Court precedent." Cary, 62 M.J. at 280. Therefore, this Court should adhere to the precedent in Levy and decline to consider Appellant's constitutional challenge to Clause 2 of Article 134, UCMJ.

B. ***Clause 2 of Article 134, UCMJ, Is Not Unconstitutionally Vague as Applied to Appellant.***

1. The proper standard of review for Appellant's Clause 2 challenge is an as-applied analysis.

Appellant challenges Clause 2 as being unconstitutionally vague. (App. Br. at 29.) In Levy, the Supreme Court clarified that in the context of the UCMJ, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." 417 U.S. at 756. The proper standard of review for a challenge of vagueness to a UCMJ article is an as-applied analysis. Id. Thus, it does not matter if Appellant complains that other servicemembers might not know what other conduct is criminalized under Article 134, UCMJ. (App. Br. at 30.) And it does not matter if Appellant is concerned that "an infinite variety of other conduct" might be charged under Article 134. (App. Br. at 26.) The only pertinent question here is whether, in the light of the conduct with which Appellant was charged, Appellant "could not reasonably understand that his conduct [was] proscribed." Levy, 417 U.S. at 757.

2. The Manual for Courts-Martial provided Appellant with fair notice that his conduct was criminal, because his conduct fits squarely within the Presidentially narrowed offense of Extramarital Sexual Conduct.

Here, Appellant was charged with an enumerated Article 134 offense, with definitions and elements provided by the President. Fair notice "does not depend on military case law or state statute alone." United States v. Vaughan, 58 M.J. 29, 32 (C.A.A.F. 2003). Such notice can also be found in the Manual for Courts-Martial. Id. at 31.[5] A straightforward reading of the text of the enumerated offense of extramarital sexual conduct in the MCM gives a reader of common intelligence ample notice of what conduct is proscribed: engaging in wrongful extramarital conduct, when one of the parties is married to another, and that, under the circumstances, the conduct was either to the prejudice of good order and discipline in the armed forces; or was of a nature to bring discredit upon the armed forces; or both. MCM, pt. IV, para. 99.b.(1)-(3).

According to the Manual, when determining whether extramarital conduct is of a nature to bring discredit upon the armed forces, all relevant circumstances should be considered, including but not limited to: (1) the Appellant's marital status, military rank, grade, or position; (2) the co-actors marital status, military

[5] As noted in Levy, the military makes an effort through Article 137 to advise its personnel of the contents of the Uniform Code, rather than depend only on the ancient doctrine that everyone is presumed to know the law. 417 U.S. at 751. Appellant thus has even less of an argument that he could not have been aware that his extramarital conduct was proscribed.

rank, grade, and position, or relationship to the armed forces; (3) the military status of the accused's spouse or the spouse of the co-actor, or their relationship to the armed forces; (4) the impact, if any, of the extramarital conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces; (5) the misuse, if any, of Government time and resources to facilitate the commission of the conduct; (6) whether the conduct persisted despite counseling or orders to desist, the flagrancy of the conduct, such as whether any notoriety ensued, and whether the extramarital conduct was accompanied by other violations of the UCMJ; (7) the negative impact of the conduct on the units or organizations or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency; (8) whether the accused's or co-actor's marriage was pending a legal dissolution, which is defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce; and (9) whether the extramarital conduct involves an ongoing or recent relationship or is remote in time. Id. MCM, pt. IV, para. 99.c.(1).

Given that extramarital sexual conduct is an enumerated offense, Appellant's claimed fears that Clause 2 allows someone to charge nearly anything as a crime, under Article 134, UCMJ, are not at issue here. (App. Br. at 26.) While the general article itself may allow for a broad spectrum of crimes to be charged, Appellant's charged misconduct was not a novel offense not regularly

subject to scrutiny by the military. Adultery has been an enumerated offense since the inception of the UCMJ in 1951. MCM, App. 6(c), (1951 ed.). Among other changes since 1951, the President updated the offense of adultery, giving the offense its new title of extramarital sexual conduct, providing a new definition of sexual conduct, making it a gender-neutral offense, and creating a legal separation defense. Exec. Order No. 13,825, 83 Fed. Reg. 9889, 10326 (Mar. 8, 2018). *Compare* MCM, pt. IV, para. 99 (2019 ed.); MCM, pt. IV, para. 62, (2016 ed.). Given that this case involves a long-standing enumerated offense, this Court should apply its prior reasoning in Jones and find that "Presidential narrowing of the 'general' article through examples of how it may be violated is part of why Article 134, UCMJ, is not unconstitutionally vague." United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing Levy, 417 U.S. at 753-56).

In this case, the President's explanations gave Appellant concrete standards against which to calibrate his behavior. He was on notice that if his affairs became "open and notorious," as opposed to "private and discrete," *see* MCM, pt. IV, para. 99c.(1), he risked engaging in service discrediting conduct. Any reasonable servicemember would have understood that engaging in an extramarital affair with a foreign national, impregnating her, falsely holding oneself out as divorced to her and her family, and showing a pornographic video of the affair to another paramour, group chat users, and Pornhub users, is the type of "open and notorious"

conduct that would be service discrediting. Appellant cannot therefore claim that Article 134 is unconstitutionally vague as applied to him.

3. Even if some hypothetical cases of extramarital sexual conduct might fall close to the line of what is service discrediting, that does not make the offense unconstitutionally vague.

Despite his conduct falling squarely within the ambit of the enumerated offense of extramarital sexual conduct, Appellant claims he cannot know which extramarital affairs are service discrediting. (App. Br. at 44.) This argument misses the mark, because the President's explanations of extramarital sexual conduct provided Appellant guidelines of how to conform his behavior, and his behavior patently fell outside those guidelines. "[S]tatutes "are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." Levy, 417 U.S. at 757 (citing United States v. National Dairy Corp., 372 U.S. 29, 32-33 (1963)). Appellant's case was not marginal, but even if it was, the Supreme Court has recognized that is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc., 342 U.S. 337, 340 (1952). Appellant had notice that his conduct was potentially proscribed by the UCMJ, and he accepted the risk that his conduct might cross the line into the realm of a crime, as it did in this case.

4. It is constitutional for court members to apply their own understanding of community standards in assessing whether conduct is service discrediting.

Appellant laments that no servicemember can understand what is criminalized under Article 134, because no servicemember knows what any particular factfinder thinks could discredit the service. (App. Br. at 30.) Then he similarly claims Clause 2 allows servicemembers to be "prosecuted and convicted on the whims and the imagined perception of a hypothetical public." (App. Br. at 40.) Appellant's complaints are unfounded. The Supreme Court has maintained that a statute is not unconstitutional just because its words "do not mean the same thing to all people, all the time, everywhere." Roth v. United States, 354 U.S. 476, 491 (1957). The words simply must "convey sufficiently definite warning of the proscribed conduct when measured by common understanding and practices." Id. (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)).

An analogy to federal law on obscenity is helpful to understand why there is no constitutional infirmity with court members making an individual determination, on a case-by-case basis, of whether conduct is service discrediting. In determining what is "obscene," it is not unconstitutional to require jurors to apply "contemporary community standards . . . in accordance with their own understanding of the tolerance of the average person in their community." Smith v. United States, 431 U.S. 291, 305 (1977). Likewise, in the military context, it is not unconstitutional to have court members use their own understanding of

community standards to evaluate whether conduct is service discrediting. *See also* Hamling v. United States, 418 U.S. 87, 104-05 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law."). And as the Supreme Court has explained, "the mere fact juries may reach different conclusions as to [the obscenity of] the same material does not mean that constitutional rights are abridged." Miller v. California, 413 U.S. 15, 26 n.9 (1973). After all, "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." Id. (internal citations omitted). So too here. Just because two different court-martial panels might reach different conclusions about what is service discrediting does not make Article 134, Clause 2 unconstitutional.

5. A factfinder's analysis of the terminal element of Clause 2 is a fact-specific analysis, which takes it outside the scope of the Supreme Court's holding in Johnson v. United States.

Appellant further argues this Court should apply the analysis in Johnson v. United States, 576 U.S. 591 (2015), to the terminal element of Clause 2 and thereby find Clause 2 void for vagueness. (App. Br. at 29-33.) However, the holding in Johnson is easily distinguishable from the terminal element of Clause 2

of Article 134, UCMJ. In Johnson, the Court determined that the Armed Career Criminal Act of 1984's definition of "violent felony" as "burglary, arson, or extortion, involves use of explosives, or [an offense that] *otherwise involves conduct that presents a serious potential risk of physical injury to another* was void for vagueness. Id. at 593-594, 605 (emphasis added). The Court's issue with the residual clause in Johnson was that it required application of the "serious potential risk" standard to an idealized ordinary case of the crime. Id. at 604. "Because 'the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect,' [the abstract inquiry required] offers significantly less predictability than one '[t]hat deals with the actual, not with an imaginary condition other than the facts." Id. Justice Scalia highlighted the Court's interpretation that the emphasis on convictions in the statute indicated that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." Id. at 604-605. The fact that the residual clause required a categorical analysis and not a fact-specific analysis is what ultimately mandated the result. Had the clause required or been conducive to a fact-specific analysis, the clause likely would have been saved. As the Supreme Court said, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world

conduct; 'the law is full of instances where a man's fate depends on his estimating rightly…some matter of degree.'" Id. at 604.

Here, the terminal element does not require the application of a categorical approach. Instead, it relies on a fact-specific analysis driven by consideration of the facts and circumstances of alleged misconduct guided by instructions provided by the President's descriptions, which highlight the types of considerations one should use in assessing whether extramarital sexual conduct was of a nature to discredit the armed forces. "Tends" is a qualitative standard to which real-world conduct is applied and tested under the crucible of the factfinder. Unlike in Johnson where the failure of persistent efforts to establish a standard provided evidence of vagueness, Id. at 598, the standard applicable to Clause 2 is well-established. MCM, pt. IV, para. 91.c.(3) ("[t]his clause of Article 134, UCMJ, makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in the public esteem). Clause 2 unequivocally applies to any conduct which *tends* to bring discredit to the armed forces. MCM, pt. IV, para. 91.c.(3). Given the marked difference between the residual clause at issue in Johnson and the terminal element's fact-specific analysis, this Court should decline to apply the analysis of Johnson to this case.

Because "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Levy, 417 U.S. at 756, Appellant's claim

that Clause 2 of Article 134, UCMJ, is void for vagueness is without merit. Clause 2 of Article 134, UCMJ, in conjunction with the President's enumeration of extramarital sexual conduct as an offense, placed Appellant on notice that his conduct was prohibited by the UCMJ.

C. The President did not impermissibly expand the statutory language of the term "of a nature" be defining it to mean "has a tendency to."

Appellant next incorrectly alleges the President impermissibly expanded the term "of a nature" in the statutory language of Article 134, UCMJ, by defining it to mean "has a tendency to." (App. Br. at 33-37.) The President had the authority to interpret Article 134 in this manner, and his choice of definitions did not expand the scope of Article 134. Congress authorized the President to enumerate examples of violations of Article 134, UCMJ, and the President operated within that power when he provided the definition at issue. U.S. CONST. art. II, § 2; *See also* Article 36, UCMJ, 10 U.S.C. § 836; United States v. Jones, 68 M.J. 465, 471-472 (C.A.A.F. 2010). Historically, to "determine the elements" of an Article 134, UCMJ, offense, this Court looks "at both the statute and the President's explanation in MCM pt. IV…" United States v. Zachary, 63 M.J. 438, 441 (C.A.A.F. 2006).

The term "of a nature to" doesn't stand for the proposition that there must be direct or actual harm. If Congress had wanted it to have that meaning, they would

have said "conduct that brought discredit upon the armed forces." Instead, it used the term "of a nature" as a means of capturing conduct that did not have a direct or actual impact.

The use of the infinitive "to bring discredit," suggests that the bringing of discredit will occur at a future in time point. *See* United States v. Davila, 461 F.3d 298, 302 (2d Cir. 2006). ("One connotation of the infinitive is to convey the future tense"). Thus, "of a nature to bring discredit" means being of a nature to bring discredit at a future point in time. The discredit is likely, but not an absolute certainty, since the future can never be entirely certain. Again, if Congress had wanted the discredit to be a certainty, it would have said so.

"Tend" is defined as "to be likely to happen or to have a particular characteristic or effect."[6] If conduct "tends to" bring discredit, it means it is likely to bring discredit at a future point in time. As applied to the terminal element, either phrasing focuses on whether the charged conduct has the character to cause discredit to service at some future point. Given that there is no difference between the meaning of the two terms, the President's definition of the term "of a nature to bring" was not an expansion of the statutory language, but merely another way to communicate the same thing. In providing the additional definition, the President

[6] Cambridge Dictionary, *Tend*, https://dictionary.cambridge.org/us/dictionary/english/tend (last visited 21 January 2024).

was providing members with clarity to ensure clear—and thereby fair—notice. Therefore, the President's use of the term "tend" to clarify the term "of a nature to" did not exceed the scope of his Congressionally delegated authority, nor did it impermissibly expand the scope of the statutory language of Article 134, UCMJ. And in any event, when instructing the members, the military judge incorporated the actual statutory language "of a nature to bring discredit" multiple times. (JA at 276-78.)

In sum, the President's provision of examples and definitions for Article 134, UCMJ, offenses serve to narrow the general article and prevents Article 134, from being unconstitutionally vague. Jones, 68 M.J. at 472 (citing Levy, 417 U.S. at 753-56). Since Article 134, Clause 2 is constitutional, Appellant cannot claim his conviction for extramarital sexual conduct was legally insufficient on those grounds.

2. The doctrine of Stare Decisis weighs in favor of upholding this Court's decision in Phillips.

Appellant invites this Court to overturn its prior decision in Phillips. (App. Br. at 14.) Phillips held that actual evidence the public was aware of the charged Clause 2 conduct was not required, as long as there was sufficient evidence for a rational factfinder to find that the conduct was of a nature to bring discredit upon the service had the public known of it. 70 M.J. at 166. This Court should decline Appellant's invitation. When assessing whether prior precedent should be

overturned, this Court uses the doctrine of stare decisis. United States v. Quick, 74 M.J. 332, 335 (C.A.A.F. 2015). Adherence to precedent is the preferred course, "because it promotes the even handed, predictable, and consistent development of legal principles, fosters reliance on judicia decisions, and contributes to the actual and perceived integrity of the judicial process. United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018). This Court considers four factors when evaluating the application of the doctrine of stare decisis: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectation of servicemembers; and (4) the risk of undermining public confidence in the law. Id. Even if those factors weigh in favor of overturning long-settled precedent, courts "[still] require 'special justification,' not just an argument that the precedent was wrongly decided." Halliburton, 573 U.S. 258 (2014). The party requesting that a court overturn precedent bears "a substantial burden of persuasion. 20 *Am. Jur. 2d Courts §127*.

A. The Phillips decision is not poorly reasoned or unworkable.

In assessing the first factor, the analysis is not whether "the interpretation at issue is plausible, but whether the [decision is] so unworkable or poorly reasoned that [it] should be overruled." United States v. Cardenas, 80 M.J. 420, 423 (C.A.A.F. 2021). This Court's decision in Phillips was neither poorly reasoned nor unworkable.

In Phillips, this Court held that actual public knowledge of the alleged misconduct is not required to prove the conduct was service discrediting. 70 M.J. at 166. This Court reasoned the required quantum of proof for a Clause 2 offense was proof "beyond a reasonable doubt that [a]ppellant's conduct would tend to bring the service into disrepute *if* it were known." Id. (emphasis added). In assessing Clause 2 offenses, this Court stated that the focus is "on the 'nature' of the conduct, whether the accused's conduct would *tend* to bring discredit on the armed forces if known by the public, not whether it was in fact so known. Id. (emphasis added). The Court then stated the statute does not require evidence regarding the views of the public. Id. at 166. This Court also held that "proof of the conduct itself *may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that under all the circumstances, it was of a nature to bring discredit upon the armed forces. Id. at 163.

1. The Phillips decision does not allow for conclusive presumptions, nor was Appellant convicted on the basis of a conclusive presumption.

Appellant argues that this Court's opinion in Phillips sanctions per se service-discrediting conduct. (App. Br. at 15.) Yet, this Court was firm in Phillips that so-called "conclusive presumptions" are impermissible. Phillips, 70 M.J. at 165. In fact, this Court was so concerned that the CCA may have applied a conclusive presumption based on the language in their opinion, that it remanded the case back to the CCA to perform a factual sufficiency review under the

standard enunciated in Phillips. Id. at 167. Thus, Phillips did not sanction conclusive presumptions; it reiterated the long-established prohibition on such presumptions, and actively took steps to protect against them. Id. at 164-165 (citing Sandstrom v. Montana, 442 U.S. 510, 523 (1979)).

Appellant argues that Judge Ryan's dissent highlights the quintessential problem with the Court's reasoning in Phillips, that nothing in the record—other than "the fact of the activity itself"—is required to make a finding of guilt. (App. Br. at 18.) Appellant goes on to argue that the Court in Phillips conclusively presumed the terminal element from the possession of child pornography itself, without explanation. (Id.) Neither of these points is accurate. This Court reiterated in Phillips that the statute required proof of the nature of the conduct: "[t]he responsibility for evaluation of the nature of the conduct rests with the trier of fact." Phillips, 70 M.J. at 166. As this Court explained, "The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred *and* must evaluate the nature of the conduct and determine beyond a reasonable doubt that Appellant's conduct would tend to bring the service into disrepute if it were known." Id. (emphasis added).

In Phillips, this Court did not conclusively presume the terminal element from the possession of child pornography itself; instead, it determined that the evidence presented was sufficient for a rational trier of fact to find beyond a

reasonable doubt that the appellant's activity would have tended to bring discredit upon the service had the public known of it. Id. at 166. In making this legal sufficiency determination, the Court pointed to a number of facts and circumstances established in the record: (1) forensic analysis of appellant's computer showed that searches had been performed seeking filenames associated with child pornography; (2) of the images the computer retrieved using LimeWire that were examined in detail by the forensic examiner, five images and two movies matched known child victims engaged in sexually explicit conduct; (3) the appellant had admitted downloading pornography that included child pornography and viewing the images on several occasions. (Id.)

To put it another way, in Phillips, this Court went beyond the mere "fact of the activity itself" in assessing whether the appellant's conviction for a Clause 2 offense was legally sufficient. It looked at the facts and circumstances and other evidence that comprised the nature of the offense, beyond the simple fact of possession. After assessing those facts, the Court determined that based on those facts, there was sufficient evidence for a rational finder of fact to determine that someone who possesses child pornography, had specifically sought it out, and had viewed it on multiple occasions, has engaged in conduct that might tend to discredit the service if the public were to know about it. Id. at 166-167. Therefore,

this Court did not apply a conclusive presumption in Phillips, nor did their holding in Phillips expressly or impliedly sanction such a presumption.

Moreover, what happened in this case followed the correct guidance of Phillips. It is no wonder that Appellant fails to restate the military judge's full instructions in his brief, because they resoundingly refute any notion that the factfinder was allowed to make any per se determination or "to conclusively presume the terminal element without a logical connection to proven facts." (App. Br. at 19.) The members were not instructed to evaluate only the fact that an extramarital sexual act occurred in determining whether the act was service discrediting. Instead, they were instructed to decide whether the conduct was service discrediting beyond a reasonable doubt and to "consider all the facts and circumstances offered on this issue" in doing so. (JA at 277.) Such instructions did not allow for a per se determination of the terminal element. Further, the military judge's instructions reflected the standard Military Judge's Benchbook instructions. This Court can therefore rest assured that the military is following Phillips and not allowing other servicemembers to be convicted of Article 134 offenses on the basis of conclusive presumptions of the service discrediting element.

2. In obtaining Appellant's conviction, the government was properly held to its burden to prove the terminal element beyond a reasonable doubt, as required by Phillips.

Contrary to Appellant's argument, the Phillips rule does not operate to eliminate the prosecution's "burden of proving all elements of the offense charged," nor its burden of persuading "the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements. (App. Br. at 19.) The Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). But nothing in Clause 2 or Phillips operates to relieve the government of this burden. As this Court stated in Phillips, "[t]he terminal element in a clause 1 or 2 Article 134 case is an element of the offense like any other. 70 M.J. at 165. Phillips further clarified, "[t]he terminal element must be proved beyond a reasonable doubt like any other element." Id. at 165. The instructions provided at Appellant's court-martial are instructive of the government's burden requirement under a Clause 2 offense:

> [t]o find the accused guilty of this offense, you must be convinced by legal and competent evidence *beyond a reasonable doubt of the following elements*: One, that at or near Brandon, United Kingdom, between on or about 23 November 2019 and on or about 12 January 2020, the accused wrongfully engaged in extramarital sexual conduct, to wit: sexual intercourse with [BF]; Two, that, at the time, the accused was married to someone else,

> which he knew; and, *Three, that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the Armed Forces*.

(JA at 276) (emphasis added). The instructions then provided the members with guidance on how they are required to evaluate the terminal element by giving specific examples of when extramarital conduct could be service discrediting, such as when it was "open and notorious." (JA at 277-278.)

Nothing in the instructions suggested the members should conclude that if the conduct is proven, so too is the terminal element, as the Appellant concedes. (App. Br. at 20.) In fact, the instructions do the exact opposite: they give specific guidance on factors to be considered in determining whether the government met its burden to prove the terminal element. Despite this, Appellant claims that the problem with Clause 2 is that it "forecloses independent consideration of whether the proven facts establish elements by leaving no ability to rebut the terminal element other than by rebutting the 'certain acts' being proven." (App. Br. at 20.) This argument does not hold water considering Appellant was acquitted of one specification of extramarital sexual conduct. Since, for that specification, Appellant did not contest that the sexual acts occurred or that he was married at the time, the members mostly likely acquitted Appellant based on the terminal element. Appellant successfully rebutted the terminal element of that

specification, demonstrating that not all affairs are a crime, just those that are of a nature to bring discredit to the armed forces.

Here, the court members were able to follow the military judge's instructions on the law and independently consider two separate instances of Appellant's conduct and determine that based on the facts and circumstances, Appellant was guilty of one, but based on the facts and circumstances of the other, the government had failed to meet its burden. Appellant's claims that Clause 2 leaves no ability to rebut the terminal element fails, because, in this case, he did exactly that. (App. Br. at 32.) And these circumstances support that the members did not make a per se determination that all extramarital sexual conduct is per se service discrediting. Thus, the requirement of the Due Process Clause that the government must prove every element beyond a reasonable doubt is not alleviated by Phillips or Clause 2 of Article 134, UCMJ. Appellant's assertions do not hold up in the face of the plain language of the instructions to the members, and this Court should find that there are no Due Process Clause concerns posed by Phillips or Clause 2 of Article 134, UCMJ.

3. It is constitutionally sound for a factfinder to use the facts and circumstances of the charged conduct alone to determine the service discrediting element has been met.

Appellant effectively concedes that it is consistent with the statutory language of Article 134, UCMJ not to require the government to put on evidence

of public awareness of the charged conduct or evidence of views of the public, as Phillips held. 70 M.J. at 166. (App. Br. at 33-35.) Appellant instead claims that this reality makes Article 134, Clause 2 unconstitutional. (Id.) But there is nothing unconstitutional about Congress's formulation of the statute. Again, federal courts' treatment of obscenity statutes provides a useful analogy. In proving material is obscene, the government need not "put forth evidence demonstrating the applicable contemporary community standard." United States v. Kirkpatrick, 662 F. App'x 237, 238-39 (5th Cir. 2016). Instead, it is constitutional for the jurors to "determine the standards of their own community." Id. (citing Smith, 431 U.S. at 291, 302, 308-09; Hamling, 418 U.S. at 104-05)). Further, the Supreme Court acknowledges that "the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials." Hamling, 418 U.S. at 104 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, (1973)). The Supreme Court has regarded "the materials as sufficient in themselves for the determination" of whether they are obscene. Ginzburg v. United States, 383 U.S. 463, 465 (1966). It logically follows that for the government to prove conduct is "service discrediting," they need not put on expert testimony or evidence of what the public thinks about particular conduct – just as Phillips said. It is constitutional for the factfinder to look at the facts and circumstances of the conduct itself and use their own understanding of the public's

standards to evaluate whether the conduct is of a nature to discredit the service. This is entirely consistent with this Court's observation in Phillips that "[t]he responsibility for evaluation of the nature of the conduct rests with the trier of fact." 70 M.J. at 166. Yet again, Phillips' reasoning was sound.

Given that the Phillips opinion expressly condemns conclusive presumptions and reaffirms that the government must prove not only the offense itself, but also the nature of that offense beyond a reasonable doubt, the decision in Phillips is not unworkable or poorly reasoned.

The first factor of the stare decisis analysis weighs in favor of adhering to prior precedent.

B. Overturning Phillips Would Harm Public Confidence in the Law

This Court's holding in Phillips ensures continued public confidence in the law. While, as Appellant states, "[t]here are and always have been, other ways of prosecuting "uniquely military" offenses," Clause 2 is and has been a valid part of a commander's disciplinary toolbox since 1916. (App. Br. at 41.) Since 1916, prosecutions under Clause 2 have proceeded based on the military's unique and strong interest in ensuring a disciplined fighting force capable of achieving war fighting abilities should the occasion arise. Levy, 417 U.S. at 743, 746. Although the UCMJ has many well-defined criminal offenses, Congress has seen fit to create Article 134, UCMJ, Clause 2 as a means to capture conduct not specifically

captured by another Article, but that none the less poses the risk of "dishonor[ing] the service in the eyes of a civilized society". United States v. Sanchez, 29 C.M.R. 32, 34 (U.S. C.M.A. 1960).

In arriving at its decision in Phillips, this Court relied partly on the decision in Levy upholding the constitutionality of Article 134, UCMJ, as a whole. 70 M.J. at 165. This Court is not alone in that reliance. Since the case was decided, the Levy case has been cited and relied upon approximately 1,707 times, by the Supreme Court, every federal Circuit court, 48 state courts, every service CCA, and this Court.[7] If this Court were to overturn Phillips based on a finding that Levy was incorrectly decided, leading to an erroneous decision in Phillips, the shockwaves that would be sent through the military justice system would be staggering. Levy has been relied on as good law for over 49 years. Commanders and prosecutors determining whether to pursue charges under the framework of Clause 2, prosecutors in deciding what evidence to present at trial, military judges and court-members assessing guilt or innocence under Clause 2, and trial defense counsel's determining how best to defend against Clause 2 charges have all invariably relied upon the quintessential holding in Levy: that Article 134, Clause 2, UCMJ is constitutional. Phillips itself has been cited 88 times by this Court and

[7] SHEPARD'S REPORT FOR PARKER V. LEVY, https://plus.lexis.com/api/permalink/b7bd870a-aaa3-48a4-943d-63162ab73b32/?context=1530671 (last visited Jan. 17, 2024).

nearly every service CCA (with the exception of the Coast Guard) since it was published in 2011.[8]

At bottom, Appellant is requesting that this Court disregard the holding in Levy, by which this Court is bound, to find Article 134, Clause 2 unconstitutional. 25.) This is a monumental request that this Court should decline, because disregarding Supreme Court precedent would undermine public confidence in the law and the military justice system writ large.

Appellant also contends that Clause 2 is not required in order for the military to prosecute uniquely military offenses as Clause 1 and Clause 3 serve that purpose. (App. Br. at 41.) However, the footnote cited by the Appellant from United States v. Medina, highlights the value of Clause 2 to the justice system and the general lesser efficacy of Clause 3 as a proper enforcement mechanism. 66 M.J. 21, 29 n.1 (C.A.A.F. 2008) (Stucky, J., dissenting) ("It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under [C]lause 3, and of upholding convictions for such offenses under [C]lause 2, we continue to see cases charged under [C]lause 3."). Preserving the means for the military justice system to protect the reputation of the service by prosecuting servicing discredit conduct promotes public confidence in

[8] SHEPARD'S REPORT FOR UNITED STATES V. PHILLIPS, https://plus.lexis.com/api/permalink/b6beebba-8627-4089-b9ad-c81718352bf1/?context=1530671

the law. In fact, for certain offenses that might only be prosecutable under Clause 2 – like possessing child pornography at an overseas base[9] – it might harm public confidence in the law if the military entirely lost the ability to prosecute such offenses under the UCMJ.

Upholding this Court's decision in Phillips protects and promotes public confidence in the law and the military justice system. Therefore, this factor weighs in favor of this Court adhering to prior precedent.

C. The Reasonable Expectation of Servicemember's supports upholding Phillips.

When an enumerated Article 134, UCMJ, Clause 2 offense is charged, it is hard to argue that servicemembers are not on notice of whether their conduct is criminal. Servicemembers receive Article 137 briefings regarding the contents of the UCMJ and the offense is listed in the MCM. MCM, pt. IV, para. 99. Clause 2 has been used as a tool of military discipline since 1916. Levy, 417 U.S. at 746. Extramarital sexual conduct has always been an enumerated Article 134, UCMJ, offense, in some form, since the inception of the Code. MCM, App. 6(c), (1951 ed.). Service members are aware of these rules and, even if they were not, ignorance of the law is no excuse. Reynolds v. United States, 98 U.S. 145, 167 (1878). If members engage in conduct that is listed as an enumerated Article 134,

[9] *See e.g.* United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005).

UCMJ, offense, they run the risk that based on the facts and circumstances of their specific conduct, they may be committing a crime. That does not make Clause 2 unconstitutional; "the law is full of instances where a man's fate depends on his estimating rightly… some matter of degree." Johnson, 576 U.S. at 604. In short, upholding Phillips will not upset the reasonable expectations of servicemembers, since they have already been living under that rule for 13 years.

D. Intervening Events Support adhering to the holding in Phillips.

Appellant argues that two intervening events have occurred since the decision in Phillips that justify overturning the case. (App. Br. at 37-39.) Specifically, Appellant points to this Court's decisions in Fosler and Richard. (Id.) Under the rule in Fosler, the government must now allege one of the three terminal element clauses when charging an Article 134, UCMJ offense. Fosler, 70 M.J. at 226. In assessing the history of Article 134, this Court stated that historically, whether under Clause 1 or Clause 2 of Article 134, UCMJ, the trier of fact was required to find that the terminal element had been proven beyond a reasonable doubt. Id. at 227. The issue in Fosler was notice. Id. at 229. Because "violation of one clause does not necessarily lead to a violation of the other clauses," and "disorders and neglects to the prejudice of good order and discipline is not synonymous with conduct of nature to bring discredit upon the armed forces," the Accused must be given specific notice on the charge sheet as to which clause or

clauses he must defend against. Id. at 230 (internal quotations omitted). Fosler established that the terminal element must be alleged either expressly or by necessary implication for an Article 134, UCMJ, charge to survive a challenge for failure to state an offense. Id. at 229-230. Nothing in Fosler questioned the constitutionality of Clause 2. In fact, much to the contrary, Fosler iterated that an allegation of adulterous conduct "if properly charged[10], would be constitutional as applied to [a]ppellant's adulterous conduct because, as discussed by the Supreme Court in [Levy], tradition and custom give notice to servicemembers that adulterous conduct can give rise to a violation of the UCMJ." Id. at 230.

In Fosler, this Court articulated a rule consistent with the holding in Phillips: "An accused cannot be convicted under Article 134, UCMJ, if the trier of fact determines only that the accused committed adultery; the trier of fact must also determine beyond a reasonable doubt that the terminal element has been satisfied." That is exactly what happened in Appellant's case. He was charged on the charge sheet with service discrediting conduct, and the members were instructed (1) that they must find beyond a reasonable doubt that his conduct was service discrediting and (2) what circumstances they should consider in deciding whether his conduct

[10] Properly charged here refers to properly including the terminal element in the charging language to ensure adequate notice to an accused.

was service discrediting. (JA at 277-279.) Since Fosler is consistent with Phillips, it gives this Court no reason to overturn that decision.

Turning next to this Court's opinion in Richard, nothing in that opinion criticizes or suggests Phillips was wrongly decided. In fact, it cites Phillips in support of its conclusion four times. 82 M.J. at 476, 479. While the Court in Richard found that the government had failed to meet its burden under Clause 1 of Article 134, UCMJ, by failing to provide evidence of a direct and palpable harm to good order and discipline of the armed forces, nothing in its opinion suggests that similar evidence of knowledge or direct and palpable harm is required for Clause 2. Id. at 478. In fact, it implied exactly the opposite, saying, "[b]oth at [a]ppellant's court-martial and before the AFCCA, the [g]overnment prevailed on arguments that would seem more appropriate for charges brought under [C]lause 2 of the general article's terminal element—that Appellant's conduct was of a nature to bring discredit upon the armed forces." Id. at 477. This quotation from Richard highlighted both the fact that Clause 2 does not require direct and palpable proof of discredit to the armed forces, but also the importance of Clause 2 to the military justice system.

Clause 1 and Clause 2 are not synonymous, and there are situations where charges under Clause 2 are more appropriate than bringing those same charges under Clause 1. Surely the military had an interest in holding the appellant in

Richard accountable for his despicable conduct of producing, possessing, and distributing images and videos of child pornography depicting a sixteen-year-old German national. Although this Court found Appellant could not be punished under Clause 1, Clause 2 would have provided a valuable mechanism to bring Appellant to justice. Nothing in Richard supports the Appellant's assertion that Richard serves as a ground-shift justifying the overturn of Phillips. It was merely clarifying the differences of required proof under Clause 1 and Clause 2.

Appellant also argues that Richard stands for the proposition that using the facts and circumstances of an offense to presume an element is unconstitutional – and since that is what Phillips allows, Phillips was wrongly decided. (App. Br. at 39.) But Richard merely says that the factfinder cannot conclusively presume prejudice to good order and discipline based on any particular fact or circumstance – such as the accused's military status or the fact the offense occurred on a military installation. 82 M.J. at 474. Phillips does not allow such a presumption. It requires the factfinder to "consider all the circumstances" and recognizes that no facts "mandate a particular result unless no rational trier of fact could conclude that the conduct was of a 'nature' to bring discredit upon the armed forces." 70 M.J. at 166. And in Appellant's case, the members were not instructed that any particular fact mandated a finding that the conduct was service discrediting. Rather, they were presented with a determination to make: "whether the alleged extramarital

sexual conduct in this case is of a nature to bring discredit upon the Armed Forces . . ." (JA at 277.) In so determining, they were instructed to "*consider all the facts and circumstances* offered on this issue. . ." and were given a list of possible factors to consider. (Id.) (emphasis added). Yet again, Richard supports this Court's holding in Phillips, rather than undermining it.

In the end, the cases cited by Appellant as support for overturning Phillips actually support the conclusion that Phillips is good law and that Phillips exists as a workable, constitutional decision in the eco-system of Article 134, UCMJ. Appellant has offered no special justification for overturning Phillips and has not otherwise met the substantial burden of persuasion necessary to overturn precedent. Accordingly, this Court should decline to overturn Phillips.

3. Appellant's Conviction for Extramarital Sexual Conduct is Legally Sufficient.

The test for legal sufficiency does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (2018). In applying this test to the evidence, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993). Thus, legal sufficiency is a very low threshold. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations and quotations omitted).

Appellant's conviction is legally sufficient. The terminal element—that the conduct was of a nature to bring discredit upon the armed forces—was proven beyond a reasonable doubt at trial, despite Appellant's assertions to the contrary. (App. Br. at 47-49.) Appellant does not allege the government failed to prove the remaining elements beyond a reasonable doubt.

Appellant argues that the only direct evidence elicited at trial on the terminal element demonstrated that the service was not discredited. (App. Br. at 47.) Specifically, he cites to the testimony of BF, who stated that her opinion of the Air Force was not changed as a result of her relationship with Appellant. (App. Br. at 48-49.) Yet, a plain language reading of the statute shows that whether Clause 2 of Article 134, UCMJ, has been violated, is not whether a co-actor's opinion of the armed forces was tarnished, but rather whether the nature of the conduct was such that it would *tend* to bring the service into disrepute if it were known. MCM, pt. IV, para. 91.c.(3). The government is not required to prove that the reputation of the armed forces was in fact tarnished. Phillips, 70 M.J. at 166. Further, the test for legal sufficiency "does not hinge on whether or how the parties' lists of circumstantial evidence or negating factors stack up against each other. United States v. Norman, 74 M.J. 144, 151 (C.A.A.F. 2015). Instead, it "hinges on whether reasonable factfinders could have drawn inferences one way or the other under a given set of circumstances." Id. In this case, there was other evidence

presented that would have justified a reasonable factfinder to determine that Appellant's conduct met the terminal element.

At trial, the evidence unequivocally established Appellant was married to A1C LW on 18 July 2019 and remained so throughout the charged time period. Appellant and BF engaged in a consensual sexual relationship for approximately three months. Throughout the course of their relationship, Appellant lied to BF and told her he was divorced. Appellant met BF's parents and her extended family on multiple occasions during the course of the relationship. At some point during the relationship, BF became pregnant with Appellant's child. Sometime later, BF ended the relationship with Appellant. During the course of their relationship Appellant recorded himself and BF engaged in sexual intercourse. After BF broke off the relationship with Appellant, Appellant uploaded a pornographic video of himself and BF to PornHub. Appellant entitled the video in a degrading and demeaning manner: "British slut loves American BBC in her ass." BF had not consented to this video being shared with anyone. Appellant made the pornographic video publicly viewable, and at the time of trial, the video had 817 views. Appellant had also sent a shortened version of the video to a group chat and another individual on the Kik messenger application. LW testified that while Appellant was engaged in a consensual sexual relationship with her, he showed her the video of BF. These factors highlight the open and notorious nature of

Appellant's extramarital sexual conduct. The relationship was not private and discrete; rather Appellant openly carried out the relationship in front of BF's family on the false pretense that he was not married. Then he flaunted his conduct by displaying and distributing a pornographic video of the affair to multiple individuals.

Appellant highlights that the affair with BF was similar in nature to that Appellant engaged in with LW and was ultimately acquitted. (JA at 48.) But, a key difference between Appellant's affair with LW and the one with BF was the video appellant posted of BF.

While Appellant asserts the video is not relevant to the terminal element because the video was shared after the charged timeframe, that assertion is erroneous. (App. Br. at 45-46.) The finder of fact is entitled to consider all the facts and circumstances of the charged conduct in making their determination whether the conduct was of a nature to bring discredit upon the armed forces. Phillips, 70 M.J. at 165. Consistent with the spillover instruction given by the military judge, if evidence [had] been presented which was relevant to more than one offense, the trier of fact was entitled to consider that evidence with respect to each offense to which it was relevant. (JA 103-104.) In this case, the video was taken during the charged timeframe. Soon after BF broke off the relationship, rather than trying to keep the relationship a secret, Appellant posted the video to a

pornographic website and showed it to others. So not only did he lie about his marital status to effectuate a sexual relationship and pregnancy, Appellant then exploited the woman he had so duped by nonconsensually distributing video of their sexual liaison. Appellant's actions were evidence of the open and notorious nature of his misconduct, and the finder of fact was permitted to consider it as such.[11]

Appellant's behavior in conducting his extramarital affair with BF was duplicitous, crass, flagrant, and exploitative. A rational factfinder could have found that if members of the American or host nation public learned of such behavior from an American airman toward the citizen of a host nation country, their view of the armed forces might be tarnished.

Viewing the evidence in the light most favorable to the government, a rational finder of fact could have found each element beyond a reasonable doubt; therefore, the conviction is legally sufficient. Appellant's conviction for an extramarital affair is legally sufficient, and this Court should affirm the findings of the Air Force Court of Criminal Appeals.

[11] The fact that trial counsel did address the video as being service discrediting in argument is irrelevant. (App. Br. at 45.) The members were instructed that argument of counsel is not evidence. (R. at 1001.) In contrast, the members were instructed to "consider all the facts and circumstances offered on this issue." (JA at 277.)

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division by electronic means on 23 January 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

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Dated: 23 January 2024