

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20220558

Sergeant First Class (E-7)

**ERICK R. FELIX**

United States Army,

Appellant

Tried at Schofield Barracks, Hawaii,  
on 15 September 2022 and 2

November 2022, before a special  
court-martial appointed by the  
Commander, Headquarters, 25th  
Infantry Division, LTC Michael E.  
Korte, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

**Assignments of Error**

**I. WHETHER THE MILITARY JUDGE ABUSED HIS  
DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA  
TO SPECIFICATION 1 OF THE CHARGE**

**II. WHETHER APPELLANT'S SENTENCE, SPECIFICALLY  
THE ADJUDGED BAD-CONDUCT DISCHARGE, IS  
INAPPROPRIATELY SEVERE**

**Statement of the Case**

On 2 November 2022, a military judge sitting as a special court-martial convicted appellant, Sergeant First Class Erick R. Felix, in accordance with his pleas, of Attempted Sexual Abuse of a Child Involving Indecent Communication, in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880

[UCMJ]. (R. at 63, Statement of Trial Results).<sup>1</sup> On the same day, the military judge sentenced appellant to thirty-six days confinement and a bad-conduct discharge. (R. at 148).

On 5 December 2022, the convening authority took no action. (Convening Authority Action). On 5 December 2022, the military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 7 April 2023. (Referral and Designation of Counsel).<sup>2</sup>

## **Statement of Facts**

### **A. Attempted Sexual Abuse of a Child**

In December of 2021, a Special Agent with the United States Air Force Office of Special Investigations, acting in an undercover capacity [UC], created a profile on the online application Whisper. The UC's purpose was to identify Soldiers engaging in communications or sexual acts with minors. (Stipulation of Fact, p. 2). Whisper is an online application that allowed "members to post anonymously, chat, and share photos and videos." (Stipulation of Fact, p. 2). The

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<sup>1</sup> In accordance with appellant's plea agreement, an additional charge of Attempted Sexual Abuse of a Child was dismissed.

<sup>2</sup> The Chronology Sheet incorrectly lists appellant's rank as "SSG" and should be corrected to reflect appellant's actual rank of "SFC." (Chronology Sheet). The Entry of Judgment incorrectly refers to the "automatic forfeiture[] of two-thirds pay and allowances. . . ." which should be corrected to read "automatic forfeiture of two-thirds pay" because the forfeiture of allowances is not authorized at a special court-martial. 10 U.S.C. § 819(a). (Entry of Judgment).

UC's profile used the name "Ashbae" and listed her age as "Female 45+."

(Stipulation of Fact, p. 2).

On 11 and 12 December 2021, appellant communicated with the UC, leading to the charges in this case. At 1636 on 11 December 2021, appellant messaged the UC's "Ashbae" profile and asked where she was located. (Pros. Ex. 2 at 5). The UC asked appellant "What u wana do," to which appellant responded, "Ladies first." (Pros. Ex. 2 at 6). The UC said "anything fun" and appellant stated that he was dropping items off at his new house and she could "ride along if you like." (Pros. Ex. 2 at 7). The UC asked what they were going to do, with a winking emoji." (Pros. Ex. 2 at 7). Appellant said "what would you like to do? I'm good with whatever you want." (Pros. Ex. 2 at 7). The UC stated, "Jus sum fun," and appellant responded, "[w]e can find something fun to do." (Pros. Ex. 2 at 7). The UC, in a continued effort to get appellant to suggest something sexual, stated "like," to which appellant responded, "I'm known to be a good time." (Pros. Ex. 2 at 7). At this point in the conversation, the UC had given no indications of her purported age, other than the "45+" that was listed on her profile.

After additional small talk, the UC stated that her mom was in the Air Force, to which appellant responded, "Is she gonna kick my ass?" (Pros. Ex. 2 at 9). Appellant then told the UC that he could not pick her up because his child was

going to ride with him to the house, but he would “do another trip later in the evening by [himself]” if she still wanted to join. (Pros. Ex. 2 at 9). The UC stated her mom was about to leave, indicating she was available to meet up. (Pros. Ex. 2 at 10). The UC and appellant then exchanged names and appellant stated he was “31” and had kids. (Pros. Ex. 2 at 11). Appellant asked the UC for her age and she responded “mmm a lil young lol.” (Pros. Ex. 2 at 11). Appellant asked “18” and the UC stated “[n]o,” leading appellant to ask if she was from “to catch a predator.” (Pros. Ex. 2 at 11). Even though she was directly asked by appellant, the UC did not reveal her purported age of under sixteen. (Pros. Ex. 2 at 11).

The UC and appellant then exchanged pictures after which appellant stated “really cute[.] I can’t meet you though[.] You are very young[.] You are probably 16 right?” (Pros. Ex. 2 at 13-14). Instead of responding to appellant’s question, the UC sent a picture of a face emoji making a confused look. (Pros. Ex. 2 at 14).

The UC stated that she was “sooo board.” (Pros. Ex. 2 at 15). Appellant said he would “bring [her] dinner” and the UC asked “what are we gonna do after?” (Pros. Ex. 2 at 16). Appellant responded, “Rock your world?!” to which the UC gave an emphatic “Yaaa” with a smile emoji. (Pros. Ex. 2 at 16). Appellant questioned whether the UC was real, and the UC stated that she was. (Pros. Ex. 2 at 16).

Appellant then changed the subject to his children and where he lived. (Pros. Ex. 2 at 17-18). The UC tried to steer the conversation back to a sexual nature, stating “[w]hat we gonna do” and “[d]on waste my time.” (Pros. Ex. 2 at 18). Appellant started texting about baseball and the UC responded “I wanna do something fun not baseball.” (Pros. Ex. 2 at 18). Appellant suggested they go eat, and the UC responded “boring” and “U wasting my time.” (Pros. Ex. 2 at 18). Appellant then said, “I’ll rock your world.” (Pros. Ex. 2 at 19). Appellant stated that he would pick her up and the UC again attempted to get appellant to say something sexual, stating “tell me what we gonna do” and “I don just want to stare at u all weird” and “B bored.” (Pros. Ex. 2 at 21). Appellant stated that he would “take [her] top off and play,” to which the UC responded, “play what.” (Pros. Ex. 2 at 21). Appellant stated “[y]ou wasting my time” and “I was gonna play with those tits.” (Pros. Ex. 2 at 21). Appellant told the UC to “[b]e safe.” (Pros. Ex. 2 at 21).

After appellant and the UC exchanged further text messages, the UC sent a picture in order to demonstrate she was real—the photo listed the current time. (Pros. Ex. 2 at 23). This picture was sent two hours after their initial text message. The UC still had not represented herself as someone under the age of sixteen.

The UC said appellant could come to her place and asked him “[b]ut tell me what we gonna do.” (Pros. Ex. 2 at 24). Appellant stated “do you” and later clarified “I’m doing you.” (Pros. Ex. 2 at 25). The UC asked if he had protection and stated “[m]y mom would kill me if I got prego.” (Pros. Ex. 2 at 25).

After communicating for over two hours via text message and being asked multiple times, the UC finally disclosed her purported age to appellant, stating “I can’t get prego b4 15.” (Pros. Ex. 2 at 25). The UC then told appellant she was currently thirteen but would turn fourteen in November. (Pros. Ex. 2 at 26). The UC said she was “more mature,” and appellant stated “[s]how me how mature” and “body.” (Pros. Ex. 2 at 26). After this, the UC sent a picture of a female’s stomach. (Pros. Ex. 2 at 27). Appellant asked for a “[w]hole body” picture, and the UC sent a picture of a fully clothed female taking a picture in a bathroom mirror. (Pros. Ex. 2 at 27-28). Appellant asked “got protection” and sent a picture of store shelves containing boxes of condoms that he obtained from the internet. (Pros. Ex. 2 at 29).

Following this text message exchange, appellant and the UC arranged a meeting at a shopette on base. (Pros. Ex. 2 at 30-33). Law enforcement went to the meeting location, but appellant never showed up. (Stipulation of Fact, p. 3). The next day, appellant sent the UC a text message stating “[s]orry little one. Just

can't do that. You are really young.” (Pros. Ex. 2 at 34). Appellant continued “[s]orry. I wasn't even considering it” and “[b]e careful in whatever you do though.” (Pros. Ex. 2 at 34). The UC responded with a middle finger emoji and expressed anger that appellant left her waiting. (Pros. Ex. 2 at 34).

The text messages between the UC and appellant were admitted by the government at sentencing. (R. at 66). Prior to announcing sentence, the military judge stated he wanted to review the text messages before imposing sentence. (R. at 66.)

At no point during appellant's plea colloquy or sentencing did the military judge inquire into whether appellant or his counsel believed the factual basis raised a possible entrapment defense. The word “entrapment” was never stated during appellant's guilty plea or sentencing. Appellant's stipulation of fact contained a general “Disclaimer of Defenses” provision that did not refer to any specific defense, including entrapment. (Stipulation of Fact, p. 5).

## **I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF THE CHARGE**

### **Standard of Review**

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). Questions of law

arising from the guilty plea are reviewed de novo. *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007). A military judge abuses his discretion if he or she fails to obtain an adequate factual basis to support the plea. *Id.* (citing *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009) (internal quotations omitted)). Where the facts raise a potential defense, the military judge “must reject the pleas if the defense is not negated.” *United States v. Winter*, 35 M.J. 93, 94 (C.M.A. 1992) (quoting Rule for Courts-Martial [R.C.M.] 910(e), Discussion). “Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea.” *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

More than a “mere possibility” of a defense is required. *Id.* (internal citation and quotation marks omitted). Instead, an appellate court must find “something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant’s guilty plea.”

*Inabinette*, 66 M.J. at 322. The existence of an affirmative defense constitutes a matter inconsistent with a plea of guilty. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).

Accordingly, under Article 45(a), UCMJ, a military judge must resolve apparent defenses through further inquiry, or the guilty plea must be rejected. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (internal citation



omitted); *United States v. Collins*, 17 M.J. 901, 903 (A.F.C.M.R. 1983) (holding a defense attorney's conclusion that an entrapment defense did not apply when facts raised the possible affirmative defense was insufficient and "the trial judge erred in accepting the accused's guilty plea without first inquiring of the accused his position in the matter"); *United States v. Gilmore*, ARMY 20130273 2018 CCA LEXIS 55, at \*2-3 (Army Ct. Crim. App. 25 Jan. 2018) (sum. disp.) (finding appellant's guilty plea improvident because a military judge failed to explain the defense of entrapment to an appellant when the facts raised possible entrapment and therefore it was unclear if appellant "understood such a defense existed or that he knowingly voluntarily waived [an entrapment defense]").

For an affirmative defense like entrapment the critical issue is whether the affirmative defense of entrapment was credibly raised during the sentencing phase of the appellant's trial. *United States v. Clark*, 26 M.J. 589, 593 (A.C.M.R. 1988).

### **Law**

Entrapment is an affirmative defense. R.C.M. 916(g) states, "[i]t is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." A defendant bears the initial burden of showing some evidence that an agent of the government originated the suggestion to commit the crime. *United States v.*

*Whittle*, 34 M.J. 206, 208 (C.M.A. 1992). “[T]he burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense . . . .” *Id.* (citations omitted).

When a person accepts a criminal offer without an extraordinary inducement to do so, he demonstrates a predisposition to commit the crime in question. *Id.* (citations omitted). “Inducement” is more than providing an appellant the means or opportunity to commit the crime. *United States v. Howell*, 36 M.J. 354, 360 (C.M.A. 1993) (citations omitted). Instead, inducement occurs when the government’s actions “create[ ] a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.” *Id.* at 359-60. Inducement may take many forms, such as “pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.” *Id.* at 359-60 (internal quotation marks and citations omitted).

The Government may use undercover agents and informants to ferret out crime and afford opportunities or facilities for criminals to act upon. *Jacobson v. United States*, 503 U.S. 540, 548 (1992). This includes law enforcement officers pretending to be someone other than a government agent. *See Howell*, 36 M.J. at

358. However, when “the Government's deception actually implants the criminal design in the mind of the defendant” the defense of entrapment comes into play. *Russell*, 411 U.S. 423, 436 (1973).

### **Argument**

The military judge abused his discretion in accepting appellant’s guilty plea to Specification 1 of the Charge by not advising defendant of the potential defense of entrapment and by not eliciting specific facts that would negate the defense. The text messages between appellant and the UC submitted during sentencing showed the UC initiated the sexual nature of the conversation and appellant was not predisposed to commit the crime.

#### **A. Entrapment was Raised at Sentencing**

Prior to announcing sentence, the military judge reviewed the stipulation of fact, heard the statements of appellant during the *Care* inquiry, and, most importantly, reviewed the text messages sent between the UC and appellant. All three raised the issue of entrapment.

Over the course of the afternoon and evening of 11 December 2021, appellant and the UC exchanged approximately 30 pages of text messages with each other. (Pros. Ex. 2). The UC did not reveal her purported age of thirteen until page 22 of the text messages – two hours after the conversation began and after

appellant had repeatedly asked for her age. (Pros. Ex. 2 at 26). As appellant stated at trial, during the conversation he had with the UC, for approximately “two-thirds of the conversation” he believed “her to be over the age of 16.” (R. at 31). This was certainly done by design because the UC was afraid that if she revealed her age too early, appellant would have quickly cut off communication with her, just like he did shortly after learning her purported age near the end of the conversation. (Pros. Ex. 2 at 34).

The UC also initiated the sexual nature of the conversation. Although certainly flirtatious, appellant started by asking the UC if they could, in general, meet with each other. It was not until the UC stated in a sexually suggestive manner, “what are we gonna do after?” that the conversation turned sexual in nature. (Pros. Ex. 2 at 15). After this, the UC constantly steered the conversation in a sexual direction. During his plea colloquy, appellant described the UC’s communications as “this individual pushing,” referring to the UC pushing him to communicate with her. (R. at 27). When appellant brought up non-sexual topics, such as his children or baseball, the UC expressed frustration with him and redirected the conversation back to sex. (Pros. Ex. 2 at 18). When appellant attempted to cut off conversation with the UC, the UC told him not to waste her

time, (Pros. Ex. 2 at 18), and later sent appellant middle finger emojis and expressed anger that appellant did not show up for the meeting (pros. ex. 2 at 34).

Additionally, the picture the UC sent looked nothing like a thirteen-year-old, with the female looking much closer to thirty than to thirteen. (Pros. Ex. 2 at 27-28). This further induced appellant to communicate with her. As appellant stated during his plea colloquy, part of the reason he asked for the photograph from the UC was to “discern what her age” was. (R. at 36). The UC’s use of a photograph of a female who looked nothing like thirteen only further acted to induce sexual conversation from appellant.

Finally, the vast majority of the sexual language used by appellant with the UC occurred *before* the UC represented that she was under the age of sixteen. For this reason, appellant was not charged for comments about having sex with the UC or playing with her breasts.

The UC in this case did not proceed in a manner designed to ensure she did not entrap Soldiers that would otherwise avoid communicating with individuals under the age of sixteen. In fact, the UC did the opposite, hiding her purported age and expressing frustration when appellant was reluctant to communicate with her.

**B. The Military Judge Failed to Inquire into Entrapment After the Defense was Raised by the Evidence.**

Despite reviewing this evidence, the military judge did not ask defendant and his counsel about a possible entrapment defense. The word “entrapment” was never stated during sentencing, and it is unclear what advice and warnings, if any, appellant received on the possible defense.

In *Clark*, the appellant argued the military judge should have rejected his guilty pleas to two specifications of wrongfully distributing cocaine in violation of Article 112a, UCMJ, because he was entrapped. 26 M.J. at 590. During sentencing, the military judge concluded the testimony of a government witness required further inquiry into whether an entrapment defense was raised. *Id.* The military judge asked defense counsel if the defense was satisfied that there was no issue with entrapment. *Id.* Defendant’s counsel stated that there was not, but defendant intended to use the facts related to entrapment in mitigation. *Id.* Defense counsel further assured the military judge that he had “gone over [entrapment] with the accused” and defendant agreed to plead guilty to the charge. *Id.* Defense counsel also informed the military judge the government would have a strong case for predisposition if the defense pursued an entrapment defense. *Id.* at 591.

In *Clark*, the court ultimately concluded there was ample evidence of predisposition. *Id.* at 593. The court noted the military judge correctly realized there was a question of entrapment and correctly “made a more searching inquiry to determine whether the appellant was asserting a position inconsistent with his pleas of guilty” as “he was bound to do by Article 45 and military case law.” *Id.* at 593-94. The court noted the military judge should have questioned the accused directly but held the defense counsel’s responses made it “clear that counsel and appellant had discussed the defense of entrapment and, after weighing the evidence, had decided that because of abundant evidence of predisposition it was not a credible legal defense.” *Id.* at 594.

Here, unlike *Clark*, there was no inquiry into entrapment. Despite seeing the text messages that led to the charges, reading the factual basis, and hearing the facts during appellant’s *Care* inquiry, the military judge never asked appellant or his counsel whether they believed entrapment was an issue and whether appellant was affirmatively waiving the defense. Because entrapment was never mentioned during the plea inquiry, there is no record of appellant discussing entrapment with his counsel and it is unclear what advice, if any, appellant received from defense counsel regarding the possible defense.

While the stipulation of fact contained a general “Disclaimer of Defenses” provision, the provision did not specifically mention entrapment despite the issue being raised by the use of an undercover agent and the undercover agent’s conduct during the investigation. (Stipulation of Fact, p. 5). Therefore, it is still unclear whether appellant was adequately advised on this possible defense by either his counsel or the military judge.

### **C. Appellant was not Predisposed to Commit the Crime**

The record also shows that, unlike in *Clark*, appellant was not predisposed to communicate sexual language with females under the age of sixteen. In *Clark*, the appellant “had been involved in a number of cocaine distributions with [the informant] before [the informant] became a government informer” and had conducted the cocaine transactions voluntary and “profited from each of them.” *Id.* at 593. Here, there is little, if any, evidence that appellant was predisposed to communicating sexual language to females under the age of sixteen. In fact, multiple facts show defendant *was not* predisposed to do so. These facts include: (1) appellant initially reaching out to a social media profile that listed the UC’s age as forty-five, (Stipulation of Fact, p. 2); (2) appellant repeatedly asking for the UC’s age during their short conversation, (Pros. Ex. 2 at 11, 14); (3) appellant expressing hesitancy to speak with the UC upon learning that she may have been



under 18, (Pros. Ex. 2 at 14); (4) the UC sending a photograph of a female that looked significantly older than thirteen, (Pros. Ex. 2 at 23); (5) appellant not showing up for the arranged meeting and telling the UC that she was too young and he never intended to meet with her, (Stipulation of Fact p. 3, Pros. Ex. 2 at 34); and (6) appellant not reengaging with the UC after she did not show up to the meeting, despite the UC's continued efforts to speak with appellant. (Pros. Ex. 2 at 34).

The actions of the UC were inappropriate because they, went beyond the level of conduct that is expected of an undercover agent seeking to stop true child predators that use the internet to attempt to abuse vulnerable children.

## **II. WHETHER APPELLANT'S SENTENCE, SPECIFICALLY THE ADJUDGED BAD-CONDUCT DISCHARGE, IS INAPPROPRIATELY SEVERE**

### **Standard of Review**

The standard of review for sentence appropriateness is de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

### **Law**

Appellate courts have “not only the power but also the independent duty to consider the appropriateness” of adjudged sentences. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66(d), UCMJ, this Court may only approve “the sentence or such part or amount of the sentence, as the Court finds

correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(d)(1)(A), UCMJ. Article 66’s “sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused.” *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). The Court’s broad power to ensure a just sentence is distinct from the convening authority’s clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Sentence appropriateness is assessed by considering the appellant, the nature and seriousness of the offenses, the appellant’s record of service, and all matters contained in the record of trial. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### **Argument**

Appellant’s sentence, specifically the adjudged bad-conduct discharge, was inappropriately severe. At trial, appellant admitted his conduct relating to the charged offense was unacceptable and took responsibility by pleading guilty. (R. at 95-96). This was consistent with his actions when initially confronted by CID shortly after the offense, when appellant quickly admitted to communicating with the UC and apologized by writing a letter. (Def. Ex. A).

Per the terms of the plea agreement, the military judge was not required to impose a bad-conduct discharge, but chose to do so. The imposition of a bad-conduct discharge was inappropriately severe for the following four reasons.

First, the UC's actions, if not amounting to entrapment, are certainly mitigating. Appellant did not seek out a minor at the outset of his communications with the UC. Instead, he reached out to an online account for a person with a listed age of "45+". (Pros. Ex. 2 at 2). The UC then hid her age throughout most of the conversation and only stated she was under sixteen after exchanging multiple sexual text messages with appellant. (Pros. Ex. 2 at 26). Most importantly, appellant did not take the significant step of traveling to the meeting with the purported minor. (Stipulation of Fact p. 3). Instead, appellant told the UC that she was too young and he never considered meeting with her. (Pros. Ex. 2 at 34). Appellant also ended the conversation with the UC on his own accord and told the UC to be safe. (Pros. Ex. 2 at 34).

There was no evidence of appellant engaging in any similar type of conduct or committing any other misconduct. Based on the evidence presented, appellant's behavior was a complete aberration from his normal behavior. Under these facts, a bad-conduct discharge was significantly greater than necessary to promote justice.

Second, appellant had a successful thirteen-year military career prior to the offense, reaching the rank of Sergeant First Class. (Pros. Ex. 2; R. at 122).

Appellant achieved all of this after growing up in poverty in Mexico before moving to a small town in California, where he worked in the fields picking fruit and vegetables from a young age. (R. at 98-101). While in the military, appellant completed three deployments between 2011 and 2019, during which he worked in the highly dangerous field of route clearance. (R. at 105). Although appellant completed the three deployments with little injury, many of his friends and co-workers were not as fortunate and he witnessed several suffer serious injury or death. (R. at 107, 113, 119). As a result of the deployments, appellant suffered from “survivor’s guilt, depression, anxiety, [and] PTSD,” that, in the time leading up to him communicating with the UC, created a “barrier” between him and his wife and led to him speaking with the UC. (R. at 122-23).

Third, as a result of appellant’s conduct, appellant’s family life was turned upside down. At the suggestion of a social worker, appellant voluntarily removed himself from his family. (R. at 129). At the time of the court-martial, appellant had not seen his wife and children for nine months. (R. at 129). Appellant further enrolled in counseling in an effort to reunite with his family. (*Id.*).

Finally, at sentencing, the government made no attempt to put forth any matters in aggravation, simply admitting defendant's ERB into evidence and resting. (R. at 65-66).

On the other hand, appellant called four witnesses who testified to him being a good worker, friend, family member, and father. (R. at 69-97). [REDACTED], who was appellant's platoon leader while on deployment to Afghanistan in 2011, described appellant as "one of the best junior Soldiers that [he] knew." (R. at 70). [REDACTED] described how appellant performed daily route clearing operations from ten to eighteen hours a day while on deployment and excelled, demonstrating a solid work ethic. (R. at 70-72). [REDACTED], another of appellant's former platoon leaders, stated that appellant's work was "excellent," and he believed appellant could be rehabilitated due to "his dedication to the work." (R. at 77-81). [REDACTED], who worked with appellant for twelve years and deployed with him twice, described appellant as "within the top five percent of NCOs [he had] worked with." (R. at 86). Appellant's sister-in-law described appellant as a "great father" and "great husband" and discussed the rehabilitative steps he had taken following the incident in 2021, including meeting with a therapist and social workers." (R. at 90-95).

There were significant extenuating circumstances present in this case. The record is clear that appellant's communications with the UC, although very serious, were made at a time in his life when he was struggling with a distant relationship with his wife after returning from three deployments. While fault certainly lies with appellant and he has shown remorse and accepted responsibility by pleading guilty, his conduct simply does not justify a bad-conduct discharge. The imposition of a punitive discharge will have permanent effects on appellant's future, including his legal rights, economic opportunities, and social acceptability, that are disproportionate to appellant's conduct in light of the actions taken by the UC, appellant not traveling to the meeting with the minor, and appellant's successful thirteen-year military record.

## **Conclusion**

Appellant respectfully requests this honorable court set aside the finding to Specification 1 of The Charge and the sentence. Alternatively, appellant requests this honorable court exercise its authority under Article 66, UCMJ, to modify his sentence and disapprove the imposition of a bad-conduct discharge.



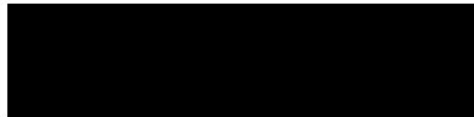
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army  
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**MICHELLE L.W. SURRATT**  
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