

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**APPELLANT’S MOTION FOR
ORAL ARGUMENT**

v.

Docket No. ARMY 20210440

Private (E-2)

NATHANIEL I. GILKEY

United States Army

Appellant

Tried at Camp Humphreys, Republic of Korea and Fort Leavenworth, Kansas, on 29 October and 28 December 2020, 13 and 23 January, 1–4 February, and 19–20 July 2021, before a general court-martial appointed by the Commander, 19th Expeditionary Sustainment Command, Lieutenant Colonel Christopher E. Martin and Colonel Jeffrey W. Hart, military judges, presiding.

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

COME NOW the undersigned appellate defense counsel, pursuant to Rules 23 and 25 of the Rules of Appellate Procedure, and request oral argument on behalf of appellant on the following matters, the first an assigned error and the second submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982):

I. WHETHER APPELLANT’S CONVICTION FOR PRODUCING AND POSSESSING A DIGITAL IMAGE OF CHILD PORNOGRAPHY, IN SPECIFICATIONS 4 AND 5 OF CHARGE IV, IS LEGALLY AND FACTUALLY SUFFICIENT.

This case, in part, involves convictions for the production and possession of child pornography that was not introduced at trial. Argument on this assignment of error is appropriate because it will clarify for the field what the government’s burden is to establish, at a contest, that unintroduced media qualifies as sexually explicit conduct.

XII. WHETHER THE MILITARY JUDGE ERRED IN ALLOWING ■ TO TESTIFY ABOUT RECORDINGS AND PHOTOGRAPHS IN VIOLATION OF MIL. R. EVID. 1002.

Appellant included this matter in *Grostefon* when he initially filed his brief. Following appellant’s submission of his brief this court decided *United States v. Grindstaff*, ARMY 20200315, 2022 CCA LEXIS 524 (Army Ct. Crim. App. 30 Aug. 2022). This court approved appellant’s motion for leave to file a supplemental citation of authority to *Grindstaff* on 1 September 2022. Given the facts of appellant’s case and this court’s decision in *Grindstaff*, this court must only determine whether the military judge’s error to admit ■ testimony was plain and obvious. Given the narrow scope, and the prevalence with which unproduced photos and videos are discussed at courts-martial throughout the field,

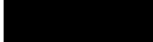
undersigned counsel believe that oral argument from both sides would assist this court in reaching an informative and reasoned opinion.

WHEREFORE, appellant, through undersigned appellate defense counsel, respectfully request this Court grant the motion for oral argument.

PANEL 4

MOTION FOR ORAL ARGUMENT

GRANTED: _____

DENIED:  _____

DATE: 14 MAR 2023



SEAN PATRICK FLYNN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



BRYAN A. OSTERHAGE
Major, Judge Advocate
Acting Branch Chief
Defense Appellate Division

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to the Court and the Government Appellate Division on 28 November 2022.



SEAN PATRICK FLYNN
Captain, Judge Advocate
Appellate Defense Counsel
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