IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20230100
Staff Sergeant (E-6) **DAVID K. MYERS,** United States Army,	Appellant	Tried at Fort Moore, Georgia, on 6 October 2022, 9 December 2022, 27-28 February 2023, 2 March 2023, before a general court-martial appointed by the Commander, Maneuver Center of Excellence, Lieutenant Colonel Trevor Barna, military judge, presiding.

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

Assignments of Error[1]

I.

WHETHER THE EVIDENCE SUPPORTING APPELLANT'S CONVICTION WAS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE EVIDENCE FAILED TO LINK APPELLANT TO THE CHARGED ACTUS REUS AND/OR HOW THAT ACTUS REUS ENDANGERED THE CHILDREN

II.

WHETHER THE MILITARY JUDGE ERRONEOUSLY FOUND THAT LAW ENFORCEMENT'S ENTRY INTO APPELLANT'S HOME WAS OBJECTIVELY REASONABLE UNDER THE EMERGENCY AID EXCEPTION TO THE FOURTH AMENDMENT

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

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Statement of the Case

On 2 March 2023, a military judge sitting at a general court-martial convicted appellant, Staff Sergeant (SSG) David K. Myers, contrary to his pleas, of three specifications of child endangerment in violation of Article 119b, Uniform Code of Military Justice, 10 U.S.C. § 919b (2019) [UCMJ].[2] (R. at 576; Charge Sheet). The judge sentenced appellant to be reduced to the grade of E-1, to be confined for 270 days, and to receive a bad conduct discharge. (R. at 674).[3] The convening authority took no action on the findings and sentence, but waived automatic forfeitures for a period of 6 months effective 2 March 2023 with the direction they be paid to appellant's spouse.[4] The military judge entered judgment on 14 March 2023.[5]

Statement of Facts

Appellant was a drill sergeant at Fort Moore, Georgia. (R. at 428). While on the trail, appellant spent the vast majority of time away from home. He regularly

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[2] The military judge acquitted appellant of one specification of animal neglect in violation of Article 134, UCMJ.

[3] The military judge sentenced appellant to 90 days confinement each for Specifications 1,2, and 3 of Charge I, with all sentences to confinement running consecutively resulting in a total adjudged confinement of 270 days.

[4] Convening Authority Action, dated 13 March 2023.

[5] The Entry of Judgment needs to be corrected to read "automatic forfeitures of pay and allowances" per month because this was a general court-martial. Also, the convening authority appears to have effectuated defense counsel's 10 March 2023 request to "waive automatic forfeiture of pay and allowances."

pulled 24-hour shifts at battalion change of quarters duty, 12-hour shifts leading a trainee platoon, or helped perform support functions to include combatives instruction, engagement skills trainer and range support, or days-long field training exercises. (R. at 217, 432, 452; Pros. Ex. 7, 8). As such, he depended upon his wife, RM, to take care of their home and to look after their three children: the girls [redacted] and [redacted] (ages five and three respectively), and their son [redacted] (age two). (R. at 655; Pros. Ex. 3 pages 1, 22, and 45; Def. Ex. D). But between the rigors of appellant's work schedule and her own mental health issues, RM struggled to handle those responsibilities. (R. at 655-56; Def. Ex. D).

For each specification of Charge I, the government charged appellant with a violation of Article 119b, UCMJ, by "locking . . . [[redacted] [redacted] and [redacted] in a room with no adult present in the home" on divers occasions between 5 May 2022 and 15 July 2022. (Charge Sheet). These bookmarks indicate the only time a testifying witness entered appellant's home during the relevant timeframe. The specifications alleged that by "locking [each child] in a room with no adult present in the home" appellant endangered their physical health and welfare. (Charge Sheet).[6]

[6] For the oldest child ([redacted] only, the government alleged that he endangered her mental health. (Charge Sheet).

A. RM arranges for a neighbor to babysit on 5 May 2022 and RM instructs the neighbor about the kids' locations upstairs.

On 5 May 2022, RM asked EH – appellant's neighbor – to watch their children as RM's babysitter backed out unexpectedly. (R. at 196). When EH came to appellant's home, RM instructed her on how to care for their children. (R. at 197). RM told her that " . . . the children were upstairs in their room" and to " . . . not let them out." (R. at 197). RM further told EH "not to leave the first floor." (R. at 198). While appellant was nearby, he did not participate in RM's conversation with EH nor is it known whether he heard the conversation. (R. at 198).

The neighbor ignored RM's directive and later went upstairs. (R. at 198). EH found the children in their two rooms behind inverted doors locked from the hallway. (R. at 198-201). Both rooms were disheveled with dirt and trash strewn about. (R. at 200-01). The boy's diaper was full, and his room had broken Christmas ornaments on the ground. (R. at 200). After EH played with the children downstairs, she returned the kids to the rooms and went outside. (R. at 205-06). EH left appellant's home upset and told of her experience to her husband, Sergeant First Class (SFC) TH. (R. at 217, 235).

B. There is no direct evidence regarding where appellant, RM, and their children are between 6 May and 13 July 2022.

Between 6 May and 13 July 2022, the government did not present direct evidence that the children were in their rooms with the doors locked without an adult present in the home.

In addition to training new waves of soldiers, appellant volunteered at the local branch of the Veterans of Foreign Wars (VFW). (R. at 333, 410). ES – a member of appellant's unit's Family Readiness Group (FRG) and a nurse - recalled seeing his truck parked there "multiple times" during the relevant times. (R. at 410). Staff Sergeant ZH – appellant's co-worker – recalled that appellant attended the VFW July Fourth celebration as a volunteer. (R. at 357-58).

On approximately 13 June 2022, Appellant's wife also began working at the VFW. (R. at 209; Pros. Ex. 6; Def. Ex. D). At least once, she brought the kids to work. (R. at 238). At an on-post July Fourth celebration held on 25 June 2022, ES observed Appellant's wife in passing but did not see the children. (R. at 424).

The neighbors, EH and SFC TH, presumed appellant and RM were gone based on whether their vehicles were parked at their home, but they did nothing to confirm their suspicions. (R. at 210-12, 217-20). Appellant drove a red-colored Dodge Ram truck and RM drove a silver-colored Dodge SUV. (R. at 210, 239). The few times that both vehicles were absent, appellant typically departed before RM. (*See e.g.,* R. at 210, 212). But for several weeks after RM began working,

there was a noticeable pattern in that a tan-colored SUV appeared when both appellant and RM were gone in the evening. (R. at 210-11, 239-40).

There was no evidence introduced at trial, as to the children's whereabouts in this timeframe other than when RM brought her children to work. There was no evidence suggesting they were at home, with a babysitter, or with their parents.

C. The neighbors pay more attention on 13 July 2022.

On 13 July 2022, both appellant's and RM's vehicles were gone but the tan-colored SUV never arrived. (R. at 239). Neither EH nor SFC TH observed or heard appellant, his wife, or their children get in their vehicles. (R. at 212, 239).

The next day, EH and SFC TH heard appellant's truck leave his home but did not observe who was in the truck. (R. at 212, 241). Shortly thereafter, EH observed RM get in her vehicle and leave without appellant's children. (R. at 212).

The following day, 15 July 2022, the neighbors noticed both appellant and RM's vehicles were gone. (R. at 212). They did not observe the vehicles leaving or if the children were in the vehicles. (R. at 212-13). Fearing the children were unattended, SFC TH called the military police. (R. at 213).

D. Detective [redacted] finds appellant's children locked in their rooms on 15 July 2022.

Detective (Det.) [redacted] arrived at appellant's home shortly after the call. (R. at 258). After circling the seemingly empty home, Det. [redacted] spotted a male toddler behind a second story window who was waving and not distressed. (R. at 259, 261;

80). Appellant then pulled up to the home, and upon Det. [redacted] insistence, let Det. [redacted] inside. (R. at 262).

Upon entering the house, Det. [redacted] smelled an "overwhelming odor of urine and feces" and saw "piles of feces" on the stairs that he attributed to animals. (R. at 263). Det. [redacted] walked upstairs with appellant and saw the children's two locked inverted doors. (R. at 263, 265). Appellant opened the two locked doors. (R. at 264). [redacted] came out naked with matted hair and covered in feces. (R. at 264). [redacted] and [redacted] emerged in a similarly disheveled condition. (R. at 267). Inside the boy's room was a feces-stained mattresses, backwards-facing furniture, smeared feces on the wall, and discarded food wrappers. (R. at 265-7, 303-10). The girl's room had similar furniture, discarded food wrappers, and other trash/debris inter-mixed. (R. at 267-68).

After Det. [redacted] discovered the children, RM "showed up in another vehicle, a separate vehicle" from working a shift at the VFW (R. at 269; Pros. Ex. 6).

E. Witnesses described the actual and prospective injuries that the children suffered.

Appellant's co-worker, Staff Sergeant ZH, and his wife, RH, took temporary custody of the children and discovered that the children had headlice. (R. at 361-68). Prompted by RH's discovery, ES – the FRG leader and nurse – inspected each child's scalp and found headlice on all three. (R. at 414)

At trial, the government called Dr. JD, a psychologist specializing in child and adolescent psychology and forensic psychology. (R. at 475). The psychologist indicated she had observed the trial, previously observed the children, and reviewed allied documents. (R. at 483-85). While the psychologist spoke generally of "child neglect," she did not attempt to discern what dangers were *specifically* tied to the children being "locked" in their rooms versus the harms tied to general "child neglect" or the "conditions like those [the trial counsel] outlined in [appellant's] household." (R. at 486-88).

The psychologist explained that the children experienced ". . . highly pathogenic care based on the conditions of the home and the conditions of the children when they were found." (R. at 485) (emphasis added). The psychologist explained that "highly pathogenic care" is "first of all, of course, the children being in a home with no adult present at their ages . . . certainly too young to be left anywhere by themselves." *Id*. She went on to cite the kids' headlice, diaper rashes, full diapers, and various states of undress as being indicative of "their basic needs . . . not being . . . met or cared for." (R. at 486).

The psychologist explained children found in homes with those conditions "tend to have higher levels of what we call internalizing behaviors than children who have experienced abuse, like physical or sexual abuse." (R. at 486). She went

on to talk about the lack of "appropriate modeling" for the children such as the lack of toilet training, and abnormal social interactions. (R. at 488- 96).

The government did not ask the psychologist to specify the likelihood and severity of any harm to the children by being locked in their rooms.

In describing the overall "delays" she observed in the children, the psychologist noted that she did not ". . . think those delays developed only in 2 and a half months [the timeframe in the specifications]." (R. at 514). Importantly, the psychologist explained that the delays occurred *independently* of where the kids were physically located. (R. at 515, lines 18-22) (emphasis added)

Next, the government called Dr. SD, a pediatrician with no prior knowledge of the case, who explained the causes of and risks associated with diaper rash. (R. at 520, 525-29, 534). He discussed the types of "theoretical" infections when there is fecal matter "throughout the environment." (R. at 529; 531). He also explained that there is a correlation between age and immunity for children but did not elaborate on whether there is a greater likelihood of infection for children exposed to fecal matter or the likelihood/probability of an infection. (R. at 529). For example, "in the animal urine you can have leptospirosis, which is very rare. You don't see them that much, but *theoretically*, yes you can get an infection." (R. at 531) (emphasis added).

When asked by the government, the pediatrician explained that he was not sure of a child's risk of infection of contracting shigella, but one could *possibly* get campylobacter or salmonella. (R. at 532)(emphasis added).

Next, the government asked the pediatrician to address the risks "associated with persistent human fecal matter . . . for children under the age of 5[.]" (R. at 532). He described the possibility of a child contracting "salmonella, shigella, campylobacter, E.Coli infections", but he did not comment on the likelihood or prevalence regarding a child developing the afflictions. (R. at 532).

The government asked the pediatrician "[w]hat types of risks would you see if a child under the age of 5 were left unattended for long periods of time?" (R. at 533). He responded they might be affected by the lack of a caregiver, could incur a physical injury, or might go without food. (R. at 533). The pediatrician did not explain the likelihood or severity of any of these potential harms, just that they are possibilities. (R. at 534). The government did not pose the facts in the case to him in order to elicit his opinion as to the likelihood that any of the children would be harmed by being locked in a room or locked in a room with no adult present.

The pediatrician additionally explained that the transmission of headlice requires direct contact *with another person* who is infested with headlice. (R. at 530). He stated that it can take a week for nits (eggs) to hatch and produce baby lice, and that it is fair to say it takes longer than one day. (R. at 531).

I. WHETHER THE EVIDENCE SUPPORTING APPELLANT'S CONVICTION WAS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE EVIDENCE FAILED TO LINK APPELLANT TO THE CHARGED ACTUS REUS AND/OR HOW THAT ACTUS REUS ENDANGERED THE CHILDREN

Standard of Review

Once an appellant makes a specific showing of a deficiency in proof, [this court] conduct[s] a de novo review of the controverted questions of fact." *United States v. Scott*, Army 20220450, *3 (Army Ct. Crim. App. 2023); *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

After appellant makes a specific showing of a deficiency in proof, the test for factual sufficiency is whether, after weighing the evidence in the record of trial and giving appropriate deference for not having personally observed the witnesses, the members of [this] court are themselves clearly convinced that the finding of guilt was against the weight of the evidence. *Scott*, Army 20220450, *3 (quoting Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12); *Rosario*, 76 M.J. 114, 117.

"[N]either a presumption of innocence nor a presumption of guilt" is applied, but the court "must make its own independent determination as to whether the evidence constitutes proof of *each required element* beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (emphasis added); *Scott*, Army 20220450, *3 (rejecting a rebuttable presumption of guilt). In conducting its *de novo* review, the Court does not abandon logic and common sense. *See Washington*, 57 M.J. at 402–03 (Baker, J. concurring).

Law

A. Factual and Legal Sufficiency

In weighing factual sufficiency, the service court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *Id*. at 399; *Scott*, Army 20220450, *3. As the highest military court explained:

> Essentially, the Court of Military Review [now Court of Criminal Appeals] provides a *de novo* trial on the record at appellate level, with full authority to disbelieve the witnesses, determine issues of fact, approve or disapprove findings of guilty, and, within the limits set by the sentence approved below, to judge the appropriateness of the accused's punishment.

United States v. Crider, 46 C.M.R. 108, 111 (C.M.A. 1973) (cited in *United States v. Leak*, 61 M.J. 234, 244 (C.A.A.F. 2005)).

However, "reasonable doubt" means the same thing with respect to this Court's factual sufficiency determination under Article 66(c),[7] UCMJ, as it did at trial. "[B]eyond a reasonable doubt" means that if "the record leaves [it] with a fair and rational hypothesis other than guilt," the Court is required to set aside the conviction for insufficient evidence. *United States v. Whisenhunt*, ARMY 20170274, 2019 CCA Lexis 244 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.) (reversing cadet's sexual assault conviction for factual insufficiency because the record also supported the appellant's scenario that the alleged victim was a willing and active participant); *see also United States v. Gumbs*, ARMY 20220066, 2023 CCA Lexis 432 (Army Ct. Crim. App. 5 October 2023) (summ. Disp.) (reversing conviction for abusive sexual contact where government's evidence as to the actus reus was circumstantial and there was another explanation for how the event unfolded).

B. Child Endangerment Requires that the Charged "Actus Reus" Must Endanger the Children.

The third element for child endangerment has two requirements: (1) the accused's acts must endanger the child's safety; and (2) the accused's mental state must be that of "culpable negligence." *United States v. Plant*, 74 M.J. 297, 300, n.4 (C.A.A.F. 2015). Actual physical or mental harm to the child is not required. *Id*.

[7] Now at Article 66(d)(1), UCMJ.

Instead the offense requires that an accused's *charged* "actions reasonably could have caused physical or mental harm or suffering." *Id.* (noting to "endanger" means a "'reasonable probability,' not merely a reasonable possibility, of harm"). This court noted that the 'threshold of risk' for proving endangerment is higher than the threshold for proving culpable negligence. *United States v. Koth*, ARMY 20150179, 2017 CCA LEXIS 145, at *7 (Army Ct. Crim. App. 16 Mar. 2017) **(**summ. disp**).**

i. The court's review is limited to the explicit language of the specification and may not rely on the surrounding circumstances of other alleged misconduct.

Just as our higher court held in *Reece*, the government must prove the specification *it charged* especially when there has not been variance. *United States v. Reece*, 76 M.J. 297 (C.A.A.F. 2017). For example, in *Plant*, the Court of Appeals for the Armed Forces (C.A.A.F.) reversed the Court of Criminal Appeals because the charged actus reus itself, as opposed to other surrounding circumstances, was not legally sufficient to support the finding of appellant's guilt with respect to child endangerment. *Plant*, 74 M.J. at 300. In *Plant*, the government claimed that the accused endangered his thirteen-month-old son "by using alcohol and cocaine" at his house party. *Id.* at 298. The panel found the accused guilty of child endangerment but excepted "and cocaine." *Id*. at 299.

The C.A.A.F. started its review by noting that it was limited to the facts alleged in the specification (as modified by the panel). *Id*. at 299. Therefore, it

ignored: the cocaine, that the accused "invit[ed] strangers into his home while his young son was present," and his "sexually assaulting two young women in the same residence in which his son slept." *Id*. When looking at the charged actus reus, all that was left to review was the accused "drinking an excessive amount of alcohol while caring for his young child," which the court determined was "irresponsible," but not enough to result in a reasonable probability that the child would be harmed. *Id*. In summary, when the government's charged actus reus is not the cause of alleged harm, the conviction could not stand. *Id.*

ii. An inference of harm is not enough, the government must show the "likelihood and severity" of the harm posed to the child as a result of appellant's act.

On top of proving the charged actus reus, the government must also show the likelihood and severity of the harm the act posed to the children. In *United States v. Pacheco*, this court overturned a child endangerment conviction because the government could not show "the likelihood and severity" of the harm that was alleged from the actus reus. *United States v. Pacheco*, ARMY 20170177, 2019 CCA LEXIS 77, at*6 (Army Ct. Crim. App. 26 Feb. 2019) (mem.op).

In *Pacheco*, the accused was playing video games in his "man cave" with his four-year-old son. *Id.* at *2. After his wife yelled at him for ignoring her, the accused pushed his wife to the ground, causing her to hit her head on the floor. *Id.* at *3. The accused then wrapped an extension cord around her hands. *Id*. After his

wife and son pleaded with him to unravel the cord because "she's calm," the accused did so. *Id*. The son would later bring up this incident in conversations indicating its effect on his psyche. *Id*.

In charging the accused with child endangerment, the government alleged that the accused endangered his son's mental health by assaulting his wife in front of her son. *Id*. at *5. This court reasonably inferred – in the absence of the son's testimony – that he witnessed the abuse. *Id*. At *6. This court recognized that this abuse "might have cause[d] mental harm and anguish to [the son]." *Id*. But, without "testimony explaining the *likelihood and severity* of the mental harm that [the son] would suffer from watching his father abuse his mother", this court was not convinced beyond a reasonable doubt. *Id*. (emphasis added).

Argument

The government failed for three reasons. First, the government did not establish that appellant locked his children in their rooms or eliminate the reasonable possibility that his wife locked the door. Second, setting aside who was to blame, the government only established one occasion in which appellant's children were locked in their rooms without an adult present in the home. Third, the government failed to establish that being locked in their rooms led to a reasonable probability of harm to the children.

The government's case was vacuous; it is complete speculation as to what appellant actually did, was doing, and where he or his children were between 5 May and 15 July 2022. For these reasons, the government failed to exclude an obviously fair and rational hypothesis other than appellant's guilt: that it was his wife that locked the children in their rooms or that the children were actually locked in their rooms with no adult present on *any other day* except 15 July 2022. *See Plant*, 74 M.J. at 300 ("a criminal conviction for child endangerment requires more than a showing of irresponsible behavior coupled with speculation by the prosecution about what possibly could have happened . . .") (underlining in original).

But even if the government had shown that appellant locked his children in their rooms, they failed to prove that he endangered his children in doing so. This is because, like *Pacheco*, the government did not provide expert testimony to the "likelihood and severity of harm" posed to the children by being locked in their rooms. *Pacheco* at *6. It was not enough to infer the possibility of harm, the government had to prove the "reasonable probability" of harm. *Id*.

A. The government did not present any evidence that appellant ever locked his children in their rooms.

Given the specific charging theory in this case, the government had to show that appellant locked the door. There is zero evidence that he did so.

It is not enough for the government to argue that appellant left the home while his children were locked in their rooms. (R. at 549). The plain reading of each specification is that appellant locked his children in their rooms and then left them in the home "without an adult present." (Charge Sheet). There are several reasons to believe the government set out to prove this very precise act.

First, the government purposefully deviated from the sample specification. Second, to "lock" means to perform a specific act. Lastly, the government focused on the locking aspect of the doors confining appellant's children. *See infra* n.9.

i. The government's "locking" theory is clear because it deviated from the sample specification.

The sample specifications for Article 119b offers that an accused endangers their child by "*leaving* the said _____ unattended . . . with no adult present in the home." *MCM*, pt. IV, para. 59e(2) (emphasis added). Here, the government departed from the MCM's language, by deliberately altering "leaving" to "locking." (Charge Sheet). As every word should be given full effect, this court should interpret the word "lock" to mean something different than "leave." When the words "are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Reece*, 76 M.J. at 301 (internal citations omitted).

ii. The difference matters, to "lock" is not synonymous with to "leave."

Leave and lock are very different. To lock means "to fasten the lock of" or "to fasten in or out or to make secure or inaccessible by or as if by means of

locks." *"Lock." Merriam-Webster.com Dictionary,* Merriam-Webster, https://www.merriam-webster.com/dictionary/lock. Accessed 11 Sep. 2023. To leave means to "desert or abandon." "*Leave*." *Merriam-Webster.com Dictionary,* Merriam-Webster, https://www.merriam-webster.com/dictionary/leave. Accessed 11 Sep. 2023.

That distinction is paramount. Giving full effect to the phrase "locking the said [child]" means that what the government had to establish was that *appellant pressed the button on the doorknob*; not just that he left the home when his wife may have later locked the children away. That appellant abandoned his children is implied as the offense was only complete "with no adult present in the home."

iii. The government focused the court's attention on the doors indicating their focus on the "locking" element.

The government homed in, dozens of times, on the inverted doors and whether they were locked. As an example, the government asked EH to comment on her observations of the doors leading to the children's bedrooms.

> Q: Okay. What, if anything, did you notice about the door to that room?
> A: Just that the – he was locked in. The doorknob had been switched around to lock from the hallway.
> Q: And the lock was engaged, or no?
> A: Yes, ma'am, yes.
> Q: Okay. And that the locking mechanism was facing the hallway or inside the room?
> A: The hallway.

(R. at 199-200).

The government later discussed the functioning of these doors' locking mechanism with four *additional* witnesses. (R. at 233, 263-264, 303, 313, 441, 443). They even called a housing inspector from the Fort Moore Directorate of Public Works to testify to the unsurprising fact that these doors were not meant to lock from the hallway. (R. at 464, 469-470). [8]

The distinction between the locked room and the rest of the house was found throughout the entire trial process. For example, the Article 32 PHO broke those two areas out in his analysis. (*Compare* PHO's Report para 3.f.(1).(i).(2).C *with* 3.f.(1).(i).(2).E)). Likewise, the government highlighted the actus reus/element of "locking" in its opening (*See e.g.,* R. at 185 ("[s]he watched the kids on Cinco De Mayo. She saw the kids locked in their rooms"); 186 ("Detective [redacted] . . .who witnessed the kids having to be unlocked, who witnessed them being locked in those rooms"); 187 ("You'll hear from [TJ] from Housing… and he's going to talk about why locks face the way they do and how those locks were turned around")).

The government also emphasized and reemphasized the actus reus/element of 'locking' in it closing. (*See e.g.*, R. at 548 ("[h]e left them in locked rooms"); 550 ("through culpable negligence by locking them in a room with no adult present

[8] The government questioned witnesses regarding the "locking" element of the specifications with virtually every witness who could have visited the house. *See e.g.*, R. at 182; 183; 185; 186; 187; 197; 199; 201; 213; 263; 265-66; 302; 313; 441-43; 445; 466; 469-70. This was also highlighted in the government's closing *See e.g.,* R. at 548, 550-556, 558.

in the home"); 550 ("[s]o, I've highlighted some words I want to focus on here first, Your Honor, this aspect of locking them in a room"); 551 ("[s]he finds them locked in those rooms. So, they're locked in on Cinco de Mayo"); 551 ("[o]f course, Detective [redacted] finds them locked in on 15 July; the accused, in fact, unlocks them. You heard testimony from Mr. [TJ] explaining that this home did not have those locks set up to engage from the hallway"); 552 ("not just the rooms they were locked in that night"); 553-54 ("[t]hat doesn't just happen in one day. So that's locking -- that's being left home alone"); 555 ("Your Honor, you saw the photos of the way the locks were set up in that house, those privacy locks for those homes that are meant to be unlockable from inside of those rooms but were, in fact, turned around"); 556 ("[t]his is in their room where they're locked for hours"); 558 ("[h]e knew he was endangering his children, Your Honor. He knew his kids shouldn't have been locked in their rooms, forgotten in filth")).

In short, the government presented its evidence in line with its charging decision demonstrating that the act of locking was the "wrong" appellant did.

B. The government failed to prove that the children were locked in their rooms with no adult present in the home on divers occasions.

The completed offense required not just that the children were locked in their rooms, but, that they were locked with no adult present in the home. The government only established that the children were with no adult present in the home on 15 July 2022 and it is unknown who left first.

i. The children were not locked in their rooms with no adult present in the home on 5 May 2022.

The government alleged that appellant's misconduct began on 5 May 2022, when RM asked their neighbor, EH, to babysit their children. (R. at 551). No offense occurred that night as there was always an adult present in the home the entire evening. While the children were locked up on 5 May 2022 as *RM* explained to EH, the evidence showed that either appellant, RM, or EH were at the home. The only time the children were left unattended in their rooms with no adult present in the home was after EH decided to finish out her babysitting shift on appellant's front porch by putting the kids back in their rooms and going outside. (R. at 206).

ii. There is no evidence that the children were locked in their rooms with no adult in the home between 6 May 2022 and 14 July 2022.

Without appellant or RM testifying, it is a complete guess as to what was going on in appellant's home between 6 May and 14 July 2022 (including the driver of the tan SUV that occasionally babysat for the children).

Lacking direct evidence, the government proposed three ways to infer that the children were locked in their rooms in this timeframe. First, that there were many occasions when appellant and RM *might* have both been outside the home. Second, when they left on other occasions, the children *may* not always have been with them. Third, that the buildup of filth in the children's rooms and the extent of

their injuries suggest the injuries took time to develop. All suppositions fail for the same reason; they are speculative. *See Plant*, 74 M.J. at 300 ("a criminal conviction for child endangerment requires more than a showing of irresponsible behavior coupled with speculation by the prosecution about what possibly could have happened . . .") (underlining in original).

a. The government did not show "No Adult Present" in this timeframe or where the children were.

In their closing argument, the government included a PowerPoint presentation with a slide titled "No Adult Present." (R. at 554; App. Ex. X, pg. 7). The government compared RM's VFW timecard and appellant's work schedule and came up with fifteen instances between 14 June and 15 July 2022 where both appellant and RM had purportedly both left the home and presumably, the children had been left inside.

For six of those instances,[9] RM worked her VFW shift while appellant had either a recovery day or day off work. (*See* R. 450-453). There is no adult present only if one believes appellant does not stay home under these circumstances especially since the government presented no witnesses to discuss whether appellant's vehicle was or was not present.

[9] 18 June 2022, 24 June 2022 (the government erroneously listed this day as a "normal work day" for appellant – it was not. It was a recovery day), 2 July 2022, 3 July 2022, 9 July 2022, and 11 July 2022.

For another six,[10] RM began and ended her VFW shift while appellant was at work indicating that it is possible they both were not present. If there was no adult present in the home, then it was because RM left the children as her timecard placed her at work after the normal duty day started according to appellant's First Sergeant. (R. at 432, 450-53; Pros. Ex. 6, 8-10).

With respect to 25 June 2022, the government did not establish whether the on-post and VFW July Fourth celebrations coincided or not.[11] But again, no adult present does not answer the question of where the kids are. ES, the FRG leader and nurse, mentioned seeing RM at the celebration, but only in passing (R. at 424, lines 14-15). An installation Fourth of July celebration is also an environment where children/families were scattered and playing.

On 14 July 2022, appellant was on twenty-four hour duty at work. (Pros. Ex. 10). All the government offered for this date was that both appellant and RM's vehicles left the Myers' home at some point. No witness saw the vehicles leave or return nor who was in the vehicles.

[10] 14 June 2022, 16 June 2022, 17 June 2022, 29 June 2022, 6 July 2022, and 13 July 2022.

[11] Contrary to the "No Adult Present" slide in Appellant Exhibit X, ZH did not say what time appellant told him he was at the VFW.

Pointing to this information, the government argued that ". . . these are all periods where the government can establish neither parent was home with the kids." (R. at 555). Apparently "establishing" is the same as "guessing."

The government's speculation only works if one presumes that appellant never stayed home when he was not working, that the children never left the home despite the vehicles having car seats (R. at 238, 338), that there were no other childcare options, and they did not have a babysitter show up to their home.

There is contrary evidence in the record. For example, SFC TH testified that RM brought her children to work. (R. at 238). This indicates that she had the means and capability to drive the children (and did so). Likewise, EH noted that she had to stay on 5 May 2022 to replace RM's babysitter and had seen someone regularly come to appellant's home after RM began working. (R. at 196, 211).

Further, the government's guess only works if one believes their neighbors, EH and SFC TH, constantly monitored appellant's comings and goings; the same for his children and RM. Only if EH and SFC TH perfectly recalled appellant and RM's activities and never left their own home would the government's three point compounded conjecture get linked to specific dates and times.

b. "That doesn't just happen in one day;" the government cannot distinguish the overall state of the home from the children's rooms.

The government emphasized the trash buildup in their rooms to suggest the children must have been frequently locked in. (R. at 552-54, 556). A fair and

rational inference is not that these children were frequently locked in, but that appellant and RM were generally unclean people. It also ignores the real possibility that the kids' rooms could be unlocked and the children chose to play in their where they each had televisions and toys. (Pros. Ex. 1 pg 31, 35, 36, 60, 61).

Witness after witness described the waft of feces and urine greeting them after entering appellant's front door. (R. at 196, 232, 263, 290, 406, 439). Everyone who stepped inside appellant's home on 15 July recounted a disheveled scene: feces engrained in the floor, on the walls, and on objects, throughout the entire house. (R. at 232, 263, 266, 290).

Outside of the children's rooms and throughout the house were overflowing litter boxes, piles of soiled diapers and trash, and evidence of a disorganized and disgusting home. (R. at 266, 301, 307, 311-12, 314, Pros. Ex. 1).

In short, the state of the children's rooms was no different than the rest of appellant's home. If the children's rooms were a disaster while the rest of the house was pristine, the government's argument may hold more water. This was not the case.

iii. There is no evidence to suggest who locked the children up on 15 July 2022.

Who locked the children in their rooms on 15 July 2022? This is the *only day* the government can prove the children were locked in their rooms with no adult present in the home.

But, the government offered no evidence to prove that it was appellant that locked his children in their rooms. And, there is no evidence from which to infer that it was appellant, rather than RM, that locked the children away.

No witness observed appellant or RM leave their home on 15 July 2022. That day, it was the absence of both appellant and RM's vehicles that prompted EH and SFC TH to call law enforcement. (R. at 212). Det. [redacted] noted that appellant and RM arrived at their home at different times in different vehicles. (R. at 262, 269). The only evidence presented as to their whereabouts was that RM had been working at the VFW. (Pros. Ex. 6) and there was no evidence as to appellant's whereabouts before he arrived to find Det. [redacted] at his home.

At best, one can believe either appellant or RM locked the children away. It is a coin flip, meaning, the government failed to exclude a fair and reasonable hypothesis other than appellant's guilt just like in *Gumbs*.

C. Irrespective of whether the appellant actually locked the door, the government did not establish the likelihood and severity of any harm the children might suffer.

While the government conducted a wrenching survey of appellant's home, all that was pertinent to the charged misconduct were the hazardous conditions within the children's rooms in which they were locked. Even though the government presented evidence of unsanitary conditions within these rooms, they

failed to prove these hazards presented a reasonable probability of harm as required by *Plant* and *Pacheco*.

It is indisputable that the children were exposed to feces and left unsupervised for some period of time on 15 July 2022. Perhaps the children were locked in their rooms on other days. It is reasonable to infer that being locked in a room, under these conditions, may subject them to some degree of theoretical harm. But, like *Pacheco*, the government failed to supplement these inferences with testimony explaining the "likelihood and severity" of harm the children might suffer by being "lock[ed] . . . in the room with no adult home." *Pacheco* at *6.

Both government experts only spoke of risks and possibilities (even using the word "theoretical" (R. at 531)), neither spoke of probabilities of injuries or the likelihood and severity of any such injury.

And as in *Plant*, this court cannot look outside of the specification to determine whether appellant endangered his children in general; the review must be limited to the unique actus reus charged; meaning the unique harm to the children by being locked in their rooms with no adult at home.

D. The government's own expert undercuts their evidence that being "locked" in their rooms with "no adult home" caused [redacted] and [redacted] headlice.

The government's own expert undermined their case. The pediatrician testified that headlice must be caught from others, and it takes time to develop. (R. at 530-31). Here, each child had headlice. The evidence showed that it takes days,

if not more than a week, for headlice to appear on a person's scalp and must be caught from interactions with *another* infected person. (R. at 530-31). This means the headlice were not a result of being locked in the rooms and isolated since there is zero evidence other infected persons entered the children's rooms. This is exactly like *Plant*, just general poor conditions unrelated to the charged 'wrong.'

E. Appellant's convictions were legally and factually insufficient.

For both legal and factual sufficiency, the government's case fails for the same reasons. There was no direct evidence, and even less circumstantial evidence, showing that appellant committed the requisite *actus reus* – locking his children in their rooms. Even disregarding who locked the children away, there is only *one day* in which the children were locked in their room with no adult present in the room – 15 July 2022. But even on this day, the record is devoid of any evidence showing who locked the door or that the circumstances those rooms or where appellant had been or what he had been doing.

II. WHETHER THE MILITARY JUDGE ERRONEOUSLY FOUND THAT LAW ENFORCEMENT'S ENTRY INTO APPELLANT'S HOME WAS OBJECTIVELY REASONABLE UNDER THE EMERGENCY AID EXCEPTION TO THE FOURTH AMENDMENT

Relevant Facts

At 2015 on 15 July 2022, law enforcement received an anonymous call requesting a welfare check of appellant's children. (R. at 20, 58). The anonymous

caller related that "children were being left unattended at a residence." (R. at 20; 242; App. Ex. V, Encl. A). The caller did not describe the conditions of the home or that they saw the homeowner's vehicles leave. (R. 20; 242).

A. What the detective claims the anonymous caller told him.

Detective [redacted] arrived at appellant's home at approximately 2050. (R. at 59). Upon arrival, he rang the doorbell and knocked on the door but heard nothing. (R. at 21). He did not see any cars in appellant's driveway. (R. at 21).

Det. [redacted] then contacted the anonymous caller to gather more information. (R. at 21). The caller stated that the children – aged two, three, and four - were left unattended, and Det [redacted] *claimed* that the caller had observed appellant and appellant's wife leave their home earlier. (R. at 21).[12]

Additionally, Det [redacted] *claimed* the caller remarked that the children were in poor condition and lived in an unhealthy environment with feces throughout the home and on the walls. (R. at 21-22).[13] Lastly, Det [redacted] *claims* the caller stated that

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[12] SFC TH, who was the anonymous caller, relayed his wife's (EH) observations to law enforcement. (R. at 241). In her testimony, EH stated that she did not see either of appellant's vehicles in his driveway on 15 July. (R. at 212-13). She did not claim that she saw either appellant or his wife leave their home on 15 July 2023. (R. at 212-13). SFC TH does not say that he told Det. [redacted] that they observed the vehicles leave. (R. at 241-43, 252).

[13] Importantly, this portion of the call regarding the unsanitary conditions/feces was not contained in Det. [redacted] report (App. Ex. V, Encl. A), the two other MP's reports (App. Ex. V, Encl. A, B); or the other MP's testimony. (*see e.g.,* R. at 114-16). Since every other witness denies the conditions of the house were mentioned in the call, including the caller, that finding of fact is clearly erroneous.

the children were locked in their rooms behind inverted doors. (R. at 22).[14] To the contrary, SGT [redacted] notes the follow up call (which was not contained in Det [redacted] report), but relays only that the caller indicated "the parents leave the house quite frequently and [the caller] never see (sic) the children fall behind when they leave, and today was another one of those days, *but [the caller] wasn't too sure*." (App. Ex. V, Encl. C) (emphasis added). No other information about the conditions were mentioned according to SGT [redacted].

B. Detective [redacted] does not question the basis for the caller's knowledge, attempt to contact appellant or his wife, or seek out more clarifying information.

The caller never established their relationship to appellant or how they acquired the information provided in their call. Specifically, the caller did not explain if they had ever been in appellant's home, or if they had, when they had been in appellant's home. The caller did not allege that appellant's children had previously been injured or if they needed medical assistance. (*See e.g.,* R. at 103).

[14] SFC TH, who was the caller, again, does not indicate that he provided the information about the doors to Det. [redacted] (R. at 242-43; 252). That discussion is also not contained in Det. [redacted] report (App. Ex. V, Encl. A), the two other MP's reports (App. Ex. V, Encl. A, B); or the other MP's testimony. (*see e.g.,* R. at 114-16). This again puts Det. [redacted] at odds with all other testimony and evidence.

After the call, Det. [redacted] renewed similar efforts to contact anyone within appellant's home. (R. at 22). For approximately four minutes, Det. [redacted] knocked on the doors, banged on walls, and circled to the back of the home. (R. at 22-3; 102).[15]

At no point did Det. [redacted] call appellant or his wife, question neighbors regarding the status of appellant's children, or call an on call magistrate.

C. Because he did not observe anyone injured or in need of medical assistance, Det. [redacted] wanted to check on the children's welfare.

Finally, Det. [redacted] observed a two-year-old boy behind a second story window with the aid of his flashlight. (R. at 23-24). The child waved at them. (R. at 80). Although the witnesses acknowledge that it could be dangerous for a child left at home alone (*see e.g.,* R. at 68), the child did not appear in any immediate danger. (R. at 80, ln. 21-23).

The boy appeared dirty and pressed his hands against a dirty window. (R. at 23). Det. [redacted] thereafter went back to the front of the home and thought to call for emergency medical assistance as he did not know if there was a "medical emergency going on inside." (R. at 24).

As to what could prompt such a medical emergency, Det. [redacted] pointed to the apparent lack of adult supervision coupled with a young child's inability to protect themselves and knack for "put[ting] things in electrical sockets, swallowing

[15] SGT [redacted] indicated that he, not Det. [redacted] was the one who rang the doorbell and knocked. (R. at 102).

things" or "they could have gotten - - even just furniture falling over on them." (R. at 25). He did not know "if they've eaten" or perhaps the children "even started a fire in the home" despite there being no smoke or smell of smoke. (R. at 25). Det. [redacted] was also concerned about the children's hygiene. (R. at 26).

D. Det. [redacted] unnecessarily compels appellant to allow law enforcement to enter his home to check on the children's welfare.

Appellant then pulled up to the home. After Det. [redacted] explained his presence, he asked appellant whether anyone was inside the home, to which appellant replied "no." (R. at 26).[16] In response, Det. [redacted] told appellant that ". . . I didn't want to have any conversation other than I just wanted to see the welfare of the children." (R. at 26-7). Det. [redacted] never stated that appellant was uncooperative, disorderly, or combative.

Because he felt that Det. [redacted] was ordering him to allow their entry into his home, appellant unlocked his front door. (App. Ex. V, Attach. G).[17] Det. [redacted] then followed appellant into the home and subsequently observed appellant's children emerge from their locked bedrooms. (R. at 27, 30).

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[16] This statement was later suppressed. (App. Ex. VIII).

[17] Although Det. [redacted] denied that appellant asked questions about whether the appellant had to let the detective in or what authority Det. [redacted] had to enter his home, both the appellant and SGT [redacted] (an MP) remember Det. [redacted] stating and appellant asking that. (R. 108-109; 121-22). SGT [redacted] specifically notes the conversation (R. at 109, lines 5-6, 14-22; R. at 121-123) which impeaches Det [redacted] recollection directly, or at least shows Det [redacted] memory is not reliable.

Det. [redacted] wrote his report eighteen days later on 3 August 2022 and left out the follow-on call or details from the phone call. (R. at 43; App. Ex. V., Encl A).

E. The military judge denied the defense motion to suppress law enforcement's warrantless entry into appellant's home.

On 5 December 2022, the defense moved to suppress all evidence derived from the unlawful search of appellant's home. (App. Ex. V). In response, the government responded that the officers' warrantless entry was justified by the emergency aid exception. (App. Ex. VI).

In his ruling on the defense motion, the military judge found that ". . . the officers' entry into the Accused's home under the emergency aid exception to the Fourth Amendment warrant requirement was objectively reasonable." (App. Ex. VIII, p. 9). The relevant findings of fact the military judge relied on are numbers two and five. Number two states " . . . an anonymous caller reported . . . that several young children were left unattended . . ." (App. Ex. VIII, p. 2).

Number five has multiple parts in the judge's paragraph: "the caller

> [a] told DET [redacted] that they were familiar with the Accused and the house in which he and his family lived.
> [b] the children's ages were two, three, and four years and that they were often left in the home alone.
> [c] also said that the conditions inside the home were unsanitary and that they believed the children were often locked in their bedrooms while the parents were away.
> [d] said that before he called 911 he watched the parents leave the house that evening but did not see any children accompanying the Accused or his wife when they left."

(App. Ex. VIII, p.2).

The military judge's analysis/ruling relies on those facts stating "that very young children were home alone *under conditions* that posed an immediate danger to their safety. The officers responded to a call that three young children were home alone and *were being kept in unsanitary conditions*." (App. Ex. VIII, p. 9) (emphasis added). He noted that "while the children were no longer 'alone' as their father, the Accused, was now home and could see to their care, whether the children were in immediate harm or needed help *was unknown* to the officers, as well as to the Accused." (App. Ex. VIII, p. 9) (emphasis added). Finally, "[w]hile the officers were able to confirm the relative safety of one child from outside the home, they were unable to see whether the other two children were in need of immediate care." (App. Ex. VIII, p. 9). The judge concluded that "based on all the evidence known to the officers it is reasonable to conclude that the officers needed to ensure that the children were safe and that they did not require immediate emergency care." (App. Ex. VIII, p. 9).

F. Testimony from the "anonymous caller" contradicts the evidence supporting the military judge's findings of fact and conclusions of law.

The government called SFC TH as a witness. (R. at 226). Sergeant First Class TH stated that he called law enforcement to report his concerns about appellant's children. (R. at 241-42). Regarding what prompted his call to law enforcement, SFC TH emphasized that "I did not observe anything. My wife had

observed it." (R. at 241). He went on to tell law enforcement that ". . . our neighbor is, you know, we're pretty certain is leaving their kids unattended in a home." (R. at 242). When Det. [redacted] called him back, SFC TH would tell him ". . . like I'm not 100 percent certain of anything. I'm not in their house, you know." (R. at 243).

EH testified she did not see feces-smeared walls or feces encrusted within the floors of the children's rooms so she did not relay that information to her husband/tell that to Det [redacted] (R. at 212-17).

Specifically, on 15 July 2023, EH did not see appellant, his wife, or their children. (R. at 212). All she noticed was that at approximately 1930, both of appellant's vehicles were gone. (R. at 212-13). She did not see whether appellant or his wife left their home without their children. (R. at 212-13).

At trial, Det. [redacted] was the only witness that saw and testified that the door was locked to the children's rooms when no adult was home during his entry to the home under the emergency aid exception. (R. at 181; R. at 263-64).

Standard of Review

The court reviews a military judge's ruling on a motion to suppress for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *Id*.

Law

A. The warrantless entry into a home is unreasonable subject to few exceptions.

"Physical entry of the home is the chief evil against which the working of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590.

To break that "firm line," warrants are required to search a person's home unless the exigencies of the situation make the needs of law enforcement *so compelling* that the warrantless search is objectively reasonable under the Fourth Amendment. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (emphasis added); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (noting that a "search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well-delineated exceptions." (internal quotation and citations omitted)).

Under exigent circumstances, the law is well settled that absent an immediate emergency, warrantless entry into a home is unconstitutional "even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton*, 445 U.S. at 588.

"[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned." *Stanton v. Sims*, 571 U.S. 3, 8 (2013) (internal quotation omitted). That said, the warrant requirement may yield in those situations where exigent circumstances *demand* that law enforcement agents act without delay." *See Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (emphasis added).

B. The emergency aid exception allows law enforcement to enter the home without a warrant to assist someone in need of immediate aid or to protect an occupant from imminent injury.

One of the narrowest exceptions under the umbrella of exigent circumstances is the "emergency aid" exception. *See Linicomn v. Hill*, 902 F.3d 529, 535-36 (5th Cir. 2018) ("We have declined to apply the emergency aid exception absent strong evidence of an emergency at the scene or an imminent need for medical attention"). Unlike other exigent circumstances like hot pursuit, concrete facts supporting a reasonable belief that someone is injured are required. *See United States v. Arch*, 7 F.3d 1300, 1304 n.3 (7th Cir. 1993) (recognizing that the emergency aid doctrine "does not permit the police to enter someone's home without a warrant based solely on an inchoate hunch that an injured person might be present; there must instead be concrete facts rendering it reasonable to believe that someone inside needs medical attention" (citations omitted)).

Even in the context of broader exigent circumstances than emergency aid, federal courts maintain a narrow view of the exceptions since police can often quickly obtain a warrant. *See e.g., United States v. Saari*, 272 F.3d 804, 812 (6th Cir. 2001) (finding that exigent circumstances did not exist when police officers responded to a "shots fired call" at a residence and observed a suspect inside a residence holding what appeared to be a gun because no threats had been made, nor a crime committed in the officer's presence).

i. The Supreme Court has taken a narrow view of immediate emergency aid.

The Supreme Court has taken a narrow view of immediate emergency aid and has only found it in cases where an actual injury was observed or strong indications of an injury/violence. In *Mincey*, the Court recognized that the Fourth Amendment allows police officers to make warrantless entries and searches when they reasonably believe that a person within needs immediate emergency aid. 437 U.S. at 392. However, the Court emphasized that such a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation." *Id*. at 393 (internal quotations omitted); *see Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Two Supreme Court opinions illustrate the application of the immediate emergency aid exception and provide the measuring stick for the exceptions' language of: "in need of *immediate* aid" and "to protect an occupant from *imminent* injury." *Stuart*, 547 U.S. at 403 (emphasis added).

In *Stuart*, law enforcement responded to a call regarding a house party. *Id*. at 400. Upon arriving, the officers moved to the backyard and heard shouting from inside the home and observed juveniles drinking beer. *Id*. at 401. Through a window, the officers saw a fight unfolding; four adults were attempting, with some difficulty, to restrain a juvenile. *Id*. The juvenile broke free and punched an adult in his face. *Id.* He spit out blood. *Id*. Then, the officers entered the home. *Id*. Under these circumstances, the Court found it "plainly reasonable" for the officers to enter the house and stop the emergency because "they had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." *Id*.

Likewise, in *Michigan v. Fisher*, officers responded to a disturbance complaint and found a chaotic scene: a smashed pickup truck with blood on the hood, damaged fenceposts along the side of the property, and blood the door to the house. 558 U.S. 45, 45-46 (2009). Through a window, officers could see the defendant inside the home, screaming and throwing things. *Id* at 46. The officers asked defendant if he needed medical attention after observing a cut on his hand. *Id*. After defendant declined their advances, the officers entered the home. *Id*.

The Court noted that the officers found "signs of a recent injury" and saw "violent behavior inside" the home. *Id*. at 48. It held "[i]t would be objectively reasonable to believe that [defendant's] projectiles might have a human target

(perhaps a spouse or child), or that [he] would hurt himself in the course of his rage", and therefore, the officer's entry was reasonable. *Id*.

Federal courts have consistently held the line keeping the emergency aid exception narrower than other subcategories of the exigent circumstances' exception.[18]

ii. Adding children to the equation does not broaden the applicability of the emergency aid exception.

Unlike combustible domestic violence cases or potential drug overdose cases, child cases that justify circumventing a warrant to enter a home are a narrower niche and often require some form of concrete facts/emergency. *See e.g., United States v. Gillespie*, 332 F. Supp. 2d 923, 928 (W.D. Va. 2004); *Ford v. D.C.*, 2016 U.S. Dist. LEXIS 107962 (D.D.C. 16 Aug 2016).

In both *Gillespie* and *Ford*, the courts determined no exigent circumstances existed to justify the warrantless search of a home when law enforcement failed to investigate their suspicion of an unattended child in the home before entering. In

[18] *See e.g., Shattuck v. Anderson*, 2021 U.S. Dist. LEXIS 24498, *46-47 ("Concrete facts supporting a reasonable likelihood that someone is injured are required"); *Arch*, 7 F. 3d at 1304 n.3 (the emergency aid doctrine "does not permit the police to enter someone's home or hotel room without a warrant based solely on an inchoate hunch that an injured person might be present; there must instead be concrete facts rendering it reasonable to believe that someone inside needs medical attention"); *Andrews v. Hickman County*, 700 F.3d 845, 855 (6th Cir. 2012); *Linicomn v. Hill*, 902 F.3d 529, 535-36 (5th Cir. 2018) ("We have declined to apply the emergency aid exception absent strong evidence of an emergency at the scene or an imminent need for medical attention.").

Gillespie, exigent circumstances did not exist, and the court noted that even with knowledge that two children were left home alone, that an objectively reasonable officer would not assume this rose to the level of an imminent emergency requiring immediate entry. 332 F. Supp. 2d at 928.

Similarly in *Ford*, the Court states that to qualify as a true safety-based exigency, there must be a "true immediacy" or confrontation of "real danger that serious consequences would certainly occur to the police or others." 2016 U.S. Dist. LEXIS 107962 (citing *United States v. Williams*, 354 F.3d 497, 504 (6th Cir. 2003). The court found that "[t]he mere possibility of danger does not meet the definition of an exigency that justifies a warrantless entry. *Id*. (citing *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1990).

In *Shattuck*, the court found that the emergency aid exception did not apply when police entered a home after receiving a telephonic report that a father may be sexually abusing his daughter (the second report on this father). *Shattuck*, 2021 U.S. Dist. LEXIS 24498, *10-11. Upon arriving at the house, the officers/social workers heard a child's voice but no one answered the door after repeated knocks from everyone (including a friend of the father). *Id.* at 13-14. Believing the child was home alone, and investigating an extremely serious crime, the officers called a prosecutor to confirm they could enter the residence. *Id.* at *15-16.

After re-calling the prosecutor with an update, the officers called the original telephonic report's source who confirmed the concerns and indicated that the caller could get a hold of the child's mother. *Id.* *16-20. Minutes later, the appellant's spouse (the child's mother) arrived but ignored the officers' questions, got on her cell phone, and walked away from the residence talking on the phone. *Id.* at *20-22. The officers believed that this confirmed that a child was actually home alone, and the wife was covering for the husband, so they forcibly entered the home and then immediately observed the father present. *Id.* at *22-24. However, the officers/social services proceeded to do a cursory search and question the child without the father's permission. *Id.* at *24-27.

In denying the law enforcement officer's request for summary judgment based on emergency aid/exigent circumstances, the court noted that once the officers saw the accused "was home . . . any belief that exigent circumstances existed immediately dissipated." *Id.* at *61-62. Likewise, the officers also observed that the mother had arrived and was present, so the idea that the child was in danger from not having a parent home was dispelled. *Id.* Therefore, entering the home, since the child was no longer alone, was unreasonable and unnecessary without a warrant. *Id.*

During the hearing, the law enforcement officers repeatedly emphasized the nature of the serious allegations against the father and asserted that there was a

reasonable basis to believe that S.S. was abused, neglected, or home alone. *Id.* *55-56. The court responded, "nothing in the allegations suggested that she was being physically injured or was at risk of *imminent* physical injury." *Id.* at *56 (emphasis added).

The court noted that federal circuit courts "took great care . . . to distinguish situations like this one—where a child may potentially be unsupervised, yet also unharmed—from those in which entry is justified by exigent circumstances or the need to render emergency aid." *Id.* at *56-57. The court contrasted a situation where there was a detailed report that was able to be confirmed regarding not only that children were home alone, but the horrible and dangerous conditions inside the home (through looking in windows) stating, "[b]y contrast, officials in this case were investigating allegations made by [a telephonic source], who had not had any recent contact with the [father] and based many of [their] 'gut uncomfortable feelings' on an incident [they] observed" at an earlier time. *Id.* at *57. Furthermore, even if the officer's believed the child was home alone, there was "no affirmative indication that [the child] was in danger of imminent physical harm." *Id.* at *58.

Significantly, the court further distinguished "other emergency aid scenarios [with] the fact that [a parent (the mother)] arrived at the home prior to the forced entry." *Id.* The parent also did not indicate that the child, even if home alone, was

in danger or show any concern that danger was likely. *Id.* Although the officers repeatedly emphasized that the mother would not cooperate or respond to questioning, the court (citing multiple cases) noted that the wife was under "no obligation to answer questions or cooperate with law enforcement." *Id.* at *58-59 (citing *King*, 563 U.S. at 469-70).

Finally, although multiple officers/social service personnel heard a voice, "the voice did not exhibit any signs of distress." *Id.* at *56. Since no one answered the door, it may have been reasonable to believe the child was home alone, "but the [officer]'s have not pointed to any affirmative indication that [the child] was injured, was in imminent danger of being injured, or was presently in need of medical care." *Id.*

On the other hand, in *United States v. Venters,* the Seventh Circuit found exigent circumstances (*not emergency aid*) where the officers had two corroborating reports (one from the hospitalized mother) that the father was cooking methamphetamines at his residence and neglecting the children while the mother was hospitalized. 539 F.3d 801. In *Venters,* the social workers and two police officers travelled to the accused's home to investigate the allegations of child neglect. *Id*. at 805.

When the group arrived, an officer knocked on the door but received no response. *Id*. He looked through a window and "observed that there were feces on

the floor and that the room was extremely cluttered." *Id*. A second officer knocked on the door and, after receiving no answer, looked through a different window, and "saw 'a child on the couch' who 'raised his head," but did not otherwise move." *Id*.

Accordingly, the second officer opened the unlocked door and announced that he was there "to check on the welfare of the children." *Id*. Although he was yelling "at the top of his voice," the child, who had no clothes on and was covered only by a small blanket, did not move. *Id*. Other officers and the social worker then entered the home, discovered the remaining two children—both of whom were "extremely dirty" and "lying naked on a 'very dirty mattress' with no sheets." *Id*. An ambulance was called to assist the children, and an officer located the father in a tool shed behind the house and arrested him for child neglect. *Id*. at 805-06.

On appeal from his conviction, the Seventh Circuit affirmed the district court's denial of the accused's motion to suppress, concluding that officers had probable cause to believe that he was committing child neglect and that exigent circumstances justified their entry into the residence. *Id*. at 807-08. As to exigent circumstances, the court pointed to the officers' knowledge that "for the previous three-to-four days, the [ ] children were living in a dangerous environment that posed serious threats to their well-being: a decrepit, unsanitary house with little or no adult supervision, and where their father regularly used, and probably made, meth in their presence." *Id*. at 808.

A large distinguishing factor from a typical "home-alone" case is that it is well-known that the chemicals and fumes involved in the use and manufacture of meth can be harmful to third parties, especially children, and that when officers observed a child nearly unresponsive on the couch, "it was eminently reasonable for the officers to have feared that [the child's] groggy movements meant that he was sick from meth fumes, was hurt from an accident that occurred while his father was making meth, had ingested the drug, or worse—all scenarios that would have required emergency medical attention." *Id*. "Simply put, there was nothing unreasonable about [the officers'] belief that they needed to enter [the appellant]'s house to provide [the child] emergency medical care . . ." *Id*. (internal citation omitted). However, the Court was careful to limit the scope of its holding, stating:

> [W]e wish to emphasize the narrowness of our determination that exigent circumstances justified [the officers'] entry into [the appellant]'s house. *The situation at the house was not one where [the officers'] knocks simply went unanswered; nor was it a situation where the officers saw that the children were healthy and unharmed inside, but yet unsupervised.* Instead, it was a situation where [the officers] (1) were aware that, for the three-to-four previous days, a drug-addicted father was left alone to "care" for his three young children, and that their house was in a state of extreme filth; (2) knew of credible and corroborated allegations that the father had exposed the children to meth in the past, including the manufacture of the drug, to such an extent that their clothing reeked of the drug; (3) observed that a small child inside the house did not immediately react to their prolonged pounding on the door; and (4) believed that the child's extremely delayed and lethargic reaction to the pounding suggested a medical

> problem caused by the dangerous environment in which he lived. And given these unique facts, the officers' belief that they needed to respond to a medical emergency inside was reasonable, and their entry into the house was prudent.

Id. at 808-09 (emphasis added).

Finally, courts often consider the cooperation of those present. *See e.g., Quintero v. City of Escondido*, 2017 U.S. Dist. LEXIS 147579, *19-23 (Cal. S. Dist. 2017) (No emergency aid exception preventing summary judgment where, despite a 911 call reporting a loud domestic disturbance with children present, officers did not observe an indication of a disturbance and the accused and his son opened the door appearing peaceful); *Andrews v. Hickman County*, 700 F.3d 845, 855 (6th Cir. 2012) (no emergency aid in entering the home to check on children despite previous child abuse calls, a potential gun in the residence, and social services present because the accused did not make any menacing gestures or verbal threats and did not possess a weapon at the time); *cf Wolf v. City of Stockton*, 2010 U.S. Dist. LEXIS 24755, *14-16 (Cal E. D. 2010) (finding the emergency-aid exception applied where police received a call about a mother and son living in a van in squalor and upon opening the unlocked door (after not being able to see inside), the mother came out screaming and combative refusing to bring out her son and then she screamed to someone inside the van to "lock the doors" while she was being detained).

Argument

The military judge abused his discretion by making erroneous findings of fact and failing to apply the correct law. Instead, he created an almost bright line rule that if law enforcement does not know what is happening inside a home with children, they can enter under the emergency aid exception.

The immediate emergency aid exception to the Fourth Amendment's requirement for a warrant did not exist here because there was no "emergency" as defined by case-law: law enforcement did not observe an injured occupant or anyone in need of *immediate* medical assistance.

But even if an emergency existed, it was obviated the moment that appellant pulled into his driveway and was peaceful/cooperative.

A. The responding officers did not have an objectively reasonable basis to believe there was an immediate need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Whatever was said between SFC TH and Det. [redacted] one thing was certainly not discussed – the possibility of appellant's children having been injured or needing medical assistance. When they recount their own experiences inside appellant's home, neither SFC TH nor EH attested to seeing the children injured.

Law enforcement did not go to appellant's home thinking medical assistance was needed and did not see anything to change that. All that Det. [redacted] and the responding officers observed after being at appellant's home for approximately

fifteen minutes was a waving two-year-old boy behind a window. Even though the boy and the window were dirty, he did not appear to be in any immediate danger, and did not seem injured or under duress. (R. at 80, ln. 21-23). Even the military judge noted that ". . . the officers were able to confirm the relative safety of one child from outside the home. . ." (App. Ex. VIII, p. 9). Law enforcement did not observe violent behavior or an injured occupant like in *Stuart* or *Fisher*.

So even under the most charitable interpretation for the government, law enforcement was faced with the prospect of unsupervised children. An unsupervised child does not equate to an injured child. In both *Stuart* and *Fisher*, the key factors in the emergency aid context were "signs of a recent injury", "actual injury", and "violent behavior." None of those facts were present here.

Like the rationale in *Shattuck* and the Seventh Circuit in *Venters*, the judge did not take "great care . . . to distinguish situations like this one—where a child may potentially be unsupervised, yet also unharmed—from those in which entry is justified by exigent circumstances or the need to render emergency aid." *Id.* at *56-57. This is a dead-ringer for *Shattuck's* rationale saying, "[b]y contrast, officials in this case were investigating allegations made by [a telephonic source], who had not had any recent contact with the [father] and based many of [the caller's] "gut uncomfortable feelings" on an incident [he had not directly] observed" at an earlier time. *Id.* at *57. Like *Shattuck*, even if the officer's believed the child was home

alone, there was "no affirmative indication that [the child] was in danger of imminent physical harm." *Id.* at *58

B. Any cause for concern dissipated once appellant returned home.

Once appellant came home, Det. [redacted] said that he was only concerned about checking on the welfare of the children. He could have done so without a search. At all times, appellant was peaceful and cooperative. He talked to law enforcement and answered their questions. This is a factor noted in repeated cases, and appellant acted similar to the cooperative suspects in *Quintero* and *Andrews*, not like the thrashing and screaming mother in *Wolf.*

There was an obvious alternative to going inside of appellant's home; Det. [redacted] should have simply asked him to bring his children to the front door and thereby avoid crossing the "firm line" of the home's threshold without a warrant.

C. Hunches and unknowns should not destroy the Constitution's "firm line"

In order to avail themselves of the emergency aid exception, the government has to proffer "concrete facts" of an injury or immediate need for medical assistance justifying the warrantless entry across the Constitution's firm line. Here, Det. [redacted] and the responding officers knew little and made no meaningful effort to learn more about the inside of appellant's home. When talking to the anonymous caller, Det. [redacted] did not ask who they were, how they knew what was going on

inside of appellant's home, how fresh was their knowledge, ask them to describe any hazards in the children's rooms or whether the children were hurt.

The military judge ruled that the "unsanitary conditions" of appellant's home posed an "immediate danger to [the victim's] safety." But what are the conditions? No one could articulate them at that precise moment when appellant pulled up according to the reports and military police officers' testimony; only after entering appellant's home and seeing for themselves could they describe it. Before appellant opened the front door, there were no "concrete facts" supporting a cognizable fear of appellant's children being hurt or on the verge of suffering a serious injury. How would the conditions, at that moment, show a "reasonable likelihood of *imminent* injury?"

What was the "immediate danger" the military judge found in his ruling? Det. [redacted] description did not indicate an "immediate emergency" with "concrete facts" of "actual or imminent harm." Det [redacted] just hypothesized about fires and falling furniture.[19] (R. at 25). The judge's ruling concluded by saying, "[w]hile the officers were able to confirm the *relative safety* of one child from outside the home, they were unable to see whether the other two children were in need of

[19] Despite these direct quotes of the examples from Det. [redacted] testimony, Det. [redacted] actually denies stating that he thought about fire or fallen furniture which shows his guessing/justifying it after the fact. (R. at 46). Even more, Det. [redacted] further denies that he had just testified regarding fire/falling furniture minutes before which shows his poor memory and that he was just making up possibilities.

immediate care." (App. Ex. VIII, p.9) (emphasis added). To be sure, the judge stated "whether the children were in immediate harm or needed help was *unknown*." (App. Ex. VIII, p.9) (emphasis added). That is simply speculation, not concrete facts of imminent harm to break the Constitution's firm line.

Under this wide lens, a warrantless search would always be justified if there are kids home and police could just list random things a child may do; that is a bright line rule that no court has adopted or even come close to and almost every federal court has distinguished/rejected. *See e.g., Venters*, at 808-809 (noting that a "situation at the house [ ] where [the officers'] knocks simply went unanswered; [ ]or [ ] a situation where the officers saw that the children were healthy and unharmed inside, but yet unsupervised" would not be enough).

By that rationale, if an officer knocked and could not see the children but believed they were home, they could always enter if it may not be clean. Where is the line the military judge applies? Simply "not knowing" if someone is okay in a potentially unclean house has never been the standard for the *narrower* immediate emergency aid exception. Every case cited above notes that simply not knowing if someone is okay is not enough, even if in good faith. *See e.g., Gillespie*, 332 F. Supp. 2d at 928 (no exigent circumstances where officers heard a child crying inside an apartment and two occupants who jumped off the apartment's balcony appeared to leave the children unattended despite the officers subjectively

believing "that there were children in the apartment and been genuinely concerned about them.").

Here, the detective's subjective and good-faith concern does not trump the constitutional "firm line" of one's home; it takes concrete facts and imminent injury or the officer needs to obtain an authorization. Here, the military judge widened what should be the narrow scope and applicability of the emergency aid exception. To affirm his ruling sets an unhealthy precedent going forward. A Soldier's privacy interests should not be overcome by the imagination of law enforcement. Especially, whereas here, Det [redacted] conflates the phone call with his later observations.

D. Appellant was substantially prejudiced by law enforcement's warrantless entry into his home.

Without entering appellant's home at that precise moment, Det. [redacted] does not observe appellant's children locked in their rooms. Det. [redacted] direct observations gave rise to the only occasion the government can establish the children were ever locked in their rooms without an adult present in the home. If not for Det. [redacted] entry into appellant's home, the government's case is utterly speculative. The only other time the children were actually known to be locked in their rooms, the babysitting neighbor was present the entire time (until she locked them back in their rooms and stepped out) which would not be a crime the appellant was charged with.

Conclusion

This court should set aside and dismiss Charge I and its Specifications since the government did not and cannot produce any evidence that the appellant committed the actus reus, and even if they could, there was no more than an inference (far short of a reasonable probability) of harm from that actus reus. Additionally, should this court not set aside and dismiss the Charge and its Specifications, this court should overrule the military judge's ruling that the emergency aid exception justified law enforcement's warrantless entry into appellant's home and suppress all evidence derived therefrom.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on December 8, 2023.

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