

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20230236

Sergeant (E-5)  
**VICTOR F. MORALES II,**  
United States Army,  
Appellant

Tried at Fort Liberty, North Carolina  
on 22 November 2022, 13 February, 3  
March, 3 April, 20 April, and 25–29  
April 2023, before a general court-  
martial convened by Commander,  
Headquarters, 82d Airborne Division,  
Colonel J. Harper Cook, Military  
Judge, presiding.

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

**Assignment of Error I<sup>1</sup>**

**WHETHER THE MILITARY JUDGE ERRED IN FINDING A  
GOOD FAITH EXCEPTION TO THE GOVERNMENT’S  
UNLAWFUL SEIZURE AND SEARCH OF APPELLANT’S  
SAMSUNG NOTE 10 PHONE AND THE UNLAWFUL  
SEARCH OF THE SAMSUNG GALAXY S7 “BOOTY MOM”  
FOLDER**

**Assignment of Error II**

**WHETHER SPECIFICATION 3 OF THE CHARGE IS  
LEGALLY AND FACTUALLY SUFFICIENT**

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<sup>1</sup> The government has reviewed appellant’s *Grosteфон* matters and agrees with the defense appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court’s authority to elevate *Grosteфон* matters deserving of increased attention. *United States v. Grosteфон*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant’s *Grosteфон* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

### **Assignment of Error III**

#### **WHETHER SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT**

#### **Statement of the Case**

On 29 April 2023, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of possession of child pornography and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [UCMJ]. (Statement of Trial Results (STR); R. at 1573). The military judge sentenced appellant to nine years of confinement, reduction to E-1, and to be dishonorably discharged. (STR; R. at 1700–01).<sup>2</sup> On 25 May 2023, the convening authority elected to take no action. (Action). On 31 May 2023, the military judge entered judgment. (Judgment).

#### **Statement of Facts**

In April of 2021, the Fort Liberty Criminal Investigation Division (CID) Office initiated an investigation into appellant based upon the receipt of a Cyber Tip. (R. at 820). Special Agent (SA) ■■■ was the digital forensic examiner (DFE)

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<sup>2</sup> Appellant's sentence followed: for Specification 1 of the Charge (Possession of Child Pornography), seven years of confinement; for Specification 2 of the Charge (Possession of Child Pornography), nine years of confinement. (STR). Appellant was sentenced to no confinement for Specification 3 of the Charge (Indecent Conduct). (STR). All terms of confinement were to run concurrent; as such, appellant's aggregate sentence was nine years. (STR).

assigned to the Fort Liberty CID Office, and initially received the Cyber Tip for review and action. (R. at 821–22). SA [REDACTED], upon receipt of the Cyber Tip, obtained subscriber data for the account associated with the suspicious activity, which allowed him to identify an associated email address, phone number, internet protocol (IP) address, and the type of electronic device being used for the transmission of suspected child pornography. (R. at 834, 838–40). A subsequent subpoena to the email domain provider (AOL) based upon the subscriber information allowed CID Agents to determine the email address being used, [REDACTED] belonged to appellant. (R. at 845). A subpoena of the IP address assisted in determining the location where the transmissions involving child pornography occurred, appellant’s on-post residence. (R. at 842–45).

On 28 July of 2021, law enforcement officers conducted a search of appellant’s residence on Fort Liberty. (R. at 846, 863). The magistrate authorization which authorized the search of the residence also permitted the seizure of any device capable of storing digital files. (R. at 846–47). Ultimately, law enforcement officers seized forty-five electronic devices during the execution of the search authorization. (R. at 864). Only three devices seized were relevant in appellant’s court martial: a Samsung Galaxy Note 10 cellphone (“Note 10”), a Samsung Galaxy S-7 cellphone (“Galaxy S-7”), and a Seagate brand external hard drive. (R. at 939, 1128, 1168). Appellant’s Note 10 alone contained more than

2,000 images, and more than 200 videos, of suspected child pornography. (R. at 1023, 1028). Appellant's Galaxy S-7 contained approximately 704 images, and 50 videos, of suspected child pornography. (R. at 1169). Appellant's hard drive contained two images of suspected child pornography. (R. at 1130; Pros. Ex. 34).

### **Assignment of Error I**

#### **WHETHER THE MILITARY JUDGE ERRED IN FINDING A GOOD FAITH EXCEPTION TO THE GOVERNMENT'S UNLAWFUL SEIZURE AND SEARCH OF APPELLANT'S SAMSUNG NOTE 10 PHONE AND THE UNLAWFUL SEARCH OF THE SAMSUNG GALAXY S7 "BOOTY MOM" FOLDER**

### **Additional Facts**

#### **A. Background.**

Following the receipt of the Cyber Tip, and the additional information gathered through the subpoenas, CID Agents obtained a magistrate authorization to search appellant's person and residence for cellphones and digital media devices. (App. Ex. VIII). Relevant here are two Samsung Galaxy cellphones. (App. Ex. XXX, p. 1; Appellant's Br. 11, 16). The first cellphone, appellant's Note 10, was seized from appellant's person on 28 July 2021. (App. Ex. XI, p. 3; App. Ex. XIII, p. 1). The second cellphone, appellant's Galaxy S-7, was seized from appellant's residence during the execution of the magistrate search authorization on 28 July 2021. (App. Ex. XX, p. 4).

## **B. Appellant's Note 10.**

On 3 February 2023, appellant timely motioned the trial court to suppress statements and derivative evidence based upon his interview with CID and a subsequent extraction of his Note 10 cellphone. (App. Ex. IV). Appellant argued his statement to CID Agents, specifically when he drew a picture showing the sequence of his passcode, was violative of Article 31(b), UCMJ, and the 5th Amendment. (App. Ex. IV, p. 1). Given CID Agents used the passcode provided to conduct a "Local Search" of the Note 10, appellant argued the data gathered in the local search was derivative evidence and should be suppressed. (App. Ex. IV, p.1). The military judge agreed and suppressed both (1) appellant's provision of the passcode, and (2) the data extracted during the local search that was conducted on the basis it was derivative of the illegally obtained passcode. (App. Ex. XVIII, p. 12).

In January of 2023, CID Agents involved in appellant's case sent the Note 10 to USACIL for a forensic examination. (R. at 45). The CID Agents requesting the phone be examined did not provide USACIL with any information revealed from the local search, nor did they provide the passcode appellant had given to them. (R. at 45–46). SA ND, the CID Agent that requested the "USACIL Search," candidly offered:

The way--the way the password was obtained was a little bit questionable, so we decided to start fresh, and basically decided to not

include anything from the password into there, so we could get a brand-new search authorization to get into it.

(R. at 45). When the phone was sent to USACIL, it had been returned to the same state that it was in at the time of seizure. (R. at 46–47). The digital forensic examiner offered that regardless of the state the phone was in, whether it was in a “before” or “after” first unlock state, the software used to perform the extraction would have been able to unlock the phone and perform the extraction. (R. at 62).

On 22 February 2023, the government sought reconsideration of the military judge’s ruling wherein the contents of appellant’s Note 10 were suppressed. (App. Ex. XI). The government sought reconsideration on the bases that the contents of appellant’s Note 10 were subject to (1) inevitable discovery and (2) the independent source doctrine. (App. Ex. XI). The military judge, upon reconsideration, found the government had met its burden in demonstrating the “USACIL Search” should not be excluded based on both the inevitable discovery and independent source doctrines. (App. Ex. XVIII, p. 12).

### **1. The military judge’s inevitable discovery analysis on reconsideration.**

In examining the inevitable discovery, the military judge found that prior to the custodial interview where appellant provided his passcode, “CID agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the digital contents of the accused's Galaxy phone *by USACIL-even if the accused had not provided CID with his passcode.*” (App. Ex.

XVIII, p. 8). The military judge also found, as a matter of fact, that sending the phone to USACIL for examination was a standard practice when field offices are not able to gain access through their local resources. (App. Ex. XVIII, p. 8). The military judge found Ms. [REDACTED]'s testimony credible and that she established:

[I]t is a routine CID practice for her office to unlock phones that cannot be unlocked at a local CID office; (b) since around October 2020, USACIL had the version of Cellebrite Premium that would have unlocked the accused's phone within about three minutes without the passcode; and (c) she would have unlocked the phone even without the phone number or the IMEI number.

(App. Ex. XVIII, p. 8). With respect to the IMEI number, the military judge also summarized Ms. [REDACTED]'s credible testimony, "She did not need, nor did she use the IMEI number or the phone number to perform this task." (App. Ex. XVIII, p. 8).

## **2. The military judge's independent source analysis on reconsideration.**

The military judge also found the government established the "USACIL Search" of appellant's Note 10 triggered the independent source doctrine. (App. Ex. XVIII, p. 9–10). The military judge found the government had met its burden in demonstrating "the USACIL search of the accused's Galaxy phone occurred independently and from lawful activities untainted by the initial illegality." (App. Ex. XVIII, p. 10). The military judge cited three reasons to support this finding:

First, neither the phone number acquired by the accused nor the manner in which SA [REDACTED] acquired the IMEI number violate the accused's constitutional rights.

(App. Ex. XVIII, p. 10).

Second, and as set forth in the court's findings of fact, on 5 January 2023, Magistrate CPT [REDACTED] independently found probable cause to grant a search authorization of the phone without regard to the accused's passcode and without regard to the tainted local search. He would have also had probable to cause to issue the authorization even without the phone number and IMEI number. Accordingly, this was a valid search authorization obtained in a manner independent from and untainted by any illegally obtained information.

(App. Ex. XVIII, p. 10–11).

Third, and as set forth in the court's findings of fact, around 24 January 2023, USACIL Analyst [REDACTED] accessed the accused phone in a manner independent from and untainted by any illegally obtained information.

(App. Ex. XVIII, p. 11).

### **C. Appellant's Galaxy S-7.**

Among the forty-five devices seized from appellant's person and residence on 28 July 2021, CID Agents recovered the Galaxy S-7 from appellant's backpack in his residence. (App. Ex. XXX, p. 1). After appellant's Note 10 was examined at USACIL, the examiner had been able to determine the passcode for that device.

(App. Ex. XXX, p. 2). The passcode was communicated to the Fort Liberty CID Office, and they attempted to use that same passcode to access the Galaxy S-7.

(App. Ex. XXX, p. 2). The passcode worked, and a subsequent examination revealed hundreds of photos and videos of suspected child pornography. (App. Ex. XXX, p. 2).



The search of the Galaxy S-7 occurred in April of 2023, and around 13 April 2023 counsel for the government and appellant went to the CID Office to review the photographs and videos. (App. Ex. XXX, p. 3). During this joint review of the evidence, the government noticed the photographs that were subsequently offered in support of Specification 3 of the Charge, namely photographs of “multiple images of closeups of clothed women's buttocks at a school pick up line.” (App. Ex. XXX, p. 3). Appellant challenged the search of the Galaxy S-7 on four separate bases: (1) staleness, (2) the search conducted exceeded the scope of the authorization, (3) inspection by counsel was tainted by the local search, and (4) the timing of the disclosure less than two weeks before trial warranted suppression as a remedy. (App. Ex. XXX, p. 3–4). The military judge denied appellant’s motion to suppress. (App. Ex. XXX, p. 6).

### **Standard of Review**

Appellate courts review a military judge’s ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (internal citations omitted). “Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. Conclusions of law are reviewed de novo.” *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). Further, a military judge abuses his discretion when his “findings of fact are clearly erroneous or if his decision is influenced by an

erroneous view of the law.” *Id.* (citations omitted). “In reviewing a ruling on a motion to suppress, [appellate courts] consider the evidence in the light most favorable to the prevailing party.” *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000) (citing *Reister*, 44 M.J. 419) (internal quotations omitted)).

## **Law**

### **A. Inevitable discovery.**

When an accused timely challenges the voluntariness of their statement, evidence derived from that statement will not be admitted unless the military judge finds by a preponderance of the evidence that the statement was voluntary, the evidence was not obtained by use of the accused’s statement, or the evidence would have been obtained even if the statement had not been made. Mil. R. Evid. 304(b). “To prevail under this doctrine, the Government must prove by a preponderance of the evidence that at the time of the unlawful search, government agents were already taking actions or pursuing leads such that their simultaneous actions and investigations would have inevitably led to the discovery of the evidence even absent the unlawful conduct.” *United States v. Black*, 82 M.J. 447, 453 (C.A.A.F. 2022) (citing *United States v. Dease*, 71 M.J.116, 122 (C.A.A.F. 2012)).

## **B. Independent source doctrine.**

In *United States v. Garcia*, the CAAF outlined the interaction between the exclusionary rule and the independent source doctrine. 80 M.J. 379, 388 (C.A.A.F. 2020).

Evidence derived from an unlawful search constitutes “fruit of the poisonous tree” and is subject to exclusion. *Utah v. Strieff*, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016) (citation omitted) (internal quotation marks omitted); *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). However, “the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source.” *Strieff*, 136 S. Ct. at 2061; *Murray v. United States*, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (holding that the independent source doctrine applies to “evidence initially discovered during ... an unlawful search, but later obtained independently from activities untainted by the initial illegality”). The purpose of the independent source doctrine is to put “the police in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred” because if evidence with an independent source were excluded, this “would put the police in a worse position than they would have been in absent any error or violation.” *Murray*, 487 U.S. at 537 (internal quotation marks omitted) (quoting *Nix v. Williams*, 467 U.S. 431, 443, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)).

*Id.*

## **C. Good-faith exception.**

In *Leon*, the Supreme Court stated, “the balancing approach that has evolved in various contexts -- including criminal trials – ‘forcefully [suggests] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was

in accord with the Fourth Amendment.” 468 U.S. at 909 (quoting *Illinois v. Gates*, 462 U.S. 213, 255 (1983)). The Supreme Court noted that where the officer’s conduct is objectively reasonable, excluding evidence would not have the deterrent effect on otherwise unlawful police misconduct. *Id.* at 919-20.

There are “four circumstances where the good-faith doctrine would not apply”:

- (1) False or reckless affidavit--Where the magistrate “was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth”;
- (2) Lack of judicial review--Where the magistrate “wholly abandoned his judicial role” or was a mere rubber stamp for the police;
- (3) Facially deficient affidavit--Where the warrant was based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; and
- (4) Facially deficient warrant--Where the warrant is “so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.”

*United States v. Carter*, 54 M.J. 414, 419-20 (C.A.A.F. 2009) (quoting *Leon*, 468 U.S. at 922-23). The good-faith doctrine is contained in Military Rule of Evidence [Mil. R. Evid.] 311:

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

- (A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the

authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

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

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

*United States v. Morales*, 77 M.J. 567, 576 (A. Ct. Crim. App. 2017) discussing Mil. R. Evid. 311(c)(3).

### **Argument**

#### **A. Appellant's Note 10.**

The military judge did not abuse his discretion in finding the seizure of appellant's Note 10, and the subsequent "USACIL Search" were proper. (App. Ex. XVIII, p. 9–12). The military judge suppressed the "Local Search" as derivative of a statement taken in violation of appellant's Article 31(b) rights and affirmed the earlier suppression in ruling on the government's request for reconsideration. (App. Ex. XVIII, p. 12).

Appellant's Note 10 was seized when SAs [REDACTED] and [REDACTED]S took appellant into custody at appellant's unit building. SA [REDACTED] testified at the suppression hearing that there was not a search authorization for the Note 10 completed at the time it was seized. (R. at 114). In argument on the motion the military judge highlighted the language from the search authorization, which was for "Cell phone devices and

digital media devices[,]” included “the search of [appellant]’s person” in the places to be searched. (App. Ex. VIII; R. at 276). Defense counsel then pivoted and offered, “they might have had the authorization to seize the phone, Your Honor, but not search it.” (R. at 277).

The military judge’s ruling following reconsideration addressed the seizure of appellant’s Note 10:

#### *IV. The Seizure of the Phone*

Neither side **address**[ed] this aspect of the court's ruling during the renewed litigation. However, based on all evidence presented, the court finds that the CID lawfully seized the accused phone on 28 July 2021. They had probable cause to do so as evidenced by the evidence they possessed at the time and under their good faith belief that the first search authorization extended to that item.

(App. Ex. XVIII, p. 11–12).

The only search of appellant’s Note 10 this court need examine is the “USACIL Search.” The military judge accepted appellant’s arguments related to the “Local Search” and the illegality of appellant providing his passcode after an unambiguous invocation , and suppressed all of that evidence. The military judge denied appellant’s motion to suppress the “USACIL Search” after finding the government established the contents of appellant’s phone were subject to the independent source and inevitable discovery doctrines. (App. Ex. XVIII, p. 11–12).

## **1. Inevitable discovery.**

The military judge's ruling with respect to inevitable discovery follows the correct factors outlined in *Black* and *Dease*. The government was required to show, by a preponderance of the evidence, that at the time CID unlawfully obtained appellant's passcode they were "already taking actions or pursuing leads such that their simultaneous actions and investigations would have inevitably led to the discovery of the evidence even absent the unlawful conduct." *Black*, 82 M.J. at 453 (citing *Dease*, 71 M.J. at 122).

In the instant case, on 18 March 2021, CID obtained a magistrate authorization to search appellant's person and residence and seize all cellphones and digital media devices. (App. Ex. VIII). As such, CID's investigative efforts, and their lawful authority to seize appellant's Note 10, predate the illegality at issue by approximately four months. Appellant does not argue with any specificity what information, excluded by the military judge's suppression of appellant's statement and the "Local Search," tainted the "USACIL Search," beyond a cursory statement that, "But for the government's unlawful actions, it would not have probable cause to search or seize appellant's phone." (Appellant's Br. 11).

The military judge did not abuse his discretion in determining the contents of appellant's Note 10, which were extracted as a result of the "USACIL Search," constituted inevitable discovery. The evidence before the court was that CID

Agents were actively investigating appellant for possession of child pornography as early as March of 2021, that CID regularly sent phones to USACIL when field offices lacked the ability to access them, and that USACIL had the technology and ability to extract the information from appellant's phone after it had been returned to the state it was in at the time of seizure.

## **2. Independent source.**

Appellant's brief makes no mention of the independent source doctrine, despite that being one of the two bases the military judge cited for denying suppression of the "USACIL Search." Accordingly, appellant has failed to articulate any purported flaw in the military judge's factual findings or application of law. The military judge outlined three reasons the "USACIL Search" shouldn't be excluded pursuant to the independent source doctrine, and those reasons are all substantially supported by the record. (App. Ex. XVIII, p. 9–10). This court should afford significant deference to all of the military judge's rulings, but especially here where appellant has made no argument to support finding any abuse of discretion.

## **3. The Note 10's IMEI number.**

Appellant claims removal of the Note 10's case to find the IMEI number was an unlawful search. (Appellant's Br. 13). The military judge properly found it was not. (App. Ex. XVIII, p. 10). The military judge recognized that the IMEI



number was affixed to the outside of the phone by the manufacturer, and that the IMEI number could not be viewed without removing the phone's case. (App. Ex. XVIII, p. 5). The military judge found removal of the case to observe the IMEI number was "a reasonable, minimally intrusive way of identifying the item." (App. Ex. XVIII, p. 10). Lastly, in responding to appellant's arguments regarding the value of the IMEI number to the subsequent investigation, the military judge's ruled:

Next, both the magistrates who issued the second and third authorizations would have still had probable cause to issue them even without the IMEI number. That is so because the IMEI number simply identified the item; it added nothing probative to linking the phone to the alleged criminality.

(App. Ex. XVIII, p. 10).

#### **B. Appellant's Galaxy S-7.**

Appellant does not challenge the seizure of his Galaxy S-7, and his arguments for suppression are aimed entirely at the search. At trial appellant sought suppression on four separate bases; however, here on appeal the sole issue appellant raises is the military judge's application of the good faith exception. (Appellant's Br. 16–17). Appellant's claim, "the agents strained to explain how they obtained these photos in a folder called 'booty mom,'" is unsupported by the record. (Appellant's Br. 16). In reviewing the photos on the Galaxy S-7, all of the photos appear in a window that can be scrolled through. (R. at 363–65).

The “booty mom” photographs were intermingled in the photo library, which also contained photographs that were “child porn and child erotica, but also just images of family, like their kids, the family's kids, as well as some other people I don't know.” (R. at 364). The military judge found as a matter of fact, “[The “booty mom” photos”] simply appeared among the thumbnail array of all photos and videos that were contained on the S7.” (App. Ex. XXX, p. 3). At trial and here on appeal, appellant suggests CID Agents searched inside folders within the phone, and that is how the “booty mom” photographs were discovered. The military judge quickly disposed of that meritless claim, and this court should as well:

Contrary to the Defense's factual assertion, [SA ■■■] did not first see a folder labeled “Mom Booty Pix” and then choose [to] open it to see what it contained. He simply saw all of the images assembled on the screen in an array of thumbnails.

(App. Ex. XXX, p. 4). The military judge concluded, as a matter of law, the “booty mom” photographs were “were in plain view, in a place where he was authorized to be, with probable cause to be there, and with a valid search authorization in hand.” (App. Ex. XXX, p. 5). The military judge offered a subsequent sentence that assuming arguendo the search exceeded the parameters of the authorization, SA ND was acting in good faith reliance on the search authorization. (App. Ex. XXX, p. 5).

Substantial testimony within the record supports the military judge's findings of fact and appellant fails to discuss how the military judge erred in his application of the "plain view" exception to the facts at hand. Appellant's discussion of the search of the Galaxy S-7 doesn't even mention the phrase "plain view," despite it being the prevailing theory under which the military judge disposed of appellant's arguments regarding scope and taint. (App. Ex. XXX, p. 4–5).

### **Assignment of Error II**

### **WHETHER SPECIFICATION 3 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT**

#### **Additional Facts**

Between August 2019 and March 2020, appellant took dozens of pictures of women, without their knowledge, which emphasized their buttocks. (STR; R. at 1212–50). Appellant took all of the pictures offered in support of Specification 3 of the Charge at his children's elementary school on-post.<sup>3</sup> (STR). Ms. ■■■, one of the women more prominently featured in appellant's covert photography collection, testified at trial. (R. at 1203). Ms. ■■■ described the pick-up line at the

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<sup>3</sup> Specification 3 of the Charge reads, "In that [appellant], U.S. Army, did, at or near Fort Bragg, North Carolina, on one or more occasions between on or about 28 August 2019 and on or about 16 March 2020, commit indecent conduct, to wit: taking photographs of multiple women without their knowledge emphasizing their buttocks while outside Bowley Elementary School, a DoD school, and that said conduct was of nature to bring discredit upon the armed forces." (STR).

elementary school, how parents would arrive and collect their children, and her observations of appellant when he would pick up his own children. (R. at 1205–11).

### **Standard of Review**<sup>4</sup>

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

### **Law**

#### **A. Legal and factual sufficiency.**

The test for legal sufficiency is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014). In resolving questions of legal sufficiency, the court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

During its legal sufficiency review, the court considers all available facts within the record and is “not limited to [an] appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). Further, in analyzing

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<sup>4</sup> Appellant’s conviction for the Specification of Charge IV was based upon conduct which occurred between 28 August 2019 and 16 March 2020; as such, this court reviews factual sufficiency under the law in effect before the National Defense Authorization Act for fiscal year 2021. (STR); Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12.

legal sufficiency, our superior court “has long recognized that the government is free to meet its burden of proof with circumstantial evidence.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). “[T]he ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private.” *Id.*

Regarding factual sufficiency, the test is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.” *Rosario*, 76 M.J. at 117 (emphasis omitted) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In its factual sufficiency review, this court “[i]n considering the record . . . may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” Article 66(d)(1), UCMJ.

### **B. Specification 3 of the Charge, Indecent conduct.**

To convict appellant of indecent conduct, the government was required to prove beyond a reasonable doubt: (1) that appellant photographed multiple women without their knowledge, emphasizing their buttocks while outside Boley Elementary School, a DoD school; (2) that such conduct was indecent; and (3) that under the circumstances, appellant’s conduct was of a nature to bring discredit

upon the armed forces. (R. at 1503); UCMJ art. 134; *MCM*, pt. IV, ¶ 104.b.

“Indecent” means “that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.” *MCM*, pt. IV, ¶ 104.c.(1).

### **Argument**

The military judge properly instructed the panel on the elements and definitions of Indecent Conduct under Article 134, UCMJ. (R. at 1503–04).

Appellant at trial, and here on appeal, does not contest whether or not he took the photographs; appellant’s argument for relief centers around the assertion that the photographs were not “indecent” as defined by statute. (Appellant’s Br. 22).

Appellant argues “an average member of the military community would not see the act obscene or indecent without additional aggravating circumstances.”

(Appellant’s Br. 22). A panel of military members disagreed. (R. at 1573).

Appellant photographed the clothed buttocks area of multiple women, over a time period of nearly a year, outside his children’s elementary school. (STR). In the photographs appellant took, the school and children were frequently visible. (R. at 1212–24). Appellant argues, “The government never pinpointed what would constitute an aggravating circumstance.” (Appellant’s Br. 22). In discussing the evidence in closing, the government highlighted:

Now, that such conduct was indecent. You'll view the images and see the testimony of Ms. [REDACTED], and here the government will ask you to apply common sense and your knowledge of how the world works. This conduct was sexually thrilling for the accused. It was done in the school pickup line surrounded by [REDACTED]<sup>5</sup> children.

(R. at 1519).

There is no other reason you create that folder. There is no [reason] you take those photographs. This was done secretly in broad daylight in that setting. Different angles, close-up, some taken next to Ms. [REDACTED]'s husband. Some have her children in the images. It's these circumstances when actually viewing those photographs and viewing all of them in the context in which they were taken that make this conduct so indecent.

(R. at 1520). The government properly argued how the circumstances of appellant's conduct further demonstrated its indecent nature and supported a finding of guilty. The panel agreed. (R. at 1573).

### **Assignment of Error III**

#### **WHETHER SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT**

#### **Additional Facts**

Appellant was found guilty of possessing one or more images of child pornography on an external hard drive. (STR; R. at 1573). The hard drive was collected from appellant's backpack within appellant's residence on Fort Liberty pursuant to the 28 July 2021 law enforcement search. (R. at 1141). A digital

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<sup>5</sup> Notably, the government's argument was interrupted by an objection which was quickly overruled. (R. at 1519).

forensic examiner assigned to the Fort Liberty CID Office, SA ■■■H, examined the hard drive . (R. at 1125–26). SA ■■■ identified two images he believed were child pornography. (R. at 1130). Those images were presented to the panel during the government’s case-in-chief, and the government argued they constituted child pornography. (Pros. Ex. 34; R. at 1132). The panel was instructed, “When determining whether certain digital images constitute child pornography, for Specification 1 of The Charge, you may only consider the images contained on Prosecution Exhibit 34.” (R. at 1499).

Defense Counsel at trial conceded in her opening statement that appellant knowingly possessed child pornography on the devices seized, “Members, I’m going to tell you right now, there was child pornography on his devices. The videos, they were there. The pictures, they were there.” (R. at 814). Appellant’s defense was aimed at whether that possession was wrongful and service-discrediting, as he claimed he was a vigilante endeavoring to lure child predators out. (R. at 814–15). Appellant testified in furtherance of this defense, claiming he intended to turn over all of the evidence to law enforcement in an effort to assist in the apprehension of child predators.

In closing, defense counsel once again circled back to the concession that the appellant possessed child pornography; however, defense counsel claimed the



images on the hard drive weren't child pornography. (R. at 1532–33). With respect to the government's argument to the panel, the trial counsel stated:

When you assess those images, you'll notice they are of two different individuals. Their breasts are underdeveloped, there's no pubic hair. They are taken in the mirror. One of them is faceless. When you assess those--weigh those factors in assessing what they appear to be. But you have to make that determination if the individuals and those photographs appear to be minors.

(R. at 1515–16).

### **Standard of Review**

Questions of legal and factual sufficiency are reviewed de novo. *Rosario*, 76 M.J. at 117.

### **Law**<sup>6</sup>

To convict appellant of possessing child pornography, the government was required to prove beyond a reasonable doubt: (1) the appellant knowingly and wrongfully possessed, on an external hard drive, child pornography, to wit: one or more digital images of a minor or what appears to be a minor engaging in sexually explicit conduct; and (2) that under the circumstances, appellant's conduct was of a nature to bring discredit upon the armed forces. (R. at 1498); Art. 134, UCMJ; *MCM*, pt. IV, ¶ 95.b.

“Child pornography” means material that contains a visual depiction of an actual minor engaging in sexually explicit conduct. Child pornography also means

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<sup>6</sup> For sake of brevity the government adopts its discussion *supra* of the law for challenges to legal and factual sufficiency.

material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct. Such a depiction need not involve an actual minor, but instead only what appears to be a minor. (R. at 1499–1500). The military judge offered the definitions of all associated terms. (R. at 1499–1500). Appellant does not cite any deficiency in the military judge’s instructions to the panel.

The Court of Appeals for the Armed Forces has adopted the *Dost* factors for examining whether an image alleged to be child pornography contains a “lascivious exhibition of the genitals of pubic area.” *United States v. Piolunek*, 74 M.J. 107, 109 (C.A.A.F. 2015) (discussing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). The *Dost* factors include:

[W]hether the focal point of the depiction is on the genitals or pubic area[;] whether the setting is sexually suggestive[;] whether the child is depicted in an unnatural pose or in inappropriate attire considering the child's age; whether the child is partially clothed or nude; whether the depiction suggests sexual coyness or willingness to engage in sexual activity; whether the depiction is intended to elicit a sexual response in the viewer; whether the depiction portrays the child as a sexual object; and any captions that may appear on the depiction or materials accompanying the depiction.

*Id.* “While members are not presumed to be suited to make legal determinations of constitutional law, they are presumed to be competent to make factual determinations as to guilt.” *Id.* at 111.

## Argument

Appellant was properly convicted of possession of child pornography, and the panel gave appropriate weight to the testimony and evidence presented at trial. Following its review of the record, affording appropriate deference to the trial court's observation of witnesses, this court should find appellant's conviction is factually and legally sufficient. The government offered the two pictures from appellant's hard drive to the panel and argued the images constituted child pornography. (Pros. Ex. 34). The military judge gave the panel the proper instructions on what constituted child pornography and further instructed only the two images from appellant's hard drive were to be considered in determining appellant's guilty or innocence as to Specification 1 of the Charge. (1499–1503).

The panel was presented with the evidence, armed with correct instructions, and found appellant guilty of Specification 1 of the Charge. (1499–1503, 1573). In examining the elements, appellant does not dispute that he possessed the two images offered in support of Specification 1 of the Charge. Appellant's arguments are that the first image did not display sexually explicit conduct, and that the second image did not display a minor. Both of appellant's arguments need to be successful to warrant relief.

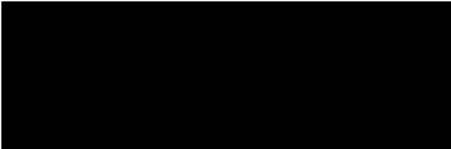
The first image, as the Bill of Particulars indicated, showed “[w]hat appears to be a 14-16-year-old female completely nude posing in front of a mirror.” (App.

Ex. VI-A, p. 29). The government concedes the only plausible theory under which appellant could have been convicted for this offense was if they found the image contained a “lascivious exhibition of the genitals or pubic area.” *MCM*, pt. IV, ¶ 93.c.(10).(e). The military judge gave proper instructions regarding the definition and assessment for a “lascivious exhibition.” (R. at 1501). Appellant does not cite how the panel misapplied the *Dost* factors to the image in question, beyond their reliance on the description of the image offered in the Bill of Particulars.


The second image showed “[w]hat appears to be a 15-17-year-old female nude using a toy (kneeling/sitting position) to penetrate her vagina (face not pictured).” (App. Ex. VI-A, p. 29). The photograph depicted a penetrative act; as such, “sexually explicit conduct” was established. *MCM*, pt. IV, ¶ 93.c.(10).(c). The panel, in reviewing the photograph, clearly found the image was of a child. Contrary to appellant’s claim, the government has never “acknowledged the depictions are of late teenagers that are possibly legal adults.” (Appellant’s Br. 28). The government maintained at trial, and does here on appeal, that the images offered in support of Specification 1 of the Charge are child pornography. The panel agreed. (R. at 1573).

### **Conclusion**

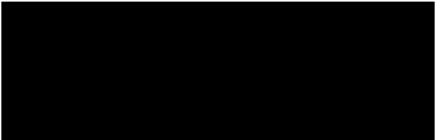
WHEREFORE, the government respectfully requests this honorable court deny appellant's request for relief and affirm the findings and sentence.



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**CERTIFICATE OF SERVICE, U.S. v. MORALES (20230236)**

I certify that a copy of the foregoing was sent via electronic submission to the  
Defense Appellate Division at [REDACTED]  
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