IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20230608
Staff Sergeant (E-6) **DAVID M. INGRAM,** United States Army, Appellant	Tried at Fort Moore,[1] Georgia, on 9 March, 8 June, 31 July, and 27–28 November 2023 before a general court-martial convened by Commander, Fort Benning, Lieutenant Colonel Trevor Barna and Lieutenant Colonel Pamela L. Jones, Military Judges, presiding.

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

Assignments of Error[2] [3]

I. [WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT.

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[1] When the court-martial initially convened, the installation was named Fort Benning. Effective 11 May 2023, the installation was officially redesignated as Fort Moore: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38192-AGO_2023-09-000-WEB-1.pdf. Effective 3 March 2025, it was redesignated as Fort Benning: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN43259-AGO_2025-08-000-WEB-1.pdf.

[2] In accordance with Rule 17.1(d) of this court's rules of appellate procedure, the government has restyled appellant's assignments of error.

[3] The government has reviewed appellant's *Grostefon* matters and submits they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 4

II. [WHETHER] REVERSIBLE ERROR OCCURRED WHEN TWO GOVERNMENT WITNESSES COMMENTED ON SSG INGRAM'S EXERCISE OF HIS RIGHTS TO REMAIN SILENT.

III. [WHETHER] THE MILITARY JUDGE REVERSIBLY ERRED BY IMPROPERLY INSTRUCTING THE MEMBERS.

IV. [WHETHER] THE SEARCH OF SSG INGRAM'S CELL PHONE VIOLATED BOTH THE TERMS OF THE AUTHORIZATION AND HIS FOURTH AMENDMENT RIGHT TO PARTICULARITY.

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Statement of the Case

On 28 November 2023, a panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of attempted sexual abuse of a child (Specifications 1 and 2 of Charge I) and one specification of attempted wrongful receipt of child pornography (Specification 3 of Charge I), in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880 (2019) [UCMJ], and one specification of wrongfully soliciting the distribution of child pornography (The Specification of Charge II), in violation of Article 82, UCMJ.[4] (R. at 711; Statement of Trial Results [STR]). The military judge sentenced appellant to a bad-conduct discharge, fifteen months of confinement, and reduction to E-1. (R. at 742; STR).[5] The military judge credited appellant with one day of Article 13 credit. (R. at 742). On 11 December 2023, the convening authority took no action on the adjudged findings and sentence.[6] (Action). The military judge entered judgment on 14 December 2023. (Judgment).

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[4] All references to the UCMJ are to the 2019 edition of the *Manual for Courts-Martial, United States* [*MCM*] with 2020 and 2021 amendments.

[5] The military judge sentenced appellant to nine months for each offense of attempted sexual abuse, running concurrently, and six months for each child pornography offense, running concurrently. (R. at 742). These grouped sentences of nine and six months then ran consecutively, for a total of fifteen months. (R. at 742).

[6] The convening authority disapproved all the defense's deferment and waiver requests. (Action).

Statement of Facts

Around 30 September 2022, [redacted] created a profile on the Whisper phone application, with the screen name "Little_palidan." (R. at 458). She posed as a fifteen-year-old in an effort to catch child sexual predators in her community, which included Fort Benning. (R. at 457–59). [redacted] was inspired by and working with [redacted], who ran a YouTube channel called "PredTV" aiming to expose local predators. (R. at 458–60, 472–73). To this end, she created a Whisper post to see who would engage her in conversation. (R. at 458).

On 6 October 2022 at approximately 2300, about twenty-five minutes after [redacted] posted, appellant contacted her. (R. at 458–60). Appellant had the username "Corn_energy" and identified himself as a thirty-year-old drill sergeant named "Jake" who worked at Sand Hill. (R. at 460; Pros. Ex. 1, p. 1, 3-4, 6, 17 (sealed)). He stated he had served as a drill sergeant for six months and in the Army for ten years. (Pros. Ex. 1, p. 5-6 (sealed)). While messaging, appellant also described his vehicle as a "big black Ford F-150 that's a 2022." (R. at 463).

Shortly after they began messaging, [redacted] stated she was fifteen years old and bored. (R. at 459; Pros. Ex. 1, p. 4 (sealed)). Appellant immediately responded, "Oh, you trouble then lmao" and "Yea haha I feel ya . . . Just scrolling through whisper looking for horny chick's lmao." (Pros. Ex. 1, p. 4-5 (sealed)). He soon asked for her location (along with a winking emoji) and mentioned his plan to

masturbate that night. (Pros. Ex. 1, p. 7 (sealed)). When "Little_paladin" replied flirtatiously, appellant requested "pics," then sent two of himself: (1) appellant standing on a boat wearing a Vans t-shirt and with a right-forearm tattoo partially exposed, and (2) appellant flexing in a gym wearing a sleeveless blue t-shirt. (Pros. Ex. 1, p. 8-9 (sealed)).

Appellant asked "Little_paladin" if she was sexually active and told her, "Then I would definitely stretch you out," after she relayed her inexperience. (Pros. Ex. 1, p. 14 (sealed)). He continued describing his desired activities in graphic detail, including having her perform oral sex on him (e.g., "I'd have you suck my dick on the way home for starters"); engaging in foreplay (e.g., "make out with you while I play with your tits"); performing oral sex on her (e.g., "[s]lowly lick my way to your wet pussy sliding my tongue between your lips . . . [p]laying with your clit . . . [t]ongue fuck your little pussy"); and engaging in vaginal intercourse (e.g. "[s]tretching your pussy with my throbbing cock as it slides deeper . . . see your petite little body riding my thick throbbing cock"). (Pros. Ex. 1, p. 15-18 (sealed)). He requested "nudes" immediately after the message, "I would rub my throbbing cock between your pussy lips," and followed the request with the message, "Then slowly push my cock inside you." (Pros. Ex. 1, p. 16-17 (sealed)). [redacted] answered with words to the effect of, "Not now." (R. at 462). Later in the conversation, after saying he wanted "to see more of [her]," appellant immediately

continued, “I would love to see your petite little body riding my thick throbbing cock.” (Pros. Ex. 1, p. 23 (sealed)).

Appellant then sent “Little_paladin” two pictures with his penis exposed and face hidden. (R. at 462). In the first, he was wearing a PT vest with his nametape partially visible. (R. at 462). In the second, he “was fully unclothed.” (R. at 462). Appellant and “Little_paladin” also discussed meeting up. (Pros. Ex. 1, p. 24-25 (sealed)). When she asked for his phone number, appellant declined, saying that doing so “makes me nervous rn . . . I ain’t trynna get caught up n shit.”[7] (Pros. Ex. 1, p. 30-31 (sealed)).

[redacted] met [redacted] the next day and provided him screenshots of this Whisper conversation. (R. at 464). Soon after, [redacted] blocked appellant to ensure he could no longer view her location and ultimately deleted the application, causing the original messages to delete from her phone. (R. at 465, 482). [redacted] provided the screenshots to the Fort Benning field office for the U.S. Army Criminal Investigation Division [CID], who began investigating. (R. at 466, 508). Upon viewing the screenshots, SA [redacted] recognized appellant as the person in the gym photograph. (R. at 509). This photo showed the “Cardio Room of one of the gyms at the Camp As Sayliyah, Qatar,” the location where appellant and SA [redacted]

[7] “Rn” is a common text abbreviation for “right now.”

deployed together. (R. at 509). Based on this conflict of interest, SA [redacted] passed off the investigation to other agents. (R. at 510–11).

The CID office took further investigatory steps. The agents confirmed appellant drove a new "black-on-black Ford F-150." (R. at 528, 540). They confirmed appellant's "place of work on Sand Hill." (R. at 537). They obtained and executed a search authorization for his Samsung Galaxy cell phone. (R. at 537–38, 562). When they seized it, Special Agent [SA] [redacted] put the phone on airplane mode "to preserve evidence" and logged it properly. (R. at 543, 547). They maintained custody of the cell phone up to trial. (Def. Ex. A; R. at 549).

A certified digital forensic examiner extracted the phone's data. (R. at 559–60, 564). He found artifacts indicating the Whisper application was previously present on the phone but no longer installed. (R. at 565–66). Another digital forensic examiner, SA [redacted], analyzed the extraction and also found that Whisper, though previously installed around "June of 2022," no longer appeared to be on the phone. (R. at 575–76). When agents searched the extraction, they found four images matching those that appellant sent over Whisper. (R. at 597–98; Pros. Ex. 9).

At trial, [redacted] identified appellant as the individual in the Whisper photos. (R. at 461). Along with the testimony of [redacted] and six CID agents, the Government presented appellant's Enlisted Record Brief, reflecting his age (thirty-

five), his length of service (eleven years), his duty position (drill sergeant), and his time as a drill sergeant (four months) at the time of his offenses. (Pros. Ex. 12).

Assignment of Error I

[WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Further, this Court's assessment for both legal and factual sufficiency "is limited to the evidence presented at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Law

A. Legal 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. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). While "resolving questions of legal sufficiency, [appellate courts] are bound to draw every reasonable inference from the evidence in the 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 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.* The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id*.

B. Factual Sufficiency.

In any case in which every finding of guilty entered into the record is for an offense that occurred on or after 1 January 2021, the court may, upon appellant's request, consider whether the findings of guilty are correct in fact only if appellant makes a specific showing of a deficiency in proof. Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (2021); *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). *See generally* William M. Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3611-12 (2021). After appellant makes such a showing, the court may weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, 85 M.J. at 130.

In weighing the evidence, the court affords "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and findings of fact entered into the record by the military judge." UCMJ art. 66(d)(1)(B). "Appropriate deference" will depend on the nature of the evidence at issue. *Harvey*, 85 M.J. at 130. "[T]he degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015); *see also United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2016) (affirming where the findings turned on witness credibility). When courts of criminal appeal review a conviction, however, such deference does not create a presumption that an appellant is in fact guilty. *Harvey*, 85 M.J. at 132.

If the court is clearly convinced that the finding of guilty was against the weight of the evidence, the court may dismiss, set aside, or modify the finding, or affirm a lesser finding. UCMJ art. 66(d)(1)(B). This court must satisfy two requirements to be "clearly convinced": (i) that the evidence, as the court has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt and (ii) of the correctness of this decision. *Harvey*, 85 M.J. at 132.

C. Attempt offenses under Article 80, UCMJ.

Article 80, UCMJ, criminalizes attempts to commit other offenses. The prescribed elements of Attempt are: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. *MCM*, pt. IV, ¶ 4.b. "Soliciting another to commit an offense does not constitute an attempt." *MCM*, pt. IV, ¶ 4.c.(5).

D. Child pornography under Article 134, UCMJ.

The Manual for Courts-Martial defines "child pornography" in relevant part as "material that contains . . . a visual depiction of an actual minor engaging in sexually explicit conduct." *MCM*, pt. IV, ¶ 95.c.(4). "Sexually explicit conduct" includes various sexual acts and, relevant to this case, the actual or simulated "lascivious exhibition of the genitals or pubic area of any person." *MCM*, pt. IV, ¶ 95.c.(10)(e). The Court of Appeals for the Armed Forces [CAAF] adopted the six "*Dost* factors" for determining what constitutes a "lascivious exhibition":

> "(1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;

> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggest sexual coyness or a willingness to engage in sexual activity;
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006) (quoting *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986) (additional citation omitted)). These factors require consideration along with the totality of the circumstances. *Id.* at 430.

The First Amendment does not protect child pornography, but every depiction of a nude child does not automatically qualify as child pornography. *New York v. Ferber*, 458 U.S. 747, 764–65 n.18 (1982); *see also United States v. Moon*, 73 M.J. 382, 386-87 (C.A.A.F. 2014) (discussing child pornography versus other "images of nude minors," within the guilty plea context).[8]

[8] Seeking both protected and unprotected materials does not bestow constitutional protection on this conduct. *Cf. United States v. Lara*, ACM 40247, 2025 CCA LEXIS 97, *14–*15 (A.F. Ct. Crim. App. 17 Mar. 2025) (unpublished op.) (stating that, in guilty plea context where appellant searched for "teen nude selfies," the mere fact that Appellant expected his searches to identify legal pornography of eighteen- or nineteen-year-olds as well as unlawful images of individuals under eighteen years of age does not confer constitutional protection over those searches.").

Impossibility is not a defense to soliciting the distribution of child pornography. *See United States v. Williams*, 553 U.S. 285, 293 (2008) (stating "an Internet user who solicits child pornography from an undercover agent violates [the law], even if the officer possesses no child pornography); *cf. United States v. Roeseler*, 55 M.J. 286, 287 (C.A.A.F. 2001) (affirming conviction for attempted conspiracy where appellant agreed to help murder two fictitious persons). Solicitation merely requires (1) a request or advisement to commit an offense and (2) the intent that the offense be committed. *MCM*, pt. IV, ¶ 6.b.

Argument

The specifications of attempted sexual abuse are legally and factually sufficient. The evidence leaves no reasonable alternative explanations. Appellant sent lewd messages and pictures to "Little_paladin" from his cell phone; therefore, he attempted to sexually abuse a child. The government always would benefit from additional corroborating evidence, but proving guilt beyond a reasonable doubt requires no specific form or quantity of evidence.

As an attempt requires more than mere solicitation, the government agrees with appellant that the guilty finding for Specification 3 of Charge I is legally insufficient under the present facts. The conviction for the solicitation (The Specification of Charge II) itself, however, is sufficient: despite no actual image to

analyze, the totality of the circumstances demonstrates appellant's request was for the distribution of child pornography.

A. The evidence proves beyond a reasonable doubt that appellant sent the lewd messages and pictures to "Little_paladin."

[redacted], posing as a fifteen-year-old girl, received sexually explicit messages and pictures from the Whisper screen name, "Corn_Energy."[9] (R. at 462; Pros. Ex. 1 (sealed)). The sender identified himself with various details: his age; his time in service; his drill sergeant position; and his workplace.[10] (R. at 460; Pros. Ex. 1 (sealed)). All these facts closely track the details from appellant's Enlisted Record Brief. (Pros. Ex. 12). CID also confirmed appellant drove the black 2022 Ford F-150 referenced in the Whisper conversation. (R. at 463, 540). These corroborating details provide strong circumstantial evidence that appellant was "Corn_Energy."

The pictures' content also links appellant to the Whisper conversation. Three of the five pictures clearly showed appellant's face, leading to SA [redacted]'s

[9] Appellant argues that a lack of evidence regarding appellant's other usernames or other related misconduct establishes reasonable doubt. (Appellant's Br. 12). The government, however, has no obligation to establish some pattern of misconduct or a connection to other accounts to prove the charged offenses. Appellant's argument that the government could have rummaged through "the full extraction of [appellant]'s phone they had in their possession" is difficult to reconcile with appellant's assertions in AE IV. (Appellant's Br. 12).

[10] He also told [redacted] his name was "Jake." (R. at 460). While this does not match appellant's name, giving a fake name is consistent with his use of an anonymous chatting application and his hesitation to provide directly identifiable details, like his phone number. (Pros. Ex. 1, p. 30-31 (sealed)).

identification during the investigation, (R. at 509-10), and to [redacted]'s identification in court (R. at 461). The picture showing the PT vest and exposed genitalia gives solid indicators on identity as well. It captures part of a right forearm tattoo, resembling appellant's tattoo in the boat picture. (Pros. Ex. 9, p. 3 (sealed)). The pictured individual is wearing a PT vest with letters "AM" showing at the end of his nametape. (R. at 462; Pros. Ex. 9, p. 3 (sealed)). Along with the lewd images being sent close in time and in the same conversation as the clothed selfies, these details provide further circumstantial evidence implicating appellant.

Law enforcement searched appellant's phone and found further evidence of his guilt therein. Whisper had been installed on appellant's phone (around June 2022) and last downloaded on 7 October 2022, but it was not installed when SA [redacted] conducted his analysis in later October 2022. (R. at 575–76, 586). They also found four photographs in appellant's camera roll, exactly matching four pictures from the Whisper conversation; this included the boat picture, the gym picture, and the two pictures of his genitalia. (R. at 597–99; Pros. Ex. 9 (sealed)).

Appellant cites uncertainty about the final date the Whisper application was active on the phone. (Appellant's Br. 14–15). This topic caused some confusion but ultimately did not demonstrate any evidentiary issues or foul play. Special Agent [redacted] testified that the extraction report indicated potential Whisper activity on the phone on 27 October 2022. (R. at 583–84). He then clarified the usage time

was "zero," which indicated the activity was not a download and "technically, [the app] really wasn't even used at that time." (R. at 583, 590-92). He further explained the 27 October date could have simply been "a typo." (R. at 587).

Based on the information available, Whisper could not have been downloaded past 7 October and was not installed when SA [redacted] reviewed the extraction. (R. at 591). The agent with relevant custody of the phone, SA [redacted], unequivocally denied installing or deleting the Whisper application. (R. at 604–05). He testified about "severe career consequences" if he had so destroyed or manipulated evidence. (R. at 607–08). While appellant attempts to construct a narrative of CID malfeasance, the facts do not support this hypothesis as anything other than a red herring. This court must give appropriate deference here: the factfinder saw and heard this testimony about a logged zero-second activity and made credibility determinations about the CID agents.

Ultimately, to find appellant did not send the Whisper messages and photos, one must believe: (1) someone obtained four photographs of appellant (including two of his genitalia) that appellant possessed on his phone; (2) this individual learned various personal and service-related details about appellant; (3) this individual wished to mirror appellant closely but used their own name or a fake name while holding this conversation; and (4) the individual used the same anonymous messaging application that appellant downloaded just months before

the events in question. These circumstances do not constitute a reasonable doubt. Based on the evidence presented at trial, the specifications of attempted sexual abuse are legally and factually sufficient.

B. Appellant wrongfully solicited the distribution of child pornography beyond a reasonable doubt.

Appellant requested nude pictures from who he believed to be a fifteen-year-old girl. This alone would not show that he intended her to send child pornography. The totality of the circumstances, however, establish this intent beyond any reasonable doubt.

Appellant engaged in highly sexualized conversation with "Little_paladin," mentioning his desire to masturbate early on and asking about her sexual experience. (Pros. Ex. 1, p. 7 & 14 (sealed)). He was well-aware of her purported age early in their messaging. (Pros. Ex. 1, p. 4 (sealed)). He requested nude pictures right after he described rubbing his genitals against hers and right before he stated he would "push [his] cock inside [her]. (Pros. Ex. 1, p. 17 (sealed)). Though he mentioned her breasts a few times, appellant's primary focus throughout the messages was genital stimulation through oral and vaginal penetration. (Pros. Ex. 1 (sealed)). He also sent "Little_paladin" pictures of his erect penis, indicating both his sexual intent and his desire for similar pictures in exchange. (R. at 462, 661).

In no conceivable situation would an adult use the phrase "lascivious exhibition of the genitals" when requesting naked pictures, from a child or otherwise. (Appellant's Br. 18-19). Without an image to analyze, the context of the conversation and appellant's aggressive advances instead inform what he meant in his requests, for pictures and particularly for "nudes." He was not asking for "literary, artistic, political, or scientific" materials. *Ferber*, 458 U.S. at 755. His request for breast pictures does not constitute a defense; if anything, it provides clarity on his separate requests for "nudes." (Pros. Ex. 1, p. 21 (sealed)). Appellant was requesting, and intended [redacted] to distribute, child pornography. This court should affirm this finding as legally and factually sufficient.

C. The government agrees the specification for attempted receipt of child pornography is legally insufficient in this case.

The government concedes that proof of the "attempt" described in Specification 3 of Charge I solely relied on the requests, and efforts to persuade, for nude photographs. Such solicitation does not satisfy the 'more than mere preparation' element, rendering the conviction for attempted receipt of child pornography legally insufficient. *See United States v. Gilbert*, ARMY 20190766, 2020 CCA LEXIS 255, *1 (Army Ct. Crim. App. 31 Jul. 2020) (mem. op.). Grooming, threats, payment, travel, or downloading could constitute an appropriate

overt act; those are not sufficiently or clearly present here. Therefore, this court should set aside this single finding and affirm the remainder.[11]

Assignment of Error II

[WHETHER] REVERSIBLE ERROR OCCURRED WHEN TWO GOVERNMENT WITNESSES COMMENTED ON SSG INGRAM'S EXERCISE OF HIS RIGHTS TO REMAIN SILENT.

Additional Facts

When asked about appellant's reaction to the search authorization, SA [redacted] stated on direct examination, "He didn't really have much of a reaction. He was cooperative." (R. at 537–38). She then described the process of collecting appellant's phone as evidence. (R. at 538).

During his direct testimony, SA [redacted] described his involvement in—and CID's overall steps taken during—this investigation. (R. at 539–47). These steps included identifying appellant and his vehicle; forming an overall investigative plan; preparing, serving, and executing a search authorization; collecting appellant's cell phone as evidence; and interviewing [redacted]. (R. 540-47). Special Agent [redacted]'s description of the investigative "game plan" included, "I'll talk to the defendant, myself. I volunteered to interview him." (R. at 541).

[11] Because of concurrent sentencing with the solicitation specification, this court need not reassess the sentence. *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013).

When asked about the search authorization for appellant's vehicle, SA [redacted] responded, "So after the interview, you know, once you got the approved search warrant for the phone and to search the vehicle, we loaded up the defendant into a vehicle and transported him back to his unit where we conducted the search there of his vehicle." (R. at 541). He did not "recall a reaction" from appellant to the search authorization. (R. at 541). Defense did not object to the testimony above. Trial counsel did not refer to this testimony in argument. (R. at 655–64, 692–96).

Standard of Review

"Whether there has been improper reference to an accused's invocation of his constitutional rights is a question of law . . . review[ed] de novo." *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (internal citation omitted).

If proper objection does not preserve issues, appellant forfeits them "absent plain error." *Id*. (internal quotation marks and citations omitted). Establishing plain error requires satisfaction of three elements: (1) error occurred; (2) such error was plain and obvious; and (3) it materially prejudiced appellant's substantial rights. *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013) (citing *United States v. Powell*, 49 M.J. 460, 464–65 (C.A.A.F. 1998)). If the error is of constitutional dimension, "the burden is on the Government to establish [it was] harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005).

Law and Argument

The right to remain silent is a fundamental protection of individual liberty: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In the military context, service members receive additional statutory protections against self-incrimination: "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." UCMJ art. 31(a). Furthermore, "it is improper to bring to the attention of the triers of fact that an accused . . . asserted his rights to counsel or to remain silent." *United States v. Moore*, 1 M.J. 390, 391 (C.M.A. 1976) (internal citations omitted); *see also* Military Rule of Evidence [Mil. R. Evid.] 301(f)(2) (invoking rights to counsel or silence is not admissible and should not raise any unfavorable inference).

While "statements made by witnesses concerning the invocation of an accused's rights must be reviewed closely," the CAAF has recognized that "improper statements made during witness testimony are subject both to the crucible of cross examination and to credibility determinations by the members." *Moran*, 65 M.J. at 182 (internal citations and quotations marks omitted). Such witness comments are less troubling when not "reiterated by trial counsel" or before "a military judge alone." *Id.*

A. Special Agent [redacted]'s mention of an "interview" did not constitute a reference to appellant's rights invocation.

In his direct testimony, SA [redacted] described CID's investigative plan and briefly mentioned he volunteered to interview appellant; he then proceeded to the time "after the interview." (R. at 541). He only mentions the general investigative chronology and never references any invocation of appellant's rights. This agent's brief comments do not imply appellant's reticence or lack of cooperation in any way and thus are not error.[12]

Assuming error arguendo, appellant does not overcome forfeiture. The error is not plain and obvious, as it requires a strained interpretation away from the testimony's clear intent. And beyond a reasonable doubt, there is no material prejudice: (1) trial counsel did not repeat, exploit, or interpret this testimony; (2) the two interview references were miniscule and subsumed within dry descriptions of CID's investigative steps; and (3) the panel received multiple admonitions about appellant's absolute right to remain silent and not drawing any negative inferences therefrom. (R. at 371, 651). The strong evidence against the appellant resulted in a conviction; the fleeting reference to a possible interview was "unimportant in relation to everything else the [panel] considered." *Moran*, 65 M.J. at 187.

[12] To illustrate this point: if appellant instead had waived his rights and made self-serving statements, SA [redacted]'s testimony would have remained identical. The testimony's focus was CID's actions leading up to execution of the search authorization.

B. The CID agents' "demeanor evidence" was non-testimonial and did not comment on appellant's silence.

"'Demeanor' evidence is evidence that describes or portrays "[o]utward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions." *United States v. Clark*, 69 M.J. 438, 444 (C.A.A.F. 2011) (quoting Black's Law Dictionary 496 (9th ed. 2009)) (alteration in original). This type of evidence is testimonial (and inadmissible) if acting as a "communication [that] itself, explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." *Id.* (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 594 (1990)) (alterations in original). Nontestimonial demeanor evidence is admissible when relevant but still cannot comment on an "accused's silence in response to police questioning." *Id.* at 445.

Neither SA [redacted] nor SA [redacted] commented on appellant's demeanor during or in reaction to police questioning. Instead, they briefly touched upon his limited reaction to the impending search. This general lack of response is nontestimonial, differing starkly from a pointed finger or nodded head. *Id*. at 444 (providing examples of testimonial demeanor evidence). Appellant did not communicate anything with his demeanor and was not then facing interrogation.

Furthermore, the demeanor evidence did not relate to invoking his rights. Special Agent [redacted] contextualized the 'non-reaction' comment by highlighting his

cooperativeness. (R. at 538). The witness emphasized appellant's lack of defiance, not his silence. This testimony helped establish appellant's awareness of the search and physical response of providing the phone, as well as CID's steps in executing the search authorization correctly.[13] Special Agent [redacted] stated he did not remember a specific reaction. (R. at 541). Not only was this evidence nontestimonial and unrelated to police questioning, but also, it did not describe his demeanor at all. "I don't recall" is not even an indirect reference to appellant invoking his rights.

Neither witness' brief testimony about reaction impermissibly calls attention to appellant's silence or relates to interrogation. One witness did not recall a reaction; the other found him to be cooperative. The admission of these benign statements did not constitute error, particularly not of a clear and obvious nature, nor did it prejudice appellant in any way.

Assignment of Error III

[WHETHER] THE MILITARY JUDGE REVERSIBLY ERRED BY IMPROPERLY INSTRUCTING THE MEMBERS.

[13] Testimony walking through the search authorization's presentation and execution was relevant to chain of custody and proper police procedure. Its probative value only increased with repeated attacks on CID's integrity and alleged failures to follow procedures and protocols. (R. at 375, 448, 594, 615, 690).

Additional Facts

At the conclusion of the presentation of evidence, the military judge provided panel instructions.[14] (R. at 629–54). She instructed them about the presumption of innocence. (R. at 629, 652). She repeatedly described and referenced the Government's burden of proof beyond a reasonable doubt. (R. at 630–33, 635–36, 640, 645, 647–48, 652–53).[15] The military judge instructed the panel this burden never shifts to the accused. (R. at 652). She also emphasized, at defense's behest,[16] appellant's right to remain silent and the lack of any adverse inference therefrom. (R. at 651).

When instructing about witness believability, the military judge provided a list of factors to consider, including intelligence, prejudices, contradictions, testimonial probability, and character for truthfulness. (R. at 649). At this topic's conclusion, she stated, "You may consider this evidence in determining the

[14] Prior to instructing the panel, the military judge provided the proposed instructions to the parties. (R. at 625). The parties received over an hour to review them and then discussed them in an R.C.M. 802 session. (R. at 625–26). The defense made no objections throughout or after this process. (R. at 626–28).
[15] The military judge also provided preliminary instructions to the panel, and conducted voir dire, on this burden of proof. (R. at 345–46, 358–59).
[16] Before their instructions discussion, the military judge asked the civilian defense counsel, "Do you wish for the court to instruct on the fact that you did not testify?" (R. at 625). Defense counsel responded, "Yes, Your Honor." (R. at 625). The record attributes this answer to "ATC," but the surrounding context indicates this ascription to be a scrivener's error. (R. at 625).

believability of the accused." (R. at 649). Defense counsel did not object to this instruction.

The military judge also instructed:

> "Only you, the members in court, determine the credibility of the witnesses and what the facts of the case are. No witness can testify that a witness's account of what occurred is true or credible, that the witness believes that a crime occurred. To the extent that you believe that any witness testified or implied such a fact or belief, you may not consider this as evidence that a crime did not occur."

(App. Ex. XXVI, p. 14); R. at 650). Defense counsel did not object to this instruction.

Following substantive instructions, closing arguments, and procedural instructions, the military judge engaged in the following colloquy:

MJ: Defense Counsel, any objection to instructions I gave?

CDC: No, Your Honor.

MJ: Do you have any additional instructions[?]

CDC: No, Your Honor.

(R. at 701).

Standard of Review

"[W]hether a panel was properly instructed is a question of law reviewed de novo." *United States v. Quezada*, 82 M.J. 54, 57 (C.A.A.F. 2021) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)).

Issues of waiver are also legal questions reviewed de novo. *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019). When an appellant waived an error through "the intentional relinquishment or abandonment of a known right," the issue "is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal citations omitted).

Law and Argument

A failure to object to instructions typically constitutes forfeiture and requires review for plain error. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). In this case, however, appellant "did not just fail to object . . . He affirmatively declined to object to the military judge's instructions and offered no additional instructions." *Id.* (R. at 701). This express acquiescence constituted affirmative waiver and extinguished the issue.

Even without waiver, the military judge's instructions are not erroneous. "[T]he Benchbook is not a source of law and mere deviation from [it] does not necessarily constitute legal error." *United States v. Cornelison*, 78 M.J. 739, 746 (Army Ct. Crim. App. 2019). While not ideal, the challenged instructions' wording did not misstate the law. And when considered within the context of the entire body of instructions given to the panel, these specific instructions did not shift the burden of proof or focus improperly on the appellant's silence.

A. Appellant waived all objections to the panel instructions, mooting this assignment of error.

The facts in the present case closely resemble those from *Davis* which resulted in waiver. When the military judge in the latter case asked defense counsel if they had "any objections or requests for additional instructions," they answered, "No, Your Honor." *Davis*, 79 M.J. at 330. This action of "expressly and unequivocally acquiescing to the military judge's instructions" constituted waiver of "all objections to the instructions." *Id.* at 331 (internal citations and quotation marks omitted).

In this case, appellant did not just fail to object. Through counsel, he waived his objections in a similar manner. (R. at 701). Therefore, the asserted error is moot, and this court need not consider it further.

B. The instruction regarding witness opinion on credibility or guilt was legally correct and did not shift the burden of proof.

A witness cannot opine about the truth or credibility of another witness' account of what occurred. This form of "[h]uman lie detector evidence is inadmissible at a court-martial." *United States v. Garcia*, ARMY 20180146, 2020 CCA LEXIS 247, *3 (Army Ct. Crim. App. 22 Jul. 2020) (internal citations omitted) (mem. op.). Witnesses also cannot provide an opinion on the ultimate issue of guilt or innocence. *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000). These prohibitions necessarily apply to opinions both helpful and harmful

to an accused, as witness credibility and final verdicts are "committed to the factfinder at the court-martial." *Id*. at 352.

The military judge instructed, "No witness can testify that a witness[']account of what occurred is true or credible, that the witness believes that a crime occurred." (R. at 650). She also admonished the panel, "[Y]ou may not consider this as evidence that a crime did not occur." (R. at 650). With this instruction, the military judge informed the members they could not consider human lie detector testimony or opinions on the ultimate issue of guilt as evidence that a crime did *or* did not occur. Though the double-negative language is inartfully drafted, it is consistent with this instruction's primary message: only the members determine guilt or innocence, as well as credibility of witnesses and their testimony. There was no error in so instructing the panel.

Appellant argues the instruction shifts the burden of proof to the defense. (Appellant's Br. 28). This argument is unpersuasive. The instruction did not state or imply the defense must disprove the crime;[17] it helped define the bounds of permissible witness testimony. Furthermore, though never required, the defense can present evidence a crime did not occur, subject to the Military Rules of

[17] Appellant states, "In other words, the correct instruction omits the word 'not' in the phrase, 'Government's burden to prove that a crime did *not* occur.'" (Appellant's Br. 28). This argument adds language and mischaracterizes this instruction.

Evidence. Neither party can present human lie detector testimony or a witness's opinion on guilt, and the military judge can instruct the panel to disregard such testimony, even if potentially favorable to the defense.

Finally, the military judge provided correct and repeated instruction on the Government's burden of proof. (R. at 359, 630, 652). Any remaining issue with the "crime did not occur" language is harmless beyond a reasonable doubt within this context. There is no reasonable possibility this wording contributed to the panel's findings, as there was strong evidence of appellant's guilt and no opinion testimony on witness credibility or guilt.

C. The military judge did not err by instructing about appellant's believability.

Appellant claims the instruction, "You may consider this evidence in determining the believability of the accused," constitutes error because it "encouraged . . . improper speculation" about his silence. (Appellant's Br. 26; R. at 649). But nowhere in the instruction did "this evidence" include 'silence,' 'decision not to testify,' or 'invocation of one's constitutional rights.' Instead, the military judge provided multiple potential factors to evaluate believability of each witness's testimony, like "friendships, prejudices," and "discrepancies." (R. at 649). They would apply with equal force to an accused's testimony if provided.

Since appellant did not testify, the framework and listed factors became inapplicable in this case, but the challenged instruction did not become untrue.

Even if this instruction "highlighted" appellant's decision not to testify, it resulted in no material prejudice, beyond a reasonable doubt. (Appellant's Br. 26). Defense counsel explicitly requested an instruction highlighting this decision not to testify. (R. at 625, 651). The panel members received clear instruction to not draw any adverse inference. (R. at 651). And "[w]e presume, absent contrary indications, that the panel followed the military judge's instructions . . ." *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017). The unequivocal and invited instruction about appellant's right to remain silent cured any weak inference appellant twists from the "believability" instruction. Even presuming unwaived error, the military judge's instructions created no reasonable possibility of material prejudice; thus, this court should affirm the findings and sentence.

Assignment of Error IV

[WHETHER] THE SEARCH OF SSG INGRAM'S CELL PHONE VIOLATED BOTH THE TERMS OF THE AUTHORIZATION AND HIS FOURTH AMENDMENT RIGHT TO PARTICULARITY.

Additional Facts

During this investigation, SA [redacted] contacted CPT [redacted], a military magistrate, and requested authorization to seize and search appellant's cell phone. (R. at 527–

28). The CID agent drafted an affidavit and attached the Whisper messages and photos as part of that request. (R. at 123). The affidavit described the initial receipt of the Whisper messages from [redacted]; SA [redacted]'s identification of appellant; the contents of the messages and photographs; the corroborating identification of appellant's truck; the explanation of Whisper; and general information about recovering files and data from digital devices. (R. at 527–28; Pros. Ex. 2 for ID).

After "reviewing the affidavit and briefly speaking with the agent" on 12 October 2022, the magistrate found probable cause and granted the search authorization. (R. at 123–25; Pros. Ex. 10). He considered the totality of the circumstances, including the attempt to "elicit photos from what . . . appeared to be a 15-year old," "the nature of the conversation and the text messages, and then also . . . photos that showed a male exposing his genitalia." (R. at 123). The search authorization specified CID could search for appellant's "personal electronic communication devices" on his person and in his truck. (Pros. Ex. 10). It also authorized CID to "conduct a digital forensic examination of the devices for photos, images, and text messages *related to* communication via the Whisper App between [appellant] and an alleged 15 yo female from 25 September 2022 to . . . 12 October 2022." (Pros. Ex. 10; App. Ex. XVII, p. 2) (emphasis added). By this wording, he granted law enforcement the ability to look for *any* photos on the phone that might relate to the dates of the Whisper communication. (R. at 125).

The military magistrate had not heard of Whisper but understood from the affidavit that it was "a messaging app." (R. at 124). He "assumed that the way that you upload the photos" on Whisper involved allowing the application "to access . . . your camera roll, wherever you have on your phone your stored photos." (R. at 124–25). Captain [redacted] based this assumption on knowledge of other devices and applications, "like an iPhone or [S]ignal or WhatsApp." (R. at 124).

After seizing appellant's phone, CID conducted a digital forensic extraction of its data. (R. at 170). Special Agent [redacted] reviewed it, "specifically looking for the five images that were in the Whisper chats." (R. at 184). He understood the search authorization to allow him to "look[] through all of the images stored on the device," including photos "taken outside that September to October timeframe." (R. at 185). While searching through the camera roll, he found four pictures matching the pictures from the Whisper chat. (R. at 186–87).

On 24 July 2023, defense counsel filed a motion to suppress all evidence from the phone, asserting "CID intentionally and recklessly went way beyond the scope of the search authorization." (App. Ex. XI, p. 21). After receiving the government's response, the court held an Article 39(a) hearing. (App. Ex. XVII, p. 1). This session included testimony from numerous CID agents and defense's forensic digital expert. (R. at 117–309). The defense briefly argued overbreadth but focused again on CID exceeding the authorization's scope. (R. at 315–17).

The military judge issued a ruling on 31 August 2023, finding the search did not exceed the authorization's scope and, alternatively, the good faith exception applied to the agents' "objectively reasonable good faith belief that their conduct is lawful." (App. Ex. XVII, p. 12–13). The military judge considered the evidence and circumstances in the affidavit, finding it "reasonable to believe that the photos the accused sent through the Whisper messaging application would be found in the camera roll of his cell phone." (App. Ex. XVII, p. 8). She further stated the search authorization provided appropriate limits for the search and found it reasonable to search beyond Whisper for the relevant photos. (App. Ex. XVII, p. 9).

Standard of Review

This court reviews a military judge's denial of a suppression motion for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007). An abuse of discretion occurs when the military judge's ruling is "arbitrary, fanciful, clearly unreasonable[,] or clearly erroneous." *United States v. Tapp*, 85 M.J. 19, 27 (C.A.A.F. 2024) (quoting *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021)). The question of a search authorization's overbreadth is reviewed de novo. *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017) (citing *United States v. Maxwell*, 45 M.J. 406, 420 (C.A.A.F. 1996)).

Law

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This protection undoubtedly includes the contents of a person's cell phone. *See Riley v. California*, 573 U.S. 373, 386 (2014) (holding police officers generally must secure a warrant before searching a cell phone's data, even when seized incident to an arrest).

A. The warrant requirement and probable cause are grounded in reasonableness.

"The ultimate touchstone of the Fourth Amendment is reasonableness." *Id.* at 381 (internal citations and quotation marks omitted). Generally, reasonableness requires a magistrate-issued warrant supported by probable cause, typically from a sworn affidavit.[18] *Id*. at 382. Within the military system, "[p]robable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). It is not an exact standard, requiring "more than a bare suspicion, but something less than a preponderance of the evidence." *Leedy*, 65 M.J. at 213. "Probable cause deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and

[18] Mil. R. Evid. 315 contains the statutory requirements for military search authorizations, which incorporate the Fourth Amendment's mandates.

prudent men, not legal technicians, act." *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001) (quoting *Illinois v. Gates*, 462 U.S. 213, 241 (1983)) (internal quotation marks omitted).

Based on these considerations, "a determination of probable cause by a neutral and detached magistrate is entitled to substantial deference." *Id.* at 419 (quoting *Maxwell*, 45 M.J. at 423). Appellate courts should remain consistent "with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *Id*. Close calls or marginal cases should resolve in favor of this preference for magistrate authorizations. *Id.*

B. Warrants and search authorizations require particularity.

Warrants and search authorizations must particularly describe where to search and what to seize. U.S. Const. amend. IV; Mil. R. Evid. 315(b)(1). This particularity requirement aims to prevent generalized, "exploratory searches." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987). Particularized search authorizations provide the executing officer the reasonable ability to identify the location and evidence intended. *Id.* at 91(Blackmun, J., dissenting) (citing *Steele v. United States*, 267 U.S. 498, 503 (1925)). Particularity, however, does not mandate "precise ex ante knowledge of the location and content of evidence." *Richards*, 76 M.J. at 369 (internal citations omitted). Instead, the "proper metric of sufficient

specificity is whether it was reasonable to provide a more specific description . . . at that juncture." *Id*.[19]

Particularity often does not require pinpoint precision, including with digital devices. "[I]n the end there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files." *Id*. at 370 (quoting *United States v. Burgess*, 576 F.3d 1078, 1094 (10th Cir. 2009)). A search within a computer can be reasonably broad to locate the specified evidence. *Burgess*, 576 F.3d at 1092.

C. The good faith exception protects reasonable reliance on defective search authorizations, avoiding unnecessary suppression of evidence.

The Supreme Court has acknowledged "the tension between" (1) protecting individual liberty and deterring police misconduct and (2) ensuring justice by making available all "evidence which exposes the truth." *United States v. Leon*, 468 U.S. 897, 900–01 (1984) (quoting *Alderman v. United States,* 394 U.S. 165, 175 (1969)). To balance these concerns, the Court recognized an exception to the

[19] With greater knowledge of digital evidence's precise location, persuasive authority has suggested military magistrates should limit authorizations for digital devices to more defined areas. *See United States v. Ixcolgonzalez*, NAVY 202400253, 2025 CCA LEXIS 186 (N.M. Ct. Crim. App. 30 April 2025) (unpublished op.) (on Article 62 appeal, upholding military judge's suppression ruling based on magistrate's lack of particularity in permitting search of "Digital devices" for "Evidence of violations of Article 134" without more definition of devices and the known relevant locations therein).

judicially-created exclusionary rule for Fourth Amendment violations, namely good faith reliance on a search warrant subsequently held to be defective. *Leon*, 468 U.S. at 905.

Leon reaffirmed the "strong preference for warrants" and deference to the magistrate. *Id.* at 914. The Supreme Court also laid out the circumstances in which the good faith exception would not apply: (1) a knowingly or recklessly false affidavit; (2) a biased or non-detached magistrate; (3) a bare affidavit that does not give a substantial basis for finding probable cause; and (4) a warrant "so facially deficient – i.e., in failing to particularize the place to be searched – that the executing officers cannot reasonably presume it to be valid." *Id.* at 914–15, 923.

Within military justice, the government may use evidence from "an unlawful search or seizure," as long as: (A) the authorization issued from a competent authority; (B) this authority "had a substantial basis for determining the existence of probable cause;" and (C) those executing the search or seizure "reasonably and with good faith relied on" the authorization. Mil. R. Evid. 311(c)(3); *see also Carter*, 54 M.J. at 421 (concluding the military's good faith exception "does not establish a more stringent rule than *Leon* did for civilian courts").

Argument

The search authorization was valid and sufficiently particularized. The affidavit linked appellant's phone to the lewd communications, providing probable

cause to search for related evidence. The screenshots, along with common sense and experience, established a clear nexus between the phone's camera roll and the offenses. CID remained within the authorized scope while executing this search. Thus, the military judge did not err in denying the defense's suppression motion.

Even assuming arguendo the search violated the Fourth Amendment, the good faith exception applies. Law enforcement reasonably relied on a search authorization that appeared facially sound, and they interpreted its language in good faith. The search comported with the requirements of Mil. R. Evid. 311(c)(3) and should be upheld.

A. The search authorization was valid and supported by probable cause.

The magistrate had a substantial basis for finding probable cause. The affidavit accurately describes the facts at that time: the messages were sent on Whisper, a phone application; "Corn_energy" sent lewd messages and pictures after learning "Little_paladin" was fifteen; and CID identified appellant from the pictures, while also confirming his vehicle. (R. at 123-24; Pros. Ex. 2 for ID, p. 2).

The messages and pictures themselves establish that some of these pictures were not taken contemporaneously with their sending. The Whisper conversation took place at night where appellant stated he was "at work" and on a "24hr shift." (Pros. Ex. 1, p. 3 (sealed)). One picture showed him on a boat in the middle of the day, and another captured him in a gym, wearing different shirts in the respective

images. (Pros. Ex. 1, p. 9 (sealed)). Shortly after he sent them, "Little_paladin" asks, "Got one of you rn?" (Pros. Ex. 1, p. 10 (sealed)). Appellant did not correct or contradict her. (Pros. Ex. 1, p. 10 (sealed)). Thus, it is reasonable to conclude that appellant did not use the Whisper app to take these photographs during the conversation. Instead, they likely were stored somewhere on the phone.

Though not knowledgeable about Whisper, the military magistrate made a common-sense assumption about picture uploads, based on similar platforms and apps. (R. at 124–25). Requiring more technical precision in the affidavit and the magistrate's knowledge would eradicate the "commonsense" lens through which courts view these issues. *Carter*, 54 M.J. at 419. An establishment of nexus only requires "a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017)[20] (quoting *United States v. Clayton*, 68 M.J. 419, 424 (C.A.A.F. 2010)). The military magistrate was reasonable permitting a search for pictures that appeared to be stored on the cell phone, and the military judge did not abuse her discretion here.

[20] Appellant analogizes the present situation to *Nieto*, but the latter case is distinguishable. (Appellant's Br. 38–39). In *Nieto*, the nexus issue was the lack of particularized connection between two distinct devices, a laptop and phone. 76 M.J. at 104-05. The *Nieto* opinion did not address searches in a single device's files or apps.

B. The search authorization provided sufficient particularity and did not result in a general search.

The military magistrate authorized a search of appellant's cell phone for photographs and images[21] related to the Whisper communications. (Pros. Ex. 10). Probable cause existed to believe the evidence sought (the relevant photos) would be in the specified place (appellant's cell phone). With probable cause to search that place, law enforcement was "also authorized to search where the items sought might reasonably be located." *United States v. Macomber*, 67 M.J. 214, 220 (C.A.A.F. 2009) (finding, in a child pornography investigation, computer in appellant's dorm room was within scope of search authorization for room itself).

The search authorization did not need further particularity to ensure sufficient parameters for CID's search. This authorization could not be interpreted to allow rummaging through most of the device's contents (location data, internet searches, call logs, etc.). And the magistrate's role is "not to tell CID step by step how to execute a search authorization" or "giv[e] them legal advice." (R. at 131). Instead, CPT [redacted] gave sufficient specificity to execute the search, to look for photos and images within the cell phone where they reasonably could be located.

[21] The "text messages" authorization is irrelevant for the present discussion. First, CID did not recall searching appellant's text messages. (R. at 194). Also, no evidence obtained or offered by the government came from text messages. Even if this court found the "text message" portion overbroad, such error had no effect on the trial and was harmless beyond a reasonable doubt.

At the time of the search, no one knew the precise dates on which the pictures were taken or their exact current location within the cell phone. There was a reasonable probability the pictures resided in Whisper, in the camera roll, or even in unallocated space. Restricting the search further would have mandated ex ante knowledge of their location. Authorizing the search of the phone's stored images for the relevant photos did not create a general search barred by the Fourth Amendment. Based on its reasonable limits, the totality of circumstances then known, and the deference due to the magistrate, this court should find the search authorization provided sufficient particularity.

C. Law enforcement searched within the scope of the magistrate authorization.

As found by the military judge, the executing agents remained within the scope of a valid search authorization. (App. Ex. XVII, p. 10). CID looked in the specified location for the particular evidence, reasonably keeping the search to the phone's stored images. (R. at 190). They did not rummage through the entire phone or expand beyond the authorization's limits.

The search authorization's plain language showed the date range related to the Whisper conversation's timeframe, not the creation of particular photographs. In other words, the scope for searching the phone's contents was not limited by a date range as to the images' genesis, but rather by relevance to the photos and

images shared on the Whisper App during the specified date range. The military magistrate's intent only bolstered this reading. (R. at 124–25; App. Ex. XVII, p. 2). Searching the entire camera roll was consistent with the authorization, and it was necessary based on the reasonable probability appellant pulled stored photos from his camera roll to send on Whisper.

A phone's camera roll is analogous to physical containers like scrapbooks or file cabinets, which would require a full search for specific pictures. The only difference lies in digital forensic tools; technological filters potentially identify photographs with greater speed or narrow to match the search authorization's requirements. (R. at 204–05). Such tools can assist with proper execution and increased efficiency, but no case law mandates their use. Just as a police search for narcotics does not require the use of drug-sniffing dogs, the agents here were not required to employ advanced technology,[22] particularly when the date range filter was not appropriate for this search.

'Narrowest possible view' or even 'best practice' is not the standard; instead, the requirement is 'reasonableness.' *See United States v. Shields*, 83 M.J.

[22] Appellant claims CID's software could use filters "which would search for specific photos." (Appellant's Br. 40). The defense expert testified primarily about filtering by date. (R. at 204). Later, he mentioned the capability to filter searches by "the background and what is depicted in the photo." (R. at 211). The record is unclear about the availability and efficacy of image-matching filters in this investigation, as well as the executing agents' familiarity with this capability.

226, 232 (C.A.A.F. 2023) ("And when it comes to cell phones and computers, although one search method may be objectively 'better' than another, a search method is not unreasonable simply because it is not optimal."). As in *Shields*, the executing agent here "was not rummaging through Appellant's phone, even though the defense expert pointed to a different—and perhaps even better—way to conduct the search." *Id*. The agents stayed within the authorization's limits and properly narrowed their search to the device's stored images.[23] (R. at 190). Therefore, this court should find the military judge did not abuse her discretion.

D. Even if this court finds some error, the agents acted in good faith.

The military judge made a reasonable ruling in finding good faith. In this case, the neutral and detached military magistrate relied on an affidavit full of verifiable facts demonstrating a substantial basis for probable cause regarding appellant's phone. Law enforcement did not present any intentional falsities; create a barebone affidavit based on hunches; nor have any reason to believe it would be improper to search for the specified evidence (related photos, images, and text messages) within the specified location (appellant's phone).

While not absolutely precise on areas for search in the phone, the search authorization was not "so facially deficient . . . that the executing officers cannot

[23] Special Agent [redacted] testified, "I did use filters, but not from Cellebrite." (R. at 196). He did not document or recall the specific filters used. (R. at 196–97).

reasonably presume it to be valid." *Leon*, 468 U.S. at 923. Even if this court finds a slight deficiency in probable cause or issue with imprecise language, the agents' reliance on, and actual execution of, the search authorization falls squarely into the good faith exception of *Leon* and Mil. R. Evid. 311(c)(3). Law enforcement is reasonable to assume a search authorization permits them to *search*, not just immediately locate and secure evidence, if it has reasonable limits. To expand particularity to ex ante knowledge of an exact evidentiary location would render searches of buildings, rooms, devices, and vehicles effectively impossible.

The military judge found the good faith exception applied in this case, and this decision was well within the scope of her discretion. Suppressing this evidence would throw askew the balance struck in *Leon*, impeding the truth-seeking mission of the justice system without deterring any bad faith or egregious police conduct. This court, therefore, should find the military judge did not abuse her discretion in denying the defense's motion to suppress.

Conclusion

WHEREFORE, the government respectfully requests this honorable court, after setting aside the conviction for Specification 3 of Charge 1, deny the appellant's remaining requests for relief and affirm the findings and sentence.

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CERTIFICATE OF SERVICE

UNITED STATES v. INGRAM, ARMY 20230608

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted]; Ms. Terri R. Zimmermann at [redacted]; and Mr. Jack B. Zimmerman at [redacted] on the 15th day of August, 2025.

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PANEL NO. 4