

**United States Court of Appeals
for the Armed Forces
Washington, D.C.**

United States,
Appellee

USCA Dkt. No. 26-0087/AF
Crim.App. No. 39889

v.

ORDER DENYING PETITION

Alexander L.
Driskill,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 16th day of April, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Johnson)
Appellate Government Counsel (Payne)

APPENDIX

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39889 (rem)

UNITED STATES

Appellee

v.

Alexander L. DRISKILL

Airman (E-2), U.S. Air Force, *Appellant*

On Remand from

The United States Court of Appeals for the Armed Forces

Decided 14 November 2025

Military Judge: Willie J. Babor; Dayle P. Percle (remand).

Sentence: Sentence adjudged on 4 November 2019 by GCM convened at Ramstein Air Base, Germany; Aviano Air Base, Italy; and Buckley Air Force Base, Colorado. Sentence entered by military judge on 2 March 2020, and reentered on 20 January 2022: Dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Colonel G. Matt Osborn, USAF; Colonel Matthew D. Talcott, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Brittany M. Speirs, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, DOUGLAS, and MCCALL, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Judge MCCALL joined. Senior Judge DOUGLAS filed a separate opinion concurring in the result.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

JOHNSON, Chief Judge:

Appellant's case is before this court for a third time. A military judge found Appellant guilty, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of one specification of wrongful possession of obscene cartoons in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.¹ Contrary to his pleas, a general court-martial composed of officer members found Appellant guilty of the Additional Charge including one specification of rape of a child (Specification 1) and one specification of sexual abuse of a child (Specification 2), both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The members sentenced Appellant to a dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.^{2,3,4}

The procedural history of this case is described in this court's 2022 opinion. *See United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *2–5 (A.F. Ct. Crim. App. 23 Aug. 2022) (unpub. op.), *rev'd*, 84 M.J. 248 (C.A.A.F. 2024) (*Driskill II*). For purposes of this opinion a condensed version will suffice. This court previously reviewed this case twice. Upon initial review, this court remanded the record because the convening authority failed to take action as required on Appellant's entire sentence. *United States v. Driskill*, No. ACM 39889, 2021 CCA LEXIS 672, at *11–12 (A.F. Ct. Crim. App. 14 Dec. 2021) (unpub. op.) (*Driskill I*). Following remand, this court's subsequent re-

¹ As noted in this court's previous opinion, the specifications covered the time period from 11 October 2016 to 27 March 2018. References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). Further, the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), as fully implemented by Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018), applied to Appellant's court-martial and post-trial processing. Unless otherwise noted, all other references to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

² The military judge merged the specifications of rape of a child and sexual abuse of a child for sentencing.

³ After trial, the convening authority suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement, or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019.

⁴ Appellant was credited with 278 days in pretrial confinement.

view affirmed the findings but approved only so much of the sentence as provided for a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Driskill II*, unpub. op. at *2, 57–58.

The United States Court of Appeals for the Armed Forces (CAAF) granted review and held that Appellant’s conviction for wrongful possession of obscene cartoons in violation of Article 134, UCMJ, violated prohibitions against double jeopardy. *United States v. Driskill*, 84 M.J. 248, 249–50 (C.A.A.F. 2024). The CAAF set aside the findings as to that charge and specification and dismissed them with prejudice. *Id.* at 257. The CAAF remanded the case to this court to conduct “a new review under Article 66, UCMJ,” 10 U.S.C. § 866, specifically directing this court to “evaluate the impact of [the CAAF’s] dismissal of the Charge and its Specification on both (1) the findings of the Additional Charge and its Specifications and (2) the sentence.” *Id.*

I. BACKGROUND

Before the current charges and specifications were preferred in this case, Appellant was tried in a separate general court-martial at Aviano Air Base, Italy. *Id.* at 250. In that case, the Government charged Appellant with three specifications of violating Article 134, UCMJ, while he was stationed in Italy. The first two specifications alleged child pornography offenses and the third specification alleged knowing and wrongful possession of obscene cartoons in violation of 18 U.S.C. § 1466(b)(1). *Id.* After the close of the evidence, the military judge dismissed this latter specification because she concluded 18 U.S.C. § 1466(b)(1) “is not a statute of extraterritorial jurisdiction.” *Id.* at 251. However, she declined to dismiss the specification with prejudice because she held the court-martial lacked jurisdiction to try that offense. *Id.* Appellant was later acquitted of the remaining two child pornography specifications. *Id.*

After the conclusion of his first court-martial, the Government charged Appellant in the instant case with one specification of possession of obscene cartoons under Clause 2 of Article 134, UCMJ. The Government also charged Appellant with two new specifications under an Additional Charge, alleging rape of a child and sexual abuse of a child in violation of Article 120b, UCMJ. Appellant’s daughter, WD, was the named victim in both of the Article 120b, UCMJ, specifications. Before trial, Appellant’s trial defense counsel filed a motion to dismiss the possession of obscene cartoons specification on the grounds of former jeopardy. The military judge denied that motion.

Following this ruling, Appellant, pursuant to a PTA, pleaded guilty to the possession of obscene cartoons. After the military judge accepted Appellant’s guilty plea, the parties proceeded to litigate the Additional Charge and its two specifications. A panel of members convicted Appellant of both Article 120b,

UCMJ, specifications. As noted above, this court’s subsequent review affirmed the findings as entered, but reduced Appellant’s term of confinement to 30 years as a matter of sentence appropriateness.

The CAAF later set aside the findings on the Charge and Specification for possession of obscene cartoons and dismissed the Charge and Specification with prejudice. *Id.* at 257. The CAAF concluded that the prosecution of this offense was barred due to former jeopardy because the first court-martial had jurisdiction to prosecute Appellant for this offense, jeopardy attached during the first court-martial, and the specification for possessing obscene cartoons was for the same offense as in the first court-martial. *Id.* at 253–54. Our superior court then remanded the case for a “new review under Article 66, UCMJ,” with specific direction to “evaluate the impact” of the dismissal of the Article 134, UCMJ, charge and specification on the remaining findings of guilty as to the Article 120b, UCMJ, offenses and the sentence. *Id.* at 257.

We conclude the error with respect to former jeopardy did not affect the findings as to the Article 120b, UCMJ, offenses, and we reassess the sentence in light of the CAAF’s dismissal of the Article 134, UCMJ, charge.

II. DISCUSSION

A. Additional Background

Appellant entered into a PTA whereby he agreed to plead guilty to the wrongful possession of obscene cartoons in violation of Article 134, UCMJ, while pleading not guilty to the Article 120b, UCMJ, offenses. Appellant further agreed to enter into a reasonable stipulation of fact which would include, *inter alia*, that although Appellant did not know how many obscene cartoons he possessed, “the number was well in excess of 100.” The PTA further provided:

In exchange for what [Appellant] ha[s] offered to do via the proposed pretrial agreement . . . the Convening Authority agrees to direct the trial counsel to offer into evidence (1) an agreed upon exhibit containing no more than 100 cartoon images in support of the Specification of the Charge, and (2) an exhibit containing no more than 50 images to be used for purposes of [Mil. R. Evid.] 404(b). The exhibit containing no more than 100 cartoon images in support of the Specification of the Charge will be attached to the stipulation of fact as Attachment 1. The exhibit containing no more than 50 images to be used for purposes of [Mil. R. Evid.] 404(b) will be marked as a Prosecution Exhibit for Identification. The images in Attachment 1 will not contain hearsay (text in any language). If any of the images contained on the exhibit

marked as a Prosecution Exhibit for Identification contain text in any language, [Appellant] reserve[s] the right, through counsel, to object to those images and their accompanying text on a hearsay basis, and to have [Appellant's] objection heard by the Military Judge. [A]ppellant also reserves the right to object to the images contained on the exhibit marked as a Prosecution Exhibit for Identification on any other applicable basis, except foundation, which [Appellant] agree[s] to waive via this pretrial agreement offer.

During the military judge's providency inquiry with respect to Appellant's plea of guilty to possession of obscene cartoons, the Government admitted a stipulation of fact as Prosecution Exhibit 1 (PE 1). Consistent with the PTA, in the stipulation Appellant admitted *inter alia* that he possessed well in excess of 100 obscene cartoons on his electronic devices, and that he possessed these obscene cartoons "because, to him, they were sexually arousing." Attached to PE 1 was a sealed computer disc that contained 100 of the obscene cartoons Appellant possessed, which included depictions of young girls in various sexually explicit situations, including engaging in sexual acts with adult men.

Pursuant to Mil. R. Evid. 404(b), the military judge allowed the Government to use the attachment to PE 1 as evidence of Appellant's motive and intent with respect to the litigated Article 120b, UCMJ, offenses Appellant was charged with committing on his daughter WD. In addition, the military judge permitted the Government to introduce a second disc containing 50 more cartoon images Appellant possessed as Prosecution Exhibit 2 (PE 2), also as evidence of Appellant's motive and intent as to the Article 120b, UCMJ, offenses under Mil. R. Evid. 404(b).⁵ The images in PE 2 were of a generally similar nature to those in the attachment to PE 1.

During the Government's opening statement, trial counsel referred to Appellant being "sexually aroused" by the obscene cartoons, and in particular images of what "appear to be children performing sexual acts on their fathers."

When the Government published the attachment to PE 1 to the court members, the military judge instructed them:

⁵ More precisely, the military judge permitted the Government to use the images from the attachment to PE 1 and from PE 2 as evidence of motive with respect to Specifications 1 and 2 of the Additional Charge, and as evidence of intent with respect to Specification 2 of the Additional Charge. The military judge explained this was because "there's no intent requirement for Specification 1 of the Additional Charge," rape of a child in violation of Article 120b, UCMJ.

This evidence, that the accused knowingly and wrongfully possessed obscene cartoons, may be considered for the limited purpose of it's [sic] tendency, if any, to prove [Appellant's] motive to commit Specification 1 or 2 of the Additional Charge, as well as to prove that [Appellant] intended to commit the offense alleged in Specification 2 of the Additional Charge.

You may not consider this evidence for any other purpose, and you may not conclude or infer from this evidence that [Appellant] is a bad person or has criminal tendencies and that, therefore, he committed the offenses alleged in the Additional Charge.

The military judge provided a similar instruction when the Government published PE 2 to the court members.

At trial, Appellant's spouse HD testified about a conversation she had with Appellant while they were living in Italy with WD. In this conversation, Appellant became emotional and told HD that "he couldn't stop looking at little girls." When HD asked Appellant to explain, he showed her images of child pornography on his computer, specifically "children engaging in sexual acts." When HD asked Appellant "if he would ever touch a child, a little girl," Appellant responded, "I don't know, because I can't even stop looking at a picture." HD testified she told Appellant she would consider not divorcing him or turning him in if he got "rid of" the child pornography and promised he would "never do this again." Appellant then destroyed two USB drives as HD watched. Regarding this evidence, the military judge provided the court members a similar Mil. R. Evid. 404(b) instruction as he had with the attachment to PE 1 and PE 2. Specifically, the military judge instructed the members could consider evidence Appellant "may have shown [HD] images of child pornography, and commented on his willingness to commit crimes similar to those in the images" only as evidence of motive as to Specifications 1 and 2 of the Additional Charge and evidence of intent as to Specification 2 of the Additional Charge.

The court members were informed at several points that Appellant had pleaded guilty to the Charge and Specification alleging possession of obscene cartoons in violation of Article 134, UCMJ.

During closing argument, trial counsel referred several times to the obscene cartoons and Appellant's admission that he found them sexually arousing.

When the military judge delivered his instructions on findings he advised the court members:

An accused may be convicted based only on evidence before the court, and not on evidence of a general criminal disposition. Each

offense must stand on its own and you must keep the evidence of each offense separate.

Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense. If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant.

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

The military judge also repeated the instruction that evidence Appellant “knowingly and wrongfully possessed obscene cartoons” could be considered only “for the limited purpose of its tendency, if any, to prove the accused’s motive to commit Specification 1 or 2 of the Additional Charge, as well as to prove that the accused intended to commit the offense alleged in Specification 2 of the Additional Charge.”

B. Law

Under Article 66(d), UCMJ, 10 U.S.C. § 866(d), “the Court of Criminal Appeals conducts a de novo review of the record for legal sufficiency, factual sufficiency, and sentence appropriateness.” *United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023) (citation omitted).

The Fifth Amendment⁶ guarantees that “[n]o person shall . . . be subject, for the same offense, to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V, cl. 2. This provision consists of three separate constitutional guarantees for an accused: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Article 44, UCMJ, 10 U.S.C. § 844, incorporates these same constitutional guarantees for service members. *United States v. Easton*, 71 M.J. 168, 170 (C.A.A.F. 2012) (citation omitted).

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). This “standard is met where a court is confident that there was no reasonable possibility that

⁶ U.S. CONST. amend. V.

the error might have contributed to the conviction.” *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citations omitted).

In order to convict Appellant of rape of a child as alleged in Specification 1 of the Additional Charge, the Government was required to prove: (1) Appellant committed a sexual act on WD, to wit penetrating her mouth with his penis; and (2) at the time WD was under the age of 12 years. *See Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*), pt. IV, ¶ 45b.a.(a). In order to convict Appellant of sexual abuse of a child as alleged in Specification 2 of the Additional Charge, the Government was required to prove: (1) Appellant committed a lewd act on WD by causing her to touch, directly or through clothing, his genitalia; (2) at the time WD was under the age of 12 years; and (3) Appellant did so with the intent to gratify his sexual desire. 2016 *MCM*, pt. IV, ¶ 45b.a.(c).

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person’s character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving motive or intent with respect to a charged offense. Mil. R. Evid. 404(b)(2).

Court members are presumed to follow the military judge’s instructions absent evidence to the contrary. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

C. Analysis

As an initial matter, as stated above, the CAAF set aside this court’s prior opinion in *Driskill II* in its entirety and directed a new Article 66, UCMJ, review. *Driskill*, 84 M.J. at 257. Following the remand from the CAAF, both parties addressed the impact of the dismissal of the Charge and Specification on the other findings and the sentence, which the CAAF directed this court to consider. However, neither party has asked this court to readdress any of the other issues this court addressed previously in *Driskill II*. *See Driskill II*, unpub. op. at *14–36, 43–58. Having reviewed this court’s prior opinion, and in the absence of any new argument from the parties, we resolve these issues—excepting the issue of former jeopardy—consistent with this court’s prior opinion, with the additional caveat that we readdress the question of sentence appropriateness at the conclusion of our opinion below.

1. Effect on Remaining Findings of Guilty

Turning to the question our superior court directed us to address, Appellant contends this court should set aside the findings of guilty as to the Article 120b, UCMJ, offenses because those findings were improperly influenced by the erroneous prosecution for possessing obscene cartoons in violation of Article 134,

UCMJ. In the alternative, Appellant contends that if this court affirms the Article 120b, UCMJ, convictions, it should remand the case for a rehearing as to the sentence. Appellant further alternatively argues that if this court instead reassesses the sentence, it should approve no more than 15 years of confinement. In contrast, the Government contends this court should affirm the remaining findings of guilty and reassess Appellant’s sentence to the same sentence it previously affirmed in *Driskill II*, including a 30-year term of confinement, or at most reduce that term of confinement by four months.⁷

Neither party’s analysis explicitly tests the impact of Appellant’s erroneous prosecution for possessing obscene cartoons for harmlessness beyond a reasonable doubt, despite the CAAF’s finding of constitutional error. *See Driskill*, 84 M.J. at 250, 256; *Mason*, 59 M.J. at 424. Instead, both parties employ the “three-pronged test to assess the danger” of impermissible spillover stated in *United States v. Kerr*: “(1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover.” 51 M.J. 401, 406–07 (C.A.A.F. 1999) (quoting *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999)). In *Southworth*, 50 M.J. at 76–78, and *United States v. Curtis*, 44 M.J. 106, 128–29 (C.A.A.F. 1996), the CAAF used these factors to determine that military judges did not abuse their discretion by denying motions to sever offenses. In *Kerr*, the CAAF applied this test to determine whether the appellant “was prejudiced by the spillover effect” of evidence of uncharged misconduct, concluding he was not. 51 M.J. at 406–07.

However, we find the test articulated in *Kerr* to be of limited value in the instant case. Unlike *Kerr*, *Southworth*, and *Curtis*, here we must test a constitutional error for harmlessness beyond a reasonable doubt. Although the individual elements of the *Kerr* test bear consideration as part of the totality of the circumstances, the ultimate question remains whether we can be confident beyond reasonable doubt Appellant’s erroneous prosecution for possession of obscene cartoons did not contribute to his Article 120b, UCMJ, convictions. *See Prasad*, 80 M.J. at 29.

⁷ The Government’s position with regard to the sentence is facially somewhat contradictory. On one hand, the Government asserts “Appellant is well-deserving of his 30-year confinement sentence.” On the other hand, the Government contends this court should “affirm the findings and sentence in this case.” The Government appears to overlook the fact that when the CAAF set aside this court’s opinion in *Driskill II*, it also set aside the reduction of Appellant’s term of confinement from the adjudged 40 years and 9 months to 30 years. Viewed as a whole, in light of the circumstances, we understand the Government’s position to be that this court should approve a 30-year term of confinement.

Considering the circumstances as a whole, we are satisfied beyond a reasonable doubt the error did not influence Appellant's convictions for rape of a child and sexual abuse of a child. The essential questions include (1) what, if anything, would have transpired differently at Appellant's court-martial with respect to the litigated Article 120b, UCMJ, offenses if the double jeopardy violation had not occurred, and (2) how might these differences have affected the outcome. Of course, without the Article 134, UCMJ, charge, there would have been no guilty plea, no PTA, and no stipulation of fact. These are significant differences in themselves, but the essential question is how these changes would have affected the litigation of the contested offenses. We find three significant points that warrant discussion: use of the obscene images as Mil. R. Evid. 404(b) evidence of Appellant's motive and intent; informing the court members that Appellant had pleaded guilty to the wrongful possession of obscene cartoons; and Appellant's admission in PE 1 that he found the obscene images sexually arousing.

First, we find the Government would have introduced some number of the obscene images that were the subject of the Article 134, UCMJ, charge as Mil. R. Evid. 404(b) evidence of motive and intent of the Article 120b, UCMJ offenses, even if the possession of obscene images had not been charged. Appellant's possession of a large number of sexually explicit cartoon images of young girls, including young girls engaged in sexual acts with adult men, was relevant evidence of a particular sexual interest in young girls. Such an interest indicated a motive for Appellant to commit sexual acts with his then approximately two-year-old daughter WD. It is true the PTA anticipated the parties would agree upon no more than 100 images to be attached to the stipulation of fact as evidence of Appellant's guilt of the Article 134, UCMJ, offense, and that the Government would offer an additional exhibit with no more than 50 additional images as a separate prosecution exhibit. However, this provision was styled as a commitment by the convening authority in exchange for Appellant's guilty plea rather than a concession by Appellant. The PTA terms did not prohibit the Defense from opposing the use of these images as Mil. R. Evid. 404(b) evidence of the contested offenses. However, at trial, although the Defense objected to file names and certain words included with images in PE 2, they did not object to the attachment to PE 1 or PE 2 as Mil. R. Evid. 404(b) on relevance grounds. This suggests both parties believed the obscene images were Mil. R. Evid. 404(b) evidence of motive and intent. In any event, whether the Defense had opposed the images or not, we are convinced that without the guilty plea and PTA the Government would have successfully introduced some representative sample of the large number of obscene images of young girls to support the inference Appellant had motive and intent to commit sexual acts with WD, with appropriate limiting instructions similar to those the military judge provided at trial.

Next, we have considered that the court members were informed at various points that Appellant pleaded guilty to wrongfully possessing obscene cartoons. However, the military judge provided appropriate anti-spillover instructions to the effect that Appellant's guilt of that offense could not be used to infer, assume, or prove he was guilty of the contested offenses. Court members are presumed to follow the military judge's instructions absent evidence to the contrary. *Taylor*, 53 M.J. at 198. We do not find such evidence here. Accordingly, we conclude the information Appellant pleaded guilty to with respect to the Article 134, UCMJ, charge did not contribute to his convictions for the contested offenses.

Turning to Appellant's admission in the stipulation of fact that he found the obscene images sexually arousing, his sexual interest was plainly implied by his possession of a large number of such images even if he had not explicitly admitted it. The images in question are pornographic as well as obscene. Although during argument trial counsel might not have been able to recite Appellant's own words to the court members in quite the same way, trial counsel would have been able to direct the court members to the same inferences and conclusions. This is particularly so when the obscene images are viewed in conjunction with his wife HD's testimony that Appellant had showed her a collection of images of child pornography, admitted he could "not stop looking at little girls," and said he did not know if he would "ever touch a child, a little girl." We conclude beyond a reasonable doubt the findings as to the contested offenses would have been the same regardless of the existence of this admission in the stipulation of fact.

Considering the entirety of the evidence and the totality of the circumstances,⁸ we are convinced beyond a reasonable doubt the findings as to rape of a child and sexual abuse of a child in violation of Article 120b, UCMJ, would have been unchanged had the double jeopardy violation not occurred.⁹

⁸ For a more detailed description and analysis of the evidence supporting Appellant's convictions for rape of a child and sexual abuse of a child, see *Driskill II*, unpub. op. at *5–23.

⁹ In addition, to the extent the *Kerr* test described *supra* applies to our inquiry, we find all three prongs weigh in favor of finding no impermissible spillover. 51 M.J. at 406–07. With regard to the first prong, as described above, evidence of the obscene cartoons would have been admissible proof of the Article 120b, UCMJ, offenses to the extent that they demonstrated motive and intent consistent with Mil. R. Evid. 404(b). In other words, the impact of the obscene cartoon evidence would have been much the same with or without the Article 134, UCMJ, charge. As to the remaining prongs, the military judge did provide appropriate limiting instructions, and the findings do not reflect improper spillover given the strength of the proper evidence of the Article 120b, UCMJ, offenses.

2. Sentence Reassessment

Next we consider whether, in light of the CAAF’s dismissal of the Article 134, UCMJ, charge, we can reliably reassess Appellant’s sentence, or instead must remand the case for a rehearing on the sentence. *See United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). Our task is to discern whether we can “determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity.” *Id.* at 15 (quoting *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006)) (additional citation omitted). Because the error was of constitutional dimensions, we must ensure a reassessment excises the prejudice beyond a reasonable doubt. *See Mason*, 59 M.J. at 424. We find that we can reliably reassess.

First, we find there has not been a dramatic change in the penalty landscape and Appellant’s exposure. *See id.* The maximum impossible punishment for the convicted offenses remains unchanged, including *inter alia* confinement for life without the possibility of parole and a mandatory dishonorable discharge. This factor favors reassessment.

Second, Appellant was sentenced by court members rather than the military judge. *See id.* at 16. This factor favors a rehearing.

Third, the remaining offenses “capture the gravamen of the criminal conduct included within the original offenses.” *Id.* By multiple measures, the significance of Appellant’s convictions for rape of a child and sexual abuse of a child was far greater than that of his conviction for possession of obscene cartoons. This factor favors reassessment.

Fourth, the remaining offenses of rape of a child and sexual abuse of a child are of a type the judges of this court “have experience and familiarity with.” *Id.* This factor also favors reassessment.

In addition, recognizing these four factors are “illustrative, but not dispositive,” we note an additional significant aspect of this case. *Id.* at 15. The court members adjudged a term of confinement of 40 years and 9 months, but in *Driskill II* this court reduced the term of confinement to 30 years as a matter of sentence appropriateness. *Driskill II*, unpub. op. at *57. We are confident beyond a reasonable doubt that without the Article 134, UCMJ, conviction, the court members would have sentenced Appellant to at least 30 years in confinement. In addition, we find such a term of confinement is not inappropriately severe for the remaining convictions. Accordingly, we reassess Appellant’s sentence to a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

D. Post-Trial Delay

On 1 April 2024, Appellant’s record of trial was redocketed with this court following the CAAF’s remand. Appellant requested and was granted 11 enlargements of time, over the Government’s opposition, before filing his brief on 27 May 2025. The Government timely filed its response on 26 June 2025, and Appellant filed a reply brief on 3 July 2025.

“[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay “where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals.” 63 M.J. at 142. Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Id.* at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant’s due process right to timely post-trial review: (1) oppressive incarceration; (2) “particularized” anxiety and concern “that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We review de novo an appellant’s entitlement to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

Over 18 months have elapsed since Appellant’s record of trial was redocketed with this court. Therefore, under *Moreno*, there is a facially unreasonable delay. We have considered the *Barker* factors and find no violation of Appellant’s due process rights. Appellant has not specifically alleged cognizable prejudice from the delay, and under the circumstances we do not discern any oppressive incarceration, particularized anxiety or concern, impairment to any further appeal, and no rehearing has been directed. Absent prejudice, we find the delay—primarily attributable to Appellant’s 11 motions for enlargement of time—has not been so egregious as to adversely affect the perception of the military justice system. Accordingly, we find no violation of Appellant’s due process rights; nor do we find any relief warranted in the absence of a due process violation. *See* 10 U.S.C. § 866(d)(2); *United States v. Valentin-Andino*, 85 M.J. 361, 364 (C.A.A.F. 2025).

III. CONCLUSION

We reassess the sentence to a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The remaining findings of guilty as to Specifications 1 and 2 of the Additional Charge and the Additional Charge, and the sentence, as reassessed, are correct in law and fact, and no additional error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). The findings of guilty as to Specifications 1 and 2 of the Additional Charge and the Additional Charge, and the sentence, as reassessed, are **AFFIRMED**.

DOUGLAS, Senior Judge (concurring in the result):

I concur in the result for the remaining findings of guilty and the sentence. However, I write separately because, in my opinion, our new Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, *de novo* review, hinges upon two separate standards of review of disparate evidence.

Because our superior court set aside one of Appellant's convictions, determined after a guilty plea and pursuant to a pretrial agreement, we must decide which evidence, if any, is available for our consideration of whether the remaining findings and sentence are correct in law and fact, or whether any error occurred that was materially prejudicial to the substantial rights of Appellant. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

A. Harmless Beyond a Reasonable Doubt: The Stipulation of Fact

At trial, Appellant entered a plea of guilty to violating one specification of Article 134, UCMJ, 10 U.S.C. § 934, knowing and wrongful possession of obscene cartoons. Appellant agreed he would "enter into a reasonable stipulation of fact." The stipulation of fact was entered as evidence, and labeled Prosecution Exhibit 1 (PE 1).

PE 1 is a two-page document and was used by the trial judge in his providency inquiry with Appellant. Paragraph five reads as follows:

The [Appellant] agrees and admits that he wrongfully possessed obscene cartoons. The cartoons were obscene in that their sexual content was patently offensive in light of community standards. Finally, the cartoons possessed by the [Appellant] lacked serious literary, artistic, political, or scientific value. The [Appellant] did not possess these obscene cartoons for any artistic reason. *The [Appellant] possessed these obscene cartoons because, to him, they were sexually arousing.*

(Emphasis added).

Appellant informed the members of his guilty plea and agreed that PE 1 could be used as evidence of the contested findings. Trial counsel referred to the emphasized language above, in part, to rationalize for the members Appellant's actions as alleged in the contested findings.

Independent of the stipulation of fact, Appellant's spouse, HD, testified that after Appellant showed her certain images of children on his computer, she asked him if "he got off on this?" Appellant replied, "Why does anybody look at pornography, [HD]?" The trial judge admitted this evidence under Mil. R. Evid. 404(b), as well as additional evidence, discussed below.

A plea agreement may include a promise by the accused to plead guilty to, or to enter a "confessional" stipulation. R.C.M. 705(b)(1). "Confession" means an acknowledgement of guilt. Mil. R. Evid. 304(a)(1)(B). The Fifth Amendment right against self-incrimination* and Article 31, UCMJ, 10 U.S.C. § 831, apply during pretrial and trial stages. *United States v. Scott*, 51 M.J. 326, 329 (C.A.A.F. 1999).

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). An error is harmless beyond a reasonable doubt when the error did not contribute to Appellant's conviction or sentence. *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016). This "standard is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citations omitted).

Here, Appellant agreed that the confessional stipulation of fact, for the offense set aside, could be used against him for the contested offenses. Because the trial judge admitted it not only for the providency inquiry, but also for these purposes, this is error. However, I find it harmless error.

First, Appellant's confession, as written in PE 1, that he "*possessed these obscene cartoons because, to him, they were sexually arousing*" does not prove most, if not all, of the elements of either remaining conviction (rape of a child and sexual abuse of a child). The two elements of child rape include a sexual act against WD, and that she had not yet attained the age of 12. The three elements of sexual abuse of a child include a lewd act upon WD, that she had not yet attained the age of 12, and that his intent was to gratify his sexual desire. At best, Appellant's confession that the cartoon images were sexually

* U.S. CONST. amend. V.

arousing could be used to explain his intent for the lewd act upon WD. Assuming Appellant's confession satisfies element three of the offense of sexual abuse of WD, the Government still must prove the remaining elements of both offenses.

Second, Appellant's confession was redundant to the sarcastic response he made to his spouse. She asked him, did he "get off" on the images he possessed and showed her. In more precise terms, HD asked Appellant if he was sexually aroused by looking at the images he showed her. His sarcastic reply, "why does anybody look at pornography," was in effect, an affirmative, "yes." Therefore, even without the confessional stipulation of fact, the Government admitted another confession, albeit through a witness, and under Mil. R. Evid. 404(b).

Therefore, I am confident admitting the confessional stipulation of fact did not contribute to Appellant's remaining convictions. *Hills*, 75 M.J. at 375.

B. Abuse of Discretion: The Evidence of Crimes, Wrongs, or Other Acts

One evening, HD asked Appellant to tuck her into bed. They discussed whether either was hiding anything from the other. Appellant admitted he had been hiding something for some time. Appellant then told HD that he "could not stop looking at little girls." HD was confused. They walked from the bedroom to their living room, where Appellant had his laptop computer. Appellant and HD sat down, and Appellant began to show HD images. The images were of child pornography. HD then asked Appellant if he "got off on this," which Appellant replied, "Why does anybody look at pornography, [HD]?" HD asked how he came to have these images, and Appellant explained he searched for them on the "black web." HD asked Appellant if he would ever "touch a child, a little girl." Appellant replied, "I don't know because I can't even stop looking at a picture." HD told Appellant to "get rid" of these images, and if he agreed to not look at these images again, she would not divorce him or report him. In front of her, Appellant threw one USB (Universal Serial Bus) drive into their fireplace and another he "tore into pieces" and threw in the trash. HD believed those were the only devices he had that contained images of this type. The next morning, Appellant denied that he would ever touch a child.

In response to a defense motion to exclude portions of HD's testimony, the trial judge ruled admissible under Mil. R. Evid. 404(b) that (1) Appellant showed images of child pornography to HD, and that (2) Appellant commented to HD upon his willingness to commit similar acts upon children to those demonstrated in the images.

The trial judge explained this evidence was to show motive as to both child rape and sexual abuse of a child, and intent as to sexual abuse of a child. The rationale was due to the similarity between the admitted Mil. R. Evid. 404(b) evidence and the charged offenses.

Specific to motive, the trial judge ruled that the trier of fact, when considering Appellant’s motives for committing the contested offenses could consider the charged acts served as an “outlet for the emotion of lust.” Specific to intent, the trial judge ruled that the trier of fact, when considering Appellant’s intent in the commission of sexual abuse of a child, could consider Appellant’s state of mind.

For both motive and intent, the trial judge determined the similarity was sufficient between the admitted Mil. R. Evid. 404(b) evidence and the alleged crimes to satisfy the three-part test of *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). The trial judge relied primarily upon the rationale provided in *United States v. Hays*, 62 M.J. 158, 164 (C.A.A.F. 2005).

PE 1 has one attachment: a disc containing 100 cartoon images. Pursuant to the pretrial agreement, PE 1, including the attachment, would be admitted “in support of” the now set aside offense. The 100 cartoon images were lawfully seized by the Government. At trial, Appellant and counsel for both sides agreed the use of these images would be to show Appellant’s “motive with respect to both [remaining offenses], and his intent with respect to the second [offense (sexual abuse of a child)].”

PE 2 is a separate disc containing an additional 50 cartoon images. This exhibit was also referenced in the pretrial agreement. Explicitly, this exhibit would be admitted “for purposes of [Mil. R. Evid.] 404(b) . . .” The trial judge ruled PE 2 would be admitted under Mil. R. Evid. 404(b) “consistent with the 404(b) ruling earlier in this case.” These images were also lawfully seized by the Government.

We review the trial judge’s decision to admit or exclude evidence for abuse of discretion. *United States v. Greene-Watson*, 85 M.J. 340, 345 (C.A.A.F. 2025) (citing *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024)). Trial judges abuse their discretion if: (1) the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) they use incorrect legal principles; or (3) their application of the correct legal principles to the facts is clearly unreasonable. *Id.*

Trial judges are tasked with giving proper instructions including limiting instructions to preclude spillover from one offense to another distinct offense. *See United States v. Southworth*, 50 M.J. 74, 76–78 (C.A.A.F. 1999).

“Evidence of a crime, wrong, or other act . . . may be admissible for another purpose, such as proving motive . . . [or] intent . . .” Mil. R. Evid. 404(b)(2); *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024).

“Motive evidence shows the doing of an act by a particular person by evidencing an emotional need in that person which could have incited or stimulated that person to do that act in satisfaction of that emotion.” *United States*

v. Whitner, 51 M.J. 457, 461 (C.A.A.F. 1999) (citing *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A. 1986)). Possession of a “large number” of sexual materials in the military barracks room, including some depicting acts similar to those particularly charged, reasonably suggests an emotional need for committing the charged misconduct. *See id.* (citing *United States v. Rhea*, 33 M.J. 413, 422 (C.M.A. 1991)) (additional citation omitted).

When considering whether uncharged misconduct constitutes admissible evidence of intent under Mil. R. Evid. 404(b), we consider “whether Appellant’s state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses.” *United States v. Hays*, 62 M.J. 158, 164 (C.A.A.F. 2005) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). “Extrinsic acts of evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.” *Id.* (quoting *United States v. Tanksley*, 54 M.J. 169, 176 (C.A.A.F. 2000) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988))).

Appellate courts apply a three-part test “to assess the danger of spillover: (1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect impermissible crossover.” *United States v. Kerr*, 51 M.J. 401, 406 (C.A.A.F. 1999) (citing *Southworth*, 50 M.J. at 76–78, and then citing *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1997)).

Here, regardless of the references in the pretrial agreement to the cartoon image exhibits, and despite Appellant’s agreement the members could consider the cartoon exhibits for the contested offenses, the trial judge thoroughly reviewed the facts, and the case law before providing his rulings. There were multiple motions and motions hearings, with witnesses, evidence, and arguments. After meticulous analysis, the trial judge admitted two portions of HD’s testimony, the attachment to PE 1, and PE 2 under Mil. R. Evid. 404(b), for motive and intent. For purposes of this de novo review, Appellant objects on appeal, to our consideration of all this evidence. Appellant contends the trial judge admitted this evidence contrary to impermissible spillover.

I find the trial judge did not abuse his discretion. The trial judge’s facts are well supported by the evidence. His applied the correct legal principles and his application of the correct legal principles was reasonable and measured.

Appellant’s spouse, HD, explained the context in which Appellant showed her images of “child pornography” on his computer. When HD asked Appellant if he would ever “touch a child, a little girl” Appellant replied, “I don’t know

because I can't even stop looking at a picture." Evidence of Appellant looking at images described by HD as child pornography and commenting to HD upon his willingness to commit similar acts upon children to those demonstrated in the images is permitted under Mil. R. Evid. 404(b)(2) to prove motive and intent. Although motive is not an element of either contested offense, motive evidence explains the emotional need Appellant could have had which incited him to commit the sexual and lewd acts upon his child, WD. *Whitner*, 51 M.J. at 461. Intent is an element of sexual abuse. Intent evidence can explain Appellant's state of mind in the commission of the charged acts when the uncharged acts are sufficiently similar. *Hays*, 62 M.J. at 158. The images are sufficiently similar, as evidenced by HD's reaction to being shown images of "child pornography," and then in the same conversation, asking her husband if he was sexually aroused by looking at these images, and then asking if he would ever touch a little girl.

The cartoon images admitted against Appellant as proof of the contested offenses totaled 150. The trial judge reasoned they were admissible under Mil. R. Evid. 404(b)(2) as evidence of motive and intent, consistent with his previous ruling regarding HD's testimony. Appellant's possession of a significant number of images, involving adult men, and female children, including some depicting acts similar to those particularly charged, reasonably suggests an emotional need for committing the charged offenses. *Whitner*, 51 M.J. at 461 (citing *Rhea*, 33 M.J. at 422).

I have carefully considered whether the evidence admitted under Mil. R. Evid. 404(b) constitutes impermissible spillover. *Kerr*, 51 M.J. 401. As already discussed *supra*, the Mil. R. Evid. 404(b) evidence was properly admitted. The trial judge crafted appropriate and narrow limiting instructions and provided them to the members at every logical and relevant stage of the proceedings. The findings do not reflect impermissible crossover. The child witness, WD, testified live at trial. Her mother, HD, and grandfather testified to her outcry statements. A forensic interviewer also testified at trial. Numerous additional witnesses testified for the Government as well as for the Defense. The findings reflect the members found Appellant guilty of the contested offenses beyond a reasonable doubt. Having determined all three parts of the *Kerr* test are satisfied, I do not find prejudicial spillover.

After reviewing the entire record and considering whether the remaining findings of guilty, and the sentence, as reassessed, are correct in law and fact, and whether any error materially prejudicial to the substantial rights of the Appellant occurred, I find no error that materially prejudices a substantial right of Appellant. Therefore, I would affirm the remaining findings and sentence, as reassessed.

This opinion is subject to revision before publication.

**UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES**

UNITED STATES
Appellee

v.

Alexander L. DRISKILL, Airman
United States Air Force, Appellant

No. 23-0066
Crim. App. No. 39889

Argued October 25, 2023—Decided March 4, 2024

Military Judges: Willie J. Babor (trial) and
Dayle P. Percle (remand)

For Appellant: *Major Frederick J. Johnson* (argued);
Major Kasey W. Hawkins (on brief); *Mark C.*
Bruegger, Esq.

For Appellee: *Captain Jocelyn Q. Wright* (argued);
Colonel Matthew D. Talcott, Lieutenant Colonel
James P. Ferrell, Lieutenant Colonel G. Matt Os-
born, and Mary Ellen Payne, Esq. (on brief).

Judge MAGGS delivered the opinion of the Court, in
which Chief Judge OHLSON, Judge SPARKS,
Judge HARDY, and Judge JOHNSON joined.

Judge MAGGS delivered the opinion of the Court.

In this appeal, Appellant challenges the finding that he is guilty of violating Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012), by possessing obscene cartoons. Appellant argues that trying him for the alleged offense violated the prohibitions against double jeopardy in the Fifth Amendment and Article 44(a), UCMJ, 10 U.S.C. § 844 (2012), because another court-martial had previously tried him for the same offense. Applying this Court’s recent precedent in *United States v. Rice*, 80 M.J. 36 (C.A.A.F. 2020), we agree with Appellant and grant appropriate relief.

I. Background

The applicable version of Article 134, UCMJ, commonly known as the “General Article,” provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134, UCMJ, 10 U.S.C. § 934 (2012).¹

In a portion of the *MCM* applicable to this case, the President parsed the language of Article 134, UCMJ, and explained its meaning as follows:

Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as “clauses 1, 2, and 3” of Article 134. Clause 1

¹ The version of Article 134, UCMJ, in the 2012 edition of the U.S.C. is reprinted in *Manual for Courts-Martial, United States* app. 2 (2016 ed.) (*MCM*). The parties agree that this version of Article 134, UCMJ, governs this case. We do not address the subsequent amendment to Article 134, UCMJ.

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offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act.

MCM pt. IV, para. 60.c.(1). Although the President’s explanations of the UCMJ are not binding on this Court, *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017), this Court followed an earlier, similar version of this explanation in *United States v. Leonard*, 64 M.J. 381, 382-83 (C.A.A.F. 2007) (following *MCM* pt. IV, para. 60.c.(1) (2005 ed.)).

Appellant’s first court-martial took place in 2018. He was charged with three specifications of violating Article 134, UCMJ. The third specification alleged that Appellant violated clause 3 of Article 134, UCMJ, by possessing obscene cartoons in violation of a federal criminal statute, 18 U.S.C. § 1466A(b)(1). The specification averred that:

[Appellant] did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, to wit: visual depictions of minors engaging in sexually explicit conduct, and that said visual depictions were transported in foreign commerce by computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

Section 1466A(b)(1) addresses the possession of obscene cartoons, stating:

Any person who, *in a circumstance described in subsection (d)*, knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene

....

... shall be subject to [certain specified] penalties.

Id. (emphasis added). One of the circumstances, described in subsection (d), is that “any visual depiction involved in the offense has been . . . transported in interstate or foreign commerce by any means.” *Id.* § 1466A(d)(4). Another circumstance is that “the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.” *Id.* § 1466A(d)(5).

Appellant pleaded not guilty to the charge and all three of its specifications. After the close of evidence, Appellant contended in his argument on findings that there was not enough evidence to prove the third specification. He stated that he could not have violated § 1466A(b) while he was in Italy because § 1466A “is not a statute of extraterritorial application.” Appellant, in an additional filing requested by the military judge in regard to this issue, asked the military judge to dismiss the specification with prejudice “because jeopardy has attached.”²

The military judge dismissed the third specification. She concluded that Congress had intended for § 1466A “to apply only within the jurisdictional limits of the United States.” On this basis, she held that the court did not have jurisdiction to try the third specification. The military judge, however, did not agree with Appellant that the specification should be dismissed with prejudice. The military judge ruled: “The lack of extraterritoriality within . . . § 1466A does not foreclose prosecution for the offense alleged, it only forecloses prosecution under the current charging scheme.”³

Appellant’s second court-martial occurred in 2019. Appellant was charged with one specification of violating Article 134, UCMJ, and two specifications of violating Article

² From the materials before us, it is unclear how trial defense counsel’s closing argument challenging the jurisdictional element became characterized as a motion to dismiss by the military judge.

³ The military judge found Appellant not guilty of the two other specifications in the charge sheet.

120b, UCMJ, 10 U.S.C. § 920b (2012). The specification under Article 134, UCMJ, was similar to the obscene cartoons specification dismissed at the first court-martial, but it alleged a violation of clause 2 of Article 134, UCMJ, instead of clause 3. The specification asserted that Appellant “did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, such conduct being of a nature to bring discredit upon the armed forces.”

Appellant moved to dismiss the specification under Article 134, UCMJ, on grounds that trying him for this offense would violate the double jeopardy prohibitions in the Fifth Amendment of the United States Constitution and Article 44(a), UCMJ, because he had already been tried for the same offense at his first court-martial. The military judge in the second court-martial denied the motion, relying on the statement by the military judge in the first court-martial that dismissal of the specification was for lack of jurisdiction and therefore did not foreclose alleging the offense under a different charge. Appellant thereupon petitioned the United States Air Force Court of Criminal Appeals (AFCCA) for a writ of mandamus, asking the AFCCA to set aside the military judge’s denial of his motion to dismiss the specification. The AFCCA denied the writ. *In re Driskill*, Misc. Dkt. No. 2019-03, 2019 CCA LEXIS 281, at *3-4, 2019 WL 2896472, at *2 (A.F. Ct. Crim. App. July 2, 2019) (unpublished) (order).

Following these rulings, Appellant pleaded guilty to the specification under Article 134, UCMJ, subject to the understanding that the double jeopardy issue he had raised was not waived. Appellant pleaded not guilty to the additional specifications under Article 120b, UCMJ, but the court-martial found him guilty of these offenses following a trial. The court-martial sentenced Appellant to a dishonorable discharge, confinement for forty years and nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority did not modify the findings or sentence.

On appeal, the AFCCA concluded that no violation of the prohibitions against double jeopardy in the Fifth Amendment and Article 44(a), UCMJ, had occurred. *United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *42-43, 2022 WL 3589824, at *14 (A.F. Ct. Crim. App. Aug. 23, 2022) (unpublished). The AFCCA reasoned that jeopardy had not attached to the specification concerning obscene cartoons at the first court-martial because that specification “was dismissed for lack of jurisdiction—grounds wholly unrelated to Appellant’s guilt or innocence—and that the dismissal came before Appellant was acquitted of the remaining specifications.” *Id.* at *42, 2022 WL 3589824, at *14. Rejecting Appellant’s other arguments, the AFCCA affirmed the findings. *Id.* at *4-5, 2022 WL 3589824, at *2. The AFCCA, however, reassessed the sentence, reducing the period of confinement to thirty years. *Id.* at *57, 2022 WL 3589824, at *20.

This Court granted review of the following issue:

In Appellant’s first court-martial, the military judge dismissed the charge of wrongful possession of obscene cartoons after closing arguments. Did the Government’s re prosecution of Appellant for the same offense violate the Fifth Amendment and Article 44’s prohibitions against double jeopardy?

United States v. Driskill, 83 M.J. 327 (C.A.A.F. 2023) (order granting review). As discussed below, we answer in the affirmative and grant appropriate relief.

II. Standard of Review and Governing Law

The granted double jeopardy issue is a question of law that we must answer *de novo*. *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019).

Three prohibitions against “double jeopardy” apply to courts-martial. *United States v. Rice*, 80 M.J. 36, 40 n.8 (C.A.A.F. 2020). The Double Jeopardy Clause of the Fifth Amendment provides: “No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Similarly, Article 44(a), UCMJ,

provides: “No person may, without his consent, be tried a second time for the same offense.” And Rule for Courts-Martial (R.C.M.) 907(b)(2)(C) requires dismissal of a charge or specification if “[t]he accused has previously been tried by court-martial or federal civilian court for the same offense.”

Applying these three prohibitions requires multiple steps. One step is determining whether the accused has been “twice put in jeopardy” or, stated differently, “tried twice.” Answering this question is sometimes complicated because not every court-martial proceeding counts as a “trial” for purposes of the Fifth Amendment, Article 44, UCMJ, and R.C.M. 907(b)(2)(C). Several rules address this issue. Most relevant here is this Court’s holding in *United States v. Easton* that jeopardy attaches pursuant to Article 44(a), UCMJ, “when evidence is introduced” and that “once jeopardy has attached, an accused may not be retried for the same offense.”⁴ 71 M.J. 168, 172 (C.A.A.F. 2012). R.C.M. 907(b)(2)(C)(i)(I) similarly provides, in pertinent part, that a court-martial proceeding is not considered a trial pursuant to the double jeopardy doctrine unless “[i]n the case of a trial by military judge alone, presentation of the evidence on the general issue of guilt has begun.” Another relevant rule is that jeopardy cannot attach if the court-martial lacks jurisdiction. R.C.M. 907(b)(2)(C)(iv) states: “No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.”

⁴ Following *Easton*, Article 44 was amended to specify that jeopardy attaches differently depending on the forum. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5226, 130 Stat. 2000, 2910-11 (2016). In the case of a trial by military judge alone, jeopardy attaches on the presentation of evidence; in the case of a trial by member panel, jeopardy attaches when the members have been impaneled. See Article 44(c)(1)(A)-(2)(A), UCMJ, 10 U.S.C. § 844(c)(1)(A)-(2)(A) (2018); R.C.M. 907(b)(2)(C)(i)(I)-(II).

Another step in applying the prohibitions against double jeopardy is determining whether the accused is truly being tried twice “for the same offense.” When specifications allege offenses under different statutory provisions, this step requires courts to look closely at the elements of each of the alleged offenses. In *Blockburger v. United States*, 284 U.S. 299, 303-04 (1932), the Supreme Court considered whether a single sale of morphine could violate separate sections of a federal criminal statute that prohibited the sale of narcotics and, thus, be considered separate offenses. One section of the statute prohibited the sale of narcotics except in their original packaging. *Id.* at 303. Another section prohibited the sale of narcotics absent a written order. *Id.* at 303-04. The Supreme Court in *Blockburger* announced the following general test for deciding whether two offenses are the same for purposes of double jeopardy: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not.” *Id.* at 304. Applying this test, the Supreme Court held that the narcotic charges at issue for the one sale were not for the same offense because each of the two respective sections of the criminal statute required proof of a fact that the other did not. *Id.*

While the *Blockburger* test generally applies in court-martial, this Court in *Rice* declined to follow “the strict application of *Blockburger* in the context of the intentionally capacious Article 134, UCMJ.” 80 M.J. at 42. The Court in *Rice* held instead that only some “differences are valid ones when determining what constitutes the same offense for purposes of a double jeopardy analysis involving Article 134, UCMJ.” *Id.* at 43. Because the two specifications under comparison in this case both allege violations of Article 134, UCMJ, a detailed review of *Rice* is necessary to explain the applicable law.

In *Rice*, the United States first prosecuted the accused in a federal district court. *Id.* at 38. One count of the indictment alleged that the accused had possessed child pornography in violation of 18 U.S.C. § 2252A. *Id.* at 38 & n.2. To

establish a violation of this civilian criminal statute, the government had to prove that the child pornography at issue had been transported in interstate commerce or produced with materials that had been transported in interstate commerce. *Id.* at 38 n.2. The Court identified this requirement as a “jurisdictional element” of § 2252A. *Id.* at 40. A “jurisdictional element” is an element that links a statute to one of the legislative powers of Congress enumerated in the United States Constitution, such as the power to regulate interstate commerce in U.S. Const. art. I, § 8, cl. 3. *Torres v. Lynch*, 578 U.S. 452, 457 (2016).

The government subsequently tried the appellant in *Rice* by court-martial. 80 M.J. at 38. Two specifications of the charges against him in the court-martial alleged that he had possessed child pornography in violation of clause 2 of Article 134, UCMJ. *Id.* The appellant argued that trying him by court-martial for these two specifications would contravene the prohibition against double jeopardy because the government had already prosecuted him in federal district court for the same offense. *Id.* at 39. The government responded that per *Blockburger*, the two specifications in the court-martial did not allege the “same offence” for which he was tried in the federal district court because the § 2252A offense required proof of transportation in interstate commerce, while the offense charged under clause 2 of Article 134, UCMJ, required proof that the offense was service discrediting. *Id.* at 40. This Court, however, rejected the government’s argument because it saw “no evidence that Congress intended Article 134, UCMJ, to serve as a vehicle for the military to re-prosecute Title 18 offenses tried in a federal civilian court simply by removing a jurisdictional element and charging it as a violation of clause 1 or 2.” *Id.* at 41. Accordingly, this Court disregarded the jurisdictional element of the § 2252A offense for the purpose of applying the *Blockburger* test and concluded that the subsequent court-martial for the possession specifications in *Rice* violated the Double Jeopardy Clause. *Id.* at 44.

III. Discussion

Appellant argues in this appeal, as he argued before the military judge and the AFCCA, that the prohibitions against double jeopardy in the Fifth Amendment and Article 44(a), UCMJ, bar his second trial for the possession of obscene cartoons in violation of Article 134, UCMJ. We agree with Appellant. Our decision rests on two primary conclusions. The first conclusion is that jeopardy attached in the first court-martial because the Government introduced evidence in the case and because the court-martial had jurisdiction to try Appellant for the offense. The second conclusion is that the specifications in the first and second court-martial concerning obscene cartoons were “for the same offense” under the analysis that this Court used in *Rice*.

A. Attachment of Jeopardy in the First Court-Martial

Under R.C.M. 907(b)(2)(C)(i)(I) and this Court’s decision in *Easton*, jeopardy attaches to an offense when the Government introduces evidence on the general issue of guilt. The parties do not dispute that this happened in the first court-martial.⁵ The military judge and the AFCCA, however, reasoned that jeopardy did not attach in this case because the first court-martial lacked jurisdiction to try Appellant for the specification concerning obscene cartoons. We agree with the general proposition that jeopardy cannot attach if the court-martial lacks jurisdiction because R.C.M. 907(b)(2)(C)(iv) provides that “[n]o court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of [the rule against double jeopardy].” But we cannot agree that the

⁵ A complete record of trial was not prepared for the first court-martial because Appellant was not found guilty of any offense. But the military judge in the first court-martial issued a written ruling, included in the record in the present case, which described evidence that the Government presented at the first court-martial.

first court-martial lacked either personal or subject matter jurisdiction.

The first court-martial had personal jurisdiction over Appellant under Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1) (2012), because, according to a stipulation of fact in the record, he was a member of a “regular component of the armed forces.” The stipulation specifies that Appellant was an active duty Airman assigned to Aviano Air Base in Italy at the time of the offense. Appellant further testified to his military membership at his second trial when he confirmed that he enlisted in 2016 for a term of six years and had never been released from active duty.

The first court-martial also had subject matter jurisdiction to determine whether Appellant had violated Article 134, UCMJ. Article 134, UCMJ, provides that it applies to “persons subject to this chapter,” referring to Chapter 47 of Title 10 of the U.S. Code, which contains the UCMJ. Thus, alleging that the offense occurred in Italy did not deprive the court-martial of jurisdiction over either Appellant or the offense under Article 134, UCMJ, because Article 5, UCMJ, 10 U.S.C. § 805 (2012), provides that “[t]his chapter applies in all places.”

The military judge reached a different conclusion, reasoning that the court-martial lacked jurisdiction over the offenses because § 1466A did not apply to conduct outside of the “special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.” We cannot agree because the question of whether the court-martial had personal and subject matter jurisdiction is distinct from the merits question of whether the Government alleged and proved a fact necessary to show a violation of § 1466A, namely, that the alleged conduct occurred in a location to which the statute applies.⁶

⁶ Appellant argues that § 1466A could apply in Italy if the Government could prove that the offending conduct occurred at an installation such as Aviano Air Base. This Court previously entertained a similar argument with respect to another federal

On this point, this Court’s decision in *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984), is instructive. In *Williams*, the accused was found guilty of violating clause 3 of Article 134, UCMJ, when he kidnapped someone on Fort Hood in violation of a federal statute, 18 U.S.C. § 1201(a)(2). *Id.* at 208-09. On appeal, however, this Court held that the evidence was legally insufficient to sustain the finding of guilt because the government had not proved that the offense occurred on a portion of Fort Hood that was within the “‘special maritime and territorial jurisdiction of the United States’” as § 1201(a)(2) required. *Id.* at 215. The Court emphasized that “all factual issues concerning guilt or innocence—including any issue of territorial jurisdiction—must be submitted to the members for determination.” *Id.* The lesson of *Williams* is that the Government’s failure to prove a statutory element of this kind concerns the sufficiency of the evidence rather than the jurisdiction of the court-martial.

In this case, confusion may have arisen about whether the jurisdiction of the first court-martial depended on the location of the offense because federal statutory elements requiring that conduct occur in the territory of the United States, or affect interstate or foreign commerce, are typically called “jurisdictional elements.” This phrase, however, is a term of art. The phrase refers to elements that link a statute to a constitutional power of Congress to legislate, not to the jurisdiction of a court. As the United States Court of Appeals for the Tenth Circuit explained in *United States v. Tony*, 637 F.3d 1153, 1158-59 (10th Cir. 2011):

criminal statute that outlawed conduct only in the territory of the United States. *See United States v. Wilmot*, 11 C.M.A 698, 702, 29 C.M.R. 514, 518 (1960) (recognizing that “the question of whether Yokota Air Base Japan, an area located in a foreign country, is territory under the control of the United States” is a question subject to “proof of the facts”). Given our reasoning about the subject matter jurisdiction of this Court, we need not express an opinion on this issue in this case.

[A] “jurisdictional element” . . . is “‘jurisdictional’ only in the shorthand sense that without that nexus, there can be no federal crime.” The absence of a required element “is not jurisdictional in the sense that it affects a court’s subject matter jurisdiction, *i.e.*, a court’s constitutional or statutory power to adjudicate a case.”

Id. (citations omitted).

Confusion may also have arisen because of Appellant’s own arguments. Appellant incorrectly asserted in the filing submitted to the military judge that the court-martial lacked subject matter jurisdiction because § 1466A does not apply outside of the United States. While this argument may have contributed to the military judge’s ruling, it is not correct, and we do not believe that this incorrect argument precluded Appellant from subsequently making a double jeopardy argument in the second court-martial. Appellant had no double jeopardy argument to forfeit or waive until the second court-martial began. And Appellant specifically preserved his double jeopardy argument at his second court-martial by raising it before entering his pleas. *See United States v. Collins*, 41 M.J. 428, 429 (C.A.A.F. 1995) (holding that double jeopardy arguments are waived if the appellant does not raise them before entering a guilty plea).

The Government presents three arguments against our conclusion that jeopardy attached in this case. First, the Government contends that in the context of courts-martial, extraterritoriality is indeed an issue of subject matter jurisdiction. The Government asserts that Article 18, UCMJ, 10 U.S.C. § 818 (2012), limits the subject matter jurisdiction of courts-martial to offenses “made punishable” under the UCMJ. Thus, according to the Government, the conduct alleged in the specification at issue in the first court-martial was not “punishable” under the UCMJ because § 1466A cannot reach conduct in Italy. The Government therefore argues that the military judge correctly dismissed the specification for lack of subject matter

jurisdiction. We cannot accept this argument because it implies that a court-martial's subject matter jurisdiction over an offense depends on whether the Government can prove all of the elements necessary to establish that the accused is guilty of the offense. No precedent supports that view.⁷

Second, the Government argues that the military judge's dismissal of the specification in the first court-martial was based on a legal judgment unrelated to factual guilt or innocence. The Government explains that the military judge was focused solely on a legal question, not an evidentiary question, and thus, the military judge never determined whether the Government's evidence was inadequate. Although the military judge's order to dismiss the third specification in the first court-martial focused on the lack of extraterritoriality, as the Government accurately emphasized here, we disagree with the military judge's legal determination regarding jurisdiction. The point in time at which jeopardy attaches is not when a military judge sitting as a court-martial makes a ruling based on the sufficiency of the evidence. Instead, as explained above, jeopardy attaches when the government introduces evidence on the general issue of guilt. *Easton*, 71 M.J. at 172; R.C.M. 907(b)(2)(C)(i)(I).

Third, the Government argues that the dismissal in the first court-martial was similar to a mistrial and should be treated like one. The Government reasons that "[i]f the military judge's dismissal is akin to a mistrial, [a] reprosecution is not barred because Appellant brought the motion." The Government explains that if Appellant had successfully moved for a mistrial at the first court-martial, then jeopardy would have terminated, and the Government could try him again for the same offenses. *See Easton*, 71 M.J. at 172 (explaining that the prohibition against double

⁷ Additionally, this Court has previously stated that "[t]he question of the extraterritorial application of federal statutes has nothing to do with the jurisdiction of the federal courts." *United States v. Martinelli*, 62 M.J. 52, 56 n.4 (C.A.A.F. 2005).

jeopardy does not “preclude subsequent proceedings, inter alia, where there is ‘manifest necessity’ for declaring a mistrial or otherwise discharging the jury” (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824))). We disagree because we see no precedent for the analogy that the Government proposes.

B. Same Offense in First and Second Courts-Martial

Our second conclusion is that Appellant was tried twice for the same offense in the first and second courts-martial. In the first trial, as described above, Appellant was charged with violating clause 3 of Article 134, UCMJ, by possessing obscene cartoons in violation of § 1466A. In the second court-martial, he was charged with possessing the same obscene cartoons in violation of clause 2 of Article 134, UCMJ. It is true, and both parties agree, that a strict application of the *Blockburger* test, unaffected by this Court’s decision in *Rice*, would indicate that these are different offenses because each offense contains an element that the other does not. Specifically, at the first trial, the Government was required to prove that the cartoons at issue had traveled in or affected foreign commerce or that the offense occurred in the special maritime and territorial jurisdiction of the United States, but the Government did not have to prove that the offense was service discrediting. At the second trial, the Government had to prove that possessing the cartoons was service discrediting but did not have to prove that the cartoons had traveled in or affected foreign commerce or that the offense occurred in the special maritime and territorial jurisdiction of the United States.

In *Rice*, this Court held that the Double Jeopardy Clause precluded the government from exploiting the unique nature of Article 134, UCMJ, to try a servicemember by court-martial for conduct that the government had previously charged as violations of Title 18 offenses in federal civilian court “simply by removing a jurisdictional element” and refiling the charges under clause 1 or 2 of Article 134, UCMJ. *Rice*, 80 M.J. at 40-44. To determine whether the earlier Title 18 charges and the later military Article 134 specifications covered the same offenses, the Court

disregarded the jurisdictional elements of the Title 18 offenses. And when the jurisdictional elements are disregarded, the § 1466A offense charged at the first trial no longer “requires proof of a fact which the [offense charged at the second trial] does not.” *Blockburger*, 284 U.S. at 304. Accordingly, following *Rice*, we must conclude that trying Appellant for the offense under Article 134, UCMJ, at the second court-martial violated the prohibition against double jeopardy.

The Government presents two arguments against our conclusion that the two courts-martial tried Appellant for the same offense. First, the Government attempts to limit *Rice* by emphasizing its narrow holding. The Court in *Rice* specifically cautioned that its holding “does not reach beyond the ‘unusual facts’ of this case, and thus ‘does not extend to those situations where additional substantive elements distinguish an offense charged under Article 134, UCMJ, from another criminal offense.’” 80 M.J. at 40 n.10 (citation omitted). We agree that the scope of *Rice* is narrow. But we see no meaningful difference between this case and *Rice*. In both cases, the accused were first charged with conduct violating a federal civilian criminal statute that included a jurisdictional element and were then later charged with the same conduct under clause 2 of Article 134, UCMJ. In both instances, if the jurisdictional elements of the federal civilian criminal statute are disregarded, the first offense does not require proof of any element the second offense does not.

The Government alternatively argues that this Court should reconsider *Rice* and apply the strict *Blockburger* test. Citing the dissent in *Rice*, the Government contends that there is no persuasive reason for disregarding elements when applying the *Blockburger* test. We do not believe that this argument is a sufficient reason to reconsider recent precedent. We have explained:

For purposes of our analysis under the doctrine of *stare decisis* . . . we do not limit our review to whether [a prior decision] was wrongly decided, but rather we examine:

whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law.

United States v. Quick, 74 M.J. 332, 336 (C.A.A.F. 2015) (footnote omitted). Because the Government has not addressed each of these factors in its brief, we decline to reconsider *Rice*.⁸

For these reasons, the finding of guilty for the Charge and its Specification must be set aside, and the AFCCA must conduct a new review under Article 66, UCMJ, 10 U.S.C. § 866 (2012). Appellant argues that the AFCCA on remand must consider how the admission of the obscene cartoons as evidence may have affected the findings of guilty for the other contested offenses.⁹ We agree. Accordingly, in conducting its new review under Article 66, UCMJ, the AFCCA shall evaluate the impact of this Court's dismissal of the Charge and its Specification on both (1) the findings of the Additional Charge and its Specifications and (2) the sentence. If the AFCCA sets aside the findings and sentence, a rehearing is authorized. If the AFCCA affirms the findings, it may reassess the sentence based on the affirmed findings of guilty or order a rehearing on the sentence.

⁸ We also note that the Court in *Rice* rested its decision largely on the evident intentions of Congress in enacting Article 134, UCMJ. We express no opinion on whether Congress, by amending Article 134, UCMJ, could provide for a different result in future cases.

⁹ During the inquiry required by *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), Appellant agreed that the stipulation of fact and his guilty plea could be used as evidence on the findings of the contested offenses (the Additional Charge and its Specifications). During the findings phase of the second court-martial, the stipulation of fact and the guilty plea were introduced into evidence in support of the contested offenses. In addition, trial counsel referred to this evidence in the opening statement and closing arguments.

IV. Conclusion

The granted question is answered in the affirmative. The decision of the United States Air Force Court of Criminal Appeals is set aside. The findings as to the Charge and its Specification are set aside and the Charge and its Specification are dismissed with prejudice. The record is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals for a new review under Article 66, UCMJ, 10 U.S.C. § 866 (2012), consistent with this opinion.

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 39889 (f rev)

UNITED STATES

Appellee

v.

Alexander L. DRISKILL

Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Upon Further Review

Decided 23 August 2022

Military Judge: Willie J. Babor; Dayle P. Percle (remand).

Sentence: Sentence adjudged on 4 November 2019 by GCM convened at Ramstein Air Base, Germany (20 May 2019), Aviano Air Base, Italy (20–27 June 2019), and Buckley Air Force Base, Colorado (28 October–4 November 2019). Sentence entered by military judge on 2 March 2020, and reentered on 20 January 2022: Dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Kasey W. Hawkins, USAF; Major Alexander A. Navarro, USAF.

For Appellee: Lieutenant Colonel Amanda L.K. Linares, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major Allison R. Barbo, USAF; Major Alex B. Coberly, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and MEGINLEY, *Appellate Military Judges*.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge KEY joined. Judge MEGINLEY filed a separate dissenting opinion.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Judge:

At a general court-martial, in accordance with his pleas and pursuant to a pretrial agreement (PTA), a military judge found Appellant guilty of one specification of wrongful possession of obscene cartoons in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.¹ Contrary to his pleas, a panel of officer members found Appellant guilty of one specification of rape of a child and one specification of sexual abuse of a child, both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The members sentenced Appellant to a dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.^{2,3} The PTA did not place any limitations on punishment.⁴

Appellant's case is before this court a second time. Although not raised by Appellant, we determined the convening authority had erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860, *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*), and we remanded his case to the Chief Trial Judge, Air Force Trial Judiciary, for corrective action. See *United States v. Driskill*, No. ACM 39889, 2021 CCA LEXIS

¹ The specifications covered the time period from 11 October 2016 to 27 March 2018. References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise noted all other references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.). Further, the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), as fully implemented by Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018), applied to Appellant's court-martial and post-trial processing.

² The military judge merged the specifications of rape of a child and sexual abuse of a child for sentencing.

³ After trial, the convening authority suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement, or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019.

⁴ Appellant was credited with 278 days in pretrial confinement.

672, at *11–12 (A.F. Ct. Crim. App. 14 Dec. 2021) (unpub. op.).⁵ The convening authority subsequently approved Appellant’s sentence, resulting in a new entry of judgment. With this error corrected, we now turn to Appellant’s remaining nine issues, along with three additional issues Appellant raised subsequent to our first opinion on this case.

Appellant initially raised nine issues which we have reworded: (1) whether the evidence was legally and factually sufficient to support Appellant’s convictions for rape and sexual abuse of a child; (2) whether the military judge abused his discretion by allowing a Government expert to testify about future impact on the named victim; (3) whether the military judge erred when he denied Appellant’s request to sever the charge for wrongful possession of obscene cartoons from the charge and specifications for rape and sexual abuse of a child; (4) whether Appellant’s conviction for wrongful possession of obscene cartoons violated the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution⁶ and Article 44, UCMJ, 10 U.S.C. § 844; (5) whether the military judge erred by denying Appellant’s motion for appropriate relief due to unequal access to the named victim; (6) whether the military judge erred by failing to compel an expert consultant for Appellant; (7) whether Appellant’s guilty plea to wrongful possession of obscene cartoons was provident;⁷ (8) whether the confinement portion of the sentence was inappropriately severe; and (9) whether Appellant’s convictions for rape and sexual abuse of a child were factually and legally insufficient due to errors in the child forensic interview.

After Appellant’s record was returned to this court, Appellant raised three additional issues which we have reworded: (10) whether his convictions for rape and sexual abuse of a child were factually and legally insufficient due to bias in the investigation; (11) whether trial counsel committed prosecutorial misconduct during his findings argument; and (12) whether the Government

⁵ Our previous decision also addressed one additional issue not raised by Appellant in his initial appeal: whether Appellant was entitled to relief for a facially unreasonable post-trial delay. We found Appellant did not suffer prejudice and that no relief was warranted. *United States v. Driskill*, No. ACM 39889, 2021 CCA LEXIS 672, at *11 (A.F. Ct. Crim. App. 14 Dec. 2021) (unpub. op.).

⁶ U.S. CONST. amend. V.

⁷ Although Appellant invites us to analyze this issue as one of legal and factual sufficiency, we decline to do so. Appellant pleaded guilty to this offense during his court-martial. In a guilty plea context, the issue is not legal or factual sufficiency, but whether the plea is provident. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

can prove beyond a reasonable doubt that the military judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless.⁸

With respect to issues (3), (5), (6), and (12), we have carefully considered Appellant's contentions and find they do not require further discussion or warrant relief. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We consider issues (1), (9), and (10) together because they all concern Appellant's contention that his convictions for rape and sexual abuse of a child were legally and factual insufficient.

Finding no error that materially prejudiced a substantial right of Appellant, and following this court's Article 66(d), UCMJ, 10 U.S.C § 866(d), mandate to affirm only so much of the findings and sentence as we find, on the basis of the entire record, should be approved, we affirm the findings. Further, we affirm the sentence, as reassessed by this court, as a result of our ruling on sentence appropriateness.

I. BACKGROUND

Appellant joined the Air Force in May 2016. At the time of his trial, he was 26 years old. In October 2016, after finishing technical school, Appellant married HD. The couple had a daughter, WD, who had been born in December 2014. After the wedding, Appellant moved to Aviano Air Base, Italy, and was assigned to the 31st Operations Support Squadron. Approximately six months later, in March 2017, HD and WD joined him in Italy.

According to HD's trial testimony, about a year later, in February or March 2018, she and Appellant spent a "really good weekend" together visiting nearby towns in Italy. At the conclusion of the weekend, Appellant went to the couple's bedroom to "tuck [HD] in and say good night." HD testified that for the past couple of months Appellant had been staying up late using his computer on the couch so it had become rare for him to go to bed with her. HD explained that after Appellant hugged her goodnight he said he had "been hiding something from [her] for a while" and that he "couldn't stop looking at little girls." HD was unsure what he meant and asked him to show her what he was talking about. Appellant then walked into the living room with her, retrieved his laptop, and showed her images of child pornography. During the conversation that followed, Appellant admitted to HD that he found the images sexually arousing. In response, HD asked Appellant "if he would ever touch a child, a little girl." Appellant replied "I don't know, because I can't even stop looking" at the images. At this point, HD told Appellant that she would not report or divorce

⁸ Issues (6), (7), (8), (9), (10) and (11) were personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

him if he immediately got rid of the images and promised her that he would never look at that type of content again. Appellant then took the universal serial bus (USB) drives that contained the child pornography and destroyed them. HD testified she believed Appellant destroyed all the images of child pornography that he possessed.

Later in March 2018, the Air Force Office of Special Investigations (AFOSI) launched an investigation of Appellant. The investigation began when WD, who was almost 3 years old at the time, was diagnosed with herpes.⁹ Appellant was interviewed by AFOSI on 27 March 2018. Consistent with the purpose of the investigation and with Appellant's consent, AFOSI agents along with local Italian police officers searched Appellant's home and seized all of his electronic devices, including cell phones, computing devices, and electronic storage devices. These items were then sent to the Defense Cyber Crime Center Cyber Forensics Laboratory (DC3/CFL) for analysis. Ms. MH, a computer forensic examiner at DC3/CFL, discovered obscene cartoons on Appellant's devices. During the *Care*¹⁰ inquiry into the providence of his pleas, Appellant admitted that the images depicted "drawings of characters that are smaller and childlike in nature engaging in sex acts." One image Appellant possessed depicted a young girl on a tricycle, with a penis-shaped dildo in the place of the tricycle seat. Another image depicted a prepubescent girl wearing pigtails. The girl had an adult's penis in her mouth with pubic hair near her face. Behind her, another larger male was holding her leg up, exposing her genitalia. Appellant admitted he did not know how many images he possessed, but agreed it was "well in excess of 100."

In June 2018, while the AFOSI investigation was still ongoing, HD and WD moved to Texas to live with HD's grandparents. During the investigation, HD did not want to talk to investigators or be involved with the investigation. She was satisfied that her husband had destroyed his USB drives containing the indecent images. HD testified that she wanted her "family together, and just have us be happy and not have to worry about it." HD elaborated that although she had physically moved, she still loved Appellant, was trying to work through

⁹ In October 2017, WD was diagnosed with herpes, known to be a sexually transmitted disease. WD's diagnosis resulted in a referral to Family Advocacy, which eventually led to an investigation by the AFOSI. The court did not factor the issue of WD's herpes diagnosis into our decision. We articulate this information to establish appropriate timelines. No evidence was admitted on this matter and it did not factor into our legal and factual sufficiency determination of Appellant's convictions. We also note Appellant's crime of rape against a child under the age of 12 was charged to have occurred between on or about 11 October 2016 (approximately when Appellant arrived in Italy) and on or about 27 March 2018 (when AFOSI interviewed Appellant).

¹⁰ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

things with him, and spoke with him as frequently as she could. She also permitted WD to talk with him as much as she could. In December 2018, Appellant visited HD and WD for the holidays. HD recalled that they were “actually happy, like, things were great. We had a blast together. I thought everything was good.” She stated she was sad and crying when Appellant returned to Italy. HD said she still trusted Appellant with their young daughter at this time, despite having seen the child pornography on his computer. However, unbeknownst to HD at that time, the investigation revealed that Appellant had multiple other digital devices containing obscene images of children engaged in sexually explicit conduct.

HD testified things changed on 28 January 2019, shortly after WD’s fourth birthday. WD made an unprompted utterance of what Appellant did to her when they were living in Italy. As HD described, HD and WD were residing with HD’s grandparents. The allegation came to light while she and WD were going through their normal bedtime routine. They were playing a game on her phone called Radial, which created tapestry-type signs. WD started to giggle at one point and said that one of the shapes looked “like Daddy’s pee-pee.” When trial counsel asked HD what happened next, HD responded:

I asked her what - - how did she know what Daddy’s pee-pee looks like. And she said “Daddy put his pee-pee in my mouth the last time we were in Italy.” And then I asked her what - - “Well what do you mean?” And she said, “Well, the last time we were in Italy, Daddy put his pee-pee in my mouth, and I spit into a towel.” And I asked her where I was and she said I was in the shower. And [I asked her] where it happened, she said “In yours and Daddy’s room.”

HD further testified that she was in shock and was having a difficult time with what she heard. HD then took WD to her grandparent’s bedroom where WD repeated to her great-grandparents what she had told HD. JC, HD’s grandfather, testified that at first, he only heard a portion of what WD said, including, “Daddy pee-pee in my mouth, and something about balls.” JC then asked WD to repeat herself, and WD responded “when we were [in Italy], [HD was] taking a shower, Daddy put his pee-pee in my mouth. He pushed his balls against my face, and I threw up on a towel.” HD testified that WD did not seem confused about whose penis was in her mouth, or when, or where it happened. According to HD, the only thing WD was confused about “was whether she did something wrong or not.” HD stated she did not report Appellant that night because she “wanted to sleep on it” because “[t]here was a lot to consider.” HD reported the allegation the next day.

After HD reported the incident, WD met with BL, a forensic interviewer with the Children's Advocacy Center located in the county where HD's grandparents resided. WD explained to BL what Appellant did to her in Italy during a video-recorded interview. BL stated that WD was able to discern what constituted a truth and what constituted a lie when prompted with hypothetical scenarios. BL testified that WD was also able to discern the differences in the questions that she asked her, which is evidenced by the fact that WD denied that anyone ever touched her chest. BL further testified that when she asked WD if anyone made her touch their private parts, WD did not respond at first and tried to change the subject, but went on to state that she did not want to talk about the bad stuff. BL recalled WD eventually told her that "daddy put his pee-pee in my mouth, and I threw up in a towel." WD described her "throw up" as white in color.

Significantly, WD also physically demonstrated what happened to her during the interview and on her own accord. WD used her hands and body to demonstrate Appellant's actions. When BL asked WD, "[W]here were daddy's hands when he put his pee-pee in your mouth?" WD replied by saying, "[H]e didn't put his own hands on it," then she indicated towards her own groin area and put her hand under her own chin, demonstrating that Appellant had lifted her chin to put his penis in her mouth. The entire recorded interview was played for the members during trial.¹¹

Under oath at trial, WD also detailed Appellant's actions. Specifically, trial counsel asked WD, "Tell me what daddy did with his pee-pee." WD testified, "[Appellant] put it in my mouth . . . [a]nd then I - - and then I throwed up it, the white stuff in a white towel." When asked what "daddy's pee-pee" looked like, WD demonstrated with her hands, then responded, "[H]e wanted me to put it in my mouth." She described the stuff that came out of "daddy's pee-pee" as white and tasting like "throw up" and stated it went in her mouth and she spit it in a towel. She continued by stating the white stuff that went in her mouth did not taste good and that "[i]t came out of this hole," while also demonstrating her response. She also described this event as occurring "next to daddy's and my mom's bed." Following trial defense counsel's cross-examination of WD, and pursuant to a member's question, the military judge asked, "[WD], one more question. Did you ever see Daddy do anything to Mommy with his pee-pee?" To which WD responded, "Nope."

At trial the Defense called Special Agent (SA) IP, the case agent in Appellant's case. Trial defense counsel, *inter alia*, explored the possibility that HD had coached WD to say that she was sexually assaulted. SA IP testified the investigation did not reveal that HD provided WD with information to support

¹¹ The recorded interview was approximately 20 minutes long.

her allegation. SA IP also testified that WD “didn’t look like she was coached” and “wasn’t behaving like she had been coached.” SA IP also stated on cross-examination that the AFOSI investigation did not reveal WD had been exposed to any pornography or obscene cartoons. She also confirmed that the investigation did not reveal WD had been exposed to the secretion of semen from any other source. Finally, she confirmed that HD was unwilling to participate in the investigation and there was no reason to believe that anyone told WD what to say during the investigation or Appellant’s court-martial.

The Defense also called Dr. JY, who was recognized as an expert in the field of forensic psychology. Dr. JY testified concerning possible memory contamination, and the typical protocol for a child forensic interview—such as developing rapport, asking open-ended questions, and assessing cognitive ability. Dr. JY concluded, after reviewing DL’s interview of WD, that WD was difficult to interview. He stated that DL had taken some “shortcuts” with rapport building due to WD’s age which made accuracy of WD’s disclosure a “toss-up.” On cross-examination, Dr. JY agreed all the questions that DL posed to WD were open-ended questions that did not suggest an answer or conclusion. He further agreed that WD did not hesitate to challenge false information and that she made “on-the-spot corrections to information given to her” by DL. Dr. JY testified WD also gave an unprompted physical demonstration during the interview of how Appellant moved his penis in her mouth and further agreed that the question did not require WD to demonstrate a response. Finally, Dr. JY agreed that there was no evidence that WD was confused about who sexually assaulted her, what was done to her, where the assault occurred, or how Appellant committed the assault.

The panel of officer members found Appellant guilty of one specification each of rape and sexual abuse of a child.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant contends his convictions of rape and sexual abuse of a child are both legally and factually insufficient. Specifically, Appellant takes issue with WD’s testimony, the manner in which the pretrial interviews were conducted, and whether WD was coached or influenced by adults. He also generally claims that the investigators were biased. Appellant asks us to set aside the findings and sentence. We disagree with Appellant’s contentions and find no relief is warranted.

1. Law

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). “Our assessment of legal and

factual sufficiency is limited to evidence produced at trial.” *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), *rev. denied*, No. 22-0111, 2022 CAAF LEXIS 278 (C.A.A.F. 12 Apr. 2022).

“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)). “The term reasonable doubt, however, does not mean that the evidence must be free from conflict.” *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff’d*, 77 M.J. 289 (C.A.A.F. 2018). “[I]n resolving questions of legal sufficiency, we are 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) (citations omitted). As a result, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted). The test for legal sufficiency “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

“The test for factual sufficiency is ‘whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,’ [this] court is ‘convinced of the [appellant]’s guilt beyond a reasonable doubt.’” *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). “In conducting this unique appellate role, we take ‘a fresh, impartial look at the evidence,’ applying ‘neither a presumption of innocence nor a presumption of guilt’ to ‘make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.’” *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). The term “reasonable doubt” does not mean evidence free from conflict. *See Lips*, 22 M.J. at 684. This court’s review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *See Article 66(d)*, UCMJ; *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

Appellant was convicted of rape of a child in violation of Article 120b(a), UCMJ, 10 U.S.C. § 920b(a), which required the Government to prove two elements beyond a reasonable doubt: (1) Appellant committed a sexual act upon WD by penetrating her mouth with his penis; and (2) that WD had not attained

the age of 12 years at the time of the sexual act. *See* 2016 *MCM*, pt. IV, ¶ 45b.b.(1)(a).

Appellant was also convicted of sexual abuse of a child in violation of Article 120b(c), UCMJ, 10 U.S.C. § 920b(c), which required the Government to prove the following elements beyond a reasonable doubt: (1) Appellant committed a sexual contact upon WD by causing her to touch his genitalia; and (2) Appellant did so with the intent to gratify his sexual desire. *See* 2016 *MCM*, pt. IV, ¶ 45b.b.(4)(a). As charged in this case, the Government also had to prove that WD had not attained the age of 12 years.

2. Analysis

a. The Government's Case

The Government introduced convincing evidence of Appellant's guilt. Most significantly, the evidence demonstrated that WD consistently described and demonstrated, from her initial unprompted utterance to her in-court testimony, how Appellant committed the act of rape of a child by penetrating her mouth with his penis, and committed the act of sexual abuse of a child by causing her to touch his genitalia. She clearly stated these offenses took place in her parents' bedroom while the family was living in Italy. The evidence also demonstrated that the offenses occurred between October 2016 and March 2018, when WD was approximately 3 years old.

Specifically, during direct examination, WD clearly and in detail described when, where, and how Appellant performed a sexual act on her. The Government powerfully reinforced her testimony with the testimony of HD, who described in detail WD's spontaneous outcry when they were playing with a phone application before bed. HD clearly described that WD told her "the last time we were in Italy, Daddy put his pee-pee in my mouth, and I spit in a towel." WD's description of the offenses was also reinforced by testimony from WD's great-grandfather, JC, and testimony from the forensic interviewer, BL. JC testified WD told him "when we were [in Italy] . . . Daddy put his pee-pee in my mouth. He pushed his balls against my face, and I threw up on a towel." BL testified WD told her that "Daddy put his pee-pee in my mouth, and I threw up in a towel." WD also described to BL that the color of her "throw up" was white and it tasted bad.

In addition, HD provided testimony concerning Appellant's possession of child pornography and that Appellant had stated to her that he found the images arousing, refused to confirm that he would not touch a child or a little girl, and admitted he "couldn't stop looking at little girls." HD also described how she refused to be involved with the AFOSI investigation concerning the child pornography, and how WD's unprompted utterance came at a time when HD was excited about keeping her family together and moving on.

b. Appellant's Claims of Reasonable Doubt

Appellant raises a number of arguments as to why we should not be convinced of his guilt beyond a reasonable doubt. We address the three most significant of them below.

Appellant first contends there were inconsistencies in WD's testimony. Specifically, Appellant argues that WD provided different descriptions of the bedroom where she was sexually assaulted. Appellant points us to WD's statement during the forensic interview, where she described pictures of "flower, pink butterflies" on the wall. This description was contradicted by other evidence. Appellant also asks that we compare the above statement with WD's testimony during cross-examination, where she generally described the room as "[j]ust normal. Just like plain . . . It was just the same. Just plain." Appellant argues that these discrepancies alone are enough to support reasonable doubt. We are unpersuaded by Appellant's argument. Even if we were to assume that there were inconsistencies in her description of the bedroom where the rape and sexual abuse occurred, "[i]nconsistencies . . . are not uncommon when child abuse victims testify." *United States v. Cano*, 61 M.J. 74, 77 (C.A.A.F. 2005). We also note that "reasonable doubt" does not mean that the evidence must be free from conflict. *See Lips*, 22 M.J. at 684. Here, any inability to accurately describe her parents' bedroom where the rape and sexual abuse occurred does little to contradict WD's vivid description and consistent recollection of where and how the acts occurred, and in this court's opinion does not, in and of itself, equate to reasonable doubt.

Appellant next contends WD's forensic interview was tainted when the interviewer "coaxed information" from WD to support the charged offenses. However, this is contrary to the record that demonstrates BL asked open-ended questions allowing WD to explain in her own words what Appellant did to her during the recorded forensic interview. BL testified during trial and Appellant's trial defense counsel extensively cross-examined her on her interview techniques. Trial defense counsel specifically questioned BL regarding her use of leading questions, to which BL testified that she was careful in her questioning as to not suggest any information or preferred responses. The strongest evidence against Appellant's argument comes from the Defense's own expert witness, Dr. JY. Dr. JY agreed during his testimony that all of the questions asked of WD during the forensic interview were open-ended questions. Additionally, he agreed there was no evidence that WD was confused regarding the details of the sexual assault. We are not persuaded that this evidence leads to reasonable doubt.

Appellant also contends WD was coached and influenced by exposure to age-inappropriate information prior to trial. Appellant alleges that WD could have made up the sexual assault because she could have seen Appellant having

sex with HD. This argument is not supported by the record. First, WD clearly stated on the record that she had not witnessed Appellant doing anything to HD with his “pee-pee.” Additionally, in response to questions posed by trial defense counsel, SA IP testified that she had no reason to believe that WD had been exposed to any child pornography or obscene cartoons, and that “[WD] didn’t look like she was coached.” On this point, we note that there is also no evidence in the record that HD had a motive to coach her daughter. Rather, the evidence adduced at trial indicated that HD stayed with her husband even after he disclosed his habit of viewing child pornography. HD further testified she loved Appellant and was looking forward to putting the investigation behind them and being a family. Most compelling is HD’s reluctance to participate with the law enforcement investigation. In sum, there was no evidence that WD was coached in preparation for her forensic interview.

Finally, Appellant contends his convictions were the product of a biased investigation. Specifically, Appellant contends that both HD and an investigator from Child Protective Services, ME, were biased against him. Having already discussed HD’s potential bias or lack thereof above, we focus our attention on ME’s involvement. ME interviewed WD shortly after WD was diagnosed with herpes. Generally, ME was investigating the possibility that WD had been sexually abused. Appellant now argues that ME was biased because she referenced WD’s herpes infection in her investigative report. We find the discussion regarding herpes irrelevant, as there was no evidence of herpes put into evidence, nor was it even remotely discussed in front of the members at trial. Interestingly, Appellant called ME as a Defense witness at trial. ME testified that when she interviewed WD, prior to WD’s outcry, that WD denied any sexual abuse. This information is very favorable to Appellant. If ME was harboring any bias towards Appellant, no evidence of such was brought to light during the trial. We find Appellant’s contention that the investigation was biased is not supported by the record.

c. Conclusion

Viewing the evidence in the light most favorable to the Prosecution, a rational trier of fact could have found the essential elements of rape and sexual abuse of a child beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant’s guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41 (quoting *Turner*, 25 M.J. at 325).

B. Expert Testimony on Future Impact to Victim

Appellant argues the military judge erred in permitting expert testimony during presentencing proceedings concerning the future impact the offenses

would have on WD. Specifically, Appellant contends that the testimony did not qualify as evidence in aggravation under Rule for Courts-Martial (R.C.M.) 1001(b)(4). Additionally, Appellant takes issue with the military judge's finding that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. Appellant asks us to set aside the sentence. We find no error and no relief warranted.

1. Additional Background

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session outside the presence of members, trial counsel informed the court that the Government would call Dr. EB to adduce expert testimony during presentencing that would demonstrate WD was at risk for significant psychological trauma due to Appellant's offenses. Trial defense counsel objected, arguing that Dr. EB's testimony would rely on research with subjects who were not similarly situated with WD. Specifically, trial defense counsel noted that the research subjects' "median age at the onset of abuse was between seven and eight years," more than double WD's age at the time of the assault, and that the subjects suffered a median duration of two years of abuse, which was longer than the single incident encompassing the charged offenses. Trial defense counsel also argued that 70 percent of the abuse in those cases involved vaginal or anal penetration, whereas WD's case involved oral penetration.

During the Article 39(a), UCMJ, session, the military judge questioned Dr. EB in order to resolve the objections. Dr. EB generally stated her testimony would be related to Appellant's convictions based on the research trial defense counsel referenced. Dr. EB testified three factors cited by the research were present in WD's case and indicated WD was at a greater risk for future psychological harm: (1) the abuser was a father or father figure; (2) oral, anal, or vaginal penetration occurred; and (3) WD was under 8 years old at the time of abuse. Dr. EB confirmed for the military judge that she concluded the three factors applied to Appellant's case based on evidence adduced during the court-martial, which she observed. She did not quantify how much of a greater risk she believed WD faced. On cross-examination, trial defense counsel pointed out how the victims in the underlying research studies differed from WD. Dr. EB responded that the articles used to inform her opinions in this case discussed 20 to 30 different studies, and that she would only "rely on parts of the articles that are relevant to [Appellant's] case."

After the questioning of Dr. EB, the military judge ruled that Dr. EB would be allowed to testify about "any aggravating circumstances . . . directly relating to or resulting from the offenses for which [Appellant] has been found guilty. This rule extends to the potential future impacts on this victim." He further

found that trial defense counsel had shown the ability “to extract equally probative testimony from [Dr. EB].” The military judge also conducted a Mil. R. Evid. 403 balancing test and found

the potential testimony of [Dr. EB] to substantially outweigh the risk of prejudice to the accused, undue delay, and confusing the issues for the members. Especially, in light of [trial] defense counsel’s abilities and knowledge in this field, as well as, the [D]efense’s own access to a forensic psychologist.

The military judge later restated his ruling on the record:

With regards to Dr. [EB]’s proposed testimony at the time in my last decision: trial counsel may present evidence to any aggravating circumstances directly relating to or resulting from the offenses of which [Appellant] has been found guilty. “Directly relating or resulting from” not only refers to past events, but potential future impact as a result of the crime on the victim.

The question here is whether [Appellant]’s misconduct could lead to future impact on [WD], as described in Dr. [EB]’s testimony. And this court finds it can. This court finds a direct link between [Appellant]’s offenses and [WD], specifically, in Dr. [EB]’s testimony regarding potential future impact of those acts on [WD]. This evidence is clearly relevant, directly related to, and resulted from [Appellant]’s acts.

Furthermore, the probative value is not substantially outweighed by undue prejudice. The relevance of Dr. [EB]’s testimony, specifically, that of the impact of the father being the perpetrator of sexual abuse, the penetrative nature of the offense, and the young age [of the victim], that is, under the age of eight, is significant, given Dr. [EB]’s knowledge, skills and experience, and the facts and circumstances before this court-martial.

When presentencing resumed, the Government called Dr. EB as a witness. During her testimony Dr. EB was recognized as an expert in the fields of clinical and forensic psychology. At this point, the military judge instructed the members that they were “not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness.” Dr. EB then gave examples of short-term effects that a child sexual abuse victim may experience such as “depression symptoms, anxiety symptoms, PTSD [post-traumatic stress disorder], low self-esteem, self-harm . . . substance abuse, sexual promiscuity, academic difficulties, as well as behavior and conduct problems.” She also testified about family problems that may arise from child sexual abuse and the specific effects upon preschool-aged victims.

Dr. EB further testified child sexual abuse victims were at risk of suffering various long-term effects. These included depression, PTSD, suicide attempts, marital problems stemming from less marital and sexual satisfaction, higher rates of re-victimization, substance abuse, and medical disorders like cardio-pulmonary disorders, and gastro-intestinal disorders. Dr. EB explained the risk of negative effects is greater where the father is the abuser, the abuse involves penetration, or when the victim is under 8 years old. She also noted that the duration of abuse can increase the likelihood of the negative outcomes, however, she also acknowledged that there was no evidence that there was a “longer duration of abuse” in WD’s case. She concluded WD was at “higher risk” of exhibiting long-term effects later in her life as a result of the assault.

On cross-examination, trial defense counsel adduced testimony that not every child would be affected in the same way and that there were several factors associated with “greater negative outcomes” that were not present in WD’s case. Dr. EB admitted that she had not personally evaluated WD and could not say that WD would, in fact, experience any of the aforementioned negative outcomes.

2. Law

We review a military judge’s decision to admit or exclude evidence, including expert testimony, for an abuse of discretion. *See United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019); *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005).

Military judges abuse their discretion when their “factual findings are clearly erroneous, view of law is erroneous, or decision is outside the range of reasonable choices.” *Hutchins*, 78 M.J. at 444 (citations omitted). To prevail under this claim of error, an appellant must show “more than a mere difference of opinion,” he must show the military judge’s decision was “arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (citation omitted).

Mil. R. Evid. 702 prescribes:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Pursuant to Mil. R. Evid. 702, an expert may “testify in the form of an opinion or otherwise.” The expert’s opinion may be based on facts or data the expert has either personally observed or has been made aware of. Mil. R. Evid 703.

In the Government’s sentencing case in aggravation, trial counsel may introduce evidence of “aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.” R.C.M. 1001(b)(4). Such evidence in aggravation may include “evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused . . .” *Id.*

As this court has previously stated: “[t]he purpose of R.C.M. 1001(b)(4) is to provide the sentencing authority with information about the consequences and repercussions of an accused’s offenses in order that a proper sentence can be discerned.” *United States v. Anderson*, 60 M.J. 548, 556 (A.F. Ct. Crim. App. 2004). This evidence naturally includes evidence that a victim “may develop psychological or behavioral problems” in the future as a direct result of an accused’s offenses. *Id.*

In determining whether evidence admitted in aggravation is “directly related” to the offenses of which an appellant was convicted, we assess whether the evidence is both direct and “closely related in time, type, and/or often outcome, to the convicted crime.” *United States v. Hardison*, 64 M.J. 279, 281–82 (C.A.A.F. 2007). “Although the relationship to the appellant’s offenses must be ‘direct,’ there is no requirement that the impact be limited to matters that have already occurred.” *Anderson*, 60 M.J. at 556. It is well “accepted that impact evidence can include well-established prospective impact as well.” *Id.*

Even when evidence qualifies for admission under R.C.M. 1001(b)(4), its probative value must still be weighed against its prejudicial impact under Mil. R. Evid. 403. *Hardison*, 64 M.J. at 281. Mil. R. Evid. 403 states: “The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.” In applying the Mil. R. Evid. 403 balancing test, military judges enjoy “wide discretion.” *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citations omitted). However, we give less deference to military judges’ decisions if they do not explain their analysis on the record, and we give military judges no deference when they fail to conduct the analysis at all. *Id.*

“When there is error in the admission of sentencing evidence, the test for prejudice is whether the error substantially influenced the adjudged sentence.”

United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)). We consider four factors to determine whether an error had a substantial influence on the sentence. Those factors include “(1) the strength of the Government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Id.* (internal quotation marks omitted and citations omitted). “An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant.” *Id.* (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).

3. Analysis

Here, the military judge did not abuse his discretion when he determined that Dr. EB’s testimony would assist the trier of fact to understand the potential future harm WD could suffer as a child-victim of sexual abuse, and that such testimony was proper evidence in aggravation. See *United States v. Stark*, 30 M.J. 328, 329–30 (C.M.A. 1990) (expert testimony that child victims of sexual abuse were “at a higher risk” of suffering from long-term effects of the abuse); *United States v. Hammond*, 17 M.J. 218, 219–21 (C.M.A. 1984) (expert testimony was admissible regarding evidence of the general effects of rape trauma even though the witness had neither interviewed nor counseled the victim).

In this case, Dr. EB, an expert in the fields of clinical and forensic psychology, testified that WD was at a greater risk of experiencing psychological harm in the future. She based her opinion on three factors that she found applicable to Appellant’s court-martial which she personally observed. Consistent with her statements in the Article 39(a), UCMJ, hearing, Dr. EB based her testimony on research applicable to the evidence presented during findings, and her opinions were limited to the possible negative outcomes that WD could later face.

We find that there was a sufficient basis in this case for the military judge to allow Dr. EB’s expert testimony because Dr. EB had observed the entire court-martial, which included watching WD’s testimony, and viewing WD’s recorded forensic interview. Also, as in *Stark*, trial defense counsel in this case conducted a vigorous cross-examination of Dr. EB, during which Dr. EB agreed that not all children would react the same way, and that there were several factors not present in WD’s case that could “predict greater negative outcomes.” Dr. EB also acknowledged on cross-examination that she had not personally evaluated WD and could not say that WD would, in fact, experience any negative outcomes as a result of the sexual abuse she suffered.

We also find that the military judge conducted sufficient analysis under Mil. R. Evid. 403 to make his determination. The military judge found Dr. EB's testimony to be relevant, and that the probative value was significant given "Dr. [EB]'s knowledge skills and experience, and the facts and circumstances before this court-martial" that were present in the research. In contrast, the military judge found the risk of unfair prejudice to be low due to trial defense counsel's ability to effectively cross-examine Dr. EB and adduce probative evidence to challenge her testimony. Based on these findings the military judge determined that the probative value of Dr. EB's testimony substantially outweighed the risk of prejudice.

In this case, Appellant has not demonstrated that the military judge's decision was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *McElhaney*, 54 M.J. at 130. Rather, the record demonstrates that the military judge correctly applied the facts to the law, conducted the required Mil. R. Evid. 403 balancing test, and properly instructed the members, prior to receiving the evidence, on how to consider Dr. EB's testimony. *See Stark*, 30 M.J. at 330. We therefore conclude that Dr. EB's testimony on the possible psychological impact of Appellant's crime on WD was properly admitted as expert testimony in aggravation.

Assuming *arguendo* that the military judge erred in admitting the testimony of Dr. EB, we find Appellant suffered no prejudice. Applying the *Barker* factors, we find the Government's case was strong. We also find that Dr. EB's testimony was insubstantial as compared to the far more aggravating evidence already before the members concerning the circumstances and details of Appellant's criminal behavior. Additionally, we find that trial defense counsel's effective cross-examination of Dr. EB sufficiently negated the risk that Dr. EB's testimony had a substantial influence on the adjudged sentence. Finally, the military judge instructed the panel that they did not have to accept Dr. EB's testimony or give it greater weight than any other evidence. We presume the members followed the military judge's instructions. *United States v. Custis*, 65 M.J. 366, 372 (C.A.A.F. 2007). Therefore, we conclude Dr. EB's testimony did not "substantially influence the adjudged sentence." *Barker*, 77 M.J. at 384.

C. Double Jeopardy

Appellant contends that the military judge erred by not dismissing the specification alleging possession of obscene cartoons on the grounds that Appellant's prosecution for this offense was in violation of the Fifth Amendment and the prohibition against double jeopardy contained in Article 44, UCMJ. Appellant asks this court to set aside the findings and sentence. We are not persuaded by Appellant's contention and find no relief is warranted.

1. Additional Background

a. Appellant's First Court-Martial

Between 29 October and 2 November 2018, Appellant was tried by a military judge at a general court-martial for three specifications alleging that Appellant (1) knowingly and wrongfully possessed child pornography, (2) knowingly and wrongfully viewed child pornography, and (3) knowingly and wrongfully possessed obscene cartoons under 18 U.S.C. § 1466A(b)(1), all in violation of Article 134, UCMJ.

During closing argument at Appellant's first court-martial, trial defense counsel argued that the specification related to the obscene cartoons was erroneously drafted. The military judge, *sua sponte*, stated that she considered the argument to be a motion to dismiss, even though trial defense counsel did not characterize it as such. The military judge requested the parties draft written briefs on the issue. After receiving the written briefs and hearing argument but before entering any findings, the military judge dismissed the specification alleging possession of obscene cartoons for lack of jurisdiction. Subsequently, the military judge acquitted Appellant of the remaining two specifications.

b. Appellant's Second Court-Martial

At Appellant's second court-martial, which we now review, the Government charged Appellant with wrongful possession of obscene cartoons in violation of Article 134, UCMJ. On 8 May 2019, the Defense moved to dismiss the specification, arguing that Appellant was now charged in violation of the Fifth Amendment's prohibition against double jeopardy.¹² On 15 May 2019, the Government filed a response, and on 20 May 2019, a hearing was held pursuant to Article 39(a), UCMJ, at which time the motion was litigated. On 13 June 2019, the military judge issued his ruling and denied the defense motion to dismiss.

In his written ruling, the military judge found Appellant was currently charged with one specification that alleged he wrongfully possessed obscene cartoons in violation of Article 134, UCMJ. The specification alleged that Appellant:

did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, such conduct being of a nature to bring discredit upon the armed forces.

¹² Trial defense counsel explicitly stated that he did not believe the double jeopardy issue was waived for appellate review despite Appellant's plea of guilty to the specification.

The military judge also found Appellant was previously tried by court-martial for knowing and wrongful possession of obscene cartoons in violation Article 134, UCMJ. Specifically, the judge found the specification from Appellant's first court-martial alleged that he:

did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, to wit: visual depictions of minors engaging in sexually explicit conduct, and that said visual depictions were transported in foreign commerce by computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

During the motions hearing, the military judge asked trial defense counsel to clarify the trial judge's ruling at the first court-martial. The following discussion ensued:

Q [Military Judge]: What was the finding, though?

A [Trial Defense Counsel]: The finding was lack of jurisdiction.

Q: Okay. So, there was no finding entered as to the - -

A: Yes, sir. It was dismissed before findings.

The military judge then concluded that both specifications captured the same course of conduct, although they were charged under different provisions of Article 134, UCMJ. The military judge also found the trial judge in Appellant's first court-martial did not enter a finding for the possession of obscene cartoons and that the specification was dismissed for lack of jurisdiction. The military judge also stated the evidence was "uncontroverted" that the trial judge for the first court-martial did not consider any of the evidence supporting the dismissed specification in reaching the findings on the other specifications. The military judge explained his conclusion was supported by the fact that the images alleged in the other specifications were contained on Appellant's cell phone and the obscene cartoons in the dismissed specification were contained on Appellant's laptops and USB drive.

Ultimately, the military judge concluded that while jeopardy had attached in Appellant's first court-martial when evidence on the merits was admitted, that jeopardy was later severed when the military judge dismissed the specification on jurisdictional grounds prior to any final judgment on the specification. The military judge then denied the Defense motion to dismiss. Subsequently, Appellant filed a petition with this court requesting a writ of mandamus to set aside the military judge's denial of the defense motion and to order the obscene-cartoon specification dismissed with prejudice. This court denied the petition. *See In re Driskill*, Misc. Dkt. No. 2019-03, 2019 CCA LEXIS 281, at *3-4 (A.F. Ct. Crim. App. 2 Jul. 2019).

2. Law

“Whether a prosecution violates double jeopardy is a question of law” that we review de novo. *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020). Questions of jurisdiction are reviewed de novo. See *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009).

The Fifth Amendment provides that no person shall “be subject, for the same offence, to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The prohibition against double jeopardy provides protection against multiple punishments and successive prosecutions for the same misconduct. See *Brown v. Ohio*, 432 U.S. 161, 165 (1977). One of the purposes underlying the prohibition on double jeopardy is “to protect the integrity of a final judgment.” *United States v. Scott*, 437 U.S. 82, 92 (1978). Another purpose is to ensure that the Government, “with all its resources and power,” is not “allowed to make repeated attempts to convict an individual” for an offense, “thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187–88 (1957).

The double jeopardy clause applies to military personnel through Article 44(a), UCMJ, 10 U.S.C. § 844(a), which provides that “[n]o person may, without his consent, be tried a second time for the same offense.” “Article 44, UCMJ, does not, however, offer broader protections than granted by the Constitution.” *United States v. McClain*, 65 M.J. 894, 899 (A. Ct. Crim. App. 2008) (citations omitted).

The analysis of whether a prosecution is barred by double jeopardy includes two temporal components, “first, that jeopardy attaches, and second, that it terminates.” *United States v. McMurrin*, 72 M.J. 697, 704 (N.M. Ct. Crim. App. 2013). “In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence.” *Serfass v. United States*, 420 U.S. 377, 388 (1975). “[T]he conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.” *Id.* at 390 (quoting *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). Jeopardy can terminate when there is no final judgment on the matter, when a charge is withdrawn and dismissed without prejudice upon a defense motion, even after the presentation of evidence. See, e.g., *Lee v. United States*, 432 U.S. 23 (1977); *United States v. Dinitz*, 424 U.S. 600 (1976).

“No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of the rule.” R.C.M. 907(b)(2)(C)(iv). “[B]efore a person can be said to have been put in jeopardy of life or limb the

court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.” *Grafton v. United States*, 206 U.S. 333, 345 (1907).

3. Analysis

At the first court-martial, a military judge-alone trial, Appellant was arraigned and entered pleas, and evidence on the merits was admitted. Therefore, we agree with the military judge that jeopardy had clearly attached. We also agree with the military judge that jeopardy terminated when the specification alleging that Appellant possessed obscene cartoons was dismissed without prejudice. We see no evidence of bad faith on behalf of the judge or trial counsel in this case. *See Lee*, 432 U.S. at 33 (the Double Jeopardy Clause will not bar reprosecution absent bad faith on behalf of judge or prosecutor). In fact, it was Appellant’s counsel who raised the issue during argument which eventually led to dismissal of the specification. It is also clear the specification was dismissed for lack of jurisdiction—grounds wholly unrelated to Appellant’s guilt or innocence—and that the dismissal came before Appellant was acquitted of the remaining specifications. Therefore, we conclude that there was no final judgment on whether Appellant wrongfully possessed obscene cartoons, and that no constitutional or Article 44(a), UCMJ, violation occurred in this case.

D. Providence of Guilty Plea

Appellant claims his guilty plea for possessing obscene cartoons was improvident because the cartoons were not obscene. Specifically, Appellant argues that “some of the characters [in the cartoons] are actually hundreds of years old even though they appear young” and thus do not depict adults and children engaged in sexually explicit behavior. We disagree, and find no relief is warranted.

1. Additional Background

As part of his guilty plea, Appellant entered into a PTA in which he waived all waivable motions as pertaining to the obscene-cartoons specification. Appellant also voluntarily entered into a stipulation of fact, where he agreed to the admissibility of 150 cartoon images that depicted adult figures engaged in sexually explicit conduct with what appear to be young children. Specifically, in the stipulation of fact, Appellant agreed that “[t]he cartoons were obscene in that their sexual content was patently offensive in light of community standards,” and that the cartoons lacked any “serious literary, artistic, political, or scientific value.”

The military judge asked Appellant during the guilty plea inquiry if “there [was] anything in the stipulation [of fact] that [he did] not wish to admit [was] true?” Appellant responded “No, Your Honor.”

When describing this offense, Appellant stated, “I wrongfully possessed obscene cartoons. . . . I reviewed the cartoons on Prosecution Exhibit 1 [stipulation of fact] and agree that they meet the legal definition of obscenity because of what they depict.” The military judge then asked Appellant to describe why the cartoons were obscene. Appellant responded, “[B]ecause they depict drawings of characters that are smaller and childlike in nature engaging in sex acts” Appellant further agreed the cartoons were “patently offensive.”

2. Law

“A military judge’s decision to accept a guilty plea is reviewed for an abuse of discretion.” *United States v. Forbes*, 78 M.J. 279, 281 (C.A.A.F. 2019) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). In reviewing the providency of a plea, a military judge abuses his discretion only when there is “a substantial basis in law or fact for questioning the plea.” *United States v. Inabinette*, 66 M.J. 320, 321–22 (C.A.A.F. 2008) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The military judge’s legal conclusion about the providency of the plea is reviewed de novo. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

“Once the military judge has accepted a plea as provident and has entered findings based on it, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused’s statements or other evidence of record.” *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

An appellant bears the burden of establishing that the record shows “a substantial basis in law or fact to question the plea.” *United States v. Phillips*, 74 M.J. 20, 21–22 (C.A.A.F. 2015). “A ‘mere possibility’ of such a conflict is not a sufficient basis to overturn the trial results.” *Garcia*, 44 M.J. at 498 (quoting *Prater*, 32 M.J. at 436).

Appellate courts will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant’s express admission on the record. See *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

“A guilty plea is provident if the facts elicited make out each element of the charged offense.” *Harrow*, 65 M.J. at 205.

“‘Indecent’ is synonymous with ‘obscene,’ and such language is not afforded constitutional protection.” *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994) (citing *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990)); see also *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019).

“Indecent language” is defined as “that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar,

filthy, or disgusting nature, or its tendency to incite lustful thought.” 2016 *MCM*, pt. IV, ¶ 89.c.

The United States Supreme Court outlined “basic guidelines” for determining whether forms of expression amount to obscenity in *Miller v. California*. 413 U.S. 15, 24 (1973). These guidelines are: (a) whether “the work, taken as a whole, appeals to the prurient interest” when viewed through the lens of “the average person, applying contemporary community standards;” (b) “whether the work depicts or describes, in a patently offensive way, sexual conduct;” and (c) “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”

United States v. White, No. ACM 39917 (f rev), 2022 CCA LEXIS 344, at *22–23 (A.F. Ct. Crim. App. 10 Jun. 2022) (unpub. op.) (citations omitted).

3. Analysis

At trial, the military judge conducted a comprehensive inquiry not just of Appellant’s plea, but, *inter alia*, also of his right to counsel and the PTA and stipulation of fact that Appellant signed. After the military judge read the elements and definitions for wrongful possession of obscene cartoons, Appellant acknowledged that he understood the elements and definitions and that, when taken together, they accurately described his conduct. Appellant described the cartoons and why they were obscene in his own words. The military judge reviewed the stipulation of fact, including 150 cartoon images where a significant number of the images depicted adult figures engaged in sexually explicit conduct with what appear to be young children which Appellant averred was accurate. We conclude that the military judge did not abuse his discretion in accepting Appellant’s plea and had no evident basis for rejecting it. Accordingly, we find Appellant’s guilty plea was voluntary and provident.

E. Trial Counsel’s Closing Argument

Appellant claims that trial counsel committed prosecutorial misconduct during his findings argument by using evidence that was admitted under Mil. R. Evid. 404(b) for the purpose of showing that Appellant had the propensity to commit the charged crimes. Specifically, Appellant alleges trial counsel used evidence that Appellant possessed child pornography to show that he had the propensity to rape and sexually abuse his daughter. Appellant asks this court to set aside the findings and sentence. We disagree with Appellant’s claims and find no relief is warranted.

1. Additional Background

As we noted above in section C, Appellant was previously acquitted of wrongfully possessing and viewing child pornography. During Appellant's current trial, trial defense counsel filed a motion to exclude any evidence of Appellant's alleged prior child pornography offenses. The military judge ruled HD could testify that Appellant had shown her child pornography, but that she could not detail the number of images or the images' content. At trial, the senior trial counsel asked HD if Appellant had shown her images of child pornography which she answered affirmatively. HD then testified about a conversation she had with Appellant regarding child pornography. She asked Appellant if he "got off on [child pornography]," and Appellant confirmed by stating, "Why does anybody look at pornography, [HD]?" HD also testified Appellant confessed to her that he started looking at child pornography to "help these children," but later "started getting turned on by it." HD asked Appellant if he would ever touch a child, and he responded, "I don't know, because I can't even stop looking at a picture."

At the conclusion of HD's testimony, the military judge issued the following instruction to the members:

You've heard evidence that [Appellant] may have shown [HD] images of child pornography, and commented on his willingness to commit crimes similar to those in the images. You may consider this for the limited purpose of its tendency, if any, to determine whether [Appellant] had a motive to commit any of the charged offenses, as well as to prove that [Appellant] intended to commit the offense alleged in Specification 2 of the Additional Charge [sexual abuse of a child]. You may not consider this evidence for any other purpose. And you may not conclude from this evidence that [Appellant] is a bad person, or has general criminal tendencies and that he, therefore, committed the offenses charged.

During findings argument, trial counsel argued:

[HD] described it as child pornography. And you know it is, because what was his response when she first found out about it, how did he describe why he started looking at these images? He said, "I just wanted to help these kids," or words to that effect. He wanted to help them? Well, the one thing we know from that is that they were real kids, because there's no helping cartoons. And so ultimately, members, you have to know exactly what this guy was into.

Trial counsel continued:

W]hen he tells [HD]: I don't know [HD], I just can't stop looking at them or I can't even stop looking at them. You know what he was bound to do. You know if that's the line that he would draw, I will look at them but I will not offend, his answer is much different to his wife. And the cross-examination was he had been drinking. Yeah, some truth serum got it out. For sure. For sure. Some truth serum got us to understand exactly what his intent was, and what his motive has been all along. Absolutely he said that to her.

Trial counsel went on to argue that when Appellant sobered up the next day, he “change[d] the degree and timeline of his guilt.” Trial counsel argued that Appellant’s culpability changed “[b]ecause he has to hide from the very fact that every time he looks at these images he has the same arousal. And he has to hide from the very fact that he is motivated to do it himself.”

Trial defense counsel did make objections to other statements in trial counsel’s argument, but none pertaining to either the Mil R. Evid. 404(b) evidence or to any of the above-quoted arguments.

2. Law

“We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error.” *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). “Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.” *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). The burden of proof under a plain error review is on the appellant. See *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

“Improper argument is one facet of prosecutorial misconduct.” *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). Prosecutorial misconduct occurs when trial counsel “oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.” *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Such conduct “can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.” *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

“A prosecutorial comment must be examined in light of its context within the entire court-martial.” *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted). “When a trial counsel makes an improper argument

during findings, ‘reversal is warranted only when the trial counsel’s comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.’” *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *Andrews*, 77 M.J. at 401–02). “We weigh three factors to determine whether trial counsel’s improper arguments were prejudicial: ‘(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.’” *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184).

“[T]he lack of a defense objection is ‘some measure of the minimal impact of a prosecutor’s improper comment.’” *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

3. Analysis

Because trial defense counsel did not object, we review for plain error. We are not persuaded by Appellant’s argument that trial counsel used evidence admitted under Mil. R. Evid. 404(b) for the improper purpose of arguing Appellant had the propensity to commit the charged offenses. We find that trial counsel argued admitted evidence for the express purpose of showing Appellant’s motive and intent. In support of his position that trial counsel misused the evidence, Appellant asks that we focus our attention on eight words spoken by trial counsel, “You know what he was bound to do.” However, after review of trial counsel’s entire argument, it is evident that trial counsel was not linking Appellant’s alleged possession of child pornography to a propensity to commit rape or sexual abuse of a child. Rather, trial counsel reasoned that Appellant was discretely revealing his motive and intent to sexually assault a child because he could not reassure his wife that he would never touch a child sexually. We note the military judge had previously instructed the members that they could consider Appellant’s comments to HD “for the limited purpose of its tendency, if any, to determine whether [Appellant] had a motive to commit any of the charged offenses.” Therefore, we conclude that trial counsel properly argued evidence admitted for its limited permitted purpose and that there was no error plain or otherwise.

Even if we were to assume that TC’s argument constituted plain or obvious error, Appellant would not be entitled to relief because he has failed to demonstrate prejudice. After considering the three factors set forth by the United States Court of Appeals for the Armed Forces in *Fletcher*, we conclude such an error did not materially prejudice Appellant’s substantial rights. As to the first factor, we find the severity of the error to be slight. The fact that trial defense counsel did not object to any of these instances is some indication of their immateriality. *See Gilley*, 56 M.J. at 123. In addition, Appellant only points to

eight words in an otherwise lengthy findings argument. We find the first factor weighs in the Government’s favor.

With regard to the second *Fletcher* factor, our review of the record finds that the military judge reiterated his instruction regarding the limited purpose for which the members could consider Appellant’s alleged possession of child pornography at least three times. We note again that the military judge provided a limiting instruction once after the testimony was heard, once immediately before trial counsel argued, and once directly after the conclusion of trial counsel’s argument. “Absent evidence to the contrary, this [c]ourt may presume that members follow a military judge’s instructions.” *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted); *see also Custis*, 65 M.J. at 372. Therefore, we find the second factor also weighs in the Government’s favor.

Finally, as we noted above, we find the strength of the evidence significantly favors the Government. The Government presented a compelling case, including the testimony of WD, HD, and JC. In sum, we find no prospect that the allegedly erroneous argument—eight words—played any substantial role in the court members’ findings. Therefore, the third factor also weighs in the Government’s favor. After weighing the *Fletcher* factors together and considering trial counsel’s arguments in context, we are confident the court members properly convicted Appellant on the basis of the evidence alone.

F. Sentence Appropriateness

Appellant contends his sentence to 40 years and 9 months of confinement is inappropriately severe. We agree.

This court “may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(d), UCMJ. We review sentence appropriateness de novo, employing “a sweeping Congressional mandate to ensure ‘a fair and just punishment for every accused.’” *United States v. Baier*, 60 M.J. 382, 383–84 (C.A.A.F. 2005) (quoting *United States v. Bauerback*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001)). In determining whether a sentence should be approved, our authority is “not legality alone, but legality limited by appropriateness.” *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957)).

“We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant’s record of service, and all matters contained in the record of trial.” *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam) (citations omitted).

ted). While we have great discretion in determining whether a sentence is appropriate, we are not authorized to engage in exercises of clemency. *See Nerad*, 69 M.J. at 146.

In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287–88 (C.A.A.F. 1999)).

We have conducted a thorough review of Appellant’s entire court-martial record, including his record of service. Our review of the trial record shows Appellant did not make an unsworn statement, and presented no evidence for the members’ consideration before they determined his sentence. Additionally, our review of Appellant’s service record shows that he joined the Air Force on 3 May 2016, served no deployments, served no remote tours, and did not have an enlisted performance report.

Here, we note that Appellant’s misconduct is severe and that the maximum sentence Appellant faced included a term of confinement for life without parole and a dishonorable discharge.

Nonetheless, based on our collective experiences as judge advocates and appellate judges, and taking into account the principles of sentencing and the matters in aggravation, as balanced by the matters in mitigation, we conclude that Appellant’s sentence to confinement for 40 years and 9 months is inappropriately severe. In making this determination, we are not engaging in an act of clemency; rather, we are fulfilling our duty under Article 66(d), UCMJ, to maintain uniformity and even-handedness of court-martial sentencing decisions. *See Sothen*, 54 M.J. at 296. Our decision is not made lightly and was the product of considerable reflection, deliberation, and debate. *See Lacy*, 50 M.J. at 288 (citing *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982) (“Under Article 66(c), [UCMJ,] Congress has furthered the goal of uniformity in sentencing in a system that values individualized punishment by relying on the judges of the Courts of Criminal Appeals to utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused’s delict, his sentence was appropriate.” (Alteration in original)); *see also United States v. Wach*a, 55 M.J. 266, 267 (C.A.A.F. 2001) (citing *United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985)) (affirming the importance of the “accumulated knowledge” of “experienced Court of Criminal Appeal judges” in assessing for sentence appropriateness). We conclude that a sentence of a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1 should be affirmed.

III. CONCLUSION

We affirm only so much of the sentence that includes a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The findings as entered and sentence as reassessed are correct in law and fact and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings of guilty as entered, and the sentence as reassessed, are **AFFIRMED**.

MEGINLEY, Judge (dissenting):

Although Appellant did not specifically ask the military judge to instruct the members that a finding of guilty must be unanimous, and while it is unknown whether Appellant was convicted by a unanimous verdict, Appellant argues the Government could not prove beyond a reasonable doubt that the military judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless. In *United States v. Westcott*, I found the appellant was denied equal protection under the law and would have set aside the findings without prejudice; our superior court has since denied review in that case. No. ACM 39936, 2022 CCA LEXIS 156, at *108 (A.F. Ct. Crim. App. 17 Mar. 2022) (Meginley, J., dissenting in part and in the result) (unpub. op.), *rev. denied*, No. 22-0206, 2022 CAAF LEXIS 522 (C.A.A.F. 21 Jul. 2022).

Nonetheless, in *United States v. Anderson*, the United States Court of Appeals for the Armed Forces (CAAF) granted the appellant's petition on the following issue:

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

No. 22-0193, 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul. 2022). That same day, the CAAF also granted review in *United States v. Veerathanongdech* on the following issue:

WHETHER THE MILITARY JUDGE'S FAILURE TO INSTRUCT THE PANEL THAT A GUILTY VERDICT MUST BE UNANIMOUS WAS HARMLESS BEYOND A REASONABLE DOUBT.

No. 22-0205, 2022 CAAF LEXIS 533 (C.A.A.F. 25 Jul. 2022).

I believe these two issues are encompassed within my dissent in *Westcott*. Therefore, although the CAAF denied review in *Westcott*, in light of these two grants by the CAAF, I maintain my position as articulated in *Westcott*, and find Appellant was denied equal protection under the law and would set aside the findings without prejudice.



FOR THE COURT

A handwritten signature in black ink, appearing to read "Anthony F. Rock".

ANTHONY F. ROCK, Maj, USAF
Acting Clerk of the Court

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 39889

UNITED STATES
Appellee

v.

Alexander L. DRISKILL
Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary
Decided 14 December 2021

Military Judge: Willie J. Babor.

Sentence: Sentence adjudged on 4 November 2019 by GCM convened at Ramstein Air Base, Germany, Aviano Air Base, Italy, and Buckley Air Force Base, Colorado. Sentence entered by military judge on 2 March 2020: Dishonorable discharge, confinement for 40 years and 9 months, and reduction to E-1.

For Appellant: Major Alexander A. Navarro, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Allison R. Barbo, USAF; Major Alex B. Coberly, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Before LEWIS, ANNEXSTAD, and OWEN, *Appellate Military Judges*.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge LEWIS and Judge OWEN joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Judge:

At a general court-martial, in accordance with his pleas, a military judge found Appellant guilty of one specification of wrongful possession of obscene cartoons in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Contrary to his pleas, a panel of officer members found Appellant guilty of one specification of rape of a child and one specification of sexual abuse of a child, both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b.¹ The members sentenced Appellant to a dishonorable discharge, confinement for 40 years and nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1.² The pretrial agreement did not place any limitations on punishment.

Appellant raises nine assignments of error which we have reworded: (1) whether the evidence was legally and factually sufficient to support Appellant's convictions for rape and sexual abuse of a child; (2) whether the military judge abused his discretion by allowing a Government expert to testify about future impact on the named victim; (3) whether the military judge erred when he denied Appellant's request to sever the charge for wrongful possession of obscene cartoons from the charge and specifications for rape and sexual abuse of a child; (4) whether Appellant's conviction for wrongful possession of obscene cartoons violated the prohibition against double jeopardy found in the Fifth Amendment³ and Article 44, UCMJ, 10 U.S.C. § 844; (5) whether the military judge erred by denying Appellant's motion for appropriate relief due to unequal access to the named victim; (6) whether the military judge erred by failing to compel an expert consultant for Appellant; (7) whether the evidence was legally insufficient to support Appellant's conviction for wrongful possession of obscene cartoons; (8) whether the sentence of confinement of 40 years and 9 months was inappropriately severe; and (9) whether Appellant's conviction for rape and sexual abuse of a child was factually and legally insufficient due to

¹ The specifications covered the time period from 11 October 2016 to 27 March 2018. References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*). Unless otherwise noted all other references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.). Further, the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), as fully implemented by Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018), applied to Appellant's court-martial and post-trial processing.

² After trial, the convening authority suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019.

³ U.S. CONST. amend. V.

errors in the child forensic interview.⁴ After careful review, we also consider two additional issues not raised by Appellant: (10) whether Appellant is entitled to appropriate relief due to the convening authority's failure to take action on the sentence as required by law; and (11) whether Appellant is entitled to relief for a facially unreasonable post-trial delay.

We find the convening authority failed to take action on the entire sentence as he was required to do, and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. We find no relief warranted for a facially unreasonable post-trial delay. We defer addressing Appellant's other assignments of error until the record is returned to this court for completion of our Article 66(d), UCMJ, 10 U.S.C. § 866(d), review.

I. BACKGROUND

Appellant's trial concluded on 4 November 2019. Eight days later, on 12 November 2019, Appellant's spouse, on behalf of the couple's daughter and named victim, submitted a request to the convening authority asking that he waive or defer forfeitures for the benefit of the victim and herself. Subsequently, on 25 November 2019, Appellant submitted a clemency request to the convening authority. In his request, Appellant highlighted three issues of interest for the convening authority but did not request any specific relief. Appellant's counsel contended that Appellant's sentence to confinement was inappropriately severe, and specifically stated that the convening authority's options at clemency were "limited, if not outright non-existent" and further described the clemency process as an "exercise in futility."

On 28 January 2020, the convening authority issued his Decision on Action memorandum. In the memorandum, the convening authority memorialized the following action on the sentence: (1) he suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019; and (2) he waived all of the automatic forfeitures for a period of six months, release from confinement or expiration of term of service, whichever was sooner, with the waiver also commencing on 18 November 2019. He then directed that the total pay and allowances be paid to Appellant's spouse for the benefit of herself and the named victim. The Decision on Action memorandum also indicated Appellant would be required to take appellate leave un-

⁴ Issues (6), (7), (8) and (9) were personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

der Article 76a, UCMJ, 10 U.S.C. § 876a. However, there was no explicit statement as to whether any of the other elements of the Appellant’s sentence were approved, disapproved, commuted, or suspended.

On 2 March 2020, the military judge signed the entry of judgment (EoJ), noting both the convening authority’s suspension of the adjudged forfeitures and waiver of the automatic forfeitures. He entered the rest of the sentence as adjudged.

II. DISCUSSION

A. Convening Authority Action

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a Rule for Courts-Martial are also questions of law we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, 10 U.S.C. § 860,

in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

See 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018).

The date of the earliest charged offense of which Appellant was found guilty was on or about 11 October 2016. The version of Article 60, UCMJ, in effect on that date stated “[a]ction on the sentence of a court-martial *shall* be taken by the convening authority or by another person authorized to act under this section.” 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)) (emphasis added); *see also United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) (“[T]he convening authority is required to take action on the sentence . . .”). Article 60, UCMJ, further stated: “Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.” 10 U.S.C. § 860(c)(2)(B) (2016 *MCM*).

The United States Court of Appeals for the Armed Forces (CAAF) recently held that:

In any case where an accused is found guilty of at least one specification where the offense was committed before January 1, 2019, a convening authority errs if he fails to take one of the following mandated post-trial actions in a case: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

United States v. Brubaker-Escobar, __ M.J. __, No. 20-0345, 2021 CAAF LEXIS 818, at *6 (C.A.A.F. 7 Sep. 2021) (per curiam). In that case, the convening authority had signed a form stating he was taking “No Action” in the case. *Id.* at *3.

In this case the convening authority stated in his Decision on Action memorandum that he suspended the adjudged forfeitures and waived the automatic forfeitures for the benefit of Appellant’s spouse and child. That said, the convening authority failed to state whether he approved, disapproved, commuted, or suspended the other portions of Appellant’s sentence of the court-martial in whole or in part, to include Appellant’s adjudged reduction in grade.⁵ Considering *Brubaker-Escobar*, we find error.

Under *Brubaker-Escobar*, the convening authority’s error was procedural, not jurisdictional. *See id.* at *7–8. “[P]rocedural errors are ‘test[ed] for material prejudice to a substantial right to determine whether relief is warranted.’” *Id.* at *8 (second alteration in original) (quoting *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005)).

In *Brubaker-Escobar*, our superior court held the convening authority’s error in taking “no action” was harmless because the appellant did not request clemency, and the convening authority could not have granted meaningful clemency regarding any portion of the adjudged sentence.⁶ *Id.* at *8. In con-

⁵ We note the Government has not offered any clarification of the convening authority’s intent. *Cf. United States v. Harrington*, No. ACM 39825, 2021 CCA LEXIS 524 (A.F. Ct. Crim. App. 14 Oct. 2021) (unpub. op.) (convening authority’s declaration regarding intent in taking “no action” on sentence demonstrated no material prejudice to a substantial right of appellant).

⁶ In *Brubaker-Escobar*, the adjudged sentence included a punitive discharge and a reduction to E-1. 2021 CAAF LEXIS 818, at *2. Under Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*), the convening authority lacked the power to affect the punitive discharge. *Id.* at *8. Further, though the convening authority in *Brubaker-Escobar* had the authority to grant clemency regarding the rank reduction, the CAAF found this power effectively “meaningless because [a]ppellant’s punitive discharge would have resulted in an automatic reduction to E-1” under Article 58a, UCMJ, 10

trast, in this case Appellant expressed his belief that his sentence was inappropriately severe with requesting any specific relief. The one remaining component of the sentence that the convening authority could meaningfully affect was the reduction in grade from E-2 to E-1, and yet Appellant did not ask for relief. In that regard, we cannot determine from the record if Appellant erroneously believed the convening authority's options were "limited" to "outright non-existent," on one hand, or if Appellant was not interested in seeking to minimize his reduction in grade, on the other.⁷

We also note that under the new post-trial processing procedures, no written legal advice on Appellant's clemency request was required and none was included in the record of trial. Therefore we cannot be sure that the convening authority knew he could grant relief in regards to Appellant's reduction in rank. Under the facts presented here, we are unable to conclude that the convening authority's error did not materially prejudice a substantial right of Appellant. Accordingly, remand is appropriate before we complete our Article 66(d), UCMJ, review.

B. Post-Trial Delay

Appellant was sentenced on 4 November 2019 and the military judge signed the entry of judgment on 2 March 2020. On 22 April 2020 Appellant's case was docketed with this court. Appellant filed his initial assignments of error 450 days later on 16 July 2021, after requesting and receiving 12 enlargements of time over the Government's objection. A month later, on 15 August 2021, Appellant filed a supplemental brief with this court. We accepted the Government's answer on 24 September 2021, after granting a motion to exceed page limits. On 15 October 2021, 541 days after his case was docketed with this court, Appellant filed a reply brief, after receiving one enlargement of time from this court. We note that Appellant was aware of the progress on his appeal and of his options with assigned counsel, and that he consented to the motions for enlargement of time in the interest of having his case thoroughly briefed.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F.

U.S.C. § 858a (2016 *MCM*), and a related Army regulation. *Id.* No such automatic reduction would apply to Appellant in this case. See Department of the Air Force Instruction 51-201, *Administration of Military Justice*, ¶ A11.26.3 (18 Jan. 2019) ("The provisions of Article 58a do not apply to the Air Force. All reductions in grade are based upon adjudged and approved sentences.").

⁷ The convening authority lacked authority to affect the punitive discharge and sentence to confinement. R.C.M. 1107(d)(1)(B) (2016 *MCM*).

2003)). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. Where there is such a delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

Appellant's case was docketed with our court on 22 April 2020. The overall delay in failing to render this decision by 22 October 2021 is facially unreasonable. *See Moreno*, 63 M.J. at 142. However, we determine there has been no violation of Appellant's right to due process and a speedy appellate review.

This case has exceeded the 18-month standard between docketing and appellate decision by approximately seven weeks. The primary reason for the delay is the fact Appellant took some 15 months to file his assignments of error after requesting and receiving 12 extensions. Once we received Appellant's reply brief, we began our Article 66(d), UCMJ, review and identified the two issues we address today. We find the length of the delay generally weighs in Appellant's favor. We find the reasons for the delay weigh in the Government's favor, especially in light of the fact that most of the delay was at Appellant's behest. Appellant has not asserted a right to speedy appellate review. He has also not pointed to any particular prejudice resulting from the presumptively unreasonable delay, and we find none.

Finding no *Barker* prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of fairness and integrity of the military justice system. *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). As a result, there is no due process violation. *See id.*

Recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude it is not.

III. CONCLUSION

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum, as the convening authority failed to take action on the sentence as required by Article 60, UCMJ (2016 *MCM*), and *Brubaker-Escobar*.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

- (1) Return the record of trial to the convening authority or his successor to take action on the sentence;
- (2) Conduct one or more Article 66(f)(3), UCMJ, proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions; and/or
- (3) Correct or modify the entry of judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66(d), UCMJ.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court