IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Michael D. King Jr., Builder Third Class (E-4) U.S. Navy, Appellant.	BRIEF ON BEHALF OF APPELLANT Crim.App. No. 201000406 USCA Dkt. No. 11-0583/NA

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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ISSUE PRESENTED

WHETHER SPECIFICATION 5 OF CHARGE I ALLEGING AN INDECENT ACT UNDER ARTICLE 120(k), UCMJ, FAILED TO STATE AN OFFENSE WHERE THE INDECENT ACT ALLEGED WAS APPELLANT ORALLY REQUESTING DURING A SKYPE INTERNET CONVERSATION THAT A CHILD UNDER THE AGE OF 16 YEARS EXPOSE HER BREASTS SO THAT HE COULD VIEW THEM UTILIZING THE WEB CAMERA.

STATEMENT OF STATUTORY JURISDICTION

Appellant's approved court-martial sentence included a punitive discharge and confinement greater than one year. Accordingly, his case fell within the lower court's Article 66 jurisdiction.[1] Appellant filed a timely petition for grant of review properly bringing his case within this Court's jurisdiction.[2]

STATEMENT OF THE CASE

A general court-martial, composed of members with enlisted representation, tried Appellant on April 13-16, 2010. Contrary to his plea, Appellant was convicted of one specification of indecent conduct and one specification of, on divers occasions, engaging in a sexual act with a child under the age of 16 years, in violation of Article 120, UCMJ.[3]

The members sentenced Appellant to confinement for 3 years, reduction to pay grade E-1, and a bad-conduct discharge.[4] On

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[1] Article 66(b)(1), Uniform Code of Military Justice(UCMJ).
[2] Article 67(a)(3), UCMJ.
[3] JA at 1.
[4] *Id*.

July 10, 2010, the convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The lower court affirmed the decision of the trial court on May 5, 2011.[5] Appellant filed a petition for grant of review with this Court on June 28, 2011, which was granted.

STATEMENT OF FACTS

Specification 5 under Charge I, alleging a violation of Article 134, UCMJ, is as follows:

> In that Builder Third Class Michael D. King Jr., U.S. Navy, Naval Mobile Construction Battalion Eleven, Gulfport, Mississippi, on active duty, did, at or near the Al Basra Oil Terminal, Iraq, on or about 27 February 2009, wrongfully commit indecent conduct, to wit: by requesting Ms. GF, a female under 16 years of age, to expose her breasts during a SKYPE internet conversation so that he could view them utilizing the web camera.[6]

At trial, defense counsel moved to have the charge dismissed, arguing that it failed to state an offense.[7] The motion was denied.[8]

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[5] *United States v. King*, No. 201000406, 2011 CCA LEXIS 83, unpublished op., (N-M. Ct. Crim. App. May 5, 2011); JA at 6.

[6] JA at 11. *See* Skype, www.skype.com (Skype is computer software that allows for audio and video communications between two or more users over the Internet).

[7] JA at 76-78.

[8] JA at 78.

SUMMARY OF ARGUMENT

Based on the rule of lenity, Specificaton 5 of Charge I fails to state an offense because "language" is not "conduct." The confusion has been created by the military history of charging "indecent acts" separately from "indecent language," as well as the President's explanation of "indecent language" in the 2008 edition of the MCM.

In the alternative, based on *United States v. Begay*, Specification 5 of Charge I fails to state an offense because it only includes 2 of the 4 elements necessary to find an accused guilty of indecent acts in violation of Article 120(k), UCMJ. Specifically, it fails to allege that the conduct (1) occurred without GF's consent; and (2) violated GF's reasonable expectation of privacy.

ARGUMENT

WHETHER SPECIFICATION 5 OF CHARGE I ALLEGING AN INDECENT ACT UNDER ARTICLE 120(k), UCMJ, FAILED TO STATE AN OFFENSE WHERE THE INDECENT ACT ALLEGED WAS APPELLANT ORALLY REQUESTING DURING A SKYPE INTERNET CONVERSATION THAT A CHILD UNDER THE AGE OF 16 YEARS EXPOSE HER BREASTS SO THAT HE COULD VIEW THEM UTILIZING THE WEB CAMERA.

1. Standard of Review: Whether a charge or specification states an offense is a question of law which this Court reviews *de novo*.[9]

2. Discussion: "A specification states an offense if it alleges, either expressly or by implication, every element of the charged offense, so as to give the accused notice and protect him against double jeopardy."[10]

Based on the rule of lenity, this Court should find that language alone is not "conduct."

This Court has consistently held that criminal statutes are to be strictly construed, and that any ambiguity should be resolved in favor of the accused.[11] Additionally, when legislative intent is ambiguous, the ambiguity is to be resolved in favor of the accused.[12]

The ambiguity of Article 120(k) is revealed when trying to determine whether language is "conduct" within the meaning of statute. The confusion has been created by the military history of charging "indecent acts" separately from "indecent language," as well as the President's explanation of "indecent language" in the 2008 edition of the MCM.

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[9] *United States v. Crafter*, 64 M.J. 209, 210 (C.A.A.F. 2006) (citations omitted).
[10] RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM) (2008 ed.); *Crafter*, 64 M.J. at 210.
[11] *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007).
[12] *Id.*

Prior to the creation of the new Article 120 in 2007, "indecent acts with another"[13] was listed by the President as an example of an offense that could give rise to an Article 134 charge.[14] Separately, the President also listed the offense of "indecent language."[15] There was no difference between the elements for the two offenses, except that one dealt with "acts" and the other "language." The logical conclusion being that prior to the 2008 edition of the MCM, the President believed that the use of indecent language or oral and written communications was not an "indecent act with another."

When Congress created Article 120(k), it was aware of this distinction as it essentially created Article 120(k) from the President's listed offense of "indecent acts with another."[16] However, despite this certain historical understanding, Congress wrote nothing in the statute to subsume "indecent language" into "indecent acts."

When Congress created Article 120(k), it added the term "indecent conduct" to the definition of "indecent act." Article 120(k) says that anyone who engages in indecent conduct is guilty of indecent acts. Therefore, based on the history of the

[13] MCM Part IV, ¶ 90 (2005 ed.).

[14] *United States v. Jones*, 68 M.J. 465, 483 (C.A.A.F. 2010)("The President is not defining offenses but merely "indicating various circumstances in which the elements of Article 134, UCMJ, could be met.").

[15] MCM Part IV, ¶ 89 (2005 ed.).

[16] Compare MCM, Part IV, ¶ 45.a(k) and 45.t(12) (2008 ed.) with MCM, Part IV, ¶ 90 (2005 ed.).

"indecent acts" and Article 120(k), it is a logical conclusion that when Congress wrote Article 120(k) they did not intend to subsume "indecent language" into "indecent act."[17]

Furthermore, unlike "indecent acts with another," "indecent liberties," and "indecent exposure," "indecent language" has not been deleted from the 2008 edition of the MCM. In fact, the President has indicated in the 2008 MCM that despite Article 120(k), oral requests such as those made by Appellant are still to be charged as "indecent language" under Article 134. The President, in his explanation of "indecent language" wrote, "[s]ee paragraph 45 if the communication was made in the physical presence of a child."[18] In other words, if the communication were *not* made in the physical presence of a child, it would be properly charged under Article 134. (emphasis added) Thus, according to the President, "indecent language" remains a separate offense from the new Article 120(k) and applies to indecent oral communications.

In *United States v. Contreras*[19] this Court reviewed whether "indecent acts with another" was a "criminal offense" under Article 130, UCMJ. In defining the term "criminal offense" this Court used the definition given by the President in his explanation of Article 130. The President narrowed the scope of

[17] The logic behind the conclusion is that if language is not an act (legal history), but an act is conduct (statute), then language is not conduct.
[18] MCM, Part IV, ¶ 90.c. (2008 ed.).
[19] 69 M.J. 120 (C.A.A.F. 2010).

"criminal offense" by excluding purely military offenses.[20] This Court said that although the President's explanation of a punitive article only serves as persuasive authority, "where the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, '[they] will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution.'"[21]

Here, the President explained that indecent language that does not occur in the physical presence of a child is properly charged as "indecent language" under Article 134. In other words, he has continued to separate language from acts or conduct. This was a proper use of the President's power, and it does not run contrary to the ambiguous language of the statute. Therefore, the Court should limit the scope of "indecent acts" by excluding oral communications such as those made by Appellant.

The new "indecent acts" statute can be interpreted to have several different meanings. One of these meanings is that language alone does not constitute an act. This ambiguity must be resolved in favor of Appellant and the charge should be set aside.

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[20] MCM, Part IV, ¶ 56.c(3) (2005 ed.).
[21] *Contreras*, 69 M.J. at 121 (quoting *United States v. Guess*, 48 M.J. 69,71 (C.A.A.F. 1998)(quoting *United States v. Davis*, 47 M.J. 484, 486-87 (C.A.A.F. 1998)

In the alternative, the specification fails to allege that the conduct (1) occurred without GF's consent; and (2) violated GF's reasonable expectation of privacy.

The President has promulgated two required elements for the offense of indecent act to be met: (1) That the accused engaged in certain conduct; and (2) that the conduct was indecent conduct."[22] However, Congress has defined "indecent conduct" as actions of

> immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, *without another person's consent, and contrary to that other person's reasonable expectation of privacy*, or –
>
> (A) That other person's genitalia, anus, or buttocks, or (if that person is female) that person's areola or nipple; or
>
> (B) That other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) of this chapter), or sexual contact.[23]

Therefore, to be proven beyond a reasonable doubt, an offense under Article 120(k) requires proof of two additional elements: (1) That the conduct occurred without the consent of the other person; and (2) That the conduct violated the other person's reasonable expectation of privacy.[24]

This conclusion is supported by changes made to the MCM as part of the passage of the National Defense Authorization Act

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[22] MCM, Part IV, ¶ 45b(11) (2008 ed.).
[23] Article 120(t)(12), UCMJ (emphasis added).
[24] *See King Jr.*, No. 201000406, 2011 CCA LEXIS 83 at 14, unpublished op., (Booker, S.J., dissenting); JA at 7.

for 2006. As discussed above, prior to 2007, an indecent act was charged as a violation of Article 134, UCMJ.[25] Following the revision of the Manual and the promulgation of the new Article 120(k), the elements remained essentially the same – with only a slight deviation in language. "Committed a certain wrongful act" became "engaged in certain conduct," and "the act was indecent" became "the conduct was indecent conduct."[26]

> In the pre-2007 Article 134, "indecent" was defined as
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> . . . that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.[27]

In Article 120(k), UCMJ, "indecent conduct" is defined almost identically as "indecent" in the previous Article 134 offense, but the President includes an non-exhaustive list of examples of conduct, *all of which* however, must be done without the consent of the other person and contrary to that person's reasonable expectation of privacy. (emphasis added)

A fundamental rule of "statutory interpretation is that statutes should be interpreted to give meaning to each word."[28] Applying these rules to Article 120(k), it is clear that this statute is aimed solely at surreptitious, voyeuristic acts.

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[25] MCM, Part IV, ¶ 90 (2005 ed.).
[26] Compare MCM, Part IV, ¶ 90 (2005 ed.) with MCM, Part IV, ¶ 45(b)(11) (2008 ed.).
[27] MCM, Part IV, ¶ 90c (2005 ed.).
[28] *United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007)(quoting *Lingle v. PSB Bancorp, Inc.*, 123 F. App'x 496, 502 (3d Cir. 2005) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

"Voyeurism" is defined in Black's Law Dictionary as "[g]ratification derived from observing the sexual organs or acts of others, usu[ally] secretively."[29]

In *United States v. Begay*,[30] the Supreme Court reviewed whether prior convictions of driving under the influence (DUI) were "violent felonies" as defined in the Armed Career Criminal Act (ACCA). The ACCA imposed a special mandatory 15-year prison term upon persons who unlawfully possessed a firearm and who also have three or more previous convictions for committing certain drug offenses or violent felonies.[31] The ACCA defined the term "violent felonies" as an act or series of acts that constitute "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[32] The Supreme Court found that "to give effect to every clause and word" of the statute, they would limit the crimes that the statute covers to only those crimes that were *similar* to the listed examples.[33] (emphasis added) They justified this interpretation by saying that if Congress did not mean to limit the crimes constituting "violent felonies" then there was no

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[29] BLACK'S LAW DICTIONARY 1608 (8th ed. 2004)
[30] 553 U.S. 137 (2008).
[31] *Id*. at 139.
[32] 18 U.S.C. § 924(e)(2)(B)(ii).
[33] *Begay,* 553 U.S. at 144-45 (quoting *Menasche*, 348 U.S. at 538-39)(citations omitted). Although not using the term, the Supreme Court used the statutory construction device of *ejusdem generis*, ("Latin for 'of the same kind'), the theory of construction cited by Judge Booker in his dissent in *King Jr*. See *United States v. Taylor*, 620 F.3d 812, 814 (7th Cir. 2010).

reason for them to include the examples at all.[34] The Supreme Court found that based on the listed examples, a DUI conviction should not have been classified as a violent felony.

Just as Congress limited the definition of "violent felonies" in *Begay* to conduct that presents a serious potential risk of physical injury to another, here Congress limited the definition of "indecent acts" to conduct that is done without a person's consent and that violates their reasonable expectation of privacy. The examples and additional elements supplement the definition of the term "indecent conduct."[35]

As elements of the offense of "indecent acts" under 120(k) (which Appellant argues was designed specifically to protect against surreptitious, voyeuristic acts), lack of consent and a violation of a reasonable expectation of privacy are required to be alleged in the specification. Their exclusion results in a fatally deficient specification that fails to state an offense.

[34] *Begay*,553 U.S. at 142.
[35] *Taylor*, 620 F.3d at 814.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Court set aside Appellant's conviction for Specification 5 of Charge I and order a rehearing on the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was electronically delivered to the Court, Appellate Government Division and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on August 22, 2010. Additionally, seven copies of the joint appendix were hand-delivered to the Court and one copy to the Appellate Government Division.

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