IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20070243
Lieutenant Colonel **DOUGLAS K. WINCKELMANN,** United States Army, Appellant	)	USCA Dkt. No. 11-0280/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issues Presented

I

WHETHER THE LOWER COURT ERRED IN AFFIRMING THE FINDING OF GUILTY AS TO SPECIFICATION 3 OF CHARGE III WHEN IT FOUND THAT AN ONLINE CHAT CONTAINING THE LINE "U FREE TONIGHT" WAS SUFFICIENT TO PROVE ATTEMPTED ENTICEMENT.

II

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY AFFIRMING FORFEITURE OF ALL PAY AND ALLOWANCES WHEN THE CONVENING AUTHORITY DID NOT APPROVE ANY FORFEITURE.

III

WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDINGS IN UNITED STATES v. RESENDIZ-PONCE AND RUSSELL v. UNITED STATES, AND THIS COURT'S RECENT OPINIONS IN MEDINA, MILLER, AND JONES.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals had jurisdiction over this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [hereinafter UCMJ]. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). This Court granted review on July 7, 2011. United States v. Winckelmann, __ M.J. ___ (C.A.A.F. 2011)(order).

Statement of the Case

Appellant was tried by general court-martial, officer members, on November 3, 2006; January 30, 2007; February 20-23, 2007; and March 9, 2007. In accordance with his pleas, he was found guilty of two specifications of conduct unbecoming an officer and two specifications of indecent acts with another in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933 and 934. Also in accordance with his pleas, he was found not guilty of violating a general order (the Joint Ethics Regulations), one specification of conduct unbecoming an officer, and one specification of attempted enticement of a minor (charged as a violation of 18 U.S.C. § 2422(b)), in violation of Articles 92, 133, and 134. Contrary to his pleas, Appellant was found guilty of two specifications of conduct unbecoming an officer, one specification of possession of child pornography, three specifications of attempted enticement of a minor (charged as a

violation of 18 U.S.C. § 2422(b)), two specifications of communicating indecent language, and two specifications of obstruction of justice, in violation of Articles 133 and 134.[1]

Appellant was sentenced to confinement for 31 years, "forfeiture of all and [sic] allowances,"[2] and to a dismissal. (JA at 150.) The convening authority's initial action included the following language: "only so much of the sentence as provides for confinement for 31 years, forfeiture of all pay and allowances is approved and except for that portion which pertains to a dismissal will be executed." (JA at 155, Action, September 30, 2007.) This action was withdrawn and a new action taken almost a month later wherein the convening authority approved "only so much of the sentence provides for confinement for 31 years and a dismissal." (JA at 162, Action, October 24, 2007.)

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[1] The military judge found Charge III, Specification 1 (attempted enticement) to be multiplicious for sentencing with Charge IV, Specification 1 (indecent language) and Charge VII, Specification 1 (conduct unbecoming an officer). Additionally, the military judge found Charge III, Specification 2 (attempted enticement), to be multiplicious for sentencing with Charge IV, Specification 2 (indecent language). He found Charge III, Specification 3 (attempted enticement) to be multiplicous for sentencing with Charge VII, Specification 2 (conduct unbecoming an officer). (JA at 55-65.) The maximum sentence to confinement was 115 years, which included 30 years for each of the three findings of guilty as to Specifications 1, 2, and 3 of Charge III. (JA at 60, 65.)

[2] Although the announcement of the sentence in the trial transcript does not include the word "pay" after the word "all," the sentence worksheet indicates that the members did intend to award total forfeitures. (JA at 154.)

A three-judge panel at the Army Court of Criminal Appeals set aside the findings of guilty as to Charge II and its sole specification (possession of child pornography) and as to Specification 2 of Charge III (attempted enticement). United States v. Winckelmann, No. 20070243 (Army Ct. Crim. App. November 30, 2010) (unpublished). (JA at 20.) The panel also modified the findings as to Specifications 1 and 2 of Charge VI (obstruction of justice), excepting the words "sodomy and." (JA at 20.) The lower court otherwise affirmed the findings, with a dissenting judge maintaining that Specifications 1 and 3 of Charge III (attempted enticement) should be set aside as well. (JA at 21, 40, Ham, J., concurring in part, dissenting in part and in the result.) Electing to reassess the sentence, the lower court affirmed so much of the sentence as provided for a dismissal, confinement for 20 years, and total forfeitures of pay and allowances. (JA at 21.) The dissenting judge wrote that she would have directed a sentence rehearing. (JA at 40, Ham, J., concurring in part, dissenting in part and in the result).[3]

[3] The lower court separately ordered various corrections to the "corrected copy" promulgating order of October 24, 2007. United States v. Winckelmann, No. 20070243 (Army Ct. Crim. App. November 30, 2010) (Notice of Court-Martial Order Correction). (JA at 42-43.)

Statement of Facts

While Appellant was stationed in Bosnia in the mid-1990's, he became pen pals with RM, the minor son of KM. (JA at 67.) When he returned from overseas, Appellant visited the family on Long Island and developed a "big brother" type relationship with KM's children. (JA at 67.) Appellant and the family emailed each other for several years but had a falling out in 2003 over a disciplinary issue involving RM. (JA at 70-71.) Although her contact with Appellant ceased, KM kept what she believed to be Appellant's email address, NYJOJO2G@aol.com, on her AOL buddy list. (JA at 71, 74, 109.)

In February 2005, KM logged onto AOL on a new computer and saw the screen name "NYJOJO2G" on her buddy list. (JA at 74, 76.) She clicked on the screen name and then on "buddy info." She testified that it showed that whoever had signed on as NYJOJO2G was in a chatroom entitled "boys with small ones." (JA at 76.) KM asked RM, now a teenager, to create a new screen name for her so she could disguise her identity on line. (JA at 77.) She put NYJOJO2G on the buddy list of her new screen name, which was 2CUTE4U231. (JA at 77, 113.) After clicking on NYJOJO2G on her buddy list and hitting "buddy info," she saw that NYJOJO2G had entered a chat room that she claimed was entitled "boys wearing briefs." (JA at 77.)

KM joined the chat and told RM what to type. (JA at 77-78, 120.) When someone in the chat room asked, "age/sex/location," she directed RM to type "14/yes/New York," intending to portray 2CUTE4U231 as a 14-year-old and that sex was okay. (JA at 78, 113.) She told RM not to reveal a gender. (JA at 78.) At that point, NYJOJO2G invited 2CUTE4U231 to a private chat. (JA at 79.)

KM continued to dictate to her son what to type once they joined NYJOJO2G in the chat room. (JA at 79-80.) When NYJOJO2G asked 2CUTE4U231 his/her name, KM told RM to type "Jake," the name of her younger son. (JA at 79-80.) When NYJOJO2G wrote back, "Hello, Jake," RM disregarded what his mother was telling him to type and wrote back, "Hello, Doug." (JA at 80, 117-18.) NYJOJO2G wrote back, "Who's this?" or "Who is this?" (JA at 80-81, 118.) When RM typed back, "Wouldn't you like to know," NYJOJO2G wrote, "How do you know me? Did we ever have sex before?" (JA at 81.) RM typed, "You probably wish you did." (JA at 81.) NYJOJO2G wrote back, "Is this [a man's name] from Georgia" and RM wrote "no" and shut off the computer without first printing the chat. (JA at 81, 116.)

KM had RM delete 2CUTE4U231 and create a new screen name, which was "Il ovean al 12." (JA at 82, 89, 123, 132.) She did not spot NYJOJO2G online again until July 14, 2005. (JA at 81-82.) She testified that she joined a chatroom where she

believed NYJOJO2G to be located online and printed off a portion of the chatroom conversation, which was admitted as Prosecution Exhibit 1. (JA at 82, 125, 151.) The screen name NYJOJO2G is not shown anywhere on Prosecution Exhibit 1 and "Il ovean al 12" only appears in the line "15m ny." (JA at 151.) The chat dialog contained varying claims of age and other physical characteristics; numerous offers to engage in instant messaging, phone calls, and to "trade" photographs and/or video; and several references to baseball. (JA at 151.)

NYJOJO2G and "Il ovean al 12" entered a private chatroom, where the following dialog occurred:

NYJOJO2G [9:04 PM]: u in nyc
Il ovean al 12 [9:05 PM]: yeah

NYJOJO2G [9:05 PM]: where
NYJOJO2G [9:05 PM]: gay or bi
Il ovean al 12 [9:05 PM]: brooklyn
Il ovean al 12 [9:05 PM]: bi
NYJOJO2G [9:05 PM]: kool
Il ovean al 12 [9:05 PM]: you
NYJOJO2G [9:06 PM]: manhattan
NYJOJO2G [9:06 PM]: bi
Il ovean al 12 [9:06 PM]: great
NYJOJO2G [9:06 PM]: u had sex with a guy
Il ovean al 12 [9:06 PM]: not yet
NYJOJO2G [9:07 PM]: u looking for younger or older
Il ovean al 12 [9:07 PM]: older
NYJOJO2G [9:07 PM]: kool
Il ovean al 12 [9:07 PM]: are you older
NYJOJO2G [9:07 PM]: y
Il ovean al 12 [9:07 PM]: age
NYJOJO2G [9:08 PM]: 27
Il ovean al 12 [9:08 PM]: location
NYJOJO2G [9:08 PM]: manhatten [sic]
NYJOJO2G [9:09 PM]: east side
Il ovean al 12 [9:09 PM]: you have sex with guys

NYJOJO2G [9:10 PM]: young men
Il ovean al 12 [9:10 PM]: how young
Il ovean al 12 [9:10 PM]: 15?
NYJOJO2G [9:11 PM]: they want
Il ovean al 12 [9:11 PM]: what

NYJOJO2G [9:11 PM]: if they want
Il ovean al 12 [9:12 PM]: brb

[11-minute break]

Il ovean al 12 [9:23 PM]: hey
NYJOJO2G [9:23 PM]: yes
NYJOJO2G [9:23 PM]: u free tonight
Il ovean al 12 [9:24 PM]: gotta go talk soon?
NYJOJO2G [9:24 PM]: ok
Il ovean al 12 [9:24 PM]: got a number
NYJOJO2G [9:24 PM]: e-mail me u want to get together
Il ovean al 12 [9:26 PM]: ok
see ya
NYJOJO2G [9:26 PM]: bye

(JA at 153.)

The entire chat was only 41 lines long and consisted of eight minutes of dialog, an 11-minute break, and a final three minutes of dialog. (JA at 153.) Appellant typed fewer than 50 words during the course of the chat.

KM was adamant that the person using the NYJOJO2G screen name was Appellant, even after being advised that the screen name was registered to Fernando Bangcot (Appellant's roommate) and even though NYJOJO2G never identified himself as "Doug." (JA at 126, 128-131.) She reported her contacts in the chatrooms to local police and was put in contact with Detective Frank Giardina of the Suffolk County Police Department computer crimes section. (JA at 95-97, 142, 149.)

Other facts necessary for resolution of the assigned errors are set out *infra*.

I

WHETHER THE LOWER COURT ERRED IN AFFIRMING THE FINDING OF GUILTY AS TO SPECIFICATION 3 OF CHARGE III WHEN IT FOUND THAT AN ONLINE CHAT CONTAINING THE LINE "U FREE TONIGHT" WAS SUFFICIENT TO PROVE ATTEMPTED ENTICEMENT.

Summary of Argument

The language used by Appellant in the brief chatroom dialog in issue is not strongly corroborative of any firmness of intent to engage in sexual activity with a minor. Appellant did not engage in grooming, a long-term online relationship, make specific travel arrangements, or travel to a rendezvous site. Consequently, the government failed to prove that Appellant took any overt action that rose to the level of a substantial step.

Standard of Review

Legal sufficiency is reviewed *de novo*. United States v. Green, 68 M.J. 266, 268 (C.A.A.F. 2010). The test is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found, beyond a reasonable doubt, all of the elements of the charged offense. Jackson v. Virginia, 443 U.S. 307 (1979).

Argument

Specification 3 of Charge III alleged that Appellant violated 18 U.S.C. § 2422(b)[4] by attempting to entice KM during the online chat between NYJOJO2G and "Il ovean al 12" on July 14, 2005. The elements of this offense, as instructed by the military judge (and as determined to be the law of the case by the lower court), are (1) that Appellant used a means of interstate commerce; (2) to knowingly and willfully attempt to persuade and entice; (3) persons he believed to be minors; (4) to engage in sexual activity for which a person may be charged with a criminal offense. (JA at 3-4.) The military judge elaborated that the government needed to prove that Appellant intended to engage in some form of unlawful sexual activity and that Appellant took some action that was a "substantial step" toward bringing about or engaging in that sexual activity. (JA at 33.) In other words, the government needed to prove that Appellant intended to engage in sex, not simply intend to

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[4] Section 2422(b) of Title 18 prohibits both attempted enticement and the completed offense. The version of the federal coercion and enticement statute, 18 U.S.C. § 2422(b), in effect between 2003 and 2006 stated: "Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years."

entice, and that Appellant committed a substantial step that would tended to effect the intent to engage in sex. The government's case fell short of its burden of proof because Appellant took no action that constituted a substantial step towards engaging in sexual activity.

Although the attempted enticement was charged as a violation of a specific federal statute under Article 134(3), Article 80 provides the "definitional yardstick" by which alleged attempts under other provisions of the UCMJ are measured. United States v. Anzalone, 41 M.J. 142, 146 (C.M.A. 1994). An attempt requires the commission of an overt act, done with the intent to commit a specific offense, that exceeds mere preparation and tends to effect its commission. Article 80, UCMJ. "Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense." Manual for Courts-Martial, United States, pt. IV, ¶ 4(c)(2). It must constitute a substantial step towards the intended offense. United States v. Jones, 37 M.J. 459, 461 (C.A.A.F. 1993). The Explanation to Article 80 in the Manual for Courts-Martial provides a useful example: purchasing a book of matches with the intent to burn a haystack would not constitute attempted arson,

although applying a burning match to the haystack would. Manual for Courts-Martial, United States, pt. IV, ¶ 4(c)(2).

The lower court concluded that Appellant attempted to persuade "Il ovean al 12" to engage in sexual activity through inquiries about his sexual preferences and "appellant's expressed willingness to engage in sex with someone Il ovean al 23's age." (JA at 9.) Considering the content of the chat to be "overwhelming" evidence of Appellant's guilt, the lower court sweepingly stated, "There is not a phrase, word or even a single keystroke that could be remotely construed as a casual chat or anything other than a blunt exchange at meeting and engaging in sex." (JA at 10.) The court below felt that the requisite substantial step occurred when NYJOJO2G typed "u free tonight," which the lower court considered to be a request for a meeting. (JA at 10.)

Such a conclusion, however, reads far too much into the line "u free tonight." The general chatroom dialog shows that most of the parties in the general chat room were looking for individuals with whom they could trade pictures and videos, chat with online, or call on the phone.[5] (JA at 151-52.) Typing "u

[5] As the Third Circuit has noted, "Section 2422(b) does not prohibit all communications with a minor, nor does it prohibit all communications that relate to illegal sexual activity. It only proscribes communications that actually or attempt to knowingly 'persuade,' 'induce,' 'entice' or 'coerce' a minor to

free tonight" could have been the prelude to setting up another chat or a phone call later that evening. It could have been a reference to the fact that "Il ovean al 12" had just excused himself from the chat for 11 minutes, and NYJOJO2G perhaps felt that "Il ovean al 12" was too busy to continue to chat. Indeed, the next response from "Il ovean al 12" was "gotta go" followed by the question, "talk soon?" and a request for NYJOJO2G's phone number. (JA at 153.) NYJOJO2G's line "email me you want to get together" is similarly subject to multiple interpretations.

Judge Ham, in dissent, found that Appellant's remarks were "simply too preliminary," and that no reasonable factfinder "could conclude that this exchange on its own is an attempt to persuade 'Il ovean al 12' to engage in sexual activity." (JA at 30, Ham, J., concurring in part, dissenting in part and in the result.) When Appellant "requested a meeting," Judge Ham considered "u free tonight" to be, at most, a simple exploration to see if would be worthwhile to ask "Il ovean al 12" to meet. (JA at 30.) If "Il ovean al 12" had replied that he was free that night, perhaps NYJOJO2G would have taken the next step, but such a conclusion was, according to Judge Ham, "completely speculative." (JA at 30.)

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engage in illicit sexual activity." United States v. Tykarsky, 446 F.3d 458, 482 (3rd Cir. 2006).

The substantial step required in an attempt must be conduct that is "strongly corroborative of the firmness of the accused's criminal intent." United States v. Byrd, 24 M.J. 286 (C.M.A. 1987). This "strong corroboration" is reflected in the general fact patterns of cases where federal circuit courts of appeal have affirmed convictions for violation of 18 U.S.C. § 2422(b). Those courts have generally found travel to a rendezvous site, after online and/or phone communication with a purported victim, to constitute a substantial step. See generally United States v. Blazek, 431 F.3d 1104 (8th Cir. 2005)(substantial step sufficient where defendant engaged in fifteen months of instant messaging and email conversations that included graphic sexual conversations, discussion about oral sex, and a suggestion of a three-way sexual encounter with one of purported victim's friends, followed by travel from Des Moines, Iowa, to Chicago for rendezvous on specific day); United States v. Barlow, 568 F.3d 215 (5th Cir. 2009)(substantial step sufficient where defendant engaged in sporadic online relationship lasting most of a year, emailed multiple pornographic pictures, asked purported victim if she would sent explicit pictures of herself, followed by travel to rendezvous site on specific day and request that purported victim not wear underwear to the rendezvous); United States v. Myers, 575 F.3d 801 (8th Cir. 2009)(defendant repeatedly pressed purported 14-year-old girl

for meeting, asked if she would be home alone from school all day, suggested picking her up from school, encouraged her to evade her mother, and provided graphic description of anticipated sexual activity at the meeting; court found substantial step occurred when defendant drove two hours to meet girl in truck where police found two boxes of condoms and a digital camera).

In cases where no actual travel was involved, courts nevertheless have looked for more than a single, brief, online chat. See generally United States v. Goetzke, 494 F.3d 1231, 1237 (9th Cir. 2007)(substantial step met where defendant sent sexually explicit letters to developmentally-disable 10-year-old boy, proposing a future meeting and engaging in grooming behavior by promising to take boy horseback riding and obtaining a motorcycle for him; letters constituted a substantial step because they unequivocally demonstrated that the crime would take place unless interrupted by independent circumstances).

Three cases from the Seventh Circuit are useful in illustrating the line of demarcation between mere preparation and a substantial step in "non-travel" cases. In United States v. Gladish, 536 F.3d 646 (7th Cir. 2008), the Seventh Circuit held that explicit sexual talk (including Gladish's sending a video of himself masturbating) and discussing the possibility of a meeting without making specific arrangements to meet did not

rise to the level of attempted enticement. The court noted that in the usual case based on a sting operation, a defendant obtains the girl's consent, goes to meet her, and then is arrested when he arrives at the rendezvous point.[6] Id. at 648. Although there was a chance that the defendant could get "cold feet at the last minute," there was sufficient likelihood, in

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[6] Military cases likewise show a strong trend of upholding convictions where there has been actual travel. See generally United States v. Tynes, 58 M.J. 704 (Army Ct.Crim.App. 2003) (Army CWO2 sent pictures of himself in Army uniform, called minor girl on the phone, traveled to meet with girl, and was ultimately arrested by FBI at a hotel room where he had gone with a video camera to meet with minor girl and tape himself having sex with her); United States v. Larson, 64 M.J. 559 (A.F.Ct.Crim.App. 2006), *aff'd* 66 M.J. 212 (C.A.A.F. 2008) (Air Force major arrested when he traveled to rendezvous site to have sex after purchasing a package of condoms); *United States v. Brooks*, 60 M.J. 495 (C.A.A.F. 2004) (Army Specialist arrested at a rendezvous site); United States v. Amador, 61 M.J. 619 (A.F.Ct.Crim.App. 2005) (Air Force E-1 arrested at rendezvous site). In United States v. Garner, 69 M.J. 31 (C.A.A.F. 2010), this Court upheld a guilty plea to 18 U.S.C. § 2422(b) of a Marine gunnery sergeant who had engaged in seventeen hours of online communication with an undercover police officer posing as a 14-year-old girl. Garner had described specific sexual acts, expressed an interest in engaging in sexual activity with the girl, send a webcam video showing himself masturbating, and alluding to a future meeting. During the providence inquiry, Garner admitted that he specifically intended to attempt to persuade the purported minor girl to engage in sexual activity with him, and that his acts constituted more than a mere preparation. In upholding the guilty plea, this Court quoted United States v. Schoof, 37 M.J. 96, 103 (C.M.A. 1993) in concluding that "where an accused pleads guilty and admits during the providence inquiry that he went beyond mere preparation and points to a particular action that satisfies him on this point, it is neither legally nor logically well-founded to say that actions that actions that may be ambiguous on this point fall short of the line "as a matter of law" so as to be substantially inconsistent with the guilty plea." Garner, 69 M.J. at 33.

the typical travel case, that the sexual crime would have taken place once the defendant met with the girl. However, the court continued, travel was not a "*sine qua non*" of finding a substantial step, which could also be met by making arrangements for a meeting such as agreeing on a time and place; making a hotel reservation, purchasing a gift, or buying a travel ticket. Id. at 649. The court ultimately concluded that the actions taken by Gladish did not indicate that he would travel from southern Indiana to northern Indiana to meet the girl, nor did he invite her to meet him in southern Illinois or elsewhere. His actions were "equally consistent" with his having intended to obtain sexual satisfaction vicariously. In fact, the court was surprised that the government even prosecuted Gladish's actions as a violation of 18 U.S.C. § 2422(b) because treating even obscene speech as the substantial step would abolish any requirement for a substantial step. Id. at 650.

Several months later, the Seventh Circuit upheld a conviction under 18 U.S.C. § 2422(b) in another online sting operation. In United States v. Zawada, 552 F.3d 531 (7th Cir. 2008), the defendant engaged in twelve instant messaging sessions, over a period of three months, with an undercover police officer whom he believed was a 13-year-old girl. He sent her obscene material, had a "relatively concrete conversation" about making a date, discussed a specific date and time of day

for their meeting, inquired about the "girl's" birth control practices, and asked her whether he should bring some kind of protection when they met. The Seventh Circuit cited Gladish for holding that "mere talk in an Internet chat room is not enough to support a conviction for an attempt to violate s 2422(b); rather, "more concrete measures" were required. Id. at 534. In comparing the two cases, the Seventh Circuit noted that although Zawada's plans never gelled into an actual meeting, it was "somewhat closer to a substantial step than the 'hot air' and nebulous comments about meeting 'sometime' that took place in Gladish." Id. at 535.

Most recently, the Seventh Circuit decided United States v. Chambers, No. 09-3654, 2011 U.S. App. LEXIS 12118 (7th Cir., Jun. 16, 2011), where it found that the substantial step requirement had been met where Chambers engaged in a 14-month grooming campaign with an undercover police officer pretending to be a 14-year-old girl. Chambers contacted the "girl" hundreds of times, spoke to her in sexually explicit terms to prepare her for a sexual encounter with him, and emailed her child and adult pornography. Not only did they repeatedly discuss specific arrangements for meeting, but Chambers found motels within walking distance of her home and formulated a plan to meet her on an Amtrak train near her home so they could have sex on the train. He confirmed that the "girl" was on birth control and

purchased Viagra for his own use during their planned sexual encounter. The Seventh Circuit held that Chambers' actions amounted to more than mere "hot air" or a "bunch of talk." Id. at 11.

Appellant's actions were less corroborative of intent than the actions taken in any of these three Seventh Circuit cases. Appellant never set up a rendezvous. There was no long-term grooming; this was a one-time contact where the Appellant typed fewer than 50 words. There were no descriptions of graphic sexual activity. As the Seventh Circuit recognized, online chats can be "hot air" or a "bunch of talk," which is why the government must show more than just an overtone of sex in a chatroom conversation. Otherwise there is too great a risk of reeling in those who use private chat rooms to engage in sexually-oriented conversation to fulfill role-playing fantasies or for immediate sexual gratification.

Inasmuch as the evidence is legally insufficient to constitute an attempt, the findings of guilty as to Specification 3 of Charge III should be set aside and a sentence rehearing directed.

II

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY AFFIRMING FORFEITURE OF ALL PAY AND ALLOWANCES WHEN THE CONVENING AUTHORITY DID NOT APPROVE ANY FORFEITURE.

Summary of Argument

The lower court's attempt to affirm adjudged forfeitures that were not approved by the convening authority is a nullity.

Standard of Review

A lower court's action in conducting a reassessment is reviewed for an abuse of discretion or "obvious miscarriage of justice." United States v. Jones, 39 M.J. 315, 317 (C.M.A. 1994).

Argument

The September 30, 2007, action in Appellant's case states the convening authority approved "only so much of the sentence as provides for confinement for 31 years, forfeiture of all pay and allowances" and ordered the sentence executed "except for that portion which pertains to a dismissal." (JA at 155.) That action was withdrawn by another action on October 24, 2007, wherein the convening authority approved "only so much of the sentence as provides for confinement for 31 years and a dismissal, and ordered, with the exception of that part which pertains to a dismissal, ordered the sentence executed. (JA at 162.) Thus, the approved sentence did not include any adjudged forfeitures.

A court of criminal appeals may act "only with respect to the findings and sentence as approved by the convening authority." Art. 66(c), UCMJ. The lower court stated that the convening authority in Appellant's case had approved the adjudged sentence to a dismissal, confinement for thirty-one years, and forfeiture of all pay and allowances. (JA at 2.) After taking corrective action as to various specifications, the lower court elected to reassess Appellant's sentence, rather than order a sentence rehearing. (JA at 21.) After conducting its reassessment, the lower court wrote, "we affirm so much of the sentence as provides for a dismissal, twenty years confinement, and total forfeiture of pay and allowances." (JA at 21.)

Given that the convening authority did not approve adjudged forfeitures, there were no adjudged forfeitures for the lower court to affirm. Thus, their attempt to do so was a nullity. As relief, Appellant prays that this Court affirm only so much of the sentence as provides for confinement for twenty years and a dismissal. See generally United States v. Seeley, 68 M.J. 188 (C.A.A.F. 2009)(in case where Army Court of Criminal Appeals erred by affirming reduction to E-1 when the convening authority did not approve such reduction, this Court approved only so much of the sentence that provided for approved confinement period,

dishonorable discharge, and forfeiture of all pay and allowances).

Conclusion

WHEREFORE, Appellant prays that as to Issue I, the findings of guilty as to Specification 3 of Charge III should be set aside and a sentence rehearing directed, and that as to Issue II, this Court should affirm only so much of the sentence as provides for confinement for twenty years and a dismissal.

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USCAAF Bar Number 34668

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Winckelmann*, Crim.App.Dkt.No. 20070243, USCA Dkt. No. 11-0280/AR, was delivered to the Court and Government Appellate Division on August 5, 2011.

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