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) APPELLEE
v.	)
	) Crim. App. Dkt. No. 20070243
Lieutenant Colonel **DOUGLAS K. WINCKELMANN** U.S. Army, Appellant	) USCA Dkt. No. 11-0280/AR

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

Granted Issue 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.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(3), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."[2]

Statement of the Case

Appellant was tried by a general court-martial, composed of 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. Contrary to his pleas,

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[1] *United States v. Winckelmann*, 2010 WL 4892816 (A.C.C.A. 2010); 10 U.S.C. § 866(b).
[2] 10 U.S.C. §867(a)(3).

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 child, two specifications of communicating indecent language, and two specifications of obstruction of justice, in violation of Articles 133, 134, UCMJ.

Appellant was sentenced to confinement for 31 years, forfeiture of all pay and allowances and a dismissal.[3] The convening authority's initial action included the 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allowances is approved and except for that portion which pertains to a dismissal will be executed."[4] This action was withdrawn and the convening authority's next action approved "only so much of the sentence as provides for confinement for 31 years and a dismissal."[5]

A three-judge panel at the Army Court of Criminal Appeals set aside the findings of guilty as to Charge II and its specification (possession of child pornography) and as to Charge III, Specification 2 (attempted enticement).[6] The panel also modified the findings as to specifications 1 and 2 of Charge IV

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[3] JA 2.
[4] JA 155.
[5] JA 162.
[6] JA 20.

(obstruction of justice), excepting the words "sodomy and".[7] The Army Court affirmed the remaining findings. Electing to reassess the sentence, the Army Court affirmed only so much of the sentence as provided for a dismissal, confinement for 20 years, and forfeiture of all pay and allowances.[8]

Statement of Facts

KM and her son RM first had contact with the appellant when RM sent Valentine's Day letters to service members in Bosnia as part of a school project.[9] Appellant wrote back to RM and they became pen pals.[10] After returning from Bosnia, appellant visited the home of KM and RM.[11] Appellant met RM during this visit.[12] The appellant would visit quite often.[13]

It was through this relationship that KM knew appellant's screen name as "NYJOJO2G".[14] In February 2005, KM saw the screen name "NYJOJO2G" in a chat room entitled "Boys with small ones".[15] KM had RM make a new screen name for her, "2CUTE4U".[16] She then joined "NYJOJO2G" in a chat room entitled "boys wearing briefs".[17] KM had her son RM instant message back and forth with

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[7] JA 20.
[8] JA 21.
[9] JA 67.
[10] JA 68.
[11] JA-69-70.
[12] JA-70.
[13] JA 70.
[14] JA 71.
[15] JA 76.
[16] JA 77, 123.
[17] JA 77.

the appellant.[18] RM, no longer listening to his mother wrote "Hello Doug" to the appellant.[19] After a minute or so appellant questioned how "2CUTE4U" knew him. The appellant asked "How do you know me? Did we ever have sex before?"[20] RM responded with "You probably wish you did".[21] The appellant asked if RM was a certain individual from Georgia, to which RM said no and shut off the computer.[22]

KM had RM make her another screen name, this time the screen name was "Il ovean al 12".[23] Although the chat room name is not reflected in the record, the chat room was full of screen names of individuals purporting to be minors.[24] This chat room included discussion about chatting[25], trading pictures[26], looking for individuals who presumably lived close to the screen name[27], and even a request for "young guys [who want to] chat about fetishes or anything else out of the ordinary".[28]

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[18] JA 79-80.
[19] JA 80.
[20] JA 81.
[21] JA-81.
[22] JA 81.
[23] JA 83, 151. "Il ovean al 12" actually represents I love anal 12 but with the spaces in different locations. JA 89.
[24] JA 151-152.
[25] JA 151; post from "Dk808holla".
[26] JA 152; post from "Pimp aint easy".
[27] JA 151-152; post from "Kissimmee5666": "Florida anyone"; post from "Roid Rage DBol": "ANYONE IN MD?? IM ME"; post from "FinalJokerz": "ANYONE IN DALLAS, TX"; post from "Pimp aint easy": "vegas any1 im to chat".
[28] JA 151; post from "Roleplaydog2003".

After "Il ovean al 12" entered the chat room, "NYGOGO2G" asked him to go to a private chatroom.[29] In that private chatroom the following dialog occurred:[30]

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 u 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
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
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

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[29] JA 91.
[30] JA 153. The chat depicts all grammatical and spelling errors.

Il ovean al 12 [9:24 PM]: got a number
NYJOJO2G [9:24 PM]: email me u want to get together
Il ovean al 12 [9:26 PM]: ok
see ya
NYJOJO2G [9:26 PM]: bye

KM spoke with a police officer who came into the bank where KM was employed.[31] He contacted his police department in Nassau County and they got in contact with Suffolk County's computer crime department.[32] At some point, Detective Frank Giardina from the Suffolk County's computer crime department spoke with KM.[33]

Additional facts necessary for the disposition of this case are set forth in the argument.

Summary of Argument

Appellant took a substantial step in the attempted enticement for a minor when he asked "Il ovean al 12" if he was free to meet that evening, after chatting with "Il ovean al 12" in a sexually charged chat room. The appellant and "Il ovean al 12" chatted through instant messages where the appellant asked where in New York City "Il ovean al 12" was located, his sexual orientation, whether he had ever had sex with a guy, and what "Il ovean al 12" was looking for. The appellant also told "Il ovean al 12" that he would have sex with someone as young as 15.

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[31] JA 95.
[32] JA 95.
[33] JA 95.

After learning these details about "Il ovean al 12", appellant asked if "Il ovean al 12" was free that evening.

Standard of Review

In resolving questions of legal sufficiency, this Court is "not limited to appellant's narrow view of the record."[34] To the contrary, "this Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution."[35] 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."[36]

Law and Argument

The Court should reject appellant's arguments concerning legal sufficiency. Affirming appellant's conviction for attempted enticement of minors requires this Court to find:

(1) That appellant used a means of interstate commerce (the Internet);

(2) To knowingly and willingly attempt to persuade and entice;

(3) Persons he believed to be minors;

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[34] *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)).
[35] *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).
[36] *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995), *cert. denied*, 516 U.S. 1075 (1996) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (quotation marks omitted)).

(4) To engage in sexual activity for which a person may be charged with a criminal offense.[37]

The Army Court found that the military judge, having listed the elements, went on to instruct that "it is necessary for the government to prove that the accused intended to engage in some form of unlawful sexual activity with the individual and knowingly and willfully took some action that was a substantial step toward bringing about or engaging in that sexual activity."[38] Thus, the military judge required intent and a substantial step toward an actual sexual act, and, in so doing, went beyond what has been required by the majority of circuit courts, which only require intent and a substantial step toward enticement.[39]

Although travel to a rendezvous location is often the "substantial step" that separates attempted enticement from "mere preparation,"[40] travel "is not a *sine qua non* of finding a substantial step in a section 2422(b) case."[41] Federal courts

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[37] JA 7.
[38] JA 8.
[39] JA 8.
[40] *See United States v. Garner*, 67 M.J. 734, 737 (N.M.C.C.A. 2009); affirmed by *United States v. Garner*, 69 M.J. 31 (C.A.A.F. 2010).
[41] *United States v. Gladish*, 536 F.3d 646, 649 (7th Cir. 2008). The federal circuit courts have defined "substantial step" various ways. In *United States v. Hofus*, 598 F.3d 1171, the 9th Circuit, explained the substantial step concept as "the defendant's actions must go beyond mere preparation, and must corroborate strongly the firmness of the defendant's criminal intent." *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010); *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995). In *Chambers*, a case where the 7th

analyzing attempted enticement have held that when an accused "initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has crossed the line toward persuading, inducing, enticing, or coercing a minor to engage in unlawful sexual activity."[42]

Appellant's actions crossed the line from mere preparation to substantial step, rendering him guilty of attempted enticement under section 2422(b). Appellant's online communications were a substantial step towards the attempted enticement of a minor. Appellant's question of "u free tonight" was the final question that qualifies as the substantial step. To properly understand the connotation and meaning behind "u free tonight", this Court needs to examine the entire conversation and its location.

Circuit found a substantial step even though the appellant did not travel to his victim, explained that a "substantial step" can be an elusive concept, but has been described as more than mere preparation, but less than the last act necessary before actual commission of the crime. *United States v. Chambers*, 642 F.3d 588, 592 (7th Cir. 2011); citing *United States v. Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985). The 7th Circuit also explained that a substantial step occurs when a person's actions make it reasonably clear that had he not been interrupted or made a mistake, he would have completed the crime.[41] *United States v. Chambers*, 642 F.3d 588, 592 (7th Cir. 2011); *Gladish*, 536 F.3d at 648.

[42] *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (noting agreement of Third, Sixth, and Tenth Circuits and citing cases); *see also United States v. Garner*, 67 M.J. 734, 738 (N.M.C.C.A. 2009)(adopting reasoning of *Goetzke*). The *Goetzke* court distinguished between actual sex acts and the conduct criminalized by section 2422(b): Attempting to engage in sexual activity "is an attempt to achieve the physical act of sex, for which physical proximity is integral." Attempting to persuade, induce, entice, or coerce a person to engage in sexual activity "is an attempt to achieve the mental act of assent, for which physical proximity can be probative but is not required." *Goetzke*, 494 F.3d at 1236.

First, the appellant entered a chat room, whose name is not reflected in the record, but was full of screen names of individuals purporting to be minors.[43] The chat room included interests in homosexuality. "SpoNGeBoBsHoMie0" chatted that he was looking for a friend because his friends are straight.[44] "JCassius", a male, was looking for younger guys for trade, chat, or phone.[45] The chat room included discussion about chatting[46], trading pictures[47], looking for individuals who presumably lived close to the screen name[48], phone sex[49], and even a request for "young guys [who want to] chat about fetishes or anything else out of the ordinary".[50] It was in this sexually charged chat room laden with young males that appellant was looking for his victim.

The next step appellant took toward enticing "Il ovean al 12" was during their private instant message conversation. Akin to a round of speed dating, appellant quickly decided if "Il ovean al 12" would be interested in him and whether a meeting

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[43] JA 151-152: a sampling of minors in the room included "RobertoNazza": 13 years old, "MountainMan8253": 16 years old, "DK808holla": 17 years old, "Vietguy787": 17 years old, "Kortez24":16 years old, "KingOfDaSouth15X":15 years old, StopTheEmolution: 14 years old.
[44] JA 151.
[45] JA 151.
[46] JA 151; post from "Dk808holla".
[47] JA 152; post from "Pimp aint easy".
[48] JA 151-152; post from "Kissimmee5666": "Florida anyone"; post from "Roid Rage DBol": "ANYONE IN MD?? IM ME"; post from "FinalJokerz": "ANYONE IN DALLAS, TX"; post from "Pimp aint easy": "vegas any1 im to chat".
[49] JA 152: "GL1CNY" wrote "47, 6'2", 8 thick, ready to shoot huge load, who want's to help over phone…im m" This individual was looking for phone sex in order to help him masturbate.
[50] JA 151; post from "Roleplaydog2003".

was possible.[51] Appellant asked where in New York City "Il ovean al 12" was located, his sexual orientation, whether he had ever had sex with a guy, and what "Il ovean al 12" was looking for.[52] The appellant also told "Il ovean al 12" that he would have sex with someone as young as 15.

At this point in their conversation, although this was a highly inappropriate conversation for a "minor" and an adult to be having, no enticement has occurred. However, the appellant, armed with the knowledge that "Il ovean al 12" was located near him, was a bi-sexual 15 year old boy who was looking for an older man, and that their conversation only centered around sex,[53] then typed the words "u free tonight". As the Army Court properly ruled, this was the point that a substantial step had taken place. In fact, once "Il ovean al 12" told appellant he had to go, the appellant told "Il ovean al 12" to email him when he wanted to get together with appellant.

What would they discuss when they met? The appellant knew nothing about "Il ovean al 12" except that he was a bi-sexual, 15 year old boy who was looking for an older man. These two individuals certainly were not going to discuss politics, or even any of "Il ovean al 12"'s interests, outside of his desire

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[51] JA 153.
[52] JA 153.
[53] It is also probable that appellant understood "Il ovean al 12" screen name means "I love anal 12".

to be with an older man. This Court when reviewing the evidence is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. When viewing the evidence in this light, there can be no other conclusion than appellant wanted to meet "Il ovean al 12" and entice the child.

Although entering the sexually charged chat room with (purported) underage children in it could be mere preparation, the substantial step of wanting to meet "Il ovean al 12" went beyond preparation. Appellant's online chats with "Il ovean al 12" constituted attempted enticement under 18 U.S.C. § 2422(b).

In *Goetzke*, the Ninth Circuit examined a conviction under section 2422(b) in which Goetzke mailed flattering letters to his victim describing sex acts Goetzke wished to perform on him and encouraged his victim to travel to meet Goetzke, but did not attempt an actual rendezvous.[54] The Ninth Circuit held that an accused has taken a "substantial step" toward commission of a crime when his conduct: (1) advances the criminal purpose charged, and (2) provides some verification of the existence of that purpose.[55] The court found that Goetzke's "grooming" activities were sufficient to amount to a substantial step: "[T]ravel by a defendant to meet a potential victim is

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[54] *United States v. Goetzke*, 494 F.3d 1231, 1233-34 (9th Cir. 2007).
[55] *Id.* at 1235-36 (quoting *Walters v. Maass*, 45 F.3d 1355, 1358-59 (9th Cir. 1995).

probative, but not required, to advance and verify an intent to persuade, induce, entice or coerce."[56]

The Navy-Marine Corps Court of Criminal Appeals adopted the reasoning of *Goetzke* in a case factually similar to appellant's.[57] In *United States v. Garner*, the appellant conducted online chats with "Molly," a person he believed to be a fourteen-year-old girl.[58] Appellant Garner flattered Molly, exchanged sexually explicit pictures and videos with her, advised Molly on how to sexually stimulate herself, and graphically expressed his desire that Molly and appellant Garner commit sodomy with one another.[59] No specific meeting was arranged, though Garner told Molly of his intent to visit her.[60] The court upheld *Garner*'s conviction for violation of section 2422(b). While no single line of text was sufficient to constitute a substantial step, the entirety of the communications convinced the court that appellant attempted to persuade his victim to engage in a sexual encounter.[61]

In *United States v. Stacy*, the Fourth Circuit Court of Appeals, when reviewing the appellant's claim regarding sentence enhancement, found that several chats which discussed location

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[56] *Goetzke*, 494 F.3d at 1236.
[57] *United States v. Garner*, 67 M.J. 734 (N.M. Ct. Crim. App. 2009). *Garner* involved a guilty plea, but the court's analysis of what constitutes a "substantial step" under section 2422(b) is relevant here.
[58] *Id.* at 735.
[59] *Id.* at 735-736.
[60] *Id.* at 736.
[61] *Id.* at 739.

of homes, ability to travel and possible locations to meet, constituted attempts to engage in unlawful conduct.[62]

In this case, appellant's communications with "Il ovean al 12" advanced appellant's criminal purpose. Therefore, this Court should adopt the reasoning of numerous federal circuits and *Garner* and hold that, while travel is probative of appellant's intent to attempt to entice, it is not required for conviction under section 2422(b).

Conclusion

Appellant was properly convicted of attempted enticement of "Il ovean al 12". Drawing every reasonable inference from the evidence of record in favor of the prosecution, the appellant was properly convicted of attempted enticement. Appellant's online chat with "Il ovean al 12" discussed sexual topics and culminated with appellant asking if "Il ovean al 12" was free that evening. When every inference is drawn in favor of the prosecution, there can be no other conclusion than appellant took a substantial step to entice "Il ovean al 12". Therefore, appellant's conviction for attempted enticement is legally sufficient and should be affirmed by this Court.

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[62] *United States v. Stacy*, 2008 WL 686554, *2 (4th Cir. 2008).

Granted Issue II

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

Summary of Argument

The Army Court's reassessment of appellant's sentence was not an abuse of discretion and is not an obvious miscarriage of justice. Furthermore, appellant was not prejudiced because under Article 58b, by operation of law, his pay and allowances are forfeited.

Standard of Review

The Army Court's reassessment of appellant's sentence is reviewed for an abuse of discretion.[63] This Court "will only disturb the [lower court's] reassessment in order to 'prevent obvious miscarriages of justice or abuses of discretion.'"[64] "If a servicemember on appeal alleges error in the application of a sentence that involves forfeitures, the servicemember must demonstrate that the alleged error was prejudicial."[65] "To establish prejudice, an appellant bears the burden of

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[63] *United States. v. Hawes*, 51 M.J. 258, 258 (C.A.A.F. 1999).
[64] *Hawes*, 51 M.J. at 258 citing *United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998); quoting *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994).
[65] *United States v. Lonnette*, 62 M.J. 296, 297 (C.A.A.F. 2006); *See* Article 59(a), 10 U.S.C. § 859(a) (2000).

demonstrating that he or she was entitled to pay and allowances at the time of the alleged error."[66]

Law and Argument

Under Article 58b, a service member sentenced by general court martial to confinement for more than six months is subject to forfeiture of all pay and allowances during the period of confinement. In addition to Article 58b, an appellate court cannot impose a higher sentence than that which would have been imposed by the trial forum.[67] This court will overturn the lower court's reassessment of a sentence where it cannot be confident that the Court of Criminal Appeals could "reliably determine what sentence the members would have imposed."[68] The reassessment must be based on a conclusion that the sentence that would have been imposed at trial absent the error "would have been at least of a certain magnitude."[69] This conclusion about the sentence that would have been imposed must be made "with confidence."[70]

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[66] *Lonnette*, 62 M.J. at 297.
[67] *Hawes*, 51 M.J. at 260 (quoting *United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998)).
[68] *Hawes*, 51 M.J. at 260. *See United States v. Vasquez*, 54 M.J. 303, 306 (C.A.A.F.2001).
[69] *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).
[70] *United States v. Taylor*, 51 M.J. 390, 390 (C.A.A.F. 1999); *see also United States v. Eversole*, 53 M.J. 132, 134 (C.A.A.F. 2000) (indicating that there must be a "degree of certainty" in determining what the trial court would have done absent the error).

The reassessed sentence by the Army Court is not a higher sentence than imposed by the members, an obvious miscarriage of justice, or abuse of the Army Court's discretion."[71] Furthermore, appellant cannot prove the alleged error was prejudicial.

By reassessing the sentence, the members of the Army Court did not impose a higher sentence. Here, the members sentenced appellant, in part, to forfeiture of all pay and allowances. The convening authority did not approve the forfeitures, but by operation of law, under Article 58b, UCMJ, automatic forfeitures went into effect since the convening authority did not waive them.[72] After the sentence reassessment, Article 58b still applies to appellant's case.

Appellant relies on *United States v. Seeley*[73] for the proposition that where an appellate court affirms a portion of the sentence that the convening authority did not approve then the appellate court has erred.[74] Appellant's reliance on *United States v. Seeley* is misplaced. *Seeley* was not a case where the

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[71] *Hawes*, 51 M.J. at 258 citing *United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998); quoting *United States v. Jones*, 39 MJ 315, 317 (C.M.A. 1994).
[72] The convening authority did not waive forfeitures. By not waiving forfeitures, Article 58b is still in effect and will cause the forfeitures to take effect.
[73] 2009 WL 6827252 (Army Ct. Crim. App. 2009).
[74] AB at 21.

service court reassessed the sentence.[75] Additionally, *Seeley* was a case where the convening authority granted clemency in the form of a sentence reduction.[76]

This case is not an obvious miscarriage of justice. Had the convening authority granted clemency to the appellant in the form of waiver of all forfeitures, there would be an issue of a miscarriage of justice, as the Army Court would effectively withdraw the convening authority's clemency to the appellant. Had the convening authority waived forfeitures, the Army Court would have erred by effectively re-instating a punishment that was granted in clemency. However, there is no evidence the convening authority waived the forfeitures nor was there a request for waiver of forfeitures from appellant.

Any alleged error by the Army Court in reassessing a sentence, to include forfeiture of all pay and allowances, was not prejudicial to appellant. Again, by operation of law, appellant's pay and allowances are still forfeited.

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[75] *Seeley*, 2009 WL 6827252. There is also some confusion as the Army Court stated "The panel sentenced appellant to a dishonorable discharge, confinement for 1,202 days, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority reduced the period of confinement to 1,172 days, but otherwise approved the adjudged sentence." This Court found issue with that as it affirmed the findings "only so much of the sentence as provides for a dishonorable discharge, confinement for 1,172 days, and forfeiture of all pay and allowances." *United States v. Seeley*, 68 M.J. 188 (C.A.A.F. 2009).

[76] *Id.*

Even if this court should decide the Army Court erred, the proper remedy would be to strike that language from the Army Court's decision. There will be no effect on appellant since he must automatically forfeit his pay and allowances by operation of law under Article 58b, UCMJ.

Conclusion

The Army Court did not err when it affirmed forfeiture of all pay and allowances, and even if there was error, appellant has not been prejudiced because by operation of law his pay was forfeited.

WHEREFORE, the Government prays this Honorable Court affirm the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on August 26, 2011 and contemporaneously served electronically on civilian appellate defense counsel Mary T. Hall, ucmjlaw@aol.com and military appellate defense counsel, Captain Jason Nef, NefAJ-HQTMP@conus.army.mil.

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