

3 September 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,	)	APPELLANT'S REPLY TO
<i>Appellee,</i>	)	UNITED STATES' FINAL BRIEF
	)	
v.	)	USCA Dkt. No. 13-0345/AF
	)	
Staff Sergeant (E-5)	)	Crim. App. No. 37594
ROBERT M. PAYNE,	)	
USAF,	)	
<i>Appellant.</i>	)	

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

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure and files this reply to the United States' final brief.

**A. Military judge did not properly instruct on attempted solicitation of child pornography.**

Instructions did not "cover" all necessary elements of Specification 4 of Charge I. Tailoring an instruction is one thing; molding the instruction to the unique charge of attempting to entice a minor is another. However, of the nine total elements that needed to be instructed upon by the judge, she only instructed on five of them. This deficit is not only a numbers problem. It is a substantive problem.

"Appellant's actions clearly met the purpose and elements of 2251(a)." Government's final brief at 14. This is something that

the members must find; it is not a finding for government counsel to describe by combing through the record in hopes of saving an erroneous conviction. This Court has "concluded that inadequacy of instructions on an element of the offense requires reversal. It is not for us to determine what the court members would have found had they been properly advised on the elements." *United States v. Mance*, 26 M.J. 244, 255 (C.M.A. 1988) (quoting *United States v. Gilbertson*, 1 U.S.C.M.A. 465, 469 (1952) (additional internal quotations omitted)).

Further, despite the government's conclusory language that the military judge "sufficiently instructed the members with regard to both the overt act and 'substantial step' requirements," no such instructions were given to the members. See Government's Final Brief at 17. They were not instructed on what they must find for each element beyond a reasonable doubt. Such missing instruction is per se prejudicial. *Mance*, 26 M.J. at 255.

**B. The government's attempt to distinguish *United States v. Schnell* is immaterial.**

In arguing that the military judge gave adequate instructions to the members of Appellant's panel, the government attempted to distinguish this Court's recent opinion in *United States v. Schnell*, 72 M.J. 339 (C.A.A.F. 2013), by arguing *Schnell* was a "guilty plea case." Government's Final Brief at 16. It stands to reason that if in a case wherein an accused is pleading guilty and

the military judge did not adequately inform him of the elements, a similar result is required as in this case, where the military judge failed to properly instruct the members.

**C. The military judge did not properly instruct the members on the specific intent for the offense.**

The government claims that "at the time Appellant requested the nude photographs of 'Marley,' he was engaged in sexually explicit conversations with her, which, as AFCCA properly noted, 'at least provided some context to the nature and purpose of the photographs requested.' JA at 6." See Government's Final Brief at 21. Appellant requested pictures and "Marley" placed additional pictures on MySpace. J.A. at 155-56. However, none of these pictures were nude. Further, "Marley" also stated, at one time, that she was waiting to get the pictures from her mother. J.A. at 155-56. Appellant specifically stated he wanted pictures to prove Marley was not a cop. J.A. at 410. However, despite this evidence, the government argues that because of the context of the chats, the misleading instructions were not in error. While the chats may have been sexual in nature, it defies common sense to believe "Marley" would get sexually explicit pictures from her mother. On the contrary, it would make sense that the pictures requested were not sexually explicit.

The government is generalizing sexually explicit discussions and attributing those generalizations to meet the requirements of

attempted creation of child pornography. See Government's Final Brief at 21. Without an adequate instruction from the military judge, the members easily did the same. The military judge improperly instructed the members about the intent on two occasions:

[T]he accused intended that the person he thought was "Marley" actually produce one or more visual depictions of her nude body to send him electronically or through the mail;

J.A. at 283.

[I]t must be proved beyond a reasonable doubt that, at the time of the acts, the accused intended to persuade, or attempted to persuade, "Marley," whom he thought was a 14-year-old female, to send nude photographs of herself to him.

J.A. at 284.

To be guilty of attempted creation of child pornography, Appellant had to intend that "Marley" **create** a sexually explicit image of a minor, not just intend that a nude photo be **sent**. The military judge also did not define what constitutes "create." The government argued that there was "no indication in the record, in the instructions, or by the parties that the words 'create' or 'creating' were used in anything other than their normally understood definitions." Government's Final Brief at 19. However, the military judge instructed the intent was for another to only "send." Absent a full definition of create that includes the proper intent, the members were left only deciding whether

Appellant requested "Marley" to send nude pictures. As such, the members were left without proper instruction on the law and were forced to generalize the apparent inappropriate behavior into the specific crime of attempted creation of child pornography.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicholas D. Carter". The signature is fluid and cursive, with a long horizontal stroke at the end.

NICHOLAS D. CARTER, Captain, USAF  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 33957  
Air Force Legal Operations Agency  
United States Air Force  
1500 W. Perimeter Road, Suite 1100  
Joint Base Andrews, MD 20762  
(240) 612-4770  
Nicholas.carter@pentagon.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 September 2013.

A handwritten signature in black ink, appearing to read "Nick Carter", is written over a faint rectangular stamp area.

NICHOLAS D. CARTER, Captain, USAF  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 33957  
Air Force Legal Operations Agency  
United States Air Force  
1500 W. Perimeter Road, Suite 1100  
Joint Base Andrews, MD 20762  
(240) 612-4770  
Nicholas.carter@pentagon.af.mil