

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,  
Appellee

v.

Lieutenant Colonel (O-5)  
**Douglas K. Winckelmann,**  
United States Army,  
Appellant

) FINAL BRIEF ON BEHALF OF  
) APPELLANT  
)  
) Crim. App. No. 20070243  
)  
) USCA Dkt. No. 11-0280/AR  
)  
)  
)

FRANK J. SPINNER  
Attorney at Law  
P.O. Box 38463  
Colorado Springs, CO 80937  
(719) 576-1175  
USCAAF# 26210  
lawspin@aol.com

JOHN L. SCHRIVER  
Captain, Judge Advocate  
Appellate Defense Counsel  
Defense Appellate Division  
U.S. Army Legal Services Agency  
9275 Gunston Road  
Fort Belvoir, Virginia 22060  
(703) 693-0692  
USCAAF# 35629

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v.	)	Crim. App. Dkt. No. 20070243
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Douglas K. WINCKELMANN	)	USCA Dkt. No. 11-0280/AR
Lieutenant Colonel (O-5)	)	
U.S. Army Reserve	)	
Appellant	)	

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

Issue Granted

WHETHER THE ARMY COURT OF CRIMINAL APPEALS, AFTER DISAPPROVING THE FINDINGS OF GUILTY FOR CHARGE IV AND ITS SPECIFICATIONS AND AFTER CONSIDERING THIS HONORABLE COURT'S DECISION DISMISSING SPECIFICATION 3 OF CHARGE III, ERRED BY REASSESSING APPELLANT'S SENTENCE TO CONFINEMENT, FIRST FROM 31 YEARS TO 20 YEARS (IN THEIR INITIAL DECISION), AND THEN FROM 20 YEARS TO 11 YEARS (IN A SUBSEQUENT DECISION), RATHER THAN DIRECTING A SENTENCE REHEARING.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (hereinafter Army Court) had jurisdiction over this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

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, Uniform Code of Military Justice, 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.<sup>1</sup>

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<sup>1</sup>The military judge found Charge III, Specification 1, attempted enticement, to be multiplicitous 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 multiplicitous for sentencing with Charge IV, Specification 2, indecent language. He found Charge III, Specification 3, attempted enticement, to be multiplicitous for sentencing with Charge VII, Specification 2, conduct unbecoming an officer.

Appellant was sentenced to confinement for 31 years, forfeiture of all pay and allowances, and to a dismissal. (JA 69). The convening authority approved only so much of the sentence as provided for 31 years confinement and a dismissal. (JA 70).

A three-judge panel at the Army Court 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. 20070403 (Army Ct. Crim. App. November 30, 2010) (unpublished) (JA 1). The panel also modified the findings as to Specifications 1 and 2 of Charge VI (obstruction of justice), excepting the words "sodomy and." (JA 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 Army Court affirmed so much of the sentence as provided for a dismissal, confinement for 20 years, and total forfeitures of pay and allowances. (JA 21). The dissenting judge wrote that she would have directed a sentence rehearing. (JA 40) (Ham, J., concurring in part, dissenting in part and in the result).

This Honorable Court subsequently granted review of Appellant's case and set aside portions of the lower court's decision. *United States v. Winckelmann*, 70 M.J. 403 (C.A.A.F. 2011). Specifically, this Court reversed the Army Court's decision as to Specification 3 of Charge III, set aside the finding of guilty and dismissed the specification, and vacated the Army Court's decision as to Charges IV, V, and VI and the sentence. The record of trial was returned to the Army Court for further consideration and for reassessment of the sentence or, if appropriate, ordering a rehearing on sentence.

Upon further review and in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), *United States v. Balan*, 71 M.J. 28 (C.A.A.F. 2012), and *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), the Army Court disapproved the findings of guilty to Charge IV and its specifications, but otherwise affirmed the findings of guilty for Charge V and its specifications, affirmed the findings of guilty for Charge VI and its specifications and reassessed the sentence. The Army Court affirmed only so much of the sentence as provides for a dismissal and eleven years' confinement, noting that it had previously erroneously affirmed total forfeitures. (JA 43, n.1). On April 17, 2013, review was granted on the issue stated above and argued below.



### Statement of Facts

While Appellant, a member of the Active Guard Reserve, was stationed in Bosnia in the mid-1990's, he became pen pals with RM, the minor son of KM. (JA 62). When he returned from overseas, Appellant visited the family on Long Island and developed a "big brother" type relationship with KM's children. Id. Appellant and the family emailed each other for several years but had a falling out in 2003 over a disciplinary issue involving RM. (JA 63-64). Although their contact ceased, KM kept what she believed to be Appellant's email address, NYJOJO2G@aol.com, on her AOL buddy list. (JA 61, 64-66). Eventually, after some time, KM discovered that Appellant may have been involved in inappropriate internet communications with minors. As a result KM contacted the police, whose investigation ultimately led to the Charges and Specifications that were referred to trial. As noted in the Army Court's decisions, Appellant pled guilty to some of the charges and specifications and litigated the remaining charges and specifications that survived motion practice.

At the conclusion of the guilty plea inquiry, the military judge found that Specification 1 of Charge V was an unreasonable multiplication of charges with Specification 4 of Charge VII and that Specification 2 of Charge V was an unreasonable multiplication of charges Specification 5 of Charge VII. (JA



50). He merged the two indecent acts specifications into the Article 133 charge, and announced that the maximum confinement for each specification was five years. Id. After finding the plea provident, he found Appellant guilty of Charge V and both specifications as amended and of Specifications 4 and 5 of Charge VII. (JA 60).

Other facts necessary for resolution of the issue granted are set forth below.

#### Summary of Argument

The Army Court abused its discretion by failing to order a sentencing rehearing after the sentencing landscape significantly changed because multiple findings of guilty were set aside during appellate review.

#### Issue and Argument

THE ARMY COURT OF CRIMINAL APPEALS, AFTER DISAPPROVING THE FINDINGS OF GUILTY FOR CHARGE IV AND ITS SPECIFICATIONS AND AFTER CONSIDERING THIS HONORABLE COURT'S DECISION DISMISSING SPECIFICATION 3 OF CHARGE III, ERRED BY REASSESSING APPELLANT'S SENTENCE TO CONFINEMENT, FIRST FROM 31 YEARS TO 20 YEARS (IN THEIR INITIAL DECISION), AND THEN FROM 20 YEARS TO 11 YEARS (IN A SUBSEQUENT DECISION), RATHER THAN DIRECTING A SENTENCE REHEARING.

#### Standard of Review

The standard of review for cases presenting an issue of whether to reassess a sentence or order a rehearing on sentence

is abuse of discretion. United States v. Moffeit, 64 M.J. 40, 42 (C.A.A.F. 2006).

#### Argument

In their first review of Appellant's case, after setting aside the finding of guilty and dismissing Charge II (possession of child pornography) and Specification 2 of Charge III (attempted enticement on December 30, 2005), the Army Court concluded, "In light of the modifications of the findings, we must reassess the sentence." *Winckelmann* at 21 (JA 21) (emphasis added). Upon reassessment, the court below concluded that an affirmed sentence of a dismissal, twenty years confinement, and total forfeitures was "no greater than would have been awarded by a court-martial for the charges and specifications that we hereby affirm." *Id.* The majority opinion, however, was noticeably silent as to any consideration of a sentence rehearing in lieu of reassessment.

Judge Ham, in dissent, stated that the court should have remanded the case for a sentence rehearing. *Winckelmann* at 40 (Ham, J., concurring in part, dissenting in part and in the result) (JA 40). Unlike the plurality, she applied the "reassessment versus sentence rehearing" factors set forth in Judge Baker's concurring opinion in *United States v. Moffeit*, 63 M.J. 40, 43 (C.A.A.F. 2006) (Baker, J., concurring). *Id.* First, she noted that Appellant had been sentenced by members

and she quoted Judge Baker's conclusion that judges of the Courts of Criminal Appeals are more likely to be certain of what a military judge alone would have done than what a panel of members would have done. Id. She next noted the "changes in the penalty landscape" caused when "charges with significant exposure or aggravating circumstances are taken off the table." Id. She observed that each of the enticement specifications under Charge III carried a potential sentence to confinement of thirty years, which meant that Charge III, the "gravamen of the alleged misconduct," had carried a maximum exposure of ninety years. Id. The child pornography charge under Charge II and Charge II carried a maximum of five years. *Id.* Judge Ham calculated that the plurality decision, if correct, removed thirty-three years of confinement, whereas her view, if correct, would remove approximately ninety years from the potential maximum sentence of 115 years. *Id.* She concluded that these reasons argued "strongly" for a rehearing on sentence, rather than a reassessment at the lower court level. *Id.*

Appellant contends that the remaining two factors on Judge Baker's list likewise support a sentence rehearing. First, the nature of the remaining offenses does not "fit within a particular normative range based on repetition and scale within a construct of individualized sentencing based on individual offenses." *Moffeit* at 43 (Baker, J., concurring). Attempted



entice~~m~~ent under a federal statute, obstruction of justice, and conduct unbecoming an officer are collectively not "bread and butter" offenses such as the "use or possession of certain drugs and unauthorized absence offenses" that Judge Baker singled out as within the normative range of military judges. Moreover, the plurality's failure to identify any factors it relied upon in reaching its decision to reassess deprives it of the greater deference accorded when there is a "clear and logical reassessment on the record."

Based on this Court's decision in Appellant's case, *United States v. Winckelmann*, 70 M.J. 403 (C.A.A.F. 2011), and in light of the remand to the Army Court, Appellant's arguments have only gained merit. More charges and specifications have been dismissed. The Army Court recognized the impact of this on a potential sentence by again reassessing the sentence, when they should have ordered a sentencing rehearing for the reasons stated above. Of course, because a different panel decided the case on remand, the dissenting judge (who is no longer sitting on the Court) in the first decision did not consider the full impact of this Honorable Court's decision and the decision on remand.

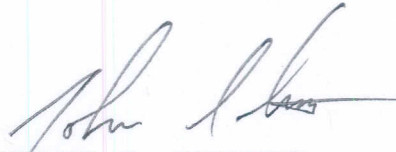
In imposing a reassessed sentence of confinement, first for twenty years, then for eleven years, the Army Court provided no acknowledgement that Appellant, a combat veteran and recipient




of two Bronze Stars, never set up a meeting with KM, never finalized meeting arrangements with BriNY11787, never traveled to a rendezvous site, never engaged in actual sex with the person on the other end of the chats, and was the one who discontinued the contact with both "Il ovean al 12" and BriNY11787. Rather, the Army Court's conclusions that a panel would have awarded twenty years or even eleven years of confinement for the remaining charges and specifications suggests that the Army Court failed to engage in any principled consideration of a sentence rehearing.

Given the history of Appellant's case on appeal, the number and nature of guilty findings that have been set aside, Appellant's service record and the significant change in the sentencing landscape, reassessment of the sentence was not a viable option. As a result, the Army Court abused its discretion and should have ordered a rehearing on sentence.


WHEREFORE, the Court should set aside the sentence and  
authorize a rehearing on sentence.

  
File: FRANK J. SPINNER  
Lead Counsel  
Attorney at Law  
USCAAF No. 26210  
Appellate Defense Counsel  
PO Box 38463  
Colorado Springs, CO 80937  
(719) 576-1175  
Email: Lawspin@aol.com

  
JOHN L. SCHRIVER  
Captain, Judge Advocate  
Appellate Defense Counsel  
Defense Appellate Division  
U.S. Army Legal Services Agency  
9275 Gunston Rd  
Fort Belvoir, VA 22060  
(703) 693-0715  
USCAAF No. 35269

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Winckelmann, Crim. App. Dkt. No. 20070243, Dkt. No. 11-0280/AR, was delivered to the Court and Government Appellate Division on May 16, 2013.

  
MELINDA J. JOHNSON  
Paralegal Specialist  
Defense Appellate Division  
(703) 693-0736