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.	)
Lieutenant Colonel (O-5) **DOUGLAS K. WINCKELMANN** United States Army, Appellant	) USCA Dkt. No. 11-0280/AR)) Crim. App. Dkt. No. 20070243

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

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is in Article 67(a)(3), UCMJ, which permits 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

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas,[3] of conduct unbecoming an officer and a gentleman (two specifications) and

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[1] 10 U.S.C. § 866.
[2] 10 U.S.C. § 867(a)(3).
[3] SJA 1.

indecent acts (two specifications) for videotaping himself and two other males engaging in acts of oral and anal sodomy, and maintaining possession of the videotape in violation of Articles 133 and 134, UCMJ.[4] Contrary to his pleas,[5] a general court-martial composed of officer members convicted appellant of possession of child pornography (one specification), attempted enticement of a minor to engage in sexual activity as proscribed by 18 U.S.C. § 2422(b) (three specifications), indecent language (two specifications), and obstruction of justice (two specifications) in violation of Article 134, UCMJ, and conduct unbecoming an officer (two specifications) for engaging in "cyber-sex" for his own sexual gratification to solicit individuals he believed to be minors in violation of Article 133, UCMJ.[6]

The officer panel sentenced appellant to confinement for 31 years, forfeiture of all pay and allowances, and dismissal from the service.[7] The convening authority approved only so much of the sentence as provided for confinement for 31 years and dismissal from the service; appellant was credited with 16 days of confinement against the sentence to confinement.[8]

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[4] JA 60; 10 U.S.C. §§ 933, 934.
[5] SJA 1.
[6] JA 67.
[7] JA 69.
[8] JA 70.

On 30 November 2010, the Army Court set aside the findings of guilty to The Specification of Charge II (possession of child pornography of a minor) and to Specification 2 of Charge III (attempted enticement of a minor).[9] The Army Court affirmed the remaining findings, reassessed the sentence, and affirmed only so much of the sentence as provided for a dismissal and confinement for 20 years.[10]

On 12 December 2011, this Court reversed the Army Court's decision as to Specification 3 of Charge III (attempted enticement of a minor), setting aside the finding of guilty and dismissing the specification.[11] This Court also vacated the Army Court's decision as to Charge IV (indecent language), Charge V (indecent acts), and Charge VI (obstruction of justice) and the sentence.[12] The case was returned to the Judge Advocate General of the Army for remand to the Army Court for further consideration of these charges in light of *United States v. Fosler*,[13] and "for reassessment of the sentence, or if it

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[9] JA 20.
[10] JA 21. The Army Court also approved the adjudged forfeitures, which had been disapproved by the convening authority, but this court subsequently found appellant was not prejudiced by the error. *United States v. Winckelmann*, 70 M.J. 403, 409 (C.A.A.F. 2011).
[11] *Id.*
[12] *Id.*
[13] 70 M.J. 225 (C.A.A.F. 2011).

determines appropriate, for the ordering of a rehearing on sentence."[14]

Upon remand on 30 August 2012, in light of *United States v. Fosler*,[15] *United States v. Ballan*,[16] and *United States v. Humphries*,[17] the Army Court set aside the findings of guilty to the two specifications of Charge IV (indecent language) and affirmed the remaining findings of guilty.[18] The Army court reassessed the sentence and approved only so much of the sentence as provided for 11 years confinement and a dismissal.[19]

Statement of Facts

A. Attempted Enticement of a Minor and Conduct Unbecoming an Officer

Appellant was deployed to Bosnia when he received letters from second-grade children on Valentine's Day.[20] Appellant responded to the children and became "pen-pals" with one boy named RM, the minor son of KM.[21] Upon his return from Bosnia, appellant met RM and KM in person.[22] Over the years, he became a "friend of the family" and developed a "big brother"

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[14] *Winckelmann*, 70 M.J. at 409.
[15] 70 M.J. 225.
[16] 71 M.J. 28 (C.A.A.F. 2012).
[17] 71 M.J. 209 (C.A.A.F. 2012).
[18] JA 46.
[19] JA 46.
[20] JA 62.
[21] SJA 24-25.
[22] JA 63.

relationship with RM.[23] The family knew appellant's America Online (AOL) screen name was "NYJOJO2G."[24] Appellant visited and called often, wrote letters, and used his email address to correspond with RM and KM.[25] However, communication between appellant, KM, and RM ceased after appellant and KM had a disagreement over a disciplinary issue involving RM.[26]

One day, KM saw appellant in a chat room called "boys wearing briefs."[27] KM asked RM to create a different screen name and to enter the "boys wearing briefs" chat room.[28] Upon entering the chat room, they were asked for "age/sex/location," to which they replied, "14/yes/New York."[29] Appellant invited them into a private chat and asked questions of a sexual nature, including: if he had ever had sex with a man; if he was bisexual or gay; if he wanted to have sex with an older or younger man; his measurements; where he lived; and his name.[30] However, the conversation ended abruptly when RM accidentally identified appellant by his first name. Appellant asked: "[W]ho is this?"[31] RM responded, "wouldn't you like to know?" [32] Appellant further

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[23] JA 63.
[24] SJA 26-27.
[25] JA 63.
[26] SJA 27-28.
[27] SJA 29.
[28] SJA 29.
[29] SJA 30.
[30] SJA 31-32.
[31] SJA 33.
[32] SJA 33.

asked: "How do you know me? Did we ever have sex before?...Is this [a man's name] from Georgia?" [33] RM responded, "no," and shut off the computer.[34]

KM had another screen name created for her, "Il ovean al 12," and she again followed appellant into a chat room.[35] Using the "Il ovean al 12" screen name, KM identified herself as a 15-year-old male from New York.[36] Appellant asked KM to join him in a private chat.[37] The chat lasted approximately 22 minutes, and it was also sexually explicit in nature; appellant asked "Il ovean al 12": where he lived; if he was gay or bisexual; if he had ever had sex with a man; whether he was looking for a younger or older man; if he was free tonight; and if he wanted to "get together" to "e-mail me."[38] KM told appellant, "gotta go talk soon?" and ended the conversation.[39]

After this second chat, KM contacted Detective FG, who worked in the computer crimes section of the Suffolk County Police Department.[40] KM gave appellant's screen name and copies of the "Il ovean al 12" chat to Detective FG.[41] Detective FG began working the case, and added appellant's screen name,

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[33] SJA 33.
[34] SJA 33.
[35] SJA 2, 34.
[36] SJA 2, 35.
[37] SJA 4, 35.
[38] SJA 4.
[39] SJA 4.
[40] SJA 36, 38-39.
[41] SJA 36-37, 38-40.

"NYJOJO2G," to his AOL buddy list.[42] The detective maintained the screen name, "BriNY 11787."[43]

In December 2005, Detective FG, who was signed on under the screen name "BryNY 11787," saw appellant online and sent him an instant message.[44] "BryNY 11787" identified himself as a 14-year-old boy.[45] During this first chat, appellant asked "BryNY 11787": where he lived; whether he had a cell phone; if he ever had sex with a man; if he had "been fucked;" how old he was during his first sexual experience; how many men he had been sexually active with; what his measurements were to include his "cock size;" whether he was "looking for a[n] older man to love [him] sexually;" whether he "promise[d] to let [appellant] do [him];" whether he "wanted to stick [appellant] and cum in [appellant];" "when" could he "visit" appellant; whether he got "hard" and "jerk[ed-]off" during the chat; whether he "sho[t] a lot of cum for" appellant.[46] Appellant also requested a picture of "BryNY 11787"'s "pr[e]tty face and whole body hard cock and tight ass," and told "BryNY 11787": that he would "like to shake [BryNY 11787's penis] until you come in my mouth;" to "think of sucking my 7.5 hard shaft and me fingering your ass;" that "I wish [I] could hold you close and kiss you and feel your nice

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[42] SJA 40.
[43] SJA 40.
[44] SJA 5, 40.
[45] SJA 7, 41.
[46] SJA 5-8.

body;" that "I would visit you once a week if you and I becum [sic] lovers;" that he also masturbated during the chat; "I shot on my laptop;" "I want the next one in me OK baby;" "Love you Brian;" that appellant could go to Smithtown to meet him; and when would be the best time to meet him.[47]

During subsequent chats, appellant engaged in additional sexually explicit conversations with "BryNY 11787." Appellant told "BryNY 11787": "I want to put whip cream in you and eat it;" "I want to love you and feel you...I want to feel you not have sex and not talk...kissing sweety [sic]...I want you to enjoy it...it will be slow and wonderful feeling...I will love you and if we part you will never forget me;" "I want to watch [you masturbate];" "I will show you how to clean you self [sic] before eating...you will love the rough toungue [sic] on your ass lips...make you want to cum [sic]"; "I will shower and soap you;" "[are your jeans] tight on your dick and balls...I would love that to be my mouth."[48]

Appellant also sent "BryNY 11787" a photograph of a naked erect penis, asked him "you want that[?]," and suggested a meeting.[49] Appellant and "BryNY 11787" decided to meet at the Smithtown train station.[50] However, appellant later emailed

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[47] SJA 5-8.
[48] SJA 12, 15-17.
[49] SJA 11, 13-16, 42-43.
[50] SJA 14.

"BryNY 11787" to tell him: "Emergency has happened and we have to reschedule. I've very sorry sweety [sic]."[51]

In January 2006, Detective FG and other Suffolk County police officers conducted a search of appellant's apartment.[52] During the search, the detective found a note in appellant's closet with the screen name "BryNY 11787" written on it and seized appellant's computers.[53] Detective FG subsequently conducted an examination of appellant's U.S. Army government computer and found that it contained: one of the photographs the detective had previously sent to "NYJOJO2G;" the screen name the detective used, "BryNY 11787;" and the appellant's screen name, "NYJOJO2G."[54]

After subpoenaing records of a Hotmail account registered to appellant, Detective FG determined that the IP address appellant used to sign on to his Hotmail account from the government computer on the date of one of the chats was the same IP address appellant used to access AOL 2 hours later.[55] The physical address for the IP address was that of appellant's apartment in New York.[56]

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[51] SJA 18, 44.
[52] SJA 45.
[53] SJA 21, 47-48.
[54] SJA 49-50.
[55] SJA 51-53.
[56] SJA 52-53.

When Detective FG interviewed appellant, appellant admitted in a written statement that: he used the screen name "NYJOJO2G" to chat online with "BryNY 11787"—who he believed was a 14 year-old boy—about having sex with each other; and he arranged to meet "BryNY 11787" for sex.[57]

B. Obstruction of Justice

RR met appellant at a group home for troubled children when RR was 10 years old.[58] Appellant worked as a counselor in this group home.[59] Appellant spent time with RR and was a male role model to RR.[60] RR considered appellant to be "like a dad" to him.[61] One night, appellant went to RR's bed in the group home and touched RR's penis.[62] After the incident, RR testified that appellant took "a special interest in me" and would "take me for extra shopping and buy me extra stuff." [63] RR also testified that appellant apologized to him.[64]

When RR was 12 years old, his mother gave appellant temporary guardianship and RR lived with appellant in Long Island so that appellant "could try to give [RR] a better

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[57] SJA 19-20, 46.
[58] SJA 54.
[59] SJA 54.
[60] SJA 55.
[61] SJA 56.
[62] SJA 56.
[63] SJA 56.
[64] SJA 56.

life."[65] RR only stayed with appellant for approximately five months because, about four to five times a week, appellant would have "sexual encounters" with RR which included touching RR's penis and trying to convince RR to give appellant oral sex.[66] RR had not told anyone about the sexual encounters with appellant because he was "way too embarrassed to tell anybody."[67] Appellant was still a father figure to RR and would always send him cards for his birthday and on Christmas; RR would send appellant father's day cards.[68] Appellant again assumed temporary guardianship over RR when he was 13 years old, and RR moved to Fort Benning, Georgia, with appellant.[69] RR only stayed a couple of months with appellant because appellant again began making sexual advances towards RR about four to five times a week.[70]

After appellant's interview with Detective FG, appellant contacted and met with RR in February 2006; RR was now an adult.[71] Appellant was "in tears" and asked RR, "[r]emember when you said that I ruined your life? How did I do that?"[72] When RR asked appellant why he had contacted him, appellant told RR:

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[65] SJA 57.
[66] SJA 58.
[67] SJA 59.
[68] SJA 59-60.
[69] SJA 60-61 .
[70] SJA 62-63.
[71] SJA 64.
[72] SJA 64.

"The reason why you're here is because I got arrested on something. I can't tell you what it is, but is going to be big, and they're going to do an investigation and try to find out everybody who I ever had contact with. I just wanted to know what you're going to say."[73] When RR asked appellant what he wanted him to say, appellant responded: "I want you to say whatever it is you have to protect me," and "[y]ou know I have the Mazda on Long Island that you can have. Whatever money you need or whatever to fix it, just let me know..."[74] RR had grown up around the Mazda vehicle and appellant knew that RR liked the car.[75]

Two weeks later, appellant again contacted RR.[76] During those two weeks, RR had found out about the charges appellant had been arrested for.[77] During this second conversation, appellant renewed his offer for RR to have the Mazda vehicle.[78]

C. Indecent Acts and Conduct Unbecoming an Officer

Between April and May 2005, appellant engaged in acts of oral sodomy with two male individuals in New York.[79] The acts of oral sodomy between appellant and the two individuals were

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[73] SJA 64-65.
[74] SJA 65.
[75] SJA 65.
[76] SJA 66-67.
[77] SJA 67.
[78] SJA 67.
[79] SJA 22-23, 74.

videotaped, and appellant maintained possession of this videotape.[80]

In July 2005, appellant and two male individuals again engaged in acts of oral and anal sodomy with each other in the Philippines.[81] The acts of oral and anal sodomy between appellant and the two individuals were videotaped, and appellant maintained possession of this videotape.[82]

D. Unreasonable Multiplication of Charges and "Multiplicity for Sentencing"

The military judge found that Specification 1 of Charge III (attempted enticement of a minor), Specification 1 of Charge IV (indecent language), and Specification 1 of Charge VII (conduct unbecoming an officer) were "multiplicious for sentencing" because the indecent language charged was the same language appellant used to both entice the individual he believed to be a minor (attempted enticement of a minor) and to engage in "cyber sex" with the individual he believed to be a minor (conduct unbecoming an officer).[83] As a result, appellant was only subject to the maximum punishment for Specification 1 of Charge III (attempted enticement of a minor), which was 30 years.[84] The

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[80] SJA 22-23, 74.
[81] SJA 22-23, 74.
[82] SJA 22-23, 74.
[83] SJA 71.
[84] SJA 72.

Army Court ultimately dismissed Specification 1 of Charge IV (indecent language).[85]

The military judge found that Specification 2 of Charge III (attempted enticement of a minor) and Specification 2 of Charge IV (indecent language) were "multiplicious" for sentencing for the same reasons as outlined above.[86] As a result, appellant was only subject to the maximum punishment for Specification 2 of Charge III (attempted enticement of a minor), which was 30 years.[87] The Army Court ultimately dismissed both Specification 2 of Charge III (attempted enticement of a minor) and Specification 2 of Charge IV (indecent language).[88]

The military judge found that Specification 3 of Charge III (attempted enticement of a minor) was "multiplicious" for sentencing with Specification 2 of Charge VII (conduct unbecoming an officer) for the same reasons as described above.[89] As a result, appellant was only subject to the maximum punishment for Specification 3 of Charge III (attempted enticement of a minor), which was 30 years.[90] This Court ultimately dismissed Specification 3 of Charge III.[91]

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[85] JA 46.
[86] SJA 71.
[87] SJA 72.
[88] JA 46.
[89] SJA 71.
[90] SJA 72.
[91] *Winckelmann*, 70 M.J. at 409.

Finally, the military judge found that Specification 1 of Charge V (indecent acts) and Specification 4 of Charge VII (conduct unbecoming an officer) constituted an unreasonable multiplication of charges, and that Specification 2 of Charge V (indecent acts) and Specification 5 of Charge VII (conduct unbecoming an officer) also constituted an unreasonable multiplication of charges because both the indecent acts charges and the conduct unbecoming an officer charges arose "of what is substantially one transaction."[92] As a result of the merger for sentencing purposes, appellant was only subject to the maximum punishment for one set of offenses. In appellant's case, the conduct unbecoming an officer specifications as charged carried the same maximum punishment as the indecent acts specifications: 5 years confinement for each specification.[93]

E. Maximum Punishment and Appellant's Sentence

The maximum punishment appellant faced at trial was 115 years:[94]

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[92] SJA 68-69.

[93] SJA 69, 72. Conduct unbecoming an officer (Art. 133, UCMJ) carried a maximum punishment of "confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year." *Manual for Courts-Martial (MCM), United States* (2005 ed.), part IV, para. 59e. The military judge found that the most analogous offense was "indecent acts." (SJA 69). Indecent acts (Article 134, UCMJ) carried a maximum punishment of "confinement for 5 years." *MCM* (2005 ed.), part. IV, para. 90e.

[94] SJA 73.

- 5 years: The Specification of Charge II (possession of child pornography) carried a 5-year maximum sentence.[95]
- 90 years: Specifications 1-3 of Charge III (attempted enticement of a minor) each carried a 30-year maximum sentence.[96]
- 10 years: Specification 1 and 2 of Charge VII (conduct unbecoming an officer) as charged each carried a 5-year maximum sentence.[97]
- 10 years: Specification 1 and 2 of Charge VI (obstruction of justice) each carried a 5-year maximum sentence.[98]

The officer panel sentenced appellant to 31 years confinement, forfeiture of all pay and allowances, and a dismissal.[99] The Convening Authority disapproved the forfeitures and approved the remainder of the sentence as adjudged.[100]

During its first review of the case, the Army Court's dismissal of The Specification of Charge II (possession of child pornography) and the Specification 2 of Charge III (attempted enticement of a minor) reduced the maximum punishment to

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[95] SJA 72.
[96] SJA 72.
[97] SJA 72.
[98] SJA 73.
[99] SJA 69.
[100] SJA 70.

80 years and 6 months confinement.[101] The Army Court reassessed the sentence to 20 years confinement and a dismissal.[102]

After this Court dismissed Specification 3 of Charge III (attempted enticement of a minor) and the Army Court upon remand dismissed Specifications 1 and 2 of Charge IV (indecent language), appellant faced a maximum punishment of 51 years confinement.[103] The Army Court reassessed the sentence to 11 years confinement and a dismissal.[104]

Summary of the Argument

The Army Court did not abuse its discretion by reassessing appellant's sentence to confinement for 11 years and a dismissal. Given the remaining charges appellant was convicted

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[101] The military judge had found Specification 2 of Charge III (attempted enticement of a minor) to be multiplicious for sentencing with Specification 2 of Charge IV (indecent language). (SJA 71). When the Army Court reassessed the sentence the first time, appellant remained convicted of Specification 2 of Charge IV (indecent language), which carried a maximum punishment of "confinement for 6 months." *MCM* (2005 ed.), part. IV, para. 89e(2).

[102] JA 21.

[103] The dismissal of Specification 1 of Charge IV (indecent language) did not affect appellant's maximum sentence because the military judge had found it multiplicious for sentencing with Specification 1 of Charge III (attempted enticement of a minor), which appellant remained convicted of. (SJA 71). The military judge also found Specification 3 of Charge III (attempted enticement of a minor) multiplicious for sentencing with Specification 2 of Charge VII (conduct unbecoming an officer). (SJA 71). After this Court dismissed Specification 3 of Charge III, appellant remained convicted of Specification 2 of Charge VII (conduct unbecoming an officer), which as charged carried a maximum punishment of 1 year. *MCM* (2005 ed.), part IV, para. 59e.

[104] JA 46.

of, including one specification of attempted enticement of a minor, two specifications of obstruction of justice, two specifications of indecent acts, and four specifications of conduct unbecoming an officer, the Army Court properly found that it could reassess the sentence pursuant to *United States v. Sales*[105] and *United States v. Moffeit*[106] because such a sentence was "at least that which would have been imposed by the court-martial" absent the errors.[107] Therefore, there was no miscarriage of justice or abuse of discretion by the Army Court reassessing the sentence instead of ordering a rehearing.

Standard of Review

In *United States v. Davis*, this Court set out the standard for reviewing sentence reassessments by the service courts: "We will only disturb the [lower court's] reassessment in order to 'prevent obvious miscarriages of justice or abuses of discretion.'"[108] Appellant "bears the burden of showing that the Army court's reassessment of his sentence was an abuse of discretion."[109] "To reverse for an abuse of discretion involves far more than a difference in...opinion... The challenged action

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[105] 22 M.J. 305 (C.M.A. 1986).
[106] 63 M.J. 40 (C.A.A.F. 2006).
[107] JA 46.
[108] 48 M.J. 494, 495 (C.A.A.F. 1998) (quoting *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994); *see also United States v. Buber*, 62 M.J. 476, 478 (C.A.A.F. 2006) (citations omitted).
[109] *Buber*, 62 M.J. at 478 (citing *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999)).

must...be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal."[110] "Further, it is error for a lower court to use an incorrect standard."[111]

Law

"A Court of Criminal Appeals can reassess a sentence to cure the effect of prejudicial error where that court can be confident 'that, absent any error, the sentence adjudged would have been of at least a certain severity.'"[112] "If the court 'cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred,' then a sentence rehearing is required."[113]

Therefore, so long as the service court "can determine to its satisfaction that, absent the error, the sentence would have been at least of a certain severity," the service court "may cure the error by reassessing the sentence instead of ordering a sentence rehearing."[114] "[A] sentence of that magnitude or less 'will be free of the prejudicial effects of error.'"[115] However,

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[110] *United States v. Curtis*, 52 M.J. 166, 169 (C.A.A.F. 1999) (quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).
[111] *Moffeit*, 63 M.J. at 41 (citing *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005)).
[112] *Buber*, 62 M.J. at 477 (quoting *Sales*, 22 M.J. at 308).
[113] *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (quoting *Sales*, 22 MJ at 307).
[114] *Moffeit*, 63 M.J. at 41 (quoting *Sales*, 22 M.J. at 308).
[115] *Doss*, 57 M.J. at 185 (quoting *Sales*, 22 M.J. at 308).

"[i]f the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error."[116]

"The sentence actually adjudged at the court-martial and the highest sentence that the sentencing authority would have adjudged absent error set ceilings on punishment that can be reassessed by the [service court]."[117] "In deciding what sentence the court-martial would probably have adjudged if the error had not occurred, the [service] court must put itself in the shoes of the military judge or court members who originally adjudged the sentence,"[118] and "must be careful not to substitute its own judgment for that of the sentencing authority."[119] "[T]he standard for reassessment is not what sentence would be imposed at a rehearing, but rather, 'would the sentence have been "at least *of a certain magnitude*."'"[120] This Court "emphasize[d] the 'at least of a certain magnitude' language because a sentencing authority may not be able to determine with precision the exact sentence that would have been adjudged absent the error, but at a bare minimum, the court can say with

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[116] *Id.* (citing *Sales*, 22 M.J. at 307).
[117] *Jones*, 39 M.J. at 317 (citations omitted).
[118] *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).
[119] *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) (quoting *Jones*, 39 M.J. at 317).
[120] *United States v. Taylor*, 51 M.J. 390, 390 (C.A.A.F. 1999).

confidence that the sentence would have been 'at least of a certain magnitude.'"[121]

Argument

The Army Court did not abuse its discretion by reassessing appellant's sentence to confinement for 11 years and a dismissal rather than ordering a rehearing. The Army Court properly found that "such a sentence is at least that which would have been imposed by a court-martial for the remaining findings of guilty" on the basis of "the error noted and the entire record" and "in accordance with the principles of *Sales* and *Moffeit*, to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*."[122]

Under the facts of this case, the Army Court did not have to order a sentence rehearing because it could discern the extent of the errors' effect on the sentencing authority's decision. The Army Court "did not seek to substitute its judgment for the sentencing authority, but instead performed the function required by [this court's] decision in *Sales*"[123] and also properly considered the factors in the *Moffeit* concurrence.[124] Despite the dismissal of several charges, the Army Court found it could reassess the sentence to "assure that

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[121] *Id.*
[122] JA 46.
[123] *Davis*, 48 M.J. at 495; JA 46.
[124] JA 46.

the sentence [was] no greater than that which would have been imposed if the prejudicial error had not been committed."[125]

Appellant does not dispute the fact that the Army court applied the correct standard under *Sales* and *Moffeit*.[126] Rather, appellant argues that had the Army Court adequately examined the factors identified in the *Moffeit* concurrence, it would have concluded that "reassessment of the sentence was not a viable option...and should have ordered a rehearing on sentencing."[127]

Analyzing appellant's case under the *Sales/Moffeit* framework, including the factors in the *Moffeit* concurrence, this case is "within the zone of Sales reassessment."[128]

First, as this Court noted in *Moffeit*, "the lower court has reviewed the records of a substantial number of courts-martial involving convictions for child pornography activities and offenses involving sexual misconduct with children and has

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[125] JA 46.

[126] Though the Army Court did not specify that it reassessed the sentence "beyond a reasonable doubt" in light of the constitutional nature of the error, this Court can properly find that the Army Court was aware of the standard and applied it correctly. (JA at 44, 46); *see also United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (courts are "presumed to know the law and to follow it, absent clear evidence to the contrary"). Even assuming that the Army Court failed to apply the "beyond a reasonable doubt" standard, this Court itself can reassess the sentence and find beyond a reasonable doubt that appellant would have been sentenced to at least 11 years confinement and a dismissal for the remaining findings of guilty. *Cf. United States v. Stoffer*, 53 M.J. 26, 28 (C.A.A.F. 2000); *United States v. Sims*, 57 M.J. 419, 422 (C.A.A.F. 2002).

[127] (Appellant's Br. 7-10).

[128] *Moffeit*, 63 M.J. at 44 (Baker, J., concurring).

extensive experience with the level of sentences imposed for such offenses under various circumstances."[129]

Second, like in *Moffeit*, a "substantial maximum was available based on the remaining charge[s] and specification[s]" and "[t]he reassessed sentence was well below that maximum."[130] Appellant's potential maximum sentence after the dismissal of the charges would have been 51 years confinement and a dismissal. The Army Court reassessed the sentence to 11 years confinement and a dismissal, well below the maximum sentence.[131]

Although in this case, like in *Moffeit*, there was a change in the penalty landscape by the dismissal of charges with significant exposure (reducing appellant's maximum sentence from 115 years to 51 years), the majority of the aggravating circumstances remained "on the table."[132] The panel would have reviewed the same aggravating evidence had the errors not occurred except for the images of child pornography, which supported a charge that only carried a maximum punishment of 5 years confinement.[133]

Despite the dismissal of Specification 3 of Charge III (attempted enticement of "Il ovean al 12" whom appellant

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[129] *Moffeit*, 63 M.J. at 42.
[130] *Id; see also Jones*, 39 M.J. at 318 ("We note that appellant's sentence was well within the maximum for the remaining offenses").
[131] JA 46.
[132] *See Moffeit*, 63 M.J. at 44 (Baker, J., concurring).
[133] SJA 72.

believed was a 15-year-old boy),[134] the panel would have still been able to consider the "Il ovean al 12" chat and the testimony of KM because the same evidence was presented to the panel to prove Specification 2 of Charge VII (conduct unbecoming an officer for engaging in cyber sex to solicit a person appellant believed to be a minor, but was actually KM).

Similarly, despite the dismissal of Specification 2 of Charge III (attempted enticement of "BriNY 11787" whom appellant believed was a 14-year-old boy, but was actually Detective FG)[135] and Specifications 1 and 2 of Charge IV (indecent language for the chats with Detective FG),[136] the panel would have still been able to consider the "BriNY 11787" chats and Detective FG's testimony because the same evidence was presented to the panel to prove both Specification 1 of Charge III (attempted enticement of a minor) and Specification 1 of Charge VII (conduct unbecoming an officer for engaging in cyber sex to solicit a person appellant believed to be a minor, but was actually Detective FG).[137]

Additionally, the fact that the military judge found several of these offenses to be either an unreasonable

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[134] *Winckelmann*, 70 M.J. at 409.
[135] JA 21.
[136] JA 46.
[137] *Cf. Sales*, 22 M.J. at 308 ("The presence of the multiplicious findings could not have led to the reception of evidence that otherwise would have been inadmissible") (citation omitted).

multiplication of charges or "multiplicious for sentencing" made the change in penalty landscape less drastic.[138]

The change in appellant's penalty landscape from 115 years to 51 years was also not as extreme as the change in penalty landscape in *United States v. Buber*,[139] *United States v. Riley*,[140] and *United States v. Harris*.[141]

In *Buber*, the maximum punishment changed from life imprisonment without the eligibility of parole to 5 years confinement when the court set aside appellant's conviction for unpremeditated murder, and appellant was no longer convicted of a "death-related offense" but merely a false-official statement.[142]

In *Riley*, the maximum punishment changed from life imprisonment to 3 years confinement when the court set aside appellant's conviction for unpremeditated murder and only affirmed a finding of guilty to negligent homicide.[143]

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[138] SJA 69-71; *see United States v. Kerr*, 51 M.J. 401 (C.A.A.F. 1999) (citing *Hawes*, 51 M.J. 258) ("In this case it was obvious, from the virtually identical specifications, that both specifications alleged the same act. In our view, the court below did not abuse its discretion in determining that appellant's sentence [for drunk driving and conduct unbecoming an officer] whether for one specification or two, would have included at least a dismissal and the short period of confinement adjudged").
[139] 62 M.J. 476.
[140] 58 M.J. 305 (C.A.A.F. 2003).
[141] 53 M.J. 86 (C.A.A.F. 2000).
[142] 62 M.J. at 479-80.
[143] 58 M.J. at 312.

In *Harris*, the maximum punishment changed from life imprisonment to 18 months confinement when the court set aside appellant's convictions for rape and maltreatment.[144]

In these three cases, this Court found that given the "dramatic change in the penalty landscape," the service courts could not "reliably determine what sentence the members would have imposed," and the "only fair course of action" was to order a sentencing rehearing.[145] In contrast, appellant's maximum sentenced was only reduced from 115 years confinement to 51 years confinement, and the Army Court found that despite the change in the sentencing landscape, it could still determine that the members would have "at least" sentenced appellant to 11 years confinement and a dismissal.[146]

The fact that appellant was sentenced by members instead of by a military judge weighs in favor of a sentencing rehearing given that the judges of the Army Court are more likely to be certain of what a military judge alone would have done than what panel of members would have done.[147] However, this Court has previously affirmed sentence reassessments in cases tried by members.[148]

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[144] 53 M.J. at 88.
[145] *Riley*, 58 M.J. at 312 (internal quotations omitted).
[146] JA 46.
[147] *Moffeit*, 63 M.J. at 43 (Baker, J., concurring).
[148] *See Davis*, 48 M.J. 949 (finding no abuse of discretion or miscarriage of justice by the service court where it reassessed

The "nature of the remaining offenses" [149] support reassessment of the sentence. The remaining charges considered by the Army Court during reassessment involved "serious offenses, at least as serious as the dismissed offenses, with significant aggravating factors."[150]

Like in *Moffeit*,[151] on reassessment, appellant—a Lieutenant Colonel with over 28 years of service[152]—stood convicted of trying to entice an individual whom he believed to be a 14-year-old boy to engage in sexual relations with him. Appellant also remained convicted of two charges of conduct unbecoming an officer for engaging in cyber sex for his own sexual gratification with two different persons, both of whom he believed were boys under the age of sixteen.[153] One of these

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the sentence to the same sentence the panel members adjudged despite appellant's potential maximum sentence changing from 22 years confinement to 7 years confinement due to the error); *Kerr*, 51 M.J. 401 (appellant, also a Lieutenant Colonel, was sentenced by members; this Court affirmed the lower-court's reassessment of the sentence); *Taylor*, 51 M.J. 390 (appellant was sentenced by members to 1 year confinement and a dishonorable discharge; the Convening Authority reduced the sentence to 8 months confinement and a bad-conduct discharge; the service court reassessed the sentence to a bad-conduct discharge; this court affirmed the service court's reassessment).

[149] *Moffeit*, 63 M.J. at 43 (Baker, J., concurring).

[150] *Id.* at 44; *see Davis*, 48 M.J. at 495 (despite the court reducing appellant's conviction from assault with intent to commit rape to indecent assault, "appellant nonetheless remained convicted of a serious sexual offense").

[151] *See Moffeit*, 63 M.J. at 41.

[152] SJA 78.

[153] SJA 2, 7, 35, 41.

individuals was appellant's family friend who had allowed appellant to be a friend and mentor to her minor son, and the other individual was a police detective.[154] In both chats, appellant asked the "boys" questions of a sexual nature.[155] In the chats with the police detective, appellant repeatedly told the "boy" all of the sexually explicit acts he would like to do to him."[156]

Appellant also remained convicted of two specifications of obstruction of justice. RR considered appellant a father-figure despite the fact that appellant had touched his penis as a child and had also asked him for oral sex.[157] After appellant's arrest, he met with RR, informed RR that he had been arrested, and told RR that if investigators contacted him: "I want you to say whatever it is you have to protect me," and in return, appellant promised to give RR the Mazda vehicle RR had loved as a child.[158]

Finally, appellant also remained convicted of two specifications of indecent acts and two additional specifications of conduct unbecoming an officer for engaging in

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[154] JA 63; SJA 414.
[155] SJA 4-17.
[156] SJA 12, 15-17.
[157] SJA 56, 58, 62-63.
[158] SJA 64-67.

anal and oral sodomy with two other individuals, videotaping the oral and anal sodomy, and maintaining a copy of the videotape.[159]

Appellant had a full opportunity to present matters in mitigation and extenuation, which the panel considered.[160] In this case, it was only a matter of removing the findings of guilty to offenses regularly reviewed by the service courts (two specifications of attempted enticement of a minor, one specification of possession of child pornography, and two specification of communication of indecent language to a person appellant believed was a minor)[161] and making a determination as to what the lowest sentence the court-martial members would have adjudged against appellant—a Lieutenant Colonel with over 28 years of service—for one specification of attempted enticement of a minor, two specifications of obstruction of justice, two specifications of indecent acts, and four specifications of conduct unbecoming an officer.

Although "it is not necessary that a reduction in sentence be granted by the [service court] in reassessing after a finding

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[159] SJA 22-23, 74.

[160] SJA 78-80; *Cf. United States v. Boone*, 49 M.J. 187, 197-99 (C.A.A.F. 1998) and *Doss*, 57 M.J. at 185-86 (both holding that given the error of ineffective assistance of counsel during sentencing, appellants were denied their right to present matters in extenuation and mitigation, therefore there was no record from which the service court could reliably reassess the sentence).

[161] *See Moffeit*, 63 M.J. at 42.

of guilty has been set aside,"[162] the Army Court reduced appellant's sentence considerably pursuant to each reassessment. Appellant's sentence was reduced first from the 31 years confinement and a dismissal down to 20 years and a dismissal,[163] and finally to 11 years and a dismissal.[164] The Army Court's reductions in sentence show that it continued to consider the "at least of a certain magnitude language" in determining what the lowest possible sentence the panel members would have adjudged based on the remaining findings of guilty.[165]

Under the facts of this case, there was no miscarriage of justice or abuse of discretion by the Army Court determining, after review of the record and pursuant to the principles announced in *Sales* and *Moffeit*, that the officer panel would have adjudged "at least" a dismissal and 11 years confinement to a senior Lieutenant Colonel, who was facing a maximum of 51 years confinement, for the remaining findings of guilty to attempted enticement of a minor, obstruction of justice, indecent acts, and conduct unbecoming an officer.

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[162] *Jones*, 39 M.J. at 317 (citing *Sales*, 22 M.J. at 308).
[163] JA 21.
[164] JA 46.
[165] *See Taylor*, 51 M.J. at 390.

Conclusion

Wherefore, the Government respectfully requests this Honorable Court affirm the decision of the Army Court of Criminal Appeals.

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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 June 21, 2013 and contemporaneously served electronically on civilian appellate defense counsel, Mr. Frank J. Spinner, and military appellate defense counsel, Captain John L. Schriver.

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