IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman First Class (E-3)
NICHOLAS E. BUSCH
USAF,
Appellant.

USCA Dkt. No. 15-0~~407/~~AF
15-0477/AF
Crim. App. No. 38530

BRIEF IN SUPPORT OF PETITION GRANTED

LUKE D. WILSON, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 35115
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews, MD 20762
(240) 612-4770

MICHAEL A. SCHRAMA, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 34736
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews, MD 20762
(240) 612-4770
Michael.A.Schrama.mil@mail.mil

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES *Appellee,* v. Airman First Class (E-3) **NICHOLAS E. BUSCH,** USAF, *Appellant.*	**BRIEF IN SUPPORT OF PETITION GRANTED** Crim. App. No. 38530 USCA Dkt. No.15-0407/AF

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

Issue Presented

AT THE TIME OF APPELLANT'S ALLEGED SEXUAL ABUSE OF A CHILD OFFENSE, THE PRESIDENT HAD NOT SET THE MAXIMUM PUNISHMENT FOR THE OFFENSE. THE MILITARY JUDGE USED A LATER-ENACTED EXECUTIVE ORDER TO SET THE MAXIMUM PUNISHMENT, EVEN THOUGH IT INCREASED THE CONFINEMENT RANGE FROM ONE YEAR TO FIFTEEN YEARS. WAS THE EX POST FACTO CLAUSE VIOLATED?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ.

Summary of Proceedings

On 18 November 2013, Appellant was tried by a general court-martial composed of a military judge alone at Sheppard Air Force Base, Texas. The Charges and Specifications on which he

was arraigned, his pleas, and the findings of the court-martial are as follows:

Chg	UCMJ Art	Spec	Summary of Offense	Plea	Finding
I	83			G	G
			Did, at or near the state of Tennessee, b/o/a 11 May 12 and o/a 15 Jan 13, by means of deliberate concealment of the fact that he had prior sex offense convictions, procure himself to be enlisted as an Airman in the United States Air Force, and did thereafter receive pay and allowances under the enlistment so procured.	G	G
II	86			G	G
			Did, o/a 7 Aug 2013, w/o authority, absent himself from his unit, to wit: the 364th Training Squadron, located at Sheppard Air Force Base, Texas, and did remain so absent until he was apprehended o/a 9 Aug 13.	G	G
III	107			G	G
			Did o/a 7 Aug, with intent to deceive, sign an official record, to wit: Relocation Processing Clearance Letter, which record was false in that A1C Busch was not qualified to PCS, and was then known by the said A1C Busch to be so false.	G	G
IV	120			G	G
			Did, on divers occasions, b/o/a 1 Feb 13 and o/a 20 May 13 commit a lewd act upon JY, a child who had not attained the age of 16 years, to wit: exposing the said A1C Busch's	G	G

Chg	UCMJ Art	Spec	Summary of Offense	Plea	Finding
			genatalia, using a communication technology while the said JY watched.		
V	134				Dismissed
			Did b/o/a 1 Feb 13 and o/a 20 May 13, use a facility and means of interstate commerce, to knowingly attempt to persuade JY, a child who had not attained the age of 18 years, to engage in sexual activity of a criminal nature in violation of Florida state laws, in violation of USC 2422(b).		Dismissed

The military judge sentenced Appellant to a dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1. J.A. 66. On 10 February 2014, the convening authority approved the sentence. J.A. 11.

On 11 February 2015, the Air Force Court of Criminal Appeals affirmed. J.A. 1. The Appellate Records Branch notified the Appellate Defense Division that a copy of the Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 12 February 2015.

Statement of Facts

Congress amended Article 120, UCMJ, to create -- among other offenses -- Sexual Abuse of a Child under Article 120b, UCMJ. The amendment took effect on 28 June 2012. Despite this,

the President did not exercise his authority pursuant to Article 56, UCMJ, to set the maximum punishment for the offense until Executive Order 13643 was signed and published on 15 May 2013.

Appellant's alleged Sexual Abuse of a Child started in April 2013 and ended in the first week of May 2013. J.A. 31.

During the maximum punishment inquiry, the trial defense counsel objected to the maximum punishment proposed by the prosecution for Sexual Abuse of a Child and argued that the applicable maximum punishment should be based on the offense of Indecent Exposure and should include only one year of confinement. J.A. 37-38. The military judge rejected the objections saying, "How do you get that number under Charge IV given the President's direction that it carry a penalty of a dishonorable discharge, 15 years and total forfeitures?" J.A. 38. The military judge went on to say,

> What's your view of Executive Order 42012 [sic] where the President has stated that the maximum punishment under paragraph 45b, Article 120b – Rape and Sexual Assault of a Child – is amended by inserting the following use of paragraph e: [...] (3) Sexual Abuse of a Child [...] a dishonorable discharge, forfeiture of all pay and allowances, and a dishonorable discharge?

Id.

In a colloquy with trial defense counsel, the military judge went on to express his belief that a charge of "indecent liberty is more applicable than indecent exposure[.]" J.A. 45-

46. He then re-affirmed his use of the Executive Order by stating, "And the maximum punishment for indecent liberty of a child is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years, which I believe tracks with the punishment under the President's executive order with regard to Article 120b for the conduct to which your client has pled guilty." J.A. 46.

Argument

THE MILITARY JUDGE VIOLATED THE EX POST FACTO CLAUSE BY USING A LATER-ENACTED LAW TO INCREASE THE RANGE OF PUNISHMENT APPELLANT FACED FOR SEXUAL ABUSE OF A CHILD.

Standard of Review

"The maximum punishment authorized for an offense is a question of law, which [the Court] review[s] de novo." *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011)(citation omitted).

"While we review a military judge's sentencing determination under an abuse of discretion standard, where a military judge's decision was influenced by an erroneous view of the law, that decision constitutes an abuse of discretion." *Id*. (citations omitted).

Law and Analysis

The military judge violated the Ex Post Facto Clause of Article I, Section 9 of the United States Constitution when he sentenced Appellant under later-enacted harsher sentencing range by utilizing Executive Order 13643. Because of this the sentence must be set aside and returned for a new sentencing hearing.

A. The Ex Post Facto Clause generally.

"The Constitution forbids the passage of ex post facto laws, a category that includes '[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Peugh v. United States*, 133 S.Ct. 2072, 2077-78 (2013)(citation omitted).

"The Framers considered ex post facto laws to be 'contrary to the first principles of the social compact and to every principle of sound legislation.'" *Id*. at 2084 (citing The Federalist No. 44, p. 282.) "The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action." *Id*. at 2085 (citation omitted). "Even where these concerns are not directly implicated, however, the Clause also safeguards 'a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under

which it can deprive a person of his or her liberty or life.'" *Id*. (citation omitted).

B. The military judge's use of EO 13643 violated the Ex Post Facto Clause of the Constitution.

The military judge used Executive Order (EO) 13643 to set the maximum punishment for Appellant's Lewd Act offense. Because EO 13643 was enacted *after* Appellant's alleged act, and because it increased the maximum punishment exposure from one year of confinement to fifteen years, the military judge's use of it violated the prohibition against ex post facto laws.

1. Because at the time of the offense, Art 120b was not "a listed offense" in Part IV of the MCM, the appropriate analysis is an RCM 1003(C)(1)(B) analysis.

The maximum punishment of any court-martial offense is determined by the analysis contained in RCM 1003(c). Under RCM 1003(c)(1)(A) and (B), the appropriate analysis depends on whether the offense in question is "listed in Part IV" of the manual. If it is, then under RCM 1003(c)(1)(A) the maximum punishment is that which is set forth in the offense. If it is not, the analysis from RCM 1003(c)(1)(B) must be utilized.

At the time of Appellant's alleged offense, the Article 120b offense of Sexual Abuse of a Child was not a listed offense in Part IV of the Manual for Courts Martial. *See United States v. Booker*, 72 M.J. 787, 799-802 (NMCCA 2013). Therefore, the maximum punishment analysis of RCM 1003(C)(1)(B) is controlling.

2. Under RCM 1003(C)(1)(B), the maximum sentence should have only included one year of confinement.

Because the post-2012 Article 120b offense of Sexual Abuse of a Child is "included in or closely related to" the offense of Indecent Exposure, the maximum authorized punishment for the offense should have only included one year of confinement.

The RCM 1003(C)(1)(B) maximum punishment analysis for offenses not listed in Part IV of the Manual breaks the analysis further down into two parts. It states,

> (B) *Offenses not listed Part IV.*
>
> (i) *Included or related offenses.* For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.
>
> (ii) *Not included or related offenses.* An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period.

The Article 120b offense of Sexual Abuse of a Child is "included in or closely related to" the offense of Indecent Exposure. To be guilty of Sexual Abuse of a Child under 120b, the Government must prove the following elements beyond a

reasonable doubt:

(1) Commission of a lewd act,

(2) upon a child.

In 2012, the definition of "lewd act" was changed to allow for the act to take place *outside* of the physical presence of the child via use of communication technology. "Lewd act" is defined as "intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desires of any person." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45b (2012 ed.).

As pointed out by the trial defense counsel, in the factual context of Appellant's case Sexual Abuse of a Child is closely related to the offense of Indecent Exposure. J.A. 43. The elements of Indecent Exposure are:

(1) The accused's exposure of a body part,

(2) The exposure was at place where the conduct involved could reasonably be expected to be viewed by people other than members of the accused's family or household,

(3) That such exposure was intentional; and

(4) That such exposure was indecent.

MCM, Part IV, ¶ 45 (2008 ed.).

"Indecent" is defined as "a form of exhibition which

signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Id*.

Although Indecent Exposure is not geared specifically to offenses against minors, clearly Sexual Abuse of a Child consummated by the exposure of genitalia via communication technology over the Internet is closely related to the offense of Indecent Exposure. In this factual context, each offense consists of (1) exposure of the genitalia, (2) for a sexual purpose.

The military judge's argument that Indecent Liberty with a Child under Article 120 is closely related fails. To be considered "closely related," the specification must contain all the elements of the offense alleged to be "closely related." *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011). However, Indecent Liberties requires the act to be done in the actual physical presence of the child. *MCM*, Part IV, ¶ 45(j) (2008 ed.); R. 97. Because this element was not alleged in the Sexual Abuse of a Child specification it cannot be considered closely related. Indecent Exposure, on the other hand, requires no such presence.

In fact, had Appellant's factual scenario been charged

under the pre-2012 Article 120, Indecent Liberties with a Child would have been factually and legally insufficient, while Indecent Exposure is broad enough to encapsulate Appellant's conduct.

Even if Sexual Abuse of a Child is closely related to Indecent Liberties, as discussed above, it would also be closely related to Indecent Exposure. Under RCM 1003(C)(1)(B)(i) when a non-listed offense is "closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses."

Thus, the maximum punishment for this unlisted offense should be equal to the maximum punishment for Indecent Exposure, a Dishonorable Discharge and 1 year confinement. *MCM*, Part IV, ¶ 45(f) (2008 ed.).

3. Because the judge utilized the harsher punishment range of EO 13643, he violated the prohibition against ex post facto laws.

The prohibition against ex post facto laws is violated when "a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh v. United States*, 133 S.Ct. 2072, 2082 (2013)(quoting *Garner v. Jones,* 529 U.S. 244 (2000)). "The question when a change in law creates such a risk is 'a matter

of degree'; the test cannot be reduced to a 'single formula.'" *Id*. (citations omitted).

Although there is no single formula, "[t]he *Ex Post Facto* Clause forbids the [government] to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." *Id*. (citations omitted). This formula alteration creates a significant, and thus impermissible, risk of a higher sentence. *Id*.

As discussed above, the applicable maximum punishment for Sexual Abuse of Child included only one year of confinement. Thus, the military judge's use of the harsher 15-year confinement period of the later-enacted EO 13643 violated the Ex Post Facto Clause.

C. The Government cannot carry its burden to prove that the constitutional violation is harmless beyond a reasonable doubt.

Constitutional errors must be reviewed under a harmless beyond a reasonable doubt standard. *Chapman v. California*, 386 U.S. 18 (1967). "The Government bears the burden of demonstrating that a constitutional error is harmless beyond a reasonable doubt." *United States v. Simmons*, 59 M.J. 485, 491 (C.A.A.F. 2004)(citing *Chapman v. California*, 386 U.S. 18 (1967)).

Because the Government cannot carry its burden to show beyond a reasonable doubt that the erroneous increase of the

maximum punishment from one year to fifteen years was harmless, this Court must set aside the sentence.

Respectfully Submitted,

LUKE D. WILSON, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35115
United States Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

MICHAEL A. SCHRAMA, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34736
United States Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that I caused a copy of the foregoing to be electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 6 July 2015.

MICHAEL A. SCHRAMA, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34736
United States Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Counsel for Appellant