5 August 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 15-0407/AF
Airman First Class (E-3), NICHOLAS E. BUSCH, USAF, *Appellant.*	)	Crim. App. No. 38530

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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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 (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

In Charge IV, Appellant was charged with committing a lewd act on divers occasions, between on or about 1 February 2013 and on or about 20 May 2013, upon JY, a child who had not attained the age of 16 years, by exposing his genitalia using a

communication technology, while JY watched. This conduct violated Article 120b, UCMJ for sexual abuse of a child.

During his guilty plea inquiry, Appellant described, "I would expose my genitalia and masturbate to [JY] while she was watching . . . Each time I exposed my genitals over Skype, while [JY] was watching, I was here at Sheppard Air Force Base, Texas, and [JY] was in Florida. (J.A. at 30.) Appellant admitted that he committed these acts each time, with the intent of arousing or gratifying both his and JY's sexual desires. (J.A. at 30, 34.) Appellant further admitted that at the time of his conduct, he knew JY was 15 years old. (J.A. at 30.) Appellant's stated that his actions were "intentional." (J.A. at 34.)

Appellant's misconduct with JY in the spring of 2013 took place after the 2012 amendments to Article 120, UCMJ[1] had taken effect, but before 15 May 2013 when the President had signed Executive Order 13643 establishing maximum punishments for the amended Article 120b. During the maximum punishment inquiry at trial, trial defense counsel objected to using 15 years confinement as the maximum punishment for Charge IV, sexual abuse of a child. (J.A. at 36-38.) Defense asserted that the

[1] The National Defense Authorization Act for Fiscal Year 2012, P.L. 112-81, 31 December 2011, created the new offense of Article 120b under the Uniform Code of Military Justice. Drafters Analysis, Manual for Courts-Martial, United States (MCM) A23-16 (2012 ed.) This new amendment took effect on 28 June 2012. (Id.)

maximum punishment for that specification should be 1 year of confinement "because it mirrors the language in the Article 120 from the 2007-2012 [sic] where it talks about indecent exposure." (J.A. at 38.) When asked about the executive order where the President set the maximum punishment at 15 years, trial defense counsel asked for a brief recess, and the court took a break for lunch. (J.A. at 38-40.)

After the lunch break, the military judge and counsel resumed the discussion of maximum punishment. This time, trial defense counsel objected to "the President unilaterally setting a maximum punishment with an executive order." (J.A. at 42.) Trial defense counsel stated, "we believe the maximum punishment should be written by Congress; and so we believe that the most analogous one would be 'indecent exposure' under the old Article 120." Id. The military judge questioned defense counsel about the fact that indecent exposure did not contain the same intent requirement as sexual abuse of a child and defense counsel agreed that was true. (J.A. at 44-5.) The military judge replied, "it seems like indecent liberty under the prior statute is more applicable than indecent exposure, because, again it covers indecent exposure, but it narrows the focus to a child." (J.A. at 45.)

Ultimately, the military judge concluded that "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. at 46.) The military judge used 15 years as the maximum punishment authorized for Charge IV, and informed Appellant that the maximum punishment authorized in the case based on his plea of guilty was a dishonorable discharge, reduction to the grade of E-1, total forfeitures of all pay and allowances, and confinement for 22 years and 1 month. (J.A. at 48.)

The military judge ultimately sentenced Appellant for all of his offenses to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confirmed for 6 years, and to be dishonorably discharged from the service. (J.A. at 66.)

SUMMARY OF THE ARGUMENT

Contrary to Appellant's claim, the *ex post facto* clause of the Constitution is not implicated in this case. The military judge did not use Executive Order 13643 to set the maximum punishment for Appellant at 15 years confinement. Instead, the military judge determined the maximum punishment by using Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(i), a rule in effect at the time Appellant committed his misconduct.

In applying R.C.M. 1003(c)(1)(B)(i), the military judge correctly determined that Appellant's offense of sexual abuse of

a child was "closely related" to the offense of indecent liberties with a child under Article 120(j), UCMJ, which was still listed in Part IV of the Manual for Courts-Martial at the time of Appellant's misconduct and carries a maximum punishment of 15 years confinement. The two offenses are sufficiently similar because both address the corruption of the morals of a child. Therefore, it was appropriate for the military judge to set the maximum confinement for Charge IV at 15 years.

Conversely, sexual abuse of a child is not "closely related" to the offense of indecent exposure, despite Appellant's contentions. The offense of indecent exposure does not capture the fact that Appellant's misconduct was committed against a child or that it was committed with the intent to arouse or gratify the sexual desires of any person.

Even if Appellant's misconduct was not closely related to any offense listed in Part IV of the Manual, it was punishable by custom of the service in accordance with R.C.M. 1003(c)(1)(B)(ii). Appellant's actions were encompassed by the long-existing offense of indecent acts of another, which historically has carried a maximum punishment of 5 years confinement.

Finally, even assuming the military judge incorrectly calculated the maximum punishment in this case, Appellant suffered no prejudice. The record demonstrates that Appellant

still would have pled guilty even if he had been informed of a lesser maximum punishment. Moreover, even if the maximum punishment had been calculated based on custom of the service, the military judge still would have adjudged the same sentence.

ARGUMENT

THE MILITARY JUDGE CALCULATED THE CORRECT MAXIMUM PUNISHMENT FOR CHARGE IV AND THUS, DID NOT VIOLATE THE EX POST FACTO CLAUSE.

Standard of Review

The maximum punishment authorized for an offense is a question of law, which appellate courts review de novo. United States v. St. Blanc, 70 M.J. 424, 428 (C.A.A.F. 2012).

Law and Analysis

R.C.M. 1003(c) discusses maximum punishments for trials by court-martial. If an accused is convicted of an offense that is not listed in Part IV of the Manual for Courts-Martial, there are two sets of options for determining the maximum punishment for that offense. R.C.M. 1003(c)(1)(B)(i), *Included or related offenses,* states:

> For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein, 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 of more offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

Alternatively, R.C.M. 1003(c)(1)(B)(ii), *Not included or related offenses,* reads: "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 custom of the service."

a. The *ex post facto* clause is not at issue in this case.

Appellant erroneously alleges that "[t]he military judge used Executive Order (EO) 13643 to set the maximum punishment for Appellant's Lewd Act offense." (App. Br. at 7.) According to Appellant, this use of EO 13643, which was signed into law after Appellant's misconduct with JY, but prior to his trial, violated the *ex post facto* clause of the Constitution.

Although R.C.M. 1003(c)(1)(B) was never explicitly mentioned on the record, the context of the record makes evident that the military judge considered whether both indecent exposure and indecent liberties with a child were closely related to the charged offense of sexual abuse of a child. This is exactly the type of analysis contemplated by R.C.M. 1003(c)(1)(B)(i) for situations where an offense is not listed in Part IV of the Manual. The military judge determined indecent liberties to be the "more applicable" offense and accordingly set the maximum punishment for Charge IV as 15 years of confinement. While the military judge commented that the end result "tracks with the punishment under the President's

executive order with regard to Article 120b," this does not negate the fact that the military judge performed a R.C.M. 1003(c)(1)(B) analysis in calculating the maximum punishment.

The Supreme Court has recently reemphasized that "[t]he Constitution prohibits passage of *ex post facto* laws, a category that includes every law that changes the punishment, and inflicts a greater punishment, that then law annexed to the crime, when committed." Peugh v. United States, 133 S.Ct. 2072, 2078 (2013)(internal citation omitted). However, since the military judge did not use EO 13643 to set the maximum punishment at trial, the *ex post facto* clause does not apply to this case. Appellant was sentenced based on R.C.M. 1003(c)(1)(B), a rule in effect at the time his crime was committed.

Even if the military judge *did* use EO 13643 to set the maximum punishment at 15 years confinement, there was no *ex post facto* violation. This Court would necessarily have to engage in a de novo analysis under R.C.M. 1003(c)(1) to determine the correct maximum punishment authorized under the circumstances. As described in detail below, such an analysis leads to the conclusion that the maximum punishment for Appellant's crime included 15 years confinement. Therefore, using EO 13643 to set the maximum punishment would not ultimately have "inflicted a

greater punishment than the law annexed to the crime when committed."

b. Charge IV is closely related to the offense of indecent liberties with a child under Article 120(j), MCM (2008 ed.).

In United States v. Booker, 72 M.J. 787, 801 (N.M. Ct. Crim. App. 2013), the Navy-Marine Corps Court of Criminal Appeals determined that prior to 15 May 2013, the amended version of Article 120 that took effect on 28 June 2012 was not an "Offense listed in Part IV" of the Manual.[2] Thus, for offenses under Article 120 committed between 28 June 2012 and 15 May 2013, "the appropriate offense-based criteria for determining the authorized punishment . . . was for an 'Offense not listed in Part IV' of the Manual. R.C.M. 1003(c)(1)(B)." Id. at 801. Following the Navy-Marine Court's logic, sexual abuse of a child in violation of Article 120b was also "not listed in Part IV" of the Manual at the time of Appellant's crime.[3]

In Booker, the NMCCA assumed that because the President had not taken specific action to remove the 2007 Article 120 offense

[2] Citing, United States v. Tualla, 52 M.J. 228, 231 (C.A.A.F. 2000), NMCCA reasoned that only the President has the authority to amend Part IV of the Manual. Here, the Joint Services Committee, rather than the President, had added the statutory text of the amended Article 120 to Part IV of the Manual, which was insufficient to render it "listed in Part IV" for purposes of R.C.M. 1003(c)(1)(A). Id. at 800-801.

[3] In his own brief, Appellant concurs that "[a]t 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" and that "the maximum punishment analysis of R.C.M. 1003(c)(1)(B) is controlling." (App. Br. at 7.)

of "aggravated sexual assault" from Part IV of the Manual, that particular offense was still "listed in Part IV" for purposes of R.C.M. 1003(c)(1)(B). Therefore, the Navy-Marine Corps Court determined whether the charged offense of sexual assault was closely related to the 2007 offense of aggravated sexual assault. Id. at 802-03. Similarly, here, the 2007 Article 120(j) offense of indecent liberties with a child was still "listed in Part IV" at the time of Appellant's misconduct with JY. The inquiry then becomes whether Charge IV for sexual abuse of a child is "closely related" to the offense of indecent liberties with a child.

The elements of sexual abuse of a child as described in Charge IV are:

(1) that the accused committed a lewd act upon a certain person; and

(2) that person had not attained the age of 16 years.

A "lewd act" includes "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." D.A. Pam 27-9, para. 3-45b-3 (21 June 2012 interim update).

The elements for indecent liberties with a child are:

(1) that the accused committed a certain act or communication;

(2) that the act or communication was indecent;

(3) that the accused committed the act or communication in the physical presence of a certain child;

(4) that the child was under 16 years of age; and

(5) that the accused committed to act or communication with the intent to arouse, appeal to or gratify the sexual desires of any person or abuse, humiliate or degrade any person.

MCM, Pt. IV, para. 45. (2008 ed.)

"Indecent liberty" includes one who with the requisite intent exposes one's genitalia, anus, buttocks or female areola or nipple to a child. Id.

In this case, the military judge correctly determined that the charged offense of sexual abuse of a child was indeed closely related to the offense of indecent liberties with a child under the 2007 version of Article 120(j). Appellant cites United States v. Beaty, 70 M.J. 39 (C.A.A.F. 2011) and claims that "[t]o be considered 'closely related,' the specification must contain all elements of the offense alleged to be 'closely related.'" (App. Br. at 11.) This is a complete misapprehension of the holding of Beaty. Beaty involved an analysis of R.C.M. 1003(c)(1)(B)(ii) and considered the issue of punishment under the United States Code.[4] The Beaty opinion

[4] In Beaty, the appellant was convicted of possessing visual depictions of "what appears to be" a minor engaging in sexually explicit conduct. Id. at 40. This Court reiterated that possession of child pornography and possession of what appears to be child pornography are "not included in, or closely related to, a listed offense" in Part IV. Id. at 42.

contains no holding or even commentary on how to determine if offenses are "closely related" to offenses listed in the MCM under R.C.M. 1003(c)(1)(B)(i).[5] Therefore, Beaty is inapplicable to this case where the Rule at issue was R.C.M. 1003(c)(1)(B)(i) for "Offenses not listed Part IV: Included or related offense." In short, there is no authority to suggest that to be "closely related" to a listed offense in the MCM, an unlisted offense must contain all the same elements as that listed offense.

United States v. Ramsey, 40 M.J. 71 (C.M.A. 1994), which squarely addresses R.C.M. 1003(c)(1)(B)(i), offers a much better framework than Beaty for determining whether sexual abuse of a child is "closely related" to indecent liberties with a child. In Ramsey, the appellant was charged with malingering for shooting himself in the shoulder while in a hostile fire pay zone, in an abortive suicide attempt. The appellant pled guilty to the lesser included offense of intentional self-infliction of injury in a hostile fire pay zone, without intent to avoid service, in violation of Article 134, UCMJ. The difference between malingering and the intentional self-infliction of injury was that the lesser included offense did not include the element that "the accused's purpose or intent . . . was to avoid

[5] In fact, this Court emphasized that the term "closely related" applies only to offenses that are closely related to offenses listed in the MCM – not to offenses in the United States Code, that latter of which were at issue in Beaty. Id. at 42 n.7.

the work, duty or service." United States v. Ramsey, 35 M.J. 733, 734 (A.C.M.R. 1992.)

At the time of the appellant's trial, self-injury without intent to avoid service was mentioned in the Manual as a lesser included offense of malingering under Article 115 and in the Drafters' Analysis to Article 115. However, the crime was not specifically enumerated under Article 134, UCMJ and thus, no maximum punishment had been specified by the Manual. Ramsey, 40 M.J. at 75. Although the trial judge found the appellant's conduct to be most closely analogous to malingering, the judge arbitrarily set the maximum punishment at 7 years, rather than the 10 years prescribed for malingering. Id. at 73.

On appeal, the appellant argued that his offense was more closely related to wrongful discharge of a firearm so as to endanger human life, than to malingering. Both this Court and the Army Court of Military Review below found that the trial judge had erred because he "failed to follow the clear mandate of R.C.M. 1003(c)(1)(B)(i)." Id. at 76.

In its opinion, this Court stated that it "agree[d] with the military judge in his initial ruling" that the offense was more closely analogous to malingering than to wrongful discharge of a firearm. Id. at 75. This Court described that:

> It would seem to make little difference *how* appellant inflicted his physical injury, the damage to the military is the same: His

> unit has lost his services, and the mission has been jeopardized proportionately. That was the social cost that appellant's act perpetrated, and that is the social cost principally addressed in malingering, as opposed to the life-threatening discharge of a firearm.

Id.

Significantly, Ramsey makes clear that in the context of R.C.M. 1003(c)(1)(B)(i), "closely related" does not mean identical. This further defeats Appellant's claim that offenses must contain all the same elements to be "closely related." In the present case, the sole difference between Appellant's crime and the offense of indecent liberties with a child is that Appellant was not in the physical presence of JY when he exposed his penis to her and masturbated in front of her, as required by the latter offense. The lack of this one aspect of the crime is similar to Ramsey where the only variance in the "closely related" crimes of malingering and self-injury without intent to avoid service was the element of "the purpose or intent to avoid the work, duty or service."[6]

Following this Court's "social cost" logic in Ramsey, the offenses of sexual abuse of a child and indecent liberties with a child are sufficiently similar to be "closely related." The

[6] It is notable that in Ramsey the offense of self-injury without intent to avoid service contained one *fewer* element than the malingering offense to which it was found to be closely related. Therefore, an offense may still be "closely related" to another offense even when it lacks an element of that other offense.

"social cost" of Appellant's crime and the crime of indecent liberties with a child is the same. Whether committed in the physical presence of the child or not, the social cost of these crimes is the corruption of the morals the child. As this Court observed in United States v. Scott, 21 M.J. 345, 349 (C.M.A. 1986), "[t]he purpose of punishing the taking of indecent liberties with children 'is to protect children under a certain age from those acts which have a tendency to corrupt their morals.'"

This Court's reasoning in Scott is further instructive in analyzing the similarities between sexual abuse of a child and indecent liberties with a child. In discussing the crime of indecent liberties with a child, this Court stated:

> We can perceive no reason to differentiate between "a depraved act" which consists of exposing one's own private parts to a child and similar "acts" which involve (a) displaying to the child a picture of one's own genitals, (b) displaying to the child a third person whose private parts are uncovered, or (c) displaying to the child a picture of the third person's private parts. The impact on the victim can be the same in any of these situations. The *mens rea* of the offender is the same – namely to gratify his own sexual desires. Id.

Likewise, the *mens rea* of an offender who exposes his penis and masturbates in front of a child, whether the act occurs in the physical presence of the child or over the internet, is to gratify his own sexual desires. The potential impact or injury

upon the child victim is also the same whether the crimes occur in the physical presence of the child or over the internet. That potential impact or injury resulting from both such crimes includes corruption of the child's morals and "fear, shame, humiliation and mental anguish." *See* United States v. Brown, 13 C.M.R. 10, 13 (C.M.A. 1953). Indeed, in this case, JY, the 15 year-old victim, testified during sentencing that Appellant's actions over the internet made her feel "uncomfortable" and "ashamed." (R. at 124-25.)

Finally, the Drafters' Analysis to the amended Article 120b highlights the closely related nature of the new sexual abuse of a child offense and the previous offense of indecent liberties with a child:

> The new "Sexual Abuse of a Child" offense under Article 120b.(c), which proscribes committing a "lewd act" upon a child was intended to consolidate the 2007 version of Article 120(f), Article 120(g), Article 120(i) and Article 120(j), by expanding the definition of "lewd act" to include any sexual contact with a child, indecent exposure to a child, communication indecent language to a child, and committing indecent conduct with or in the presence of a child. Exposure, communication, and indecent conduct now include offenses committed via any communication technology to encompass offenses committed via the internet (such as exposing oneself to a child by using a webcam), cell phones, and other modern forms of communication. This charge expands the pre-2012 definition of "indecent liberty" which proscribed conduct only if committed in the physical presence of a child . . .

Drafters Analysis, MCM, A23-16 (2012 ed.)

Article 120(j), indecent liberties with a child was *specifically* revised and expanded to account for the proliferation of technology, and now includes the type of conduct in which Appellant engaged. Therefore, there can be little question that sexual abuse of a child, the expanded version of indecent liberties with a child, is "closely related" to that previous offense.

c. Charge IV is not closely related to indecent exposure.

The reasoning from Ramsey and Scott also demonstrates why the charged offense of sexual abuse of a child is not closely related to the crime of indecent exposure. The elements of indecent exposure do not account for the fact that the crime was perpetrated against a child specifically or that the "social cost" of Appellant's crime is the corruption of the morals of children.

This Court previously addressed "the difference between the crimes of indecent exposure and taking indecent liberties as they affect a minor under sixteen years of age" in Brown, 13 C.M.R. at 17. In distinguishing the two offenses, the Court focused on the fact that, unlike indecent exposure, "the crime of taking indecent liberties with a minor . . . must be done with intent to gratify the lust, passions, or sexual desires of

either the person committing the act or of the child." As this Court highlighted, "[i]t should be readily apparent that when the act is committed with that specific intent, the potentiality for harm to the child is increased." Id. *See also* United States v. Allen, 13 M.J. 597, 605 (A.F.C.M.R. 1982)(Indecent liberties with a child "is a serious offense unrelated to the minor offense of indecent exposure.")

Applying that reasoning to this case, sexual abuse of a child by committing a lewd act also includes the statutory requirement that the act be done "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." Since indecent exposure does not require such an intent, it is not "closely related" to sexual abuse of a child for the purposes of R.C.M. 1003(c)(1)(B)(i). During the maximum punishment inquiry, the military judge himself noted this important distinction about the intent requirement of the two offenses. Thus, he did not err by finding the charged offense to be "closely related" to indecent liberties with a child, rather than to indecent exposure, and using the maximum punishment of 15 years confinement for Charge IV. On this basis, this Court should affirm Appellant's sentence to 6 years confinement.

d. Even if Charge IV is not closely related to an offense listed in Part IV, it is punishable by custom of the service.

If sexual abuse of a child is not closely related to any offense in Part IV, then it punishable as authorized by custom of the service in accordance with R.C.M. 1003(c)(1)(B)(ii). In Booker, NMCCA found that the charged 2012 Article 120 offense of sexual assault upon "a person incapable of consenting due to impairment by an intoxicant" was punishable by custom of the service. NMCCA recognized that such conduct "has been punishable by court-martial since at least 1951." Booker, 72 M.J. at 806

Similarly, the crime of indecent acts with another was an offense under Article 134, UCMJ from 1951 through 2007, before being subsumed by the 2007 revisions to Article 120. MCM, Chapt. XXV,(1951 ed.); MCM, pt. IV, para. 90 (2008 ed.) ("Indecent acts with another was deleted by Executive Order 13447, 72 Fed. Reg. 56179 (Oct. 2, 2007)"); *see also,* United States v. Sanchez, 29 C.M.R. 32 (C.M.A. 1960) (discussing a soldier convicted of indecent acts with another for exposing his penis to a child under 16 years of age in 1957.)

The maximum punishment for this crime has historically been a dishonorable discharge, 5 years of confinement and total forfeitures. MCM, Chapt. XXV, (1951 ed.); MCM, Pt. IV, para. 90 (2008 ed.) Following the reasoning in Booker, conduct

encompassing this long-standing UCMJ offense should be punishable with the same maximum punishment as a "custom of the service."

Appellant's conduct in this case was encompassed by the offense of committing an indecent act with another. The Air Force Court of Criminal Appeals made a similar determination in United States v. Miller, ACM 36829 (f rev) (A.F. Ct. Crim. App. 30 April 2009)(unpub. op.), a case concerning conduct similar to Appellant's. In Miller, the appellant was originally convicted of attempting to take indecent liberties with a child, by using a web camera to send a live feed of himself masturbating to someone he believed to be a 14-year-old-girl. Id. at 1. This Court determined that the offense could not constitute attempted indecent liberties with a child because the act did not occur in the physical presence of the alleged victim. United States v. Miller, 67 M.J. 87, 91 (C.A.A.F. 2008). This Court then remanded the case to AFCCA to determine whether the evidence was legally and factually sufficient to support a finding of guilty to the lesser included offense of indecent acts with another. Id. On remand, AFCCA answered that question affirmatively. Miller, unpub. op. at 2-3.

Applying the reasoning of Miller to this case, the elements of indecent acts with another are:

(1) that the accused committed a certain wrongful act with a certain person.

(2) that the act was indecent;[7] and

(3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, ¶¶ 4.d., 87.d(1) (2005 ed.)

Appellant described that 15-year-old JY watched him over Skype while he exposed his genitalia and masturbated: certainly such behavior is grossly vulgar, obscene and repugnant to common propriety. He also admitted he did this in order to gratify or arouse his own and 15-year-old JY's sexual desires, making his conduct of the form that tends to "excite lust." The fact that JY was 15 tends to "deprave the morals with respect to sexual relations." Finally, such conduct with an underage girl was unquestionably of a nature to lower the Air Force in public esteem. Given that Appellant's crime is encompassed by indecent acts with another, which has historically been a punishable offense under the UCMJ, Appellant's conduct is punishable by "custom of the service." Therefore, if Appellant's conduct is not closely related to any offense listed in Part IV, the maximum punishment for Charge IV as established by "custom of

[7] "Indecent" 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.

the service" is a dishonorable discharge, five years confinement and total forfeitures.

e. Even if the maximum punishment was incorrectly calculated, Appellant suffered no prejudice.

Assuming the maximum punishment was incorrectly calculated in this case, this Court tests for prejudice by examining Appellant's decision to plead guilty and also the sentence assessment. United States v. Walls, 9 M.J. 88, 91 (C.M.A. 1980). In this case, any error would have had minimal effect on Appellant's decision to plead guilty. In fact, we know from the record Appellant never requested or moved to withdraw his guilty plea after the military judge determined the maximum punishment. The entire record also reveals overwhelming evidence of Appellant's guilt. Not only would multiple witnesses, including JY, testify in support of the charged offenses, but Appellant also confessed to his misconduct on two Air Force Forms 1168. (J.A. at 67-74.) Appellant would still have pled guilty, even if he was advised of the maximum confinement based on "custom of the service."

With respect to sentence assessment, if Charge IV was only punishable by "custom of the service," then the maximum punishment for all Appellant's crimes would have been 12 years and one month confinement, as opposed to 22 years and one month confinement. Even if the maximum authorized punishment had been

12 years and one month confinement, the military judge did not even adjudge half of that. Appellant's crimes were serious and warranted severe punishment. The conduct described in Charge IV was perpetrated against a child, certainly placing it on the more severe side of the spectrum for an indecent act. Moreover, Appellant was also convicted of lying on his enlistment paperwork to deliberately conceal the fact that he had prior sex convictions in Kansas before joining the Air Force. These prior convictions were for aggravated indecent liberties with a child for digital penetration of a 7-year old and fondling over the clothes of a 10 or 11 year old when Appellant was 15 years old. Finally, Appellant again falsified official documentation to aid himself in going AWOL, which had to be terminated by apprehension.

The Air Force Court of Criminal Appeals, a court with reassessment authority, already concluded that Appellant still would have pled guilty and still would have received the same sentence adjudged by the military judge alone and approved by the convening authority. Indeed, the totality of Appellant's crimes demonstrates an alarming lack of rehabilitative potential. If the military judge had determined the maximum punishment to be 12 years, one month confinement, he still would have adjudged a sentence of at least the same severity. Thus, even if there was error in assessing the maximum punishment in

this case, Appellant suffered no prejudice. This Court should deny Appellant's request and affirm the entire adjudged and approved sentence including 6 years confinement.

CONCLUSION

WHEREFORE the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 5 August 2015.

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