IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JAVON C. RICHARD,
Airman Basic (E-1), USAF
Appellant

Crim. App. No. 39918

USCA Dkt. No. 22-0091/AF

APPELLANT'S REPLY BRIEF

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 W. Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
U.S.C.A.A.F. Bar No. 36470
matthew.blyth@us.af.mil

MARK C. BRUEGGER
Senior Counsel
AF/JAJA
U.S.C.A.A.F. Bar No. 34247
mark.bruegger.1@us.af.mil

STUART J. ANDERSON, Maj, USAF
Appellate Defense Counsel
AF/JAJA
U.S.C.A.A.F. Bar No. 35036
stuart.anderson.3@us.af.mil

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Supreme Court of the United States

Court of Appeals for the Armed Forces and Court of Military Appeals

Service Courts of Criminal Appeals

Manual for Courts-Martial, United States, 2016

Other Authorities

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman Basic (AB) Javon Richard, the Appellant, hereby replies to the Government's Answer (Ans.) concerning the granted issue, filed on April 25, 2022.

ARGUMENT

The Government's expansive interpretation of "prejudice to good order and discipline" rests on sweeping generalities about military justice. But these platitudes cannot overcome the language of the statute, the President's guidance on Article 134, Uniform Code of Military Justice (UCMJ), and this Court's interpretation of the Article. Nor can they change the immutable facts of this case: the Government, at trial and on appeal, cannot point to a direct and palpable impact on good order and discipline resulting from the charged offenses. Consequently, this Court should hold AB Richard's Article 134, UCMJ, convictions legally insufficient.

1. The incidental involvement of military property or base access is insufficient to demonstrate a direct and palpable impact on good order and discipline.

The Government asserts that AB Richard's "misconduct violated Clause 1 because he used his military status and the resources he

received from the military to effectuate the commission of his crimes." (Ans. at 15.) Specifically, the violation rests on AB Richard's: (1) sponsoring of IB onto a military installation; (2) filming sexual activity in a government-owned dormitory such that government property, like a desk or bed, became involved; (3) possessing contraband images during a government-funded change in duty station; and (4) distributing images that displayed military furniture. (Ans. at 15–18.) This Court can safely dismiss these arguments for several reasons.

First, and perhaps most importantly, enumerating trivial connections to the military cannot substitute for proof beyond a reasonable doubt of a "reasonably direct and palpable" impact on good order and discipline. *Manual for Courts-Martial, United States* (2016), pt. IV, ¶ 60.c.(2)(a) [*MCM*]. The Government neglects to explain how this evidence impacted good order and discipline; rather, it simply states that it did. Legal sufficiency requires more.

Second, the involvement of government property is purely incidental to the charged offenses. Any on-base misconduct will likely involve some government property. And while such misconduct may increase the possibility of prejudicing good order and discipline, more is

needed than just their situs to establish this essential element of a Clause 1 offense. Indeed, nothing about the facts of *this* case shows any importance to the location of the charged offenses or the presence of government-owned furniture.

The dangers of the Government's position are self-evident. The unimportant involvement of government resources cannot convert conduct into a crime. To rely on such minor connections runs counter to the President's caution against charging conduct under Clause 1 if the conduct is only prejudicial in some remote or indirect sense. *See MCM*, pt. IV, ¶ 60.c.(2)(a).

Third, the Government cannot provide authority to support its novel theory of Clause 1's scope. It offers several cases for the proposition that using military property or position for personal gain can prejudice good order and discipline. (Ans. at 20 (citing *United States v. Alexander*, 12 C.M.R. 102 (C.M.A. 1953); *United States v. Bey*, 16 C.M.R. 239 (C.M.A. 1954).) But the factual chasm with those cases is too great.

In *Alexander*, a soldier paid the appellant to transport an alleged Korean prostitute to another base in a government-owned vehicle. 12 C.M.R. at 103. The appellant took this vehicle from the motor pool

without clearance. *Id.* at 104. He also hid the Korean woman in the truck using a significant amount of government clothing, and when he left he had other soldiers as passengers. *Id.* at 103–04. Given these circumstances, ranging from the use of a government vehicle for private gain to the involvement of other soldiers in the appellant's scheme, it is unsurprising that this Court's predecessor had "no doubt" the misconduct had an "appreciable and adverse impact on good order or discipline." *Id.* at 104. Conversely, there was no such demonstrated impact in the present case—no other service members were involved, no government property was unlawfully commandeered to effectuate any crimes, and there was no appreciable effect on any unit or military mission.

Bey is similarly unavailing. In that case, a platoon sergeant took money from a junior enlisted trainee in order to secure a pass to leave base. *Bey*, 16 C.M.R. at 240–41, 243. While this case incidentally involves military housing, *Bey* had an obvious connection to good order and discipline—a superior enlisted member used his authority for private gain by obtaining a pass to temporarily leave the military environment and then selling that pass to a trainee. Such a connection to the military

environment is plainly lacking here, as is any involvement of other service members, let alone those in a subordinate position.

An apt rejoinder to the Government's citations is *United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013). In *Caldwell*, the appellant received news that his commander ordered him into pretrial confinement and that a friend had passed away. *Id.* at 138–39. The appellant then cut open his wrists in his barracks room in an attempt to commit suicide. *Id.* at 138. A senior noncommissioned officer (SNCO) found him and administered medical care with the assistance of corpsmen. *Id.* The appellant received further acute medical care and spent one day in a psychiatric ward before entering pretrial confinement. *Id.* He later pleaded guilty to self-injury under Article 134, UCMJ. *Id.* at 139. During his *Care* inquiry, he explained that his actions were "a touchy subject" in the unit and that officers were "really mad" at him. *Id.*

Reviewing this information, this Court found a substantial basis in fact and law to question the plea and set aside the conviction. *Id.* at 140–41. This Court concluded that the SNCO and corpsmen responded as they would to any injury, unit uneasiness was insufficient for direct and palpable effect, and there was no evidence of diverted medical resources

needed elsewhere. *Id.* at 141. This Court rejected the notion that expenditure of medical resources alone could undermine good order and discipline, as this would render every suicide attempt requiring medical attention *per se* prejudicial to good order and discipline. *Id.*

Applying *Caldwell* to this case further demonstrates the insufficiency of the evidence here. In *Caldwell*, military personnel and resources were directly required in response to the appellant's conduct, and the unit was aware and "uneasy" or "mad" at him. And yet none of this provided a basis to support *a guilty plea* to conduct prejudicial to good order and discipline. Conversely, the only involvement of government resources here was incidental, and no military members were aware at all.

Fourth, the recitation of platitudes about good order and discipline has no bearing on the question before this Court. The Government cites to Supreme Court cases that have underscored the importance of a disciplined fighting force. (Ans. at 18 (citing *Parker v. Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring); *O'Callahan v. Parker*, 395 U.S. 258, 281 (1969) (Harlan, J., dissenting)).) No one disputes the importance of a disciplined military. And the Government was certainly free to

marshal evidence at the court-martial to supports its contention that AB Richard's conduct actually prejudiced good order and discipline. That evidence never came, thus the crux of the Government's argument is that AB Richard violated good order and discipline simply because good order and discipline is so important.

In sum, the Government can only point to marginal connections to military property or military status, and such connections cannot suffice to prove a reasonably direct and palpable impact on good order and discipline.

2. The Government's alternate theory that harm to civilians affects the "order of the military service" similarly falls short of direct and palpable impact on good order and discipline.

The Government seeks to further broaden the scope of good order and discipline by emphasizing the impact on civilians or the civilian community. (Ans. at 20–21 (citing *United States v. Snyder*, 4 C.M.R. 15, 18 (C.M.A. 1952); *Solorio v. United States*, 483 U.S. 435, 445 n.10 (1985)).) However, the Government's cited authorities cannot support the substitution of civilian harm for "reasonably direct and palpable" prejudice to good order and discipline.

For example, the Government misconstrues the import of *Snyder*. That case involved three charged violations of Article 134, UCMJ, wherein the accused enticed three different noncommissioned officers to have sex with a woman, but not for payment. 4 C.M.R. at 16–17. In reviewing these charges for legally sufficiency, this Court's predecessor focused on how the statute applied to disorders and neglects to the prejudice of good order and discipline in the armed forces, and relied heavily on Colonel William Winthrop's definitions in *Military Law and Precedents*. *Id*. at 17–18. This included Col Winthrop's observations regarding crimes against civilians:

> "Inasmuch, however, as civil wrongs, such as injuries to citizens or breaches of the public peace, may, when committed by military persons and *actually prejudicing military discipline*, be cognizable by courts-martial as crimes or disorders, the term 'good order' may be deemed, in cases of such wrongs, *to include, with the order of the military service, a reference to that also of the civil community*." [Emphasis supplied]

4 C.M.R. at 18 (first emphasis added) (quoting William Winthrop, *Military Law and Precedents*, 723 (2d ed. Government Printing Office 1920)). The Government extrapolates from this language its contention that injuring a civilian may, apparently standing alone, "affect the 'order of the military service'" so as to violate the statute. (Ans. at 21.)

However, this proposition ignores the necessary predicate that such conduct must also "actually prejudic[e] military discipline." 4 C.M.R. at 18 (quoting Winthrop, *Military Law and Precedents*, 723). Nowhere in the *Snyder* opinion does the Court proffer as broad an interpretation as the Government suggests; to the contrary, the Court explicitly acknowledged that its inquiry was directed at "whether the misconduct alleged [was] palpably prejudicial to good order and discipline, and not merely prejudicial in an indirect or remote sense." *Id.* at 17–18. Furthermore, the Government cannot point to any cases from the last 70 years that have cited *Snyder* for its desired proposition.

The Government also seizes upon the *Snyder* Court's statement that "acts of the character under scrutiny here must, as a general thing, involve or touch other persons." 4 C.M.R. at 18. But the Government's recitation of how *Snyder* distinguished purely private conduct from that which "touch[es] other persons" misses the mark. (Ans. at 21 (quoting *id.*).) Specifically, the Court noted how if a person chooses to use obscene language "in the presence of other members of the armed forces, the action may, under certain circumstances, be prejudicial to good order and discipline." *Snyder*, 4 C.M.R. at 18. The Government seems to interpret

this as meaning because AB Richard's "conduct very clearly 'touched' another person," it was prejudicial to good order and discipline. (Ans. at 21.) But the Court's use of "may, under certain circumstances," evinces that not all obscene language uttered in the company of other service members will be prejudicial to good order and discipline. Instead, the dispositive factor would be whether the prejudice from that language was "reasonably direct and palpable." *Snyder*, 4 C.M.R. at 17. The same is true here. The mere involvement of another person *may* be prejudicial to good order and discipline, but it is not *per se* prejudicial as the Government contends.

The Government attempts to buttress its position by citing a footnote from *Solorio*, 483 U.S. at 445 n.10. (Ans. at 21.) Specifically, the Government claims that "[t]he mistreatment of an individual by a military member is conduct the Supreme Court has quoted as 'being destructive of good order and discipline' and a 'breach of military [law].'" (Ans. at 21 (citing 483 U.S. at 445, n. 10 (quoting 14 Writings of George Washington 140–41 (J. Fitzpatrick ed. 1936))).) But that portion of *Solorio* addressed the scope of jurisdiction to try servicemembers for noncapital crimes under civilian law. 483 U.S. at 445. This relates to

Clause 3 of Article 134, UCMJ. Thus, the mere fact that George Washington opined that military members committing civilian crimes is "destructive of good order and discipline" does not establish the scope of "prejudice to good order and discipline" for Clause 1 offenses.

The Government also cites *United States v. Choate*, where the appellant mooned[1] a servicemember's wife on base and engaged in a continuous course of sexually degrading conduct. 32 M.J. 423, 426 (C.M.A. 1991). The Government points to the *Choate* Court's comment that a verbal statement from the appellant suggested "'an offense akin to abusing a female on post or communicating indecent language to a female, which have long existed as disorder offenses under military law.'" (Ans. at 23 (quoting 32 M.J. at 426).) But while misconduct against a civilian on base can sometimes prejudice good order and discipline, a conviction for that offense still requires actual evidence of prejudice to good order and discipline, not speculation. The *Choate* Court reviewed all the facts of the case and ultimately concluded that "[o]ur concern is

[1] "Mooning is the 'exhibit[ion] of one's bare buttocks as a defiant or amusing gesture.'" *Choate*, 32 M.J. at 424 n.1 (quoting THE NEW DICTIONARY OF AMERICAN SLANG 282 (1986)).

with the specific facts of this case and the disrupted military environment resulting from appellant's continuous course of sexually degrading conduct toward the wife of a fellow soldier." 32 M.J. at 427. Unlike this case, where the Government offers no evidence of impact on the military, this Court's predecessor in *Choate* found the required disruption.[2]

Two post-*Fosler*[3] Army Court of Criminal Appeals (Army Court) cases are instructive. In *United States v. Parker*, the appellant pleaded guilty to indecent liberties with a child. ARMY 20120713, 2014 CCA LEXIS 651, at *3 (A. Ct. Crim. App. August 27, 2014) (per curiam) (unpublished) (Appendix A). The Army Court began by reviewing *Fosler*'s holding that Clauses 1 and 2 are not synonymous. *Id.* at *5 (citing 70 M.J. at 230). It then noted that, during his plea colloquy, the

---

[2] Of note, the Government also claims that *Choate* demonstrates the breadth of conduct prejudicial to good order and discipline. (Ans. at 23–24.) The Government declines to address the more recent cases of *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013), *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013), and *Caldwell*, 72 M.J. at 141, where this Court addressed prejudice to good order and discipline. In *Goings*, this Court noted the testimony of senior noncommissioned officers regarding the impact on good order and discipline. 72 M.J. at 208. In *Gaskins*, this Court highlighted that the Government failed to "proffer any physical evidence or witness testimony as to how Appellant's acts might have affected [ ] his unit . . . ." 72 M.J. at 234–35.

[3] *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

appellant's admission to conduct prejudicial to good order and discipline "depended on the contingent fact *if* other soldiers knew about his misconduct." *Id.* at *6 (emphasis in original). "Put another way, he explained why his conduct would tend to bring discredit upon the armed forces, but not why his conduct had a reasonably direct and obvious injury [to] good order and discipline." *Id.* at *7. The Army Court thus rejected the plea based on Clause 1 but affirmed based on Clause 2. *Id.* at *8.

In *United States v. Kelly*, the Army Court addressed a similarly flawed guilty plea to offenses charged under Clause 1 and Clause 2. ARMY 20120990, 2014 CCA LEXIS 921 (A. Ct. Crim. App. August 26, 2014) (per curiam) (unpublished) (Appendix B). In that case, the appellant possessed child pornography while he was in Afghanistan and communicated indecent language to a child while he was in Afghanistan. *Id.* at *5–6. The Army Court affirmed based on Clause 2 but rejected the Clause 1 plea because the appellant failed to explain how his conduct affected good order and discipline.

Parker and *Kelly*, like this case, involved offenses against civilians. The notion that crimes against civilians impact the "order of the

service"—even if no one in the service knows—did not even register as a valid theory. The Army Court affirmed on Clause 2 because the conduct tended to discredit the service, independent of any servicemembers' knowledge. Similarly, the Government here dwells on the harm to IB or the ill-defined "community," which resonates only in Clause 2 and not in Clause 1.[4]

The Government concludes its argument on the civilian community impact by stating that "good order and discipline, as well as the safety and security of the community is threatened by crimes committed on a military installation using military resources." (Ans. at 24.) But a hypothetical threat is not a direct and palpable impact on good order and discipline.

[4] With regard to the harm to IB, the Opening Brief overstated the evidence when it asserted that all sexual activity and recordings were consensual. (Brief on Behalf of Appellant (App. Br.) at 34.) All the sexual activity between IB and AB Richard was consensual and lawful. However, IB claimed there was a video taken prior to Prosecution Exhibit 5 of which she was not aware. (JA at 83–84.) The Government did not produce this video, but the members did convict AB Richard of divers production of digital videos of child pornography. (JA at 33.) With regard to Prosecution Exhibit 6, which includes nude images of IB, she consented to video mutual masturbation but was not aware that AB Richard took screenshots of her. (JA at 41, 97.) Neither of these errors affect any arguments made to this Court.

Taken together, the cited authorities cannot support the Government's expansion of Clause 1 to rest upon harm to civilians, rather than direct and palpable prejudice to good order and discipline.

3. The Government's approach flouts meaningful distinctions between Clause 1 and Clause 2 offenses.

The Government contends that the use of government property or status to commit an offense against a civilian satisfies Clause 1. (Ans. at 20–22.) Yet its reasoning eschews key differences between Clause 1 and Clause 2. The Government's argument, in essence, would allow the offense itself to satisfy the terminal element without reference to good order and discipline. Reaching the Government's desired end requires this Court to ignore the language of the statute, the President's guidance, and this Court's consistent, contrary precedent.

In *United States v. Phillips*, this Court held that the Government is not required to specifically articulate how conduct is service discrediting for Clause 2 cases. 70 M.J. at 166. The Government seizes on this line to assert that it is "not required to articulate how [AB Richard's] conduct prejudiced good order and discipline"; instead, it need only introduce evidence of the terminal element beyond a reasonable doubt. (Ans. at 25–26.) Later, the Government explicitly calls for this Court to "align

Clause 1 and Clause 2" and hold that awareness by military personnel is not required for an offense to be prejudicial to good order and discipline. (Ans. at 27.) This Court should reject the Government's invitation to blur Clause 1 and Clause 2 for at least five reasons.

First and foremost is the plain language of the statute. Clause 1 offenses are "disorders and neglects to the prejudice of good order and discipline in the armed forces." Article 134, UCMJ, 10 U.S.C. § 934. Clause 2 offenses encompass "conduct *of a nature* to bring discredit upon the armed forces." *Id.* (emphasis added). The fundamental difference is that one requires an actual impact while the other rests on the nature of the offense. This Court recognized the importance of the distinction in *Phillips*:

> The focus of clause 2 is on the 'nature' of the conduct, whether the accused's conduct would tend to bring discredit on the armed forces if known by the public, not whether it was in fact so known. The statute, which requires proof of the 'nature' of the conduct, does not require the government to introduce testimony regarding views of 'the public' or any segment thereof.

70 M.J. at 165–66 (emphasis in original). Clauses 1 and 2 are not interchangeable.

Second, the President's guidance on Article 134 makes the distinction crystal clear. Clause 1 offenses "refer[ ] only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote and indirect sense." *MCM*, pt. IV, ¶ 60.c.(2)(a). The President's caution against charging acts that are prejudicial "in some remote and direct sense" resounds here. *See id.* Additionally, the President clarified that Clause 1 offenses are "*confined* to cases in which the prejudice is reasonably direct and palpable." *Id.* (emphasis added). "Palpable" means "capable of being touched or felt" or "easily perceptible" by other senses or the mind. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1672 (1976). By contrast, Clause 2 offenses encompass conduct that has "a tendency to bring the service into disrepute or which tends to lower it in public esteem." *MCM*, pt. IV, ¶ 60.c.(3). This distinction—"palpable" versus having "a tendency"—explains the basis for differential treatment.

Third, treating Clause 1 and Clause 2 as requiring similar proof—where the nature of the offense can satisfy either clause without showing an impact—runs counter to almost 15 years of this Court's precedent on the terminal element. Beginning with *United States v. Medina*, 66 M.J.

21 (C.A.A.F. 2008), this Court has recognized the folly of treating Article 134's three clauses as interchangeable. (*See* App. Br. at 32–33.)

Fourth, conflating the two clauses presents a significant notice concern. The Government declines to address notice issues in its answer. But this case shows why the Government's approach is so problematic. AB Richard was on notice to defend against the allegation that his production, possession, and distribution of child pornography was prejudicial to good order and discipline. The Government made zero effort at trial to introduce evidence of the conduct's impact on good order and discipline.

As noted in the Opening Brief, the first mention of good order and discipline from the Government came in rebuttal findings argument and incorrectly stated that possessing child pornography on a phone, by itself, was prejudicial to good order and discipline. (App. Br. at 6–7, 23–26.) On appeal, the Government argues that the presence of military furniture or sponsoring IB on base indicates that AB Richard used government resources to facilitate the offenses. The Government at trial could have, but did not, make such an argument. In fact, it made no valid arguments about prejudice to good order and discipline, instead incorrectly relying

on the offense itself. AB Richard defended himself against the charged offense and was effectively convicted of service discrediting conduct. (*See* App. Br. at 14–16, 19–20.)

Fifth, AB Richard does not ask this Court to make new law or create a new test, despite the Government's protestations. The Government claims that AB Richard offers a new "awareness" test that imposes a "higher burden of proof" for Clause 2 offenses. (Ans. at 26.) Quite the opposite. AB Richard raised the issue of awareness to underscore there is absolutely zero evidence of impact on good order and discipline. Awareness is a natural corollary of the requirement that conduct have a palpable impact on good order and discipline. *See MCM*, pt. IV, ¶ 60.c.(2)(a). While perhaps one could conjure a hypothetical where conduct prejudices good order and discipline without military awareness, this is not that case. The Government, with the benefit of time and hindsight, can point to nothing more than the incidental presence of military property and that the conduct occurred on base. The point is that the lack of *any* awareness among military members accentuates the Government's failure of proof. AB Richard does not require a new awareness test to prevail.

Having branded this a new "test," the Government bemoans its unworkability, raising questions about when military members must become aware of misconduct or whether Clause 1 offenses require military witnesses. (Ans. at 28–29.) These arguments may resonate in another case, but not here. The Government introduced no evidence of direct and palpable impact on good order and discipline during the charged timeframe.

Nor does this constitute a "higher burden of proof" for Clause 1 offenses. The burden of proof is the same; the type of evidence is different. And the difference flows from the language of the statute and the President's guidance—conduct that has a palpable impact on good order and discipline differs from conduct that *tends* to discredit the service. This is why child pornography offenses charged as service discrediting conduct are sufficient even if nobody is aware that they occur. *See Phillips*, 70 M.J. at 166. AB Richard asks no more than a standard legal sufficiency review: whether a reasonable factfinder could conclude that his conduct had a direct and palpable impact on good order and discipline.

4. Overturning *Davis* is not a prerequisite for AB Richard to prevail.

The Government claims that *Davis* remains consistent with *Phillips*, in part because *Davis* simply stated that "[unlawful conduct], by its unlawful nature, *tends* to prejudice good order or to discredit the service." (Ans. at 30–31 (quoting 26 M.J. 445, 448 (C.M.A. 1988) (emphasis added by Government)).) Thus, the argument goes, *Davis* did not say unlawful conduct always prejudices good order and discipline.[5] (Ans. at 30.) As a starting point, this cannot be correct based on the language in *Davis*, which states that generally unlawful conduct "*is* prejudicial to good order and discipline by the very reason that it *is* (or has been) generally recognized as illegal." 26 M.J. at 448 (first emphasis added). AB Richard maintains his position that *Davis* is inconsistent with this Court's jurisprudence on the terminal element. (App. Br. at 31–34.) But overruling *Davis* is not a requirement here. The quoted section of *Davis* was dicta that does not control this case. (*Id.* at 31.)

[5] The Government took the opposite position before the Air Force Court. (JA at 8.)

5. Conclusion

The Government summarizes this case as follows: "[AB Richard] used his government quarters for the privacy he needed to commit his child pornography crimes against a host-country national." (Ans. at 31–32.) This is, if anything, service-discrediting conduct. However, the Government on appeal cannot escape the charging decisions of the Government at trial. It charged AB Richard with child pornography offenses to the prejudice of good order and discipline and then, the presence of government furniture notwithstanding, entirely failed to offer proof of any impact on good order and discipline. AB Richard's convictions under Article 134 are legally insufficient.

WHEREFORE, Appellant respectfully requests this Honorable Court dismiss Specifications 1, 2, and 3 of Charge IV with prejudice.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth@us.af.mil

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar. No. 34247
AF/JAJA
mark.bruegger.1@us.af.mil

STUART J. ANDERSON, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35036
AF/JAJA
stuart.anderson.3@us.af.mil

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 4,455 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth@us.af.mil

APPENDIX A

United States v. Parker

United States Army Court of Criminal Appeals

August 27, 2014, Decided

ARMY 20120713

Reporter
2014 CCA LEXIS 651 *

UNITED STATES, Appellee v. Sergeant JUSTIN E. PARKER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Parker, 2014 CAAF LEXIS 1225 (C.A.A.F., Dec. 23, 2014)*

Prior History: **[*1]** Headquarters, III Corps and Fort Hood. James L. Varley, Military Judge, Lieutenant Colonel Craig E. Merutka, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-Guilty plea was proper because, although the military judge failed to elicit an adequate factual basis that the servicemember's indecent liberties with a child under Unif. Code Mil. Justice art. 134, *10 U.S.C.S. § 934 (2000)*, were prejudicial to good order and discipline, the evidence was sufficient to establish that his indecent acts with a child were servicediscrediting.

Outcome
Affirmed in part and reversed in part.

Counsel: For Appellant: Captain A. Jason Nef, JA; Captain Ian M. Guy, JA, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major Robert A. Rodrigues, JA; Captain Carl L. Moore, JA (on brief).

Judges: Before TOZZI, CAMPANELLA, and CELTNIEKS, Appellate Military Judge.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of rape of a person under the age of 12, and one specification of indecent liberties with a child, in violation of Articles 120 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 920*, *934 (2000)* [hereinafter UCMJ] and one specification of abusive sexual contact with a child, in violation of Article 120, UCMJ (2006 & Supp. II 2009) (current version at *10 U.S.C. § 920 (2012)*). The military judge convicted appellant, contrary to his pleas, of one specification of rape of a person under the age of 12 on divers occasions, one specification of assault with intent to commit rape,

four specifications of indecent acts with a child, and one specification of indecent liberties with a child in violation of *Articles **[*2]** 120* and *134, UCMJ* (2000). The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-three years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved sixteen years confinement and approved the remainder of the sentence.

Appellant's case is before this court for review pursuant to *Article 66, UCMJ*. Appellant raises two assignments of error which warrant discussion and relief.* First, we conclude the military judge failed to elicit an adequate factual basis that appellant's indecent liberties with a child under *Article 134* were prejudicial to good order and discipline. Second, we find the evidence is legally and factually insufficient to establish that appellant's indecent acts with a child were prejudicial to good order and discipline. In all instances, appellant's conduct was servicediscrediting, and we accordingly affirm his *Article 134* convictions under a Clause 2 theory.

BACKGROUND

Appellant was charged, *inter alia*, of assault with intent to commit rape, indecent liberties with a child, and indecent acts with a child, "which **[*3]** conduct, under the circumstances, was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces." Thus, the government charged appellant in each instance with violating Clause 1 and Clause 2 of *Article 134, UCMJ*.

Appellant pleaded guilty to one specification of indecent liberties with a child (the Specification of The Additional Charge). His stipulation of fact does not discuss either whether his conduct was prejudicial to good order and discipline or was service-discrediting. At the providence inquiry, the military judge properly defined Clause 1 as "'[c]onduct prejudicial to good order and discipline,' is conduct which causes a reasonably direct and obvious injury to good order and discipline." At his plea inquiry, appellant affirmatively answered that his conduct was prejudicial to good order and discipline. When asked why, appellant answered, "At the time I was an NCO . . . and had my Soldiers knew [sic] what was going on, I believe it would have affected the morale and discipline, and the respect they have for the military . . ." Appellant also answered affirmatively when the military judge asked him if it would have caused **[*4]** problems if other people in appellant's unit had known what appellant was doing.

Appellant pleaded not guilty to one specification of assault with intent to commit rape, one specification of indecent liberties with a child, and several specifications of indecent acts with a child. To prove the terminal element of *Article 134, UCMJ*, the trial counsel asked the following questions to the victim:

> Q: Now, [appellant], was a Soldier, had any Soldiers ever lived with you before this, or had you known any Soldiers?
> A: Yes.
> Q: And what was your overall impression of Soldiers before [appellant] did this to you, what would you say?
> A: I thought Soldiers were good and they were supposed to protect people and I knew that they were fighting for our country. And I just thought they were good.
> Q: And what [appellant] did to you affect your overall impression of Soldiers in any way?
> A: Yes.
> Q: Will you tell the judge how?
> A: I don't think that Soldiers -- Well, not all of them are good. I am not as trusting to them. And just because somebody is in the Army I don't automatically trust them or believe that they are a good person.

The military judge found appellant guilty of all *Article 134* specifications under **[*5]** both Clause 1 and Clause 2.

LAW AND DISCUSSION

---

* The matters personally submitted by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)* are without merit.

A. Providence of Appellant's Guilty Plea Under a Clause 1 Theory of Criminality

"During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." *United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008)* (citing *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991))*. We review a military judge's decision to accept a plea for an abuse of discretion by determining whether the record as a whole shows a substantial basis in law or fact for questioning the guilty plea. *Id. at 322*; *UCMJ art. 45*; Rule for Courts-Martial 910(e).

As our superior court recently reiterated, "[t]he . . . clauses of *Article 134* constitute '. . . distinct and separate parts.'" *United States v. Fosler, 70 M.J. 225, 230 (C.A.A.F. 2011)* (quoting *United States v. Frantz, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953))*; *see also Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶¶ 60.c.(2), (3). It follows, then that "[v]iolation of one clause does not necessarily lead to a violation of the other . . . ." *Id*. More specifically to the case before us, the court in *Fosler* stated that "disorders and neglects to the prejudice of good order and discipline" are not synonymous with "conduct of a nature to bring discredit upon the armed forces . . . ." *Id*. Thus, if a specification alleges both Clause 1 and 2, then there must be a substantial basis **[*6]** in fact in the record to support a finding of guilty as to both.

Given the facts of this case, there is no question that appellant committed indecent liberties with a child. Moreover, the plea inquiry established facts demonstrating appellant's conduct was service-discrediting, and we are convinced that appellant understood that his conduct tended to discredit the armed forces. However, the plea inquiry failed to elicit an adequate factual basis regarding the prejudicial effect of appellant's misconduct on good order and discipline in the armed forces. Here the military judge properly defined and explained the term "prejudice to good order and discipline," as, *inter alia*, "conduct which causes a reasonably direct and obvious injury to good order and discipline." *See also MCM*, Part IV, ¶ 60.c.(2)(a).

While appellant acknowledged that his conduct violated Clause 1, his factual explanations as to why his conduct violated Clause 1 are insufficient. Appellant's stated reasons for his conduct violating Clause 1 depended on the contingent fact *if* other soldiers knew about his misconduct. He never stated that the public and other soldiers were aware of his conduct. This contingency does not **[*7]** establish a reasonably direct and obvious injury to good order and discipline. Put another way, he explained why his conduct would tend to bring discredit upon the armed forces, but not why his conduct had a reasonably direct and obvious injury good order and discipline. As a result, we therefore find a substantial basis in law and fact to question the providence of appellant's plea to committing conduct prejudicial to good order and discipline in violation of Clause 1 of *Article 134*. We find no substantial basis in law or fact to question appellant's guilty plea under a Clause 2 theory of criminality.

B. Legal and Factual Sufficiency Under a Clause 1 Theory of Criminality

This court reviews legal sufficiency issues de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. In conducting our review, we must determine "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))*.

Article 66(c), UCMJ, requires the Court of Criminal Appeals to conduct a de novo review of the factual sufficiency of the case. *See United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)*. The review "involves a fresh, impartial look at the evidence, giving no deference to the decision **[*8]** of the trial court on factual sufficiency beyond the admonition in *Article 66(c), UCMJ*, to take into account the fact that the trial court saw and heard the witnesses." *Washington, 57 M.J. at 399*. This court "applies neither a presumption of innocence nor a presumption of guilt," but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id*.

During the contested portion of appellant's trial, the victim's testimony established beyond a reasonable doubt appellant's liability under a servicediscrediting theory of criminality. However, that testimony does not establish a reasonably direct and obvious injury to good order and discipline. Nor does the other evidence admitted at trial establish appellant's liability under Clause 1 either. The government concedes that the evidence is insufficient to sustain convictions under Clause 1 for these contested offenses, and after reviewing the record, we accept that concession. Consequently, the evidence is legally and factually insufficient to establish appellant's guilt under a Clause 1 theory of liability for his *Article 134* offenses.

CONCLUSION

On consideration of the entire record, as **[*9]** well as those matters personally raised by appellant pursuant to *Grostefon*, the court affirms only so much of the finding of guilty of Specification 1 of Charge III as follows:

> In that [appellant], U.S. Army, did, at or near Fort Carson, Colorado, between on or about 24 November 2003 and 3 March 2005, commit an assault upon Ms. SE, by trying to pull down her pajamas with his hands, while Ms. SE was trying to stop him, which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The court affirms only so much of the findings of guilty of Specification 2 of Charge III as follows:

> In that [appellant], U.S. Army, did, at or near Fort Carson, Colorado, on divers occasions between on or about 24 November 2003 and 3 March 2005, commit an indecent act upon the body of Ms. SE, a female under 16 years of age, not the wife of [appellant], by touching her breasts and genitalia with his hand, and putting his mouth on her breast, with the intent to arouse and gratify the sexual desires of Ms. SE and [appellant], which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The court affirms only so much of the findings of guilty **[*10]** of Specification 3 of Charge III as follows:

> In that [appellant], U.S. Army, did, at or near Fort Carson, Colorado, between on or about 24 November 2003 and 3 March 2005, commit an indecent act upon the body of Ms. SE, a female under 16 years of age, not the wife of [appellant], by rubbing his penis against Ms. SE's body, with the intent to arouse and gratify the sexual desires of Ms. SE and [appellant], which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The court affirms only so much of the findings of guilty of Specification 4 of Charge III as follows:

> In that [appellant], U.S. Army, did, at or near Fort Carson, Colorado, between on or about 24 November 2003 and 3 March 2005, commit an indecent act upon the body of Ms. SE, a female under 16 years of age, not the wife of [appellant], by putting his finger inside Ms. SE's vulva, with the intent to gratify the sexual desires of Ms. SE and [appellant], which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The court affirms only so much of the findings of guilty of Specification 5 of Charge III as follows:

> In that [appellant], U.S. Army, did, at an unknown **[*11]** location traveling between Fort Carson, Colorado and Texas, between on or about 24 November 2003 and 3 March 2005, take indecent liberties with Ms. SE, a female under 16 years of age, not the wife of [appellant], by rubbing his penis with his hand, while he was touching Ms. SE's breast with his other hand, with the intent to arouse and gratify the sexual desires of [appellant], which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The court affirms only so much of the findings of guilty of Specification 6 of Charge III as follows:

> In that [appellant], U.S. Army, did, at or near Fort Hood, Texas, between on or about 20 July 2006 and 30 September 2007, commit an indecent act upon the body of Ms. SE, a female under 16 years of age, not the wife of [appellant], by touching her breast with his hand, with the intent to arouse and gratify the sexual desires of Ms. SE and [appellant], which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The court only affirms so much of the Specification of The Additional Charge as follows:

> In that [appellant], U.S. Army, did at or near Fort Hood, Texas, between on or about **[*12]** 1 July 2006 and 30 September 2007, take indecent liberties with Ms. TB, a female under 16 years of age, not the wife of [appellant], by rubbing his genitalia on her genitalia and groin and touching her breast with his hand, with intent

> to arouse, appeal to, and gratify the lust and sexual desires of [appellant], which conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles articulated by our superior court in *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2014)* and *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, the sentence as approved by the convening authority is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

APPENDIX B

United States v. Kelly

United States Army Court of Criminal Appeals

August 26, 2014, Decided

ARMY 20120990

Reporter
2014 CCA LEXIS 921 *

UNITED STATES, Appellee v. Specialist CORY D. KELLY United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Kelly, 2014 CAAF LEXIS 1037 (C.A.A.F., Oct. 27, 2014)*

Prior History: **[*1]** Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell (pretrial) Headquarters, Fort Campbell (action). Steven E. Walburn, Military Judge. Colonel Jeff A. Bovarnick, Staff Judge Advocate.

Case Summary

Overview
HOLDINGS: [1]-There was no question that appellant wrongfully and knowingly possessed child pornography and communicated indecent language to a child under sixteen years, and his conduct was service-discrediting; [2]-The plea inquiry, however, failed to elicit an adequate factual basis regarding the prejudicial effect of appellant's misconduct on good order and discipline in the armed forces; [3]-Appellant explained why his conduct would tend to bring discredit upon the armed forces, but not why his conduct had a reasonably direct and palpable effect upon good order and discipline.

Outcome
Judgment affirmed in part.

Counsel: For Appellant: Captain A. Jason Nef, JA; Captain Susrut A. Carpenter, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Robert A. Rodrigues, JA; Captain Benjamin W. Hogan, JA (on brief).

Judges: Before TOZZI, CAMPANELLA, and CELTNIEKS Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of violating a lawful general order, one specification of wrongfully and knowingly possessing child pornography, and four specifications of communicating indecent language to a child under sixteen years, in violation of Articles 92 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 892*, *934 (2006)* [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for three months, and reduction to the grade of E-1.

Appellant's case is before this court for review pursuant to *Article 66, UCMJ*. Appellant raises **[*2]** one assignment of error which warrants discussion and relief.* We conclude the military judge failed to elicit an adequate factual basis as to whether appellant's misconduct charged under *Article 134, UCMJ* was prejudicial to good order and discipline. Although not raised by the parties, we also consolidate two specifications of communicating indecent language to a child under sixteen years.

"During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." *United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008)* (citing *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)*). We review a military judge's decision to accept a plea for an abuse of discretion by determining whether the record as a whole shows a substantial basis in law or fact for questioning the guilty plea. *Id. at 322*; *UCMJ art. 45*; Rule for Courts-Martial 910(e).

The government charged appellant with wrongfully and knowingly possessing child pornography and communicating indecent language to a child under sixteen years, "which conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the [a]rmed [f]orces," a violation of Clauses 1 and 2 of *Article 134, UCMJ*. *See Manual* ***[*3]*** *for Courts—Martial, United States* (2008 ed.), pt. IV, ¶¶ 60.c.(2), (3). As our superior court recently reiterated, "[t]he . . . clauses of *Article 134* constitute '. . . distinct and separate parts.'" *United States v. Fosler, 70 M.J. 225, 230 (C.A.A.F. 2011)* (quoting *United States v. Frantz, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953)*). It follows, then that "[v]iolation of one clause does not necessarily lead to a violation of the other . . . ." *Id*. More specifically to the case before us, the court in *Fosler* went on to state that "disorders and neglects to the prejudice of good order and discipline" are not synonymous with "conduct of a nature to bring discredit upon the armed forces . . . ." *Id*. Thus, if a specification alleges both Clause 1 and 2, then there must be a substantial basis in fact in the record to support a finding of guilty as to both.

Given the facts of this case, there is no question that appellant wrongfully and knowingly possessed child pornography and on multiple occasions communicated indecent language to a child under sixteen years. Moreover, the plea inquiry established facts demonstrating that appellant's conduct was service-discrediting. The plea inquiry, however, failed to elicit an adequate factual basis regarding the prejudicial effect of appellant's misconduct on good order and discipline in **[*4]** the armed forces. Here, the military judge properly defined and explained the term "prejudice to good order and discipline," as, *inter alia*, "those acts in which the prejudice is reasonably direct and palpable . . ." *See also MCM*, Part IV, ¶ 60.c.(2)(a).

While appellant acknowledged that his conduct violated Clause 1, his factual explanation as to why his conduct violated Clause 1 is insufficient. For both offenses, he stated that his conduct violated Clause 1 *if* the public or other soldiers knew about his misconduct. He never stated that the public and other soldiers were aware of his conduct. Put another way, he explained why his conduct would tend to bring discredit upon the armed forces, but not why his conduct had a reasonably direct and palpable effect upon good order and discipline. As a result, we find a substantial basis in law and fact to question the providence of appellant's plea to committing conduct prejudicial to good order and discipline in violation of Clause 1 of *Article 134, UCMJ*.

We also note two of appellant's convictions for communicating indecent language to a child under sixteen years, Specifications 4 and 5 of Charge II, respectively, occurred on 14 May 2011. **[*5]** Nothing in the record indicates that these offenses occurred separately or were otherwise distinct criminal transactions. Accordingly, we find that these specifications unreasonably exaggerate appellant's criminality. *See United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001)*. We consolidate the specifications as a remedy.

CONCLUSION

---

* The matters personally submitted by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)* are without merit.

On consideration of the entire record, as well as those matters personally raised by appellant pursuant to *Grostefon*, the court affirms only so much of the finding of guilty of Specification 1 of Charge II as follows:

> In that [appellant], U.S. Army, did, at or near Forward Operating Base Tarin Kowt, Afghanistan, on or about 29 June 2011, wrongfully and knowingly possess approximately 10 images of child pornography, which conduct was of a nature to bring discredit upon the Armed Forces.

The court only affirms so much of Specification 2 of Charge II as follows:

> In that [appellant], U.S. Army, did, at or near Fords, New Jersey, on or about 29 March 2011, in writing communicate to [LJ], a child under the age of 16 years, certain indecent language, to wit: "I'd cum on ur chest then on ur face", or words to that effect, which conduct was of a nature to bring discredit upon the Armed Forces.

The court only affirms so **[*6]** much of Specification 3 of Charge II as follows:

> In that [appellant], U.S. Army, did, at or near Forward Operating Base Tarin Kowt, Afghanistan, on or about 25 February 2011, in writing communicate to [LJ], a child under the age of 16 years, certain indecent language, to wit: "yea I'll spank u and fuck u in the ass", or words to that effect, which conduct was of a nature to bring discredit upon the Armed Forces.

Specifications 4 and 5 of Charge II are consolidated into Specification 4 of Charge II as follows:

> In that [appellant], U.S. Army, did, at or near Forward Operating Base Tarin Kowt, Afghanistan, on or about 14 May 2011, in writing communicate to [LJ], a child under the age of 16 years, certain indecent language, to wit: "so I can pull it out and handcuff ur hands behind ur back and make u cry for my dick" and "then pound ur pussy and right before i cum ill shoot it in ur mouth", or words to that effect, which conduct was of a nature to bring discredit upon the Armed Forces.

The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles articulated by our superior court in *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2014)* and *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, **[*7]** the sentence as approved by the convening authority is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

End of Document

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on May 5, 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth@us.af.mil