IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SCOTT A. MEAKIN,
Lieutenant Colonel (O-5), USAF
Appellant.

Crim. App. No. 38968

USCA Dkt. No. 18-0339/AF

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

WHETHER APPELLANT'S CONVICTION FOR ENGAGING IN ANONYMOUS, PRIVATE, AND CONSENSUAL COMMUNICATIONS WITH AN UNKNOWN PARTNER(S) IN THE PRIVACY OF HIS HOME WAS LEGALLY SUFFICIENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (CCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Between August 26-28, 2015, Lieutenant Colonel Scott Meakin [hereinafter Appellant] was tried at a general court-martial comprised of a military judge alone at Davis-Monthan Air Force Base, Arizona. Contrary to his pleas, Appellant was convicted of two charges and seventeen specifications of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2012). (JA at 89, 214-15). Consistent with his pleas, Appellant was acquitted of one specification of conduct unbecoming an officer

and a gentleman, in violation of Article 133, UCMJ. (*Id.*). The military judge sentenced Appellant to a dismissal, 20 months confinement, and total forfeitures of all pay and allowances. (JA at 218).

On July 14, 2017, the CCA denied Appellant relief from his claims that the speech underlying his convictions was protected by the First Amendment. (JA at 4-7). But upon finding an error in the Addendum to the Staff Judge Advocate's Recommendation, as well as a violation of Article 12, UCMJ, 10 U.S.C. § 812 (2012), the CCA set aside the convening authority's action and ordered new post-trial processing. (JA at 16-20).

On December 2, 2017, the convening authority approved 19 months and 15 days of confinement, and otherwise approved the adjudged sentence. (JA at 29-30). On June 21, 2018, the CCA affirmed the findings and amended sentence. (JA at 25).

Appellant petitioned this Court for review on August 17, 2018, and this Court granted review on October 11, 2018.

STATEMENT OF FACTS

Investigatory Background

In November 2013, a special agent with a Canadian Internet Child Exploitation unit conducted a sting operation on the website "Motherless." (JA at 100-02). Motherless is a "primarily pornographic" website that allows users to post images, engage in online group discussion forums, or chat privately with other users. (JA at 102).

Pursuant to the agent's operation, he posed as a father who was offering his daughter for sexual exploitation. (JA at 103). In this role, he began a chat with Appellant. (*Id.*). The chat related to the men performing sexual activities with their respective daughters. (JA at 103, 219). This chat was a one-on-one, private conversation between the agent and Appellant. (JA at 118-19). No other users were involved or could access the pair's conversation. (*Id.*). Appellant never provided his real name or identified himself as an Air Force member during these communications. (JA at 116).

At some point, Appellant suggested they move their private chat to Yahoo Instant Messenger (IM) and provided his e-mail

address: "love2ski4@yahoo.com." (JA at 106). After the agent claimed he could not access Yahoo IM, the conversation moved to e-mail. (*Id.*).

The ensuing e-mail conversation then spanned from November 27, 2013 to January 7, 2014, with various breaks (typically between one to two days) between messages. (JA at 226-57). During the conversation, the parties referenced their purported sexual desires and activities, and discussed a visit from Appellant, wherein he agreed to sexually exploit the agent's fictitious daughter. (JA at 228-30, 232, 234-361). Ultimately, however, Appellant told the agent that he would neither visit nor sexually exploit anyone:

> Hey man, I'm not going to come. I'm all talk man. I could never do what I've been saying. Just like to talk. I'm sure you are pissed. I could just never do that stuff. Hope you understand.

(JA at 580; *see also* JA at 124).[1] This was the last message Appellant sent to the agent. (JA at 124).

Similar to their online chat, the e-mails between the agent and Appellant were one-on-one, private communications that were

[1] This was the second time Appellant indicated he would not perform the previously discussed acts or would not visit. (JA at 121, 238).

inaccessible to the public. (JA at 118-19). Appellant called himself "John Jones" and claimed to live in San Diego, California. (JA at 117, 226-57). Appellant also reiterated that he had a daughter. (JA at 114, 229-30). None of this information was true, as Appellant actually lived in Tucson, Arizona, and did not have a daughter. (JA at 117, 145). Further, Appellant never identified himself as a military or Air Force member. (JA at 117, 226-57).

Following Appellant's last e-mail, the agent traced the communications as originating from an Internet Protocol (IP) address in Tucson belonging to Comcast.[2] (JA at 112, 122). Due to jurisdictional issues, the agent forwarded this information to an American contact in the Department of Homeland Security (DHS). (JA at 112-15).

The DHS agent later identified Appellant as the user of the assigned IP address and executed a search of Appellant's residence. (JA at 122, 129-30). Investigators seized computers, flash drives, and

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[2] A computer attached to the Internet uses a unique numerical address called an Internet Protocol address, or IP address, to identify itself to other computers. *See*, *e.g.*, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 987 n.1 (2005).

disks (JA at 138); none of which were government-owned or issued (JA at 142).

Appellant waived his right to remain silent and cooperated in separate interviews with federal and Air Force investigators. (JA at 134-37, 258-356). Appellant admitted to conversing about sexual conduct with minors, but said it was only a fantasy. (JA at 137, 150, 271, 275, 327-28). He denied using government equipment to communicate his fantasies (JA at 340, 347), confirmed that the traced IP address was from his house (JA at 337-38), and insisted he had never actually abused any children (JA at 150, 316). Investigators corroborated these facts and likewise found no evidence indicating Appellant made any arrangements to carry out his fantasies. (JA at 144, 146, 160-61).

Appellant also agreed to help DHS find the person purportedly trying to exploit a child (i.e., the Canadian agent who was offering his fictitious daughter). (JA at 150). However, Appellant doubted whether the information provided by the individual he communicated with was true (JA at 278-79) and suspected the user was similarly engaged in mere fantasy (JA at 150, 314).

Appellant's Communications with Unknown Individual(s)

After searching Appellant's devices, investigators discovered other e-mail communications from Appellant which referenced sex with minors. (JA at 174-75, 357-461). These e-mails were between Appellant and the following partner(s): (1) "Austin Hickey," (2) "bj goodson," (3) "Chronic Bator," (4) "foodspunker," (5) "funninezerosix," (6) "jes120652," (7) "Jpunani3607," (8) "grobbles77," (9) "maggiemos13," (10) "MeierT69," (11) "Mondyman69," (12) "rcj303," (13) "std4uanme," (14) "steve636," (15) "stwiggy1988," (16) "taylor23cd," and (17) "wxlp97xqc." (JA at 357-461).

Appellant's e-mails referenced graphic fantasies, including his purported preference for young girls aged 12 – 17 years (JA at 359); oral ejaculations (JA at 364, 380, 385, 437); surreptitiously ejaculating in food (JA at 360, 405, 409); and forced oral sex (JA at 415, 451). In some of the e-mails, Appellant requested photographs or videos of purported minors. His requests were relayed in the following manner:

> (1) "Send me a pic of that thick ass" [of purported 16 year old] (JA at 358);
>
> (2) "hey send me those pics of her the one with it in her

mouth" (JA at 387);

(3) "oh wow share that pic please" [in response to comment from e-mail partner claiming to be masturbating to picture of a 7 year old] (JA at 413);

(4) "sedn [sic] a young vid please :)" (JA at 415);

(5) "got any more bj vids witht he [sic] youngs" (JA at 416);

(6) "you have a pic of the 12 and 8" (JA at 421);

(7) "got any nudes or bra and panties?" [of purported 12 year old] (JA at 424);

(8) "you got any young nudes?" (JA at 428);

(9) "you have any nudes? . . . send a couple" [in reference to "flash shots"] (JA at 430);

(10) "so you like em young huh :) got any pics? . . . can you photo share" (JA at 443);

(11) "show me some of your favs." (JA at 445);

(12) "do you have any pics [of a 13 year old]?" (JA at 447);

(13) "you got some nudes? . . . send a few :)" (JA at 455);

(14) "do you have any nude pics [of a 9 year old]? . . . any vids" (JA at 459).

Appellant also requested photos of a purported 18 year old. (JA at 450). It is unclear from the record what images, if any, Appellant received from his e-mail partner(s).

Appellant never provided his real name in any of the e-mails he sent his partner(s), nor did he identify himself as a member of the military. (JA at 159-60, 357-461). In many of his communications, Appellant referenced a fictitious daughter. (JA at 360-61, 378, 395, 408, 446). In turn, Appellant's e-mail partner(s) frequently referenced his/her/their own purported children or children they claimed to have access to, ranging in age from 3 to 18. (*See*, *e.g.*, JA at 360-61, 406, 414, 419, 447, 449, 454, 458). In Appellant's e-mails to "maggiemos13," "maggiemos13" claimed to be 14 years old. (JA at 441). This appears to be the only e-mail exchange where Appellant communicated directly with a user(s) purporting to be underage.

Despite the involvement of at least three investigative agencies,[3] the government never ascertained the identity or age of Appellant's e-mail partner(s). (JA at 180-81). Correspondingly, the government had no evidence indicating that Appellant's e-mail partner(s) represented more than one individual. The government

[3] Among the agencies involved in the investigation include the Internet Child Exploitation Unit of the Halton Regional Police Service in Ontario, Canada (JA at 99-100); DHS, Homeland Security Investigations (JA at 128, 152); and the Air Force Office of Special Investigations (JA at 169).

also found no evidence indicating any actual children were abused as a result of Appellant's e-mails (JA at 160-61) or that Appellant himself ever harmed any child (JA at 179). There is no evidence that Appellant's e-mail partner(s) or any third parties ever complained about Appellant's communications. Appellant's e-mail partner(s) appeared to be willing to engage in communications with Appellant, and all of the e-mails appear to be one-on-one, non-commercial, private messages. (JA at 357-461). Additional facts regarding Appellant's communications are included in the Argument section below.

Legal Proceedings

Appellant pled and was found guilty in federal district court to knowing access of child pornography.[4] (JA at 518, 496-501). The military later charged Appellant with eighteen specifications alleging conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ. (JA at 33-42). Appellant's communication with the Canadian law enforcement officer was charged as Specification 1 of

[4] There is no evidence before this Court that Appellant's federal conviction for the possession of child pornography was connected to his communications with his e-mail partner(s).

the Charge. (JA 33, 35). The other e-mail correspondence was charged as Specifications 2-17 of the Charge, as well as the lone specification of the Additional Charge. (JA at 35-40).

At Appellant's court-martial, the only evidence that his e-mails with the unknown individual(s) diminished anyone's opinion of Appellant as an officer was from the investigators who uncovered the communications in the course of their investigation and the commander who reviewed the evidence in order to determine whether to prefer charges. (JA at 138-39, 186-87).

Prior to trial, Appellant's defense counsel moved to dismiss the charges and their specifications, alleging that Appellant's communications were private and constitutionally protected. (JA at 570-72). The defense largely relied on *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Stanley v. Georgia*, 394 U.S. 557 (1997), wherein the Supreme Court respectively proscribed the state from regulating private intimate sexual conduct that is not commercial in nature and permitted the possession of obscene materials in one's own home, excluding child pornography. (*Id.*). The defense argued that if *Lawrence* held as fundamental the right of individuals to make

decisions regarding private, consensual sexual conduct, "[c]riminalizing the communication within those private conversations cuts against the foundation of that fundamental right." (JA at 571).

Trial defense counsel also distinguished Appellant's case from *United States v. Hartwig*, 39 M.J. 125, 126-28 (C.A.A.F. 1994), wherein the accused sent an unwanted communication to a minor and identified himself as a military member. (JA at 60). In contrast, Appellant engaged in anonymous, private, and apparently consensual communications with his partner(s). (JA at 60-61).

In its response, the government conceded that – other than the Canadian detective – the identity of Appellant's e-mail partner(s) was unknown. (JA at 69). The government further conceded that there was no evidence any third parties could see the communications between Appellant and his e-mail partner(s). (*Id.*).

Nevertheless, the government argued that the due process right to privacy did not apply to speech, and that *Lawrence* was therefore inapplicable since it addressed conduct not speech. (JA at 67, 573-78). The government further argued that Appellant did "not just hav[e] a

private conversation with a counselor or spouse," he "publish[ed] it out into the world" (JA at 69) because he sent the message over the Internet (JA at 84-85). Notably, the government cited *Hartwig* as the appropriate standard to determine whether private speech is protected. (JA at 71).

In considering the motion, the military judge found that no evidence was presented on the following: (1) the context of the charged communications between Appellant and his e-mail partner(s); (2) whether Appellant's e-mail partner(s) was/were one or more persons; (3) the identity of Appellant's e-mail partner(s); (4) the age of Appellant's e-mail partner(s); (5) the location of Appellant's e-mail partner(s), including whether the partner(s) was/were in Appellant's home; (6) whether Appellant's e-mail partner(s) shared any of the e-mail communications; (7) whether Appellant's e-mail partner(s) acted upon any of the communications; and (8) the relationship between Appellant and his e-mail partner(s). (JA at 90-91). Ultimately, however, the military judge held that the First Amendment did not protect Appellant from a conviction on the charges and specifications. (JA at 91). Although not explicitly cited,

this holding seemed to rest on Appellant distributing what the military judge found to be indecent communications "outside the privacy of the home or private space." (*Id.*). Accordingly, the military judge denied the defense's motion to dismiss. (*Id.*). The military judge later found Appellant guilty of all but one of the eighteen charged specifications. (JA at 216-17).

The CCA's Analysis

In its review of Appellant's case, the CCA addressed whether Appellant's private, anonymous, and apparently consensual online chats and e-mails were sufficient to constitute conduct unbecoming an officer. (JA at 4-7). Citing the Supreme Court's language from *Stanley*, which questioned the government's ability to reach into the privacy of one's own home to enforce obscenity regulations, the CCA noted that "the zone of privacy *Stanley* protected does not extend beyond the home." (JA at 6).

The CCA then opined that Appellant's "obscene 'fantasies' via the medium of online chats and e-mails" are not afforded constitutional protection. (JA at 7 (citing *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994))). Deeming Appellant's communications

"clearly indecent," and finding that Appellant "did not have to outwardly identify himself as a member of the military for his actions to constitute conduct unbecoming an officer," the CCA upheld his conviction as legally sufficient. (JA at 7).

SUMMARY OF ARGUMENT

"[A]lmost every obscenity case involves difficult constitutional issues." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 379 (1971) (Black, J., dissenting). The present case is no exception.

Here, Appellant communicated repugnant sexual fantasies involving children. While it is impossible to condone Appellant's language, the manner by which he effected his communications affords his speech constitutional protection. All of Appellant's communications were one-on-one, private, and non-commercial. Appellant did not threaten anyone, incite others to imminent lawless action, or explicitly request illegal materials. Appellant sent his messages from his home, using his personal devices vice government equipment, and did not outwardly involve any military members or otherwise identify himself as an Air Force officer. And with one

possible exception, Appellant appeared to be communicating with consenting adults.

Under these circumstances, the majority of Appellant's communications should be considered private, sexual intimacies with a willing partner(s) and afforded constitutional protection under *Stanley* and *Lawrence*.

ARGUMENT

APPELLANT'S CONVICTION FOR ENGAGING IN ANONYMOUS, PRIVATE, AND CONSENSUAL COMMUNICATIONS WITH AN UNKNOWN PARTNER(S) IN THE PRIVACY OF HIS HOME WAS NOT LEGALLY SUFFICIENT.

Standard of Review

Issues of legal sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "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. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

For cases where the First Amendment may render a conviction legally insufficient, this Court must first determine "whether 'the speech involved . . . is . . . protected under the First Amendment.'" *United States v. Rapert*, 75 M.J. 164, 170 (C.A.A.F. 2016) (quoting *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008)); *accord Jenkins v. Georgia*, 418 U.S. 153, 163 (1974) (Brennan, J., concurring) (noting that appellate courts are required "to review independently the constitutional fact of obscenity"). If this Court finds such speech protected, it must then determine whether the government has proved the elements of the charged offense. *Rapert*, 75 M.J. at 170-171. "Finally, if the Government has successfully carried its burden . . . the Court may undertake to determine 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" *Id.* (quoting *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (C.M.A. 1972)) (citing *Wilcox*, 66 M.J. at 449). This is a question of law this Court reviews *de novo*. *Id*. at 172 (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)).

Law and Analysis

A. Appellant's private, non-commercial communications with a willing partner(s) was protected speech.

It is well-settled that obscene speech is not protected by the First Amendment. *See*, *e.g.*, *United States v. Williams*, 553 U.S. 285, 288 (2008) (citing *Roth v. United States*, 354 U.S. 476, 481-485 (1957)); *Wilcox*, 66 M.J. at 447-8 (citations omitted). Nevertheless, the Supreme Court has extended First Amendment protection for some otherwise obscene activities that occur in the privacy of one's own home.

In *Stanley*, 394 U.S. at 557, the Court rejected as unconstitutional a state obscenity law that effectively prohibited possessing obscene materials in one's home. The Court distinguished the case from those involving public distribution, as with the latter "there is always the danger that obscene material might fall into the hands of children, or that it might intrude upon the sensibilities or privacy of the general public." *Id*. at 567 (internal citations omitted). The Court also famously noted:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means

> anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.

Id. at 565.

More than thirty years later, in *Lawrence*, 539 U.S. at 558, the Court invalidated, on substantive due process grounds, a state law criminalizing sodomy between consenting adults. The Court reasoned that the "far-reaching consequences" of laws that purport to merely limit a particular sexual act "touch[ ] upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id*. at 567. Notably, however, the Court did not limit its holding to conduct occurring in one's home. *Id*. at 562, 578.

While *Stanley* and *Lawrence* did not address pure speech *per se*, it would be incongruous to not extend their holdings to private communications, especially those emanating from or within the home. *Cf*. *Lawrence*, 539 U.S. at 590) (Scalia, J., dissenting) (noting that the *Lawrence* decision "call[s] into question" morality-based laws, including those prohibiting obscenity). If an individual may, within his/her home, possess materials or engage in private conduct with another that his/her community otherwise deems obscene, that

individual should be able to privately discuss said materials or said conduct within his/her home or in a comparatively private setting. To hold otherwise would undercut the First Amendment and privacy interests that serve as the foundations for *Stanley* and *Lawrence*. Consequently, it is reasonable to conclude that obscene speech, uttered privately, is constitutionally protected. *But see United States v. Orito*, 413 U.S. 139, 143 (1973) (a pre-*Lawrence* decision noting that the Supreme Court has consistently rejected constitutional protection for obscene material outside the home) (citations omitted).

There are, of course, exceptions to this generalized proposition. For example, *Lawrence* was limited to private activities involving consenting adults and explicitly distinguished cases involving minors or "persons who might be injured or coerced or where consent might not easily by refused." 539 U.S. at 578. The Court has also upheld statutes prohibiting the possession of child pornography due to the state's compelling interest in protecting children. *See Osborne v. Ohio*, 495 U.S. 103 (1990); *see also United States v. Barker*, 77 M.J. 377, 381 (C.A.A.F. 2018) ("Child pornography is a continuing crime: it is 'a permanent record of the depicted child's abuse, and the harm

to the child is exacerbated by [its] circulation.'") (quoting *Paroline v. United States*, 572 U.S. 434, 440 (2014)). Likewise, individuals may not pander child pornography or offer to engage in illegal transactions. *See Williams*, 553 U.S. at 297-99 (citing *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973)).

Given the parameters of what speech may or may not be constitutionally protected within the home or in comparably private settings, the present case can be summarized as follows: with one possible exception, Appellant engaged in lawful, private, non-commercial communications with a willing partner(s).[5] Under these circumstances, Appellant's communications are entitled to constitutional protection.

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[5] The potential exception is Appellant's communications with "maggiemos13." (JA at 437-42). After exchanging sexually explicit language with "maggiemos13," Appellant asked how old he/she was. (JA at 441). "[M]aggiemos13" responded "14." (*Id.*). Appellant then continued to engage "maggiemos13" in sexually-based banter. (JA at 441-42). Although the military judge found that the government never established the age of Appellant's e-mail partner(s) (JA at 90), Appellant's sexually-charged communications with an individual who claimed to be a minor would likely not qualify for constitutional protection, regardless of the location.

1. There is no evidence that Appellant's communications adversely affected the military or incited illegal activity.

It is undeniable that Appellant's communications with his e-mail partner(s) were graphic and extolled sexual activities with minors. In some of the e-mails, Appellant appeared to advocate for certain actions. (*See*, *e.g.*, JA at 416 ("you should force him to watch"); JA at 430 ("yea dump a load in her milkshake and watche [sic] her eat")). However, there is an important distinction between an explicit proposal to engage in illegal activity and the mere advocacy of illegality.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Supreme Court held that speech inciting illegal action was not protected under the Constitution and defined such speech as "advocacy . . . directed to inciting or producing imminent lawless action and [which] is likely to incite or produce such action." There is a lower standard for dangerous speech in the military, as there is no requirement regarding "an intent to incite" nor that the incitement produce "imminent" danger. *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996). Rather, "[t]he test in the military is whether the speech interferes with or prevents the orderly accomplishment of the

mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." *Id.* (citing *Hartwig*, 39 M.J. at 128) (citing *Priest*, 21 U.S.C.M.A. at 570).

In the present case, there was no evidence that Appellant's communications involved other military members or government equipment, or at all related to the Air Force's mission. (JA at 357-461). Appellant never identified himself as a military member and never discussed anything related to the military. (JA at 116-17, 159-60, 357-461). Although Appellant's commander (JA at 187) and an investigator (JA at 139) spoke generally about the duties of an officer, the government offered no evidence directly tying Appellant's private speech with a specific degradation to the Air Force's loyalty, discipline, mission, or troop morale. Further, the government offered no evidence that any child was actually harmed or placed in harm's way due to Appellant's communications.

The absence of such evidence therefore fails to serve as a basis for eroding the constitutional protection otherwise afforded to Appellant's private speech. Appellant may have advocated his fantasies with his e-mail partner(s), but his communications did not

demonstrate an intent to produce, or were likely to produce, imminent illegal conduct with children, nor did they represent a clear danger to the loyalty, mission, discipline, and morale of the Air Force.

2. Appellant's requests for images or videos of children were not illegal requests for child pornography.

From the outset, it is important to note that there is no evidence before this Court that Appellant's federal conviction for the possession of child pornography was connected to his communications with his e-mail partner(s). Consequently, one should not surmise that any particular request by Appellant for images or videos from his partner(s) actually resulted in his receipt of child pornography, or that there was an implicit understanding between Appellant and his partner(s) that Appellant's image or video requests were in fact requests for pornography. Instead, Appellant's various requests should be evaluated individually and in the context they were provided. These requests should also be analyzed with an eye towards whether they are specifically seeking child pornography. *Cf. United States v. Barberi*, 71 M.J. 127, 130-31 (C.A.A.F. 2012) (noting that speech outside the categories of "'defamation, incitement, obscenity, and pornography produced with real children'" retains

First Amendment protection) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002)); *New York v. Ferber*, 458 U.S. 747, 764-65 n.18 (1982) (holding that child pornography is not protected by the First Amendment, but that "nudity, without more is protected expression.").

In what appears to be Appellant's first request for an image, he asks "Austin Hickey" to "[s]end me a pic of that thick ass." (JA at 358). Given the context of their communications, this is an apparent reference to "Austin Hickey's" purported 16 year old daughter. (JA at 360). However, it is not a request for an image containing sexually explicit conduct. "Austin Hickey" could reasonably comply with the request by sending a picture of his purported daughter's clothed buttocks. Accordingly, this is not a request for child pornography. Similar conclusions can be made regarding Appellant's remaining requests:

- "[H]ey send me those pics of her the one with it in her mouth" (JA at 387). No context is provided for "her" or "it." (*Id.*).

- "[O]h wow share that pic please." (JA at 413). Appellant's request is in response to a comment from his e-mail partner(s), who claimed to be masturbating to an image of a 7 year old. (*Id.*). However, no context is provided for

what the actual image depicted. (*Id.*).

- "[S]edn [sic] a young vid please :)." (JA at 415). Although the accompanying communications are sexually explicit, no context is provided regarding what kind of video Appellant requested. (*Id.*).

- "[Y]ou have a pic of the 12 and 8." (JA at 421). Appellant appears to be requesting images of a 12 and 8 year old. (*Id.*). However, no context is provided regarding what kind of picture Appellant requested. (*Id.*).

- "[G]ot any nudes or bra and panties?" (JA at 424). The context indicates Appellant is seeking pictures of a purported 12 year old. (*Id.*). However, requests for images of nude or scantily clad children, without more, are constitutionally protected. *See Barberi*, 71 M.J. at 130-131.

- "[Y]ou got any young nudes?" (JA at 428) and "you have any nudes? . . . send a couple." (JA at 430). In the set of e-mails that contain these requests, Appellant does not indicate how he defines "young." (JA at 426-33). Additionally, requests for images of nude children, without more, are constitutionally protected. *See Barberi*, 71 M.J. at 130-131.

- "[S]o you like em young huh :) got any pics? . . . can you photo share." (JA at 443). In this set of e-mails, Appellant does not indicate how he defines "young" nor does he provide context for the kind of pictures he is seeking. (*Id.*).

- "[S]how me some of your favs." (JA at 445). The communications accompanying this request appear to indicate that Appellant is referencing small, young children. (*Id.*). However, the request itself does not specifically ask for an image or video containing children engaged in sexually explicit conduct. (*Id.*).

- "[D]o you have any pics?" (JA at 447). Appellant's request appears to be for a picture of his partner(s)'s purported 13 year old daughter. However, no context is provided regarding what kind of picture Appellant requested. (*Id.*).

- "[G]ot any more pics of her." (JA at 450). Appellant's request appears to be for a picture of his partner(s)'s purported 18 year-old daughter. (*Id.*). No context is provided regarding what kind of picture Appellant requested. Moreover, pornography containing 18 year olds is not illegal.

- "[Y]ou got some nudes? . . . send a few :)" (JA at 455). The context indicates that Appellant is seeking pictures of nude children aged between 7 and 15 years old. (*Id.*). However, requests for images of nude children, without more, are constitutionally protected. *See Barberi*, 71 M.J. at 130-31.

- "[D]o you have any nude pics? . . . any vids." (JA at 459). The context indicates Appellant is seeking images or videos of a purported 9 year old. (JA at 458-59). However, requests for images of nude children, without more, are constitutionally protected. *See Barberi*, 71 M.J. at 130-31.

Appellant's sole request that may fall outside the First Amendment's protection is contained in his communications with "Jess Smith." (JA 414-25). Specifically, on October 20, 2013, Appellant sent the following message: "got any more bj vids witht he [sic] youngs." (JA at 416). It is reasonable to conclude that this is a request for a video featuring oral sex. However, at this point in

Appellant's communications with "Jess Smith," no context is provided for how they collectively define "young." (JA at 414-16). On October 29, 2013, "Jess Smith" indicated that he/she had a purported 12 year old. (JA at 414). But the charged language did not occur until the following day, and there is no accompanying reference to "Jess Smith's" child. (*Id.*). Without more, this request is similarly insufficient to establish that Appellant was requesting child pornography.

Given the above facts, the government failed to demonstrate that any of Appellant's requests for images or videos of children were in fact requests for child pornography. Accordingly, his requests do not fall outside the First Amendment's protection.

3. There is no evidence that Appellant's private speech occurred outside his home.

In *United States v. Bowersox*, 72 M.J. 71 (C.A.A.F. 2013), this Court affirmed the conviction of a soldier charged with possessing obscene materials in his shared barrack's room. Although this Court ultimately reasoned that the soldier's privacy interest in shared quarters was not equivalent to one's privacy in a home, its analysis acknowledged that the Supreme Court's proscription against

governmental intrusion into one's home extended to military members. *Bowersox*, 72 M.J. at 76 (citing *Orito*, 413 U.S. at 141-43).

Turning to the present case, there is no evidence that Appellant's e-mail partner(s) were not co-located in his home. In her ruling on the defense's motion to dismiss, the military judge – who also served as the fact-finder – explicitly found that no evidence was presented regarding the physical location of Appellant's e-mail partner(s), including whether the partner(s) was in Appellant's home. (JA at 90). The government similarly failed to produce such evidence during trial. Consequently, the entirety of Appellant's charged communications with his e-mail partner(s) could have occurred within his own home, which would entitle the speech to constitutional protection under *Stanley*.

In its response to both the defense's motion to dismiss (JA at 69, 84-85) and during findings argument (JA at 204), the government contended that Appellant's communications were not private because they were sent over the Internet. Citing *United States v. Reidel*, 402 U.S. 351 (1971), the government essentially argued that the constitutional protections *Stanley* afforded to obscene materials

possessed in the home did not apply to Appellant once he "published" his e-mails on the internet. (JA at 84). The CCA agreed with this reasoning. (JA at 7) (noting that expressing fantasies online through chats and e-mails is not afforded constitutional protection). This Court should not follow suit.

First, none of the Supreme Court's precedent prohibiting the distribution of obscenity addresses private, non-commercial communications between consenting parties. In *Reidel*, the defendant advertised the sale of obscene materials in the newspaper and was later charged when he used the mail to send those materials to an undercover postal inspector. 402 U.S. at 353. The seminal cases of *Roth v. United States*, 354 U.S. 476, and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), similarly involved commercial actors, while *Miller v. California*, 413 U.S. 15, 24 (1973), involved vendors mailing sexually explicit brochures to unwilling recipients.

Slightly more relevant to the present case is *Orito*, 413 U.S. at 139, wherein the appellee was charged with transporting obscene materials from San Francisco to Milwaukee using two airlines. Although the lower court held the affecting criminal statute

"unconstitutionally overbroad since it failed to distinguish between 'public' and 'non-public' transportation of obscene materials," a sharply divided Supreme Court disagreed. *Id.* at 140. Finding "no constitutionally protected privacy" involved, the Court concluded that it could not "say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter." *Id.* at 143. Parallel reasoning can apply to the present case in that Appellant's speech was intended for private use; however, unlike in *Orito*, no actual transportation of Appellant's speech was shown to have occurred.

Military precedent is similarly unpersuasive. Although the CCA relied on *Moore*, 38 M.J. at 490, to support its contention that private e-mails are not afforded constitutional protection (JA at 7), *Moore* did not involve consenting parties. Rather, the speech at issue was "part and parcel of an abusive, degrading, extortionate, adulterous relationship" by an Air Force officer in a long-term relationship over the course of his career with a woman who

ultimately found his advances unwelcome. *Id.* at 491-93. *Hartwig*, 39 M.J. at 125, involved a similar circumstance of an officer who solicited nude photos from a 14 year old he had never met.

Assuming *arguendo* that this Court is nevertheless tempted to analogize the distribution of information through the Internet to the transportation of materials using the mail or common carriers, it is important to note the difference in technology between those mediums and the e-mail at play here. E-mail does not exist in any one place or require physical transportation of any sort. *See generally Microsoft Corporation v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corporation)*, 855 F.3d 53, 61 (2d Cir. 2017) (Jacobs, J. dissenting) (citing Orin Kerr, *The Next Generation Communications Privacy Act*, 162 U. Pa. L. Rev. 373, 408 (2014)). It is generally created on a private and most assuredly password-protected account, discreetly dispersed through non-public channels without direct third party assistance or involvement, and only accessed through a second private and equally assuredly password-protected account. Regardless of whether an e-mail's recipient is a thousand miles away

or just a few feet, there is an infinitesimal danger its contents "might fall into the hands of children" or that it will "intrud[e] upon the sensibilities or privacy of the general public." *Stanley*, 394 U.S. at 567 (citations omitted).

The greater danger from e-mail, at least from a First Amendment perspective, is the one espoused by the government: that the mere use of the Internet, regardless of sender and recipient location, renders any speech therein subject to government intrusion. As seemingly conceded by the government, a husband could be liable for e-mailing his wife an obscene message while sitting next to her in their marital bed. (JA at 83-84). This is an absurd scenario that contradicts the spirit, if not the direct import, of both *Stanley* and *Lawrence*.

4. *Even if Appellant's e-mails were distributed beyond his home, his private communications are constitutionally protected because they involved non-public, sexual intimacy with a willing partner(s).*

Should this Court decline to view Appellant's communications as occurring solely within his home and thus entitled to First Amendment protection under *Stanley*, it should nevertheless view his private activities as constitutionally protected in accordance with

Lawrence. In *Lawrence*, the Supreme Court concluded that a constitutional liberty interest protects the right of competent adults to engage in private, consensual sexual activity. 539 U.S. at 578. "Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable." *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004). Whether the liberty interest identified in *Lawrence* renders a servicemember's conviction unconstitutional in a particular case involves a three-part inquiry:

> (1) Was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?
>
> (2) Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?
>
> (3) Are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Marcum, 60 M.J. at 206-07.

With regards to the first and second prongs of this inquiry, Appellant engaged in private communications with a willing partner(s). The e-mails did not involve threats, incitements to illegal

activity, or the distribution of child pornography. Although they referenced sexual activities with minors, the government offered no evidence that any children were actually harmed or in danger, or that Appellant's messages otherwise influenced another to commit such abuse. Rather, the e-mails contained pure speech focused on the private fantasies of the respective sender and recipient. The government also offered no evidence that any recipient complained about the messages, nor were the e-mails found in any public or widely accessible forum. Accordingly, Appellant's messages qualified as sexual intimacy between himself and his partner(s); part of his personal and private sexual life upon which the government may not intrude. *Lawrence*, 539 U.S. at 578.

Moving to the third prong, there is no doubt the military has a unique interest in obedience and discipline. *See United States v. Goings*, 72 M.J. 202, 206 (C.A.A.F. 2013) (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974)). Concomitant with this interest is a capable and respected officer corps; hence, "[a]n officer's conduct that disgraces him personally or brings dishonor to the military profession affects his fitness to command the obedience of his subordinates so as

to successfully complete the military mission." *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009). Nevertheless, there are myriad sexual fetishes and acts in which an officer may engage privately that, while otherwise lawful, could affect his/her standing with subordinates and thus adversely affect his/her fitness to command obedience. Consequently, to appropriately balance the military's needs with an officer's private and lawful liberty interests, the focus should not be on the underlying sexual activity, but rather the circumstances under which the officer elects to exercise his/her interests. *Cf. United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985) (noting that while officers are held to a higher standard of conduct, "private fornication in the absence of some other aggravating circumstance would not seem subject to prosecution under Articles 133 and 134 -- regardless of the moral censure to which this activity might be subject."); *Goings*, 72 M.J. at 202 (holding that the commission of a sexual act in the presence of a third party does not fall within the "wholly private and consensual sexual activity" construct protected by *Lawrence*).

For comparison purposes, *Hartwig* and *Moore* both involved communications of a sexual nature that the respective appellants intended to be private. However, the communications at issue were not, in fact, consensual. In a similar vein, *United States v. Conliffe*, 67 M.J. 127 (2009), involved, *inter alia*, otherwise consensual activity in the privacy of a bedroom that was filmed without a party's consent. Conversely, in *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001), this Court found legally insufficient two conduct unbecoming specifications alleging inappropriate sexual comments in the workplace. This Court's decision was based on its analysis of the circumstances surrounding the remarks, including the fact that the recipients never notified the speaker that the comments were unwelcome. *Brown*, 55 M.J. at 385-87. Finally, in *Forney*, 67 M.J. at 271, this Court upheld an Article 133, UCMJ, conviction involving the possession of virtual child pornography – which is otherwise legal in civilian society. Notably, however, the offending officer used government equipment to effect his crimes. *Id.* at 276.

In this case, Appellant never provided his real name in any of the e-mails he sent his partner(s), nor did he identify himself as a

military member. (JA at 159-60, 357-461). His partner(s) appeared to be a willing recipient of the e-mails and there is no evidence that Appellant ever shared his one-on-one e-mails with third parties. Moreover, Appellant effected his communications from his home (JA at 337-38), using personal vice government equipment (JA at 142, 340, 347). Finally, no other military member was outwardly involved in Appellant's messages; the military only became aware of Appellant's activities through the subsequent investigation. Given these circumstances, Appellant's e-mails should be considered private, sexual intimacies with a willing partner(s) and afforded constitutional protection under *Lawrence*.

B. The government did not prove the elements of the charged offenses.

If this Court finds Appellant's speech constitutionally protected, it must then determine whether the government has proven the elements of the charged offense. *Rapert*, 75 M.J. at 164-65. As charged, the elements of Article 133, UCMJ, are:

> (1) That the accused wrongfully and dishonorably communicated, in writing, certain indecent language; and
>
> (2) That, under the circumstances, these acts constituted conduct unbecoming an officer and gentleman.

10 U.S.C. § 933.

As articulated by this Court in *Hartwig*, "[w]hen an alleged violation of Article 133 is based on an officer's private speech, the test is whether the officer's speech poses a 'clear and present danger' that the speech will, 'in dishonoring or disgracing the officer personally, seriously compromise[ ] the person's standing as an officer.'" 39 M.J. at 128. Utilizing this test to determine whether Captain Hartwig's written solicitation for nude photos from a 14 year old girl qualified as unbecoming conduct, this Court held that "any reasonable officer would recognize that sending sexual overtures to a stranger, under the circumstances of this case, would risk bringing disrepute upon himself and his profession." *Id.* at 130 (citing *Parker*, 417 U.S. at 733; *United States v. Frazier*, 34 M.J. 194, 198-99 (C.M.A. 1992)).

Applying the *Hartwig* test to this case, however, Appellant's e-mails did not pose a "clear and present danger" to his standing as an officer. Unlike the letter at issue in *Hartwig*, which was sent to a minor and which ultimately was intercepted by the minor's mother, the e-mails here were: (1) sent to individual(s) presumptively capable of consenting, and (2) never intercepted by third parties, other than

law enforcement officials after the fact. *Id.* at 127. Further, the government did not present any evidence that the recipients here did not consent to receiving the e-mails. Regardless of the apparent repugnancy of Appellant's speech, a reasonable officer would not have anticipated that his/her private, anonymous, and consensual e-mail communications would pose a "clear and present danger" to his/her status as an officer.

C. The gravity of Appellant's actions did not justify the invasion to his free speech.

Assuming *arguendo* that this Court finds the government met its burden by proving the elements of the charged offenses, it "may undertake to determine 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" *Rapert*, 75 M.J. at 164-65 (citations omitted). "If the resulting danger justifies the invasion of free speech necessary to avoid it, the rights of individual servicemembers must yield to the needs of the nation." This is a question of law this Court reviews *de novo*. *Id.*

In *Priest*, 21 U.S.C.M.A. at 564, this Court weighed a servicemember's First Amendment rights against the dangers

associated with his publication and distribution of an anti-Vietnam War newsletter. Among other things, the newsletter included explicit information on how servicemembers could desert, provided a formula for gunpowder, advocated the use of violence, ridiculed the armed forces, and suggested means by which the military could be weakened from within. *Id*. at 567. Distinguishing the case from one involving political discussions between military members "in the privacy of their rooms," this Court found that at least "[o]ne possible harm from the [publications] is the effect on others if the impression becomes widespread that revolution, smashing the state, murdering policeman, and the assassination of public officials are acceptable conduct." *Id*. at 571-72. Consequently, this Court upheld the servicemember's conviction.

This Court came to similar conclusion in the more recent case of *Rapert*, 75 M.J. at 164, which involved a servicemember using racial slurs against and threatening then President-Elect Barack Obama on election night in 2012. The servicemember made these statements to a colleague's spouse, who took them seriously given the servicemember's previous boasts about being a member of the Ku

Klux Klan. *Id*. at 165-66. Finding that the balance of interests weighed in favor of proscribing the speech at issue, this Court focused on two distinct dangers. First, there was the risk the conduct posed to the ability of the servicemember to function as a member of the military, as his speech indicated a present and potential future disregard for the chain of command. *Id*. at 172. Second, there was a "collateral threat that this disregard for the chain of command might metastasize." *Id*.

In the present case, there was no known involvement of any military member other than Appellant. There was likewise no widespread publication or distribution of his speech. Certainly, there was private discourse regarding the repugnant fantasies of Appellant and his e-mail partner(s), but there was no evidence indicating that the fantasies were anything more than that. In sum, there was no connection at all between Appellant's speech and the military mission, save for its post-investigation exposure and corresponding legal ramifications. To this end, any public rebuke or loss of esteem in Appellant by his subordinates due to his speech was predicated by his court-martial, not his private and anonymous e-mails with an

unknown partner(s). These circumstances are far different than those addressed by this Court in *Priest* and *Rapert*, and warrant a different outcome.

CONCLUSION

It is one thing to condemn Appellant for his repugnant speech. It is quite another to convict him when he effects such speech in a wholly private, consensual, and non-commercial manner. Had Appellant identified himself as a military member, involved other military members, communicated using government equipment, or sent messages from his work station, or had he directly contributed to the abuse of any children or requested illegal materials, perhaps the analysis would be different. Instead, Appellant engaged in lawful sexual intimacies with a willing partner(s) in a non-public, private setting, and these intimacies did not otherwise have any connection to the military. Under these circumstances, Appellant's conduct should be afforded constitutional protection. Accordingly, Appellant respectfully requests that this Honorable Court set aside his conviction for Specifications 1-8 and 11-17 of the Charge, and the Additional Charge and its Specification.

Respectfully Submitted,

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I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on November 13, 2018.

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