IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 18-0339/AF
Lieutenant Colonel (O-5) SCOTT A. MEAKIN, USAF *Appellant.*	)	Crim. App. No. 38968

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

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 (AFCCA) reviewed this case pursuant to Article 66, UCMJ. 10 U.S.C. § 866(c). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct.

STATEMENT OF FACTS

Detective Todd Martin worked in the Child Exploitation Unit of the Halton Regional Police Service in Ontario, Canada. (JA at 99-100.) In November of 2013, on a pornographic website called "Motherless," Detective Martin engaged in a conversation with someone with the username "Dadmangles." (JA at 102-03.) The two discussed sexually assaulting a three- to four-year-old girl. (JA at 103, 219-25.) The user Dadmangles sent Detective Martin an email from the email address love2ski4@yahoo.com. (JA at 106, 226.) The rest of their conversation occurred over email. (JA at 106, 225-57.) Via email, they continued to discuss the sexual abuse and degradation of children. (JA at 226-57.) The love2ski4@yahoo.com user sent Detective Martin a picture of his erect penis, and the user asked Detective Martin if his young daughter would like to see it. (JA at 109.)

Because the user appeared eager to follow through with his chats, Detective Martin initiated an investigation. (JA at 110.) From one of the emails he was sent, Detective Martin obtained an IP address of the user. (JA at 112.) The IP address led Detective Martin to Tucson, Arizona. (JA at 112.) Detective Martin began working the investigation in coordination with a United States Department of Homeland Security liaison based out of Toronto, Canada. (JA at 112-13.)

The liaison emailed SA Philip Keys, also a special agent with the Department of Homeland Security, disclosing that a Tucson, Arizona resident engaged in an internet chat with a Canadian police officer. (JA at 129.) SA Keys obtained information from Comcast relating to the IP address, and discovered the IP address was linked to Appellant. (JA at 131-32.) During his investigation, SA Keys also discovered Appellant was active duty Air Force and notified the Air Force Office of Special Investigations (hereinafter "OSI"). (JA at 130.)

Using the information he received, SA Keys served a search warrant at Appellant's residence. (JA at 129-31.) During the search, and after reading Appellant his Miranda rights, SA Keys asked Appellant questions. (JA at 136.) Appellant indicated he did engage in the chat and verified his email address as love2ski4@yahoo.com. (JA at 136-37.) Appellant also admitted to engaging in similar chats with a number of other people. (JA at 137.) During the search, SA Keys seized laptop computers, flash drives, and computer data discs. (JA at 138.)

SA Keys, who served in the United States Army for seven years as a special agent, testified that it was shocking to learn Appellant was an active duty officer. (JA at 138-39.) SA Keys testified the situation shocked him because military members are held to a higher standard, and because officers are sworn to protect people. (JA at 139.)

SA John Owen with the Department of Homeland Security conducted computer forensic examinations on the equipment seized from Appellant's home. (JA at 155-56.) He found the love2ski4@yahoo.com email address on a laptop, along with the IP address that had been identified to Dadymangles. (JA at 156-58.)

OSI interviewed Appellant. (JA at 170-71, 258-356.) During his interview, Appellant admitted that when he would go reread the conversations he participated in, it would make him sick. (JA at 271-72.) Appellant discussed the different users he chatted with, and how they had different profiles. (JA at 278.)

In response to a warrant, Yahoo provided OSI evidence capturing Appellant's conversations. (JA at 172-74, 357-461.) The documents revealed that Appellant engaged in a number of conversations with various users. (Id.) The conversations discuss and detail the sexual abuse and degradation of children. (Id.) Specifically, the conversations discuss abusing the children or relatives of the other users. (JA at 219-57, 357-461.) In many of the conversations, Appellant asked for pictures of the sexual abuse. (JA at 427, 443, 455.) He also suggested the other users engage in sexual abuse of children. (JA at 406, 410, 415, 450.)

In June of 2013, Appellant became the deputy officer to Lt Col Eshelman, the commander of 563rd OSS, who testified he was shocked when he read the charged conversations. (JA at 183, 185.) In fact, after reading Appellant's repulsive language, Lt Col Eshelman found it difficult to get intimate with the

woman he was dating. (JA at 185.) Lt Col Eshelman stated that the conversations did not meet the standards of an officer, and would make him question Appellant's sincerity when it came to mentoring young officers. (JA at 186-87.)

Appellant was charged with two charges and 17 specifications of using indecent language in violation of Article 133, UCMJ. (JA at 1-2, 33-42.) At trial the parties agreed that "paragraph 89 of part four of the MCM" offered the appropriate definition for "indecent." (JA at 196.) That definition states:

> "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thought, the language must violate community standards.

(JA at 5); Manual for Courts-Martial, United States (MCM), Part IV, ¶ 89 (2012 ed.).

The military judge found Appellant guilty of all specifications except Specification 9 of the Charge. (JA at 216-17.) She also excepted language out of Specifications 4 and 5 of the Charge. (JA at 216-17.) The military judge sentenced Appellant to forfeit all pay and allowances, to be confined for 20 months, and to be dismissed from the Air Force. (JA at 218.) On 14 July 2018, the Air Force Court of Criminal Appeals denied Appellant's claim of error under the First Amendment, but set aside the convening authority's action due to an

Article 12 violation and a post-trial processing error. (JA at 20.) On subsequent review, the Air Force Court affirmed the findings and sentence. (JA at 25.)

SUMMARY OF THE ARGUMENT

Obscenity, such as patently indecent sexual language, is not protected under the First Amendment. United States v. Williams, 553 U.S. 285, 288 (2008). For civilians, possessing obscenity in one's home without disclosing it can—in some limited circumstances—be protected speech. Stanley v. Georgia, 394 U.S. 557, 559 (1969). However, Appellant's speech does not qualify for protection because he did not merely possess obscenity, he produced it, memorialized it in writing, and transmitted it through the internet to 18 users. (JA at 129-39, 219-225, 406, 410, 415, 450.)

Obscenity in the military is afforded even less protection. Parker v. Levy, 417 U.S. 733, 758 (1974). Under Article 133, UCMJ, language which disgraces an officer personally or compromises his or her standing as an officer is punishable under the code and not protected under the First Amendment. MCM, Part IV, para. 59(c)(2) (2012 ed.); United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009). As such, Appellant's conviction is legally sufficient because there is some evidence upon which a reasonable fact finder could rely in order to find Appellant's language disgraced him and compromised his standing as an officer. United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006) (citation

omitted). While Appellant raises other concerns about the circumstances of his communications, those considerations are inapposite to a First Amendment analysis for obscenity in the military. Therefore, this Court should affirm the decision of the Air Force Court.

ARGUMENT

APPELLANT'S CONVICTIONS ARE LEGALLY SUFFICIENT AS HIS CONVERSATIONS DETAILING SEXUAL ABUSE AND DEGRADATION OF CHILDREN WERE NOT CONSTITUTIONALLY PROTECTED AND THERE WAS SIGNIFICANT EVIDENCE THAT HIS WORDS CAUSED PERSONAL DISGRACE AND COMPROMISED HIS STANDING AS AN OFFICER.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

1. Legal Sufficiency

A conviction is legally sufficient when, "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." Roderick, 62 M.J. at 429. This test is similar to the affirmative defense test. *See e.g.* United States v. Davis, 76 M.J. 224, 228-29 (C.A.A.F. 2017) (describing the "some evidence" test for

raising an affirmative defense, and noting "'[t]his test is similar to that for legal sufficiency'") (quoting United States v. Schumacher, 70 M.J. 387, 390 (C.A.A.F. 2011)). Accordingly, this Court must "draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)).

2. Appellant's conduct is not protected under the First Amendment.

Before addressing legal sufficiency, courts first ask 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)). Appellant has not made this threshold showing.

The Supreme Court has "long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment." Williams, 553 U.S. at 288 (citing Roth v. United States, 354 U.S. 476, 481-85 (1957). So has the military. *E.g.* United States v. Bowersox, 72 M.J. 71, 75 (C.A.A.F. 2013); United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008) (noting that materials which contain a description of sexual conduct in a patently offense way are to be considered obscenity for First Amendment purposes); United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994).

Moreover, "[t]he Supreme Court 'has long recognized that the military is, by necessity, a specialized society separate from civilian society.'" United States v.

Forney, 67 M.J. 271, 275 (C.A.A.F. 2009) (quoting Levy, 417 U.S. at 743). So much so, that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." Id. (quoting Levy, 417 U.S. at 758 (1974)).

a. Even by civilian standards, Appellant's speech is not protected.

Outside of a military framework, merely possessing obscene materials in one's home *can* be protected speech; however, this is not true in all circumstances. *Compare* Stanley, 394 U.S. at 559 *with* Osborne v. Ohio, 495 U.S. 103, 111 (1990); *see also* Williams, 553 U.S. 285, 288-89 (2008) ("we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.")

In Stanley, the Supreme Court found a Georgia law prohibiting the mere personal possession of obscene materials in the home was unconstitutional. Stanley, 394 U.S. at 559. The Court's rationale was to prevent legislation aimed at "controlling a person's private thoughts." Stanley, 394 U.S. at 566. Thus, on multiple occasions, the Supreme Court "noted that Stanley was a narrow holding" that "should not be read too broadly." Osborne, 495 U.S. at 108; *see also* United States v. Reidel, 402 U.S. 351, 357 (1971). As this Court put it, "Stanley has been strictly limited to its facts." Bowersox, 72 M.J. at 75.

Conversely, the Supreme Court has never found First Amendment protection when obscenity is transmitted to others. *See e.g.* Roth, 354 U.S. at 481-85 (finding no protection for obscenity that was mailed and advertised); Alberts v. California, 354 U.S. 476, 481 (1957) (finding no protection for "writing, composing and publishing an obscene advertisement"). Even Stanley limited the protection for obscenity to "mere *private*[1] *possession* of obscene material." Stanley, 394 U.S. at 561 (emphasis added). Only when the individual is "sitting *alone* in his own house" with his obscene thoughts or materials, could an obscenity receive protection. Id. at 565 (emphasis added). In fact, recently the Court emphasized: "we have limited the scope of the obscenity [protection]" since Stanley. Williams, 553 U.S. at 288 (citing Miller v. California, 413 U.S. 15, 23-24 (1973)) (emphasis added).

Thus, even for civilians, First Amendment protection draws a line in the sand between the *possession* of obscenity and the *transmission* of obscenity. Roth, 354 U.S. at 481-85; Alberts, 354 U.S. at 481; *see* Stanley, 394 U.S. at 561. That line is unmistakable when the transmission extends beyond the home. United States v. Orito, 413 U.S. 139, 143 (1973) (The Supreme Court "has consistently rejected constitutional protection for obscene material outside the home."); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376 (1971) (finding it

[1] In this context, the word "private" suggests solitude, not intimacy.

constitutional to prosecute an individual caught transporting obscene photos back to his house intended for mere possession in his own home).

Appellant's case does not resemble Stanley. It does not deal with "mere private possession of obscene material" inside the home. Stanley, 394 U.S. at 561 (emphasis added). That is, Appellant was not "sitting alone in his own house" with his obscene thoughts or materials. Id. at 565 (emphasis added). In other words, Stanley is predicated on the speech *not having an audience*. Unlike Stanley, Appellant's case deals with the production, preservation, and transmission of written obscenities, detailing and encouraging unspeakable acts of child rape and degradation. (JA at 129-39, 219-225, 406, 410, 415, 450.) Appellant's case is analogous to Alberts, where the First Amendment did not protect "writing, composing and publishing an obscene advertisement." Alberts, 354 U.S. at 481.

Reliance on Lawrence v. Texas, 539 U.S. 558 (2003) is also misplaced. (App. Br. at 19-20.) Lawrence does not address speech or the First Amendment; rather it addresses the right to privacy under "the Due Process Clause of the Fourteenth Amendment to the Constitution." Lawrence, 539 U.S. at 564. Substantive due process protection for consensual sexual relations has nothing to say about a supposed First Amendment protection to transmit obscenities on the internet. If Appellant wanted to have consensual sexual conversations with anonymous internet users while in his home—such conduct might be permitted

under Lawrence. However, Appellant wanted to have (and did have) *obscene* sexual conversations with these anonymous users. Obscenity is a First Amendment horse of different color, for which Lawrence offers no protection.

Moreover, coupling Stanley and Lawrence conflates two very different uses of the term "private." Appellant cites Lawrence for the proposition of "private" conduct between consenting adults. (App. Br. at 19, 33.) However, in that case the term private is used to describe human intimacy or "private human conduct," like sex, involving more than one person. Lawrence, 539 U.S. at 567. In Stanley, however, the word "private" suggests solitude, i.e. the person possessing the obscenity would be "sitting *alone* in his own house." Stanley, 394 U.S. at 565 (emphasis added). Nothing is shared in these circumstances; it is simply one "person's private thoughts." Stanley, 394 U.S. at 566. In other words, Stanley allows for "mere *private* possession of obscene material," but it does not allow for *communal* possession—to say nothing of transmission—of obscene material. Stanley, 394 U.S. at 561 (emphasis added). Lawrence did not address privacy in this context, let alone change the law surrounding it.

Thus, even by civilian standards, Appellant's speech was not protected under the First Amendment. He transmitted obscenities to myriad people akin to Roth and Alberts. (JA at 129-39, 219-225.) From a free speech standpoint, Appellant went much further than the individual in Thirty Seven Photographs who

merely carried obscene materials through customs in secret; here, Appellant actually sent written obscenities to others. Therefore, Appellant's speech was not protected even under the heightened scrutiny of civilian standards. However, the issues in this case present a much lower hurdle.

b. By military standards, Appellant's speech was certainly not protected, and his conviction was legally sufficient.

First Amendment protections apply differently in the military. Levy, 417 U.S. at 743. "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." Id.; Forney, 67 M.J. 271, 275 ("constitutionally protected speech in civilian society does not mean it is protected under military law"); United States v. Gray, 42 C.M.R. 255, 258 (C.M.A. 1970) ("Some restrictions exist of necessity in the armed forces which have no counterpart in the civilian community.") United States v. Moore, 38 M.J 490, 493 (C.M.A. 1994) (quoting Levy, 417 U.S. at 765)) ("It has long been recognized that a 'higher code termed honor' holds military officers 'to stricter accountability'" with regard to their speech.); United States v. Norvell, 26 M.J. 477, 481 (C.M.A. 1988).

Accordingly, when speech constitutes "conduct unbecoming an officer and gentleman," it is not protected. MCM (2012 ed.), Part IV, para. 59(b). As charged in Appellant's case, this crime has two elements: (1) that he wrongfully and dishonorably communicated, in writing, certain indecent language; and (2) that,

under the circumstances, these acts constituted conduct unbecoming an officer and gentleman. (JA at 33-42); *see also* MCM (2012 ed.), Part IV, para. 59(b).

Appellant does not dispute he was the author of the charged messages. (*See* App. Br. at 22, 38-39.) Nor does he challenge whether the language itself was indecent.[2] (App. Br. at 22, 43.) Even if he did, Appellant's language was patently offensive given the agreed upon definition of indecency.[3] (JA at 33-42.) He employed remarkably vile (and disturbingly graphic) language in order to celebrate and encourage the sexual exploitation of children. (*e.g.* JA. at 223, 406, 410, 415, 450.)

Accordingly, instead of challenging the authorship or content of these messages, Appellant appears to challenge the second element maintaining that, under the circumstances of his case, his indecent language was protected speech and therefore, not unbecoming conduct. (App. Br at 18.) However, the circumstances in which speech loses First Amendment protection and becomes criminal under Article 133, UCMJ are spelled out in the Manual:

> . . . action or [speech] in an unofficial or private capacity which, in dishonoring or *disgracing the officer personally*,

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[2] "It is undeniable that Appellant's communications with his email partner(s) were graphic and extolled sexual activities with minors." (App. Br. at 22.) Later Appellant characterizes his own communications as "repugnant speech." (App. Br. at 43.)

[3] Language " which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." (JA at 5.)

> *seriously compromises the person's standing as an officer*. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, *indecency*, indecorum, lawlessness, injustice, or cruelty.

MCM, Part IV, para. 59(c)(2) (2012 ed.) (emphasis added).

This Court reaffirmed what circumstances create unbecoming conduct thus:

> An officer's [speech] need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. The gravamen of the offense is that the officer's conduct *disgraces him personally* or *brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission*. Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out -- this notwithstanding whether or not the act otherwise amounts to a crime.

Schweitzer, 68 M.J. at 137 (internal quotations and citations omitted) (emphasis added).

In short, the test for whether Appellant's indecent speech was unbecoming conduct under the circumstances (i.e. whether it was unprotected speech)[4] is whether it: (1) disgraced him personally, or (2) compromised his standing as an officer. MCM, Part IV, para. 59(c)(2) (2012 ed.); Schweitzer, 68 M.J. at 137. Thus, Appellant's conviction is legally sufficient so long as there is some evidence

[4] "'Indecent' is synonymous with 'obscene,' and such language is not afforded constitutional protection." Moore, 38 M.J. at 492.

of either of those two outcomes, upon which "a reasonable factfinder could have found . . . beyond a reasonable doubt." Roderick, 62 M.J. at 429. There is abundant evidence for both, and Appellant does not appear to contend this point.[5]

Perhaps the most compelling evidence of personal disgrace came from Appellant's own lips when discussing his crimes with OSI:

> "like I would read the stuff, uhm, you know, later or think about what I was saying later, you know, like -- like hours later, you know, and it just it would make me sick . . . . I realize I have an issue here and so I, yeah, absolutely need to do something about it . . . . Yeah, I mean, I probably -- there's probably something wrong in my head, you know . . . .

(JA at 271-72.) There is no need to draw inferences in favor of the prosecution, let alone "every reasonable" one; Appellant gave direct and immutable evidence that he was personally disgraced. Barner, 56 M.J. at 134. Considering this evidence in the light most favorable to the prosecution, it is fair to presume Appellant was making a blanket statement that pertained to all of the language captured in the various charged specifications. *See* Roderick, 62 M.J. at 429.

In addition to evidence of personal disgrace, there is substantial evidence

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[5] Appellant does not make a case that his conduct did not tend to disgrace him personally or compromise his standing as an officer. (App. Br. at 18-38.) Rather, it appears Appellant is saying his obscenities were protected (and therefore not conduct unbecoming) because they were "private, non-commercial communication[] with a willing partner(s). (Id.) In any event, if Appellant's speech is not protected, any legal insufficiency argument would face insurmountable problems given the state of the evidence.

Appellant's language compromised his standing as an officer. His commander, Lt Col Eshelman, testified that he was shocked when he read the charged conversations. (JA at 185.) In fact, Lt Col Eshelman's personal life was affected after reading Appellant's repugnant messages. (JA at 185.) Moreover, Lt Col Eshelman stated that the conversations did not meet the standards of an officer, and would make him question Appellant's sincerity when it came to mentoring young officers. (JA at 186-87.)

While it is true that Appellant never identified himself to his audience as a military member, "[f]orbidden speech is measured by 'its tendency,' not its actual effect." United States v. Hartwig, 39 M.J. 125, 130 (C.A.A.F. 1994) (quoting United States v. Priest, 45 CMR 338, 345 (C.M.A. 1972). Lt Col Eshelman provided compelling evidence that Appellant's speech *tended* to compromise his standing as an officer—because it *did* compromise his standing in Lt Col Eshelman's eyes.

Similarly, SA Keys, the Homeland Security Agent who served seven years in the United States Army, testified that it was shocking to learn Appellant was an active duty officer. (JA at 138-39.) SA Keys testified the situation shocked him because military members are held to a higher standard, and because officers are sworn to protect people. (JA at 139.)

Drawing "every reasonable inference from the evidence in favor of the

prosecution" suggests that Lt Col Eshelman and SA Keys felt this way about the language in every specification. Barner, 56 M.J. at 134. Thus, the evidence supporting Appellant's conviction is legally sufficient and no additional inquiry is required. However, Appellant raises other legal frameworks for consideration, so the United States will respond accordingly.

3. Indecent language that disgraces officers or comprises their standing is not protected, and there is no other test that protects indecent speech from being punished under Article 133, UCMJ.

Instead of addressing the test outlined by the Manual and this Court, Appellant makes essentially four arguments suggesting circumstances in which patently indecent speech, which though disgracing or compromising, is still not punishable: (1) when it does not adversely affect the military, (2) when it does not constitute a request for child pornography, (3) when it takes place within the home, and (4) when it involves private sexual conversation with a willing partner. (App. Br at 22, 24, 28, 33.) These four circumstances, alone or together, do not protect indecent speech from criminal liability under Article 133, UCMJ.

a. In the military, indecent speech is not protected, even if it has no adverse effect on the military.

Appellant claims his conviction is legally insufficient because "there is no evidence that [his] communications affected the military or incited illegal

activity."[6] (App. Br. at 22.) "[T]he 'clear and present danger' standard, which was articulated by the Supreme Court in Schenck v. United States, 249 U.S. 47, 52 (1919)," established "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Hartwig, 39 M.J. at 127 (C.A.A.F. 1994). "[T]he 'clear and present danger' standard applies to speech by military members, but the standard requires a different application in a military context." Id. at 128.

Specifically, in the military, the "clear and present danger" test for Article 133, UCMJ is essentially a reformulation of the test outlined in the Manual. *See* Id. (quoting MCM, Part IV, Para. 59(c)(2) (1984 ed.) ("When 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

[6] With regard to "inciting illegal activity," Appellant's only source in support of this position is Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), which deals with dangerous, rather than obscene speech. Moreover, Appellant acknowledges that even for dangerous speech, "there is a lower standard" in the military. (App. Br. at 22.) (citing United States v. Brown, 45 M.J. 389, 395 (C.A.A.F. 1996). In fact Brown does not necessarily establish protection for dangerous speech simply because it fails to incite illegal activity. Brown, 45 M.J. at 395 (citations omitted) Brown specifically states: "The 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. This is a lower standard *not requiring* 'an intent to incite' or an 'imminent' danger.'" Id. (emphasis added).

dishonoring or disgracing the officer personally, seriously compromise[] the person's standing as an officer.'")

Appellant employs the "clear and present danger" to assert "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." (App. Br. at 23.) However, this Court repudiated this argument explaining: "To the extent that [any] appellant argues that the prosecution must prove actual damage to the reputation of the military, we reject [t]his argument. Forbidden speech is measured by 'its tendency,' not its actual effect." Hartwig, 39 M.J. at 130 (quoting Priest, 45 C.M.R. at 345.

Moreover, even if the clear and present danger standard does suggest something more than what is already captured in the Manual, it is not entirely settled whether "clear and present danger" is the correct lens to view obscene speech. *See* Moore, 38 M.J. at 493 (finding no First Amendment protection for indecent speech that tends to disgrace officers or compromises their standing). In fact, more recently this Court has employed the clear and present danger standard only in cases involving dangerous speech, not obscenity. *See* Wilcox, 66 M.J. at 447; Brown, 45 M.J. at 395. Furthermore, the Supreme Court has held that the clear and present danger standard is inapplicable to cases involving obscenity. Roth, 354 U.S. 476, 486 (1957) (quoting Beauharnais v. Illinois, 343 U.S. 250, 266

(1952)).

The dangerous speech standard set out in Priest does not apply here; rather, the standard is whether the indecent speech tends to disgrace or compromise the officer's standing, as described in Moore and the MCM. Moore, 38 M.J. at 493; MCM, Part IV, Para. 59(c)(2) (1984 ed.) As the Supreme Court has reaffirmed, obscene speech is not protected by the First Amendment. Williams, 553 U.S. at 288. This Court reaffirmed that principle. United States v. Bowersox, 72 M.J. 71, 75 (C.A.A.F. 2013); *see also* United States v. Gill, 40 M.J. 835, 837 (A.F.C.M.R. 1994); United States v. Maxwell, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995), *rev'd on other grounds* 45 M.J. 406 (C.A.A.F. 1996).

Even assuming the Government had to show more than a tendency, but a clear and present danger of personal disgrace or compromised standing, the result is the same. The question before the Court is legal sufficiency and Appellant used language, so foul, it did not just pose a danger of disgracing him—it literally made him feel sick just reading or thinking about it. (JA at 271-72.) He communicated obscenities that did not just have the requisite "tendency"[7] to compromise his standing as an officer, they actually vitiated his commander's confidence in his ability to mentor subordinates. (JA at 186-87.) As such, there is plenty of

[7] "Forbidden speech is measured by 'its tendency,' not its actual effect." Hartwig, 39 M.J. at 130. (quoting Priest, 45 CMR at 345.

evidence upon which rational fact-finders could have determined that he was guilty beyond a reasonable doubt. Roderick, 62 M.J. at 429. Thus, regardless of whether Appellant's speech had an adverse effect on the military, his conviction is legally sufficient; and the Government showed actual effect on the military because Appellant's commander lost confidence in his standing as an officer.

b. In the military, indecent speech is not protected, even if it does not constitute an illegal request for child pornography.

Appellant maintains his "requests for images or videos of children were not illegal requests for child pornography." (App. Br. at 24.) Even if true, it is unclear how this would affect the legal sufficiency of the evidence.

"There is no requirement that an offense be otherwise criminal to constitute a violation of Article 133." Norvell, 26 M.J. at 481. "Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out -- this notwithstanding whether or not the act otherwise amounts to a crime." Schweitzer, 68 M.J. at 137. Appellant was not convicted for making an illegal request for child pornography. Thus, whether or not his indecent language also amounted to a request for child pornography is irrelevant. Id. at 137.

Appellant cites one authority in support of this proposition—United States v. Barberi, 71 M.J. 127, 130-31 (C.A.A.F. 2012). (App. Br. at 24-28.) However, that case merely reinforces "[t]he freedom of speech has its limits; it does not embrace

certain categories of speech, including defamation, incitement, *obscenity*, and pornography produced with real children." Barberi, 71 M.J. at 130 (citations omitted). Only "speech that falls *outside* of these categories retains First Amendment protection." Id. (emphasis added).

Indecent speech does not fall outside of those categories; it "is synonymous with 'obscene,' and such language is not afforded constitutional protection." Moore, 38 M.J. at 492. Appellant's speech was indecent, and therefore obscene, because it advocated performing explicit sexual acts on children of tender age. (JA at 219, 579.) His speech was not protected, so whether it constituted a separate illegal request for child pornography has no bearing on the legal sufficiency of the evidence. For the reasons outlined above, the evidence is legally sufficient.

c. In the military, indecent speech is not protected, regardless of where it occurred.

Appellant insists his conviction is legally insufficient because "there is no evidence that [his] private speech occurred outside his home." (App. Br. at 28.) As discussed *supra*, neither Stanley nor Lawrence—by themselves or together—suggest the transmission of obscenities from one person to another is protected speech so long as it takes place in the confines of one's home. Where the obscene communications take place does not factor in the analysis. *See e.g.* Hartwig, 39 M.J. at 128 ("[T]he private nature of [indecent language] neither clothes it with First Amendment protection nor excludes it from the ambit of Article 133.");

Norvell, 27 MJ at 478 ("Conduct which is entirely unsuited to the status of an officer and gentleman often occurs under circumstances *where secrecy is intended*.") (emphasis added).

However, even if Appellant was at liberty to communicate obscenities in his home, that is not what happened here. "Appellant chose to express his obscene 'fantasies'[8] via the medium of online chats and emails, and analogizes that activity to private conversation within his home." (JA at 7, 106, 136-38). These activities are not analogous.

Appellant's conversations did not stay in his house. (JA at 99-100.) He sent obscenities to, inter alia, a Canadian police officer working in Canada. (JA at 99-103.) Though not done for commercial purposes, Appellant transmitted obscenities akin to the individuals in Roth and Alberts, who sent obscenities in the mail as advertisements. Roth, 354 U.S. at 481-85; Alberts, 354 U.S. at 481; *see also* United States v. Reidel, 402 U.S. 351, 353 (1971) (no First Amendment protection for a defendant who sent obscenities through the mail to an undercover postal inspector.).

[8] Importantly, the Air Force Court drew the distinction between *having* a fantasy and *expressing* a fantasy with obscene language. (JA at 7.) Appellant blurs this distinction indicating what he did "was only fantasy." (App. Br. at 6; JA at 137, 150, 271, 275, 327-28.) Moreover, Appellant did more than just express fantasies; he sent a picture of his erect penis to the Canadian police officer so the officer could show it to his young daughter. (JA at 109.)

Moreover, like virtually all email, the obscenities were stored and transmitted by a host company, in this case Yahoo. (JA at 172-74.) In response to a warrant, Yahoo supplied law enforcement with virtually all of the communications that served as the bases for his crimes. (JA at 172-74, 357-461.) Moreover, Yahoo is not the only email provider that stored these conversations. Appellant shared obscenities with people using Gmail, (JA at 226-57,) and BTinternet, (JA at 449-51.) These respective providers house additional copies of the obscenities on their own servers, i.e. in different physical locations. In other words, even if Appellant was just sending those messages to himself, they were still leaving the home to be stored on Yahoo's servers—and Gmail servers and BTinternet servers.

In this sense, Appellant's case is worse than the defendants in Thirty Seven (37) Photographs and Orito who merely transported obscene photos without showing them to anyone. 402 U.S. at 376; 413 U.S. at 139. Here, Appellant not only transported them, but he made them accessible to at least three people—himself, the end user,[9] and the email providers. This allowed him and his audience to access these obscenities anywhere in the world with an internet connection.

As such, it is simply not accurate to equate Appellant's conduct to having an

[9] An "end user" means the person who actually used the product. Appellant's email correspondents were "end users" of whatever email product they used to communicate with Appellant.

intimate conversation in his home. The United States offered evidence that Appellant produced, proliferated, and transmitted obscene speech outside his home to Canadian law enforcement and to email providers. (JA at 99-103, 172-74.) The Supreme Court "has consistently rejected constitutional protection for obscene material outside the home," and so should this Court here. Orito, 413 U.S. at 143.

Finally, the test is legal sufficiency, not proof to a mathematical certainty. Appellant maintains "the entirety of Appellant's charged communications with his email partner(s) could have occurred within his own home." (App. Br. at 29.) However, the Government put on evidence that Appellant communicated with 18 different internet end users. (JA at 99-103, 357-641.) When considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found beyond a reasonable doubt that the communications transmitted over the internet did not occur entirely within Appellant's home. Roderick, 62 M.J. at 429.

In other words, it is technically possible that—while perusing questionable chat rooms available to the world's teeming billions—Appellant just happened on a person located within his own home who was writing under a pseudonym. It is also possible that this happened, not once, but 18 separate times. But, when "draw[ing] every reasonable inference from the evidence in favor of the prosecution," the fact that Appellant was emailing anonymous internet users is at

least some evidence to suggest the communications left his home. Barner, 56 M.J. at 134.

d. In the military, indecent speech is not protected, regardless of whether it was private and consensual.

Finally, Appellant asserts that "his private communications constitutionally protected because they involved non-public, sexual intimacy with a willing partner(s)." (App. Br. at 33.) "Constitutional rights identified by the Supreme Court generally apply to members of the military *unless by test or scope they are plainly inapplicable*." United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004) (emphasis added). For the reasons outlined *supra*, Stanley's "mere personal possession" test, and Lawrence's Fourteenth Amendment test for privacy are plainly inapplicable. *See* Forney, 67 M.J. at 275 (quoting Levy, 417 U.S. at 758) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."); Hartwig, 39 M.J. at 128 ("the private nature of [indecent language] neither clothes it with First Amendment protection nor excludes it from the ambit of Article 133."); Norvell, 27 MJ at 478 ("Conduct which is entirely unsuited to the status of an officer and gentleman often occurs under circumstances where *secrecy is intended*.")

This Court determined that "conduct of an officer may be unbecoming *even*

when it is in private." Moore, 38 M.J. at 493 (emphasis added); Hartwig, 39 M.J. at 128. There exists no requirement "that speech must be 'published' before it is punishable under Article 133." Id. This Court's predecessor observed, "Over a century ago, the Supreme Court upheld the constitutional authority of Congress to prohibit *private* or unofficial conduct by an officer which 'compromised' the person's standing as an officer 'and brought scandal or reproach upon the service.'" Id. at 128-29 (emphasis added).

In United States v. Gill, 40 M.J. 835, 837 (A.F.C.M.R. 1994), the Air Force Court rejected an appellant's argument that his indecent speech was protected by the First Amendment, despite the fact that they "were *private communications* between *consenting adults*." (emphasis added). Citing to Moore, the Air Force Court in Gill determined that the First Amendment was not applicable because the language was indecent on its face and was prejudicial to good order and discipline. Id. Similarly, the Air Force Court found First Amendment protections inapplicable to private, consensual, and anonymous email messages containing indecent language. United States v. Maxwell, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995), *rev'd on other grounds* 45 M.J. 406 (C.A.A.F. 1996). Citing to Moore, that court explained:

> The language used by appellant lowers his standing as an Air Force officer. The fact it was made under circumstances he believed would be private does not lessen the discrediting nature of the conduct. Furthermore,

> the First Amendment does not afford protection to indecent language under the circumstances of this case.

Maxwell, 42 M.J. at 580. Thus, there is no First Amendment exception for private speech, consensual or otherwise.

Moreover, even if there was, it is not clear Appellant's conversations were private for First Amendment purposes. *See cf.* United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers. . . . They may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient.") Even under Fourth Amendment scrutiny, this Court noted "[e]xpectations of privacy in e-mail transmissions depend in large part on the type of e-mail involved and the intended recipient." United States v. Maxwell, 45 M.J. 406, 418-19 (C.A.A.F. 1996). Specifically, "[m]essages sent to the public at large in the 'chat room' or e-mail that is 'forwarded' from correspondent to correspondent lose any semblance of privacy." Maxwell, 45 M.J. at 419.

This precedent, though dealing with Fourth Amendment expectations of privacy, still calls into question what would constitute a private conversation for First Amendment purposes. Appellant is quick to point out the dearth of information law enforcement could find on Appellant's audience. (App. Br. at 9-10) ("the government had no evidence indicating that Appellant's email partner(s)

represented more than one individual.) However, ironically—and no doubt inadvertently—by doing so Appellant highlights the unreasonableness of any privacy expectation.

In other words, is it really reasonable for Appellant to publish obscenity to an unknown audience, of unknown composition, in unknown locations, and with unknown intentions, and then expect that those conversations would remain private? Once Appellant made an electronic copy of his obscene fantasies and published them to unknown readers, it seems inevitable that such messages would be "'forwarded' from correspondent to correspondent [and] lose any semblance of privacy." Maxwell, 45 M.J. at 419. For Appellant, that point became painfully evident when it turned out some of his conversations *were* being circulated among law enforcement officials. (JA at 99-103.) If "[e]xpectations of privacy in e-mail transmissions depend in large part on the type of e-mail involved and the intended recipient," then blasting obscenities into the ether (or, at the very least, to unknown recipients) should, in turn, blast a crater into any reasonable expectation of privacy. Maxwell, 45 M.J. at 418-19.

In sum, First Amendment protection for officer speech is not measured by intent for privacy or consensual participation. Moore, 38 M.J. at 128-29. The test for protected speech under Article 133, UCMJ and the First Amendment is: whether it "disgrac[es] the officer personally" or "seriously compromises the

person's standing as an officer." MCM, Part IV, para. 59(c)(2) (2012 ed.); Schweitzer, 68 M.J. at 137.

Yet, even applying the three-part privacy inquiry outlined in Marcum, 60 M.J. at 206-07, Appellant's speech is still unprotected. In Marcum, this Court determined the constitutionality of consensual sodomy offenses under then Article 125, UCMJ by asking:

> [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?

Id. at 206-07 (internal citations omitted).

First, for the reasons described *supra*, Appellant's indecent language was not of a nature to bring it within the liberty interest identified by the Supreme Court. This is not Fifth Amendment[10] conduct, this is First Amendment conduct that asks whether the speech was "dishonorable and compromising as hereinbefore spelled out" not whether it was wholly private conduct between consenting adults. Schweitzer, 68 M.J. at 137.

[10] That is, a substantive due process right of privacy.

Second, unlike Lawrence where the behavior was wholly private and consensual; here, Appellant encouraged his audience to commit unconscionable sexual acts with minors,[11] and requested child pornography.[12] (JA at 219-225, 416.) Regardless of whether "any children were actually harmed or in danger," the point is, Appellant was encouraging both harm and danger. (App. Br. at 35.)

"Lawrence did not establish a presumptive constitutional protection for all offense arising in the context of sexual activity." United States v. Goings, 72 M.J. 202, 206 (C.A.A.F. 2013). Quite the opposite, Lawrence specifically noted its facts "d[id] not involve minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[,] . . . public conduct[,] or prostitution." Lawrence, 539 U.S. at 578. Appellant's case involved all of these things.[13] This is a far cry from the "wholly private and

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[11] For example "you feed her cum yet . . . you should take a picture of her first facial [i.e. ejaculation oh her face] that hot," (JA. at 223;) "she is just your cum dumpster huh so awesome . . . dont waste any of that sperm . . . no I mean give it all to her," (JA at 406;) "I want to see more pics of her eating sperm . . . i want to see it drip off her fact," (JA at 410;) "you make them lick your ass . . . you force it in right," (JA at 415;) "do you ever think about fucking her . . . i would fuck the shit out of her." (JA at 450.)

[12] Although Appellant maintains that not *all* of his requests for sexual pictures of minors constitute requests for child pornography, even Appellant agrees that some did. (App. Br. at 27.)

[13] Appellant discussed injuring children during sexual activities, e.g. "fuck I just gagged her . . . she is tearing up." (JA at 372.) Appellant discussed coercing children during sexual activities e.g. "she is cryi[ng] now I didn't get her up for[] a w[h]ile I told he[r] I will finish fast." (JA at 374.) Appellant described relationships where consent could not easily be refused, e.g. "I might want to force

consensual activity" Lawrence describes. Goings, 72 M.J. at 206.

Finally, there "are additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence" in this case. Marcum, 60 M.J. at 206-07; United States v. Lebowitz, 676 F.3d 1000, 1012 n.5 (11th Cir. 2012) (holding Lawrence "immaterial" to its analysis because "[e]ven if Lawrence protected the sexual conduct depicted on the video tape, . . . the depictions . . . traveled across state lines by means of computer" and became "publicly traded contraband"). Appellant's position as a military officer is the relevant factor at issue.

"It has long been recognized that a 'higher code termed honor' holds military officers 'to stricter accountability'" with regard to their speech. Moore, 38 M.J 490, 493 (C.M.A. 1994) (quoting Levy, 417 U.S. at 765)). Without some modicum of respect for one's superior officer, the command structure is compromised—disrupting the "loyalty, discipline, mission, or morale of the troops." Brown, 45 M.J. at 395 (citations omitted). As such, Lawrence's protection cannot reach the types of obscenities Appellant communicated—it

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it in her throat a little. In which case you might have to hold her head a little." (JA at 253.) Appellant described public conduct with children, e.g. we could "play with her pussy and ass in public. But not get caught." (JA at 234.) Appellant described the involvement of a prostitute stating: "Hey wouldn't it be fun to get a young hooker to help us out. Get her to keep i[t] hard in between round with your girl. Also hold her down. Maybe your girl can lick her pussy too." (JA at 226-27.)

would undermine the military's core concept of good order and discipline.

In sum, Lawrence does not provide the test for an officer's protected speech under the First Amendment, but even if it did, Appellant's crimes fall outside the scope of Lawrence as it applies to the military. As such, Lawrence has no bearing on the analysis because it does not speak to whether Appellant's indecent language brought disgrace upon himself or compromised his standing as an officer.

4. The gravity of Appellant's actions warrant the limitation on his speech.

In addition to inverting the test for protected speech under Article 133, UCMJ, Appellant claims "the gravity of [his] actions did not justify the invasion of his free speech." (App. Br. at 40.) In other words, Appellant maintains that after showing an obscenity case is legally sufficient, the Government must also show the sort of additional justification sometimes associated with dangerous speech. *See* Rapert, 75 M.J. at 170.

In cases involving dangerous speech for which the evidence was legally sufficient, this Court has asked "whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid danger." Rapert, 75 M.J. at 172 (quoting Priest, 21 C.M.A. at 570). There is no precedent to suggest this analysis applies for obscenity. *Compare e.g.* Stanley, 394 U.S. at 561; Roth, 354 U.S. at 481-85; Alberts, 354 U.S. at 481; Orito, 413 U.S. at 143; Reidel, 402 U.S. at 353; Miller, 413 U.S. at 24-25; Thirty-Seven (37)

Photographs, 402 U.S. at 376; Bowersox, 72 M.J. at 7; Barberi, 71 M.J. at 130 (treating obscenity as a non-protected category altogether); Moore, 38 M.J. at 492; Hartwig, 39 M.J at 128; *with e.g.* Rapert, 75 M.J. at 172; Priest, 21 C.M.A. at 570.

Yet, even if applicable, the gravity of Appellant's actions warranted limiting his speech. In Priest, the servicemember distributed a newsletter containing, inter alia, explicit information on how to desert, how to create gun powder, ways to be violent, and how to undermine the military from within. Priest, 21 C.M.A. at 567. In finding the gravity of this speech warranted infringement, this Court found "[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." Id. at 571-72. In other words, this Court asked in effect: if taken seriously, how would the speech affect the audience?

For Appellant this is not a favorable analysis. In other words, according to Priest, "[o]ne possible harm" stemming from Appellant's indecent language "is the effect on others if the impression becomes widespread" that treating children as sexual slaves is "acceptable conduct." Id. Appellant's language was not ironic or satiric. For example, when a member of Appellant's audience indicated he was "damn serious" about letting Appellant abuse his daughter, Appellant responded in kind: "same here man." (JA at 224.) In fact, Appellant was keenly aware about

the sincerity of his tone. (JA at 580.) So much so, he profusely apologized to one correspondent for not being able to carry out some of their plans: "Hey man, I'm not going to come. I'm all talk man . . . I'm sure you are pissed." (JA at 580.) If Appellant's actions are measured by their potential to affect his audience—and Appellant gives every indication of sincere intent—the analysis in Priest and Rapert are damning indeed.

CONCLUSION

In the context of Article 133, UCMJ, the test for unprotected speech is whether the indecent language disgraced him personally or compromised his standing as an officer. MCM, Part IV, para. 59(c)(2) (2012 ed.); Schweitzer, 68 M.J. at 137. The Government presented copious evidence of both, upon which a reasonable factfinder could find him guilty beyond a reasonable doubt. Thus, Appellant's conviction is legally sufficient, and all other issues raised are immaterial.

WHEREFORE, this Court should affirm the lower court's opinion.

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 13 December 2018.

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