IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant* v. ZACHARY C. ROCHA, Airman (E-2), United States Air Force, *Appellee*.	)	UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUE Crim. App. Dkt. No. 40134 USCA Dkt. No. 23-0134/AF 1 May 2023

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

CERTIFIED ISSUE

WHETHER THE PRESIDENTIALLY-ENUMERATED ARTICLE 134, UCMJ, OFFENSE OF INDECENT CONDUCT PROVIDED APPELLEE WITH CONSTITUTIONALLY-REQUIRED FAIR NOTICE THAT COMMITTING SEXUAL ACTS WITH A CHILD SEX DOLL WAS SUBJECT TO CRIMINAL SANCTION.

INTRODUCTION

The enumerated Article 134, UCMJ offense of "Indecent Conduct" reflects the military's interest in prohibiting service discrediting conduct that is "grossly vulgar, obscene, and repugnant to common priority" and "tends to deprave morals with respect to sexual relations." Manual for Courts-Martial, (MCM), pt. IV, para. 104.c.(1) (2019 ed.) (JA at 225). In every society, including the military, "there are fundamental norms of decency and morality that cannot be transgressed if that

society is to function in a healthy and productive manner." United States v. Whorley, 550 F.3d 326, 346 (4th Cir. 2008). Engaging in sexual acts with an anatomically-correct child sex doll with vaginal and anal orifices is exactly that type of "indecent conduct" the military cannot tolerate if it wants to function in healthy and productive manner. As members of Congress recognized, child sex dolls are particularly odious because they "normalize sex between adults and minors" and "desensitize the user" to pedophilic behavior. Congressional Record Vol. 164, No. 98, June 13, 2018, pgs H5119-H5121.[1] In other words, child sex dolls tend to deprave morals with respect to sexual relations. Common sense also dictates that engaging in sexual acts with a child sex doll – thereby simulating sex with a real child – is widely considered within American society to be grossly vulgar and obscene. It is not acceptable to common propriety. Any reasonable person would understand that engaging in sexual acts with a child sex doll falls within the definition of "indecent conduct" as criminalized by the President under Article 134, UCMJ.

Yet, against this backdrop, The Air Force Court of Criminal Appeals (AFCCA) found that the enumerated offense of indecent conduct under Article 134, UCMJ, did not give Appellee sufficient constitutional notice that engaging in sexual acts with a child sex doll was criminal behavior. In reaching this erroneous

[1] Available at https://www.congress.gov/congressional-record/volume-164/issue-98/house-section/article/H5119-1.

conclusion, AFCCA misapplied the tests used in federal courts and the Supreme Court for determining whether a law gives an accused proper notice that his conduct is criminal. *See* Sections A-B, *infra*. Rather than starting with the plain language of the enumerated indecent conduct offense, AFCCA incorrectly required Appellee's specific conduct to be criminalized by something else "in the *MCM*, federal law, military case law, military custom and usage, military regulations or [] state law." (JA at 011.) This deviated from the Supreme Court's "fair notice" jurisprudence which recognizes that most laws "must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). AFCCA's error is likely to be compounded by trial judges who may now mistakenly require that any acts charged as indecent conduct be criminalized by another source of law, even if the acts are already fairly encompassed by the existing definition of indecent conduct. Such errors may make it unduly onerous for the military to prosecute future indecent conduct cases. Therefore, this Court should reverse the decision of the Air Force Court.

STATEMENT OF STATUTORY JURISDICTION

AFCCA reviewed this case under Article 66(d), UCMJ.[2] This Court has jurisdiction over this matter under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

On 19 March 2021, at Mountain Home Air Force Base, Idaho, contrary to Appellee's pleas, a general court-martial comprised of a panel of officer members convicted Appellee of one specification of indecent conduct – engaging in, on divers occasions, "sexual acts with a sex doll with the physical characteristics of a female child" – in violation of Article 134, UCMJ. (JA at 002.) Consistent with his plea, the panel acquitted Appellee of one specification of knowingly receiving child pornography in violation of Article 134, UCMJ. (Id.) The military judge sentenced Appellee to a bad conduct discharge, confinement for 90 days, forfeiture of all pay and allowances, and reduction to the grade of E-1. (Id.) The convening authority took no action on the findings, denied Appellee's request for waiver of forfeitures, and approved the sentence in its entirety. (Id.)

Appellee raised eight assignments of error before AFCCA.[3] (Id.) On 16 December 2022, the lower court found in favor of Appellee on his second assignment of error, concluding Appellee did not have fair notice that his alleged

[2] Unless otherwise noted, all references to the UCMJ, punitive articles, Military Rules of Evidence, and the Manual, are to the MCM (2019 ed.).
[3] Appellee personally raised three issues pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

conduct was punishable as indecent conduct. (JA at 012-13.) AFCCA set aside the findings of guilty and the sentence and dismissed with prejudice the charge and specification. (JA at 013.) One judge filed a dissenting opinion. (JA at 013-17.)

On 17 January 2023, the United States moved the lower court to reconsider, and reconsider, *en banc*, its ruling. (JA at 018.) On 31 January 2023, AFCCA denied the United States' motion. (JA at 031.) On 31 March 2023, the Judge Advocate General of the Air Force certified for review the issue now before this Court.

STATEMENT OF FACTS

The Child Sex Doll

On 20 May 2019, command representatives at Mountain Home AFB, Idaho, conducted an inspection of the dorms, including Appellee's dorm room. (JA at 003, 063.) When CW, a member of the inspection team, entered Appellee's dorm room, he saw "a very life like doll" on Appellee's bed. (JA at 063.) Upon seeing the doll, CW was "shocked" and "stunned." (JA at 066.) He quickly departed the room and found Special Agent (SA) JL of the Air Force Office of Special Investigations (AFOSI). (Id.) CW told SA JL what he found and instructed SA JL to look on Appellee's bed. (Id.)

SA JL entered Appellee's room and saw the doll lying on Appellee's bed. (JA at 077, 174-75.) The doll scared SA JL "quite a bit" (JA at 080) because "it kind of looked like a child." (JA at 077.) The doll was approximately 35 inches in

length (JA at 207, 214; *see* JA at 175); weighed approximately 37 pounds (*see* JA at 166 (indicating weight of shipment as "17 KG")); was made of silicone (JA at 100); had small breasts (JA at 172-73); had openings in the mouth, vagina, and anus (Id.); and came with a battery-powered device that emitted "moaning" noises when turned on. (JA at 310.)

The same day, SA JL and another AFOSI agent interviewed Appellee regarding the doll. (JA at 003.) The agents told Appellee they suspected him of the "offense of Article 134, child pornography," and advised Appellee of his rights. (JA at 087-89.) Appellee waived his rights and agreed to speak with the agents. (JA at 089.) Appellee then told the agents more about the doll. (*See generally* JA at 089-155.)

Appellee explained that he came across a website that sold sex dolls. (JA at 150.) While browsing the website, Appellee found a doll that he liked. (JA at 138.) Appellee and the agents had the following exchange regarding the doll:

> Appellee: Well, I was really stressed out today when I heard there was a drug sweep of the dorms because I thought I'd have [the doll] taken away from me and I'm sure it's not in there anymore.
>
> Agent: Why would you say that?
>
> Appellee: I got pulled in []here because of that, right?
>
> Agent: Right. Well, do you think there's -- what do you think is wrong with that, I guess. What do you think our perspective would be? I don't know.

Appellee: Well, an outside perspective would see that as really weird.

Agent: Why is it weird?

. . .

And why is weird wrong? Is there anything wrong with weird?

Appellee: It's a doll of a child.

(JA at 097-98.) Appellee said that while the website did not specifically label this doll as a "child doll," he knew it was a child doll because "it is very -- it is kind of obvious." (JA at 098.) Appellee admitted he knew what he was purchasing was a child doll. (Id.)

Appellee explained he had the doll shipped to the off-base residence of CS, a coworker. (JA at 090-92.) The agents asked why Appellee did so instead of shipping it the dorms. (JA at 090.) The following exchange ensued:

Appellee: No, it's -- they wouldn't deliver[] to the dorms and I thought, hey, it -- I should ship it somewhere else because it's on a military base and *it's obvious it's not good to have something like that on a military base.*

Agent: Why would it not be good to have it on a military base?

Appellee: I think it would be implied.

Agent: Well, we're human beings, so we're not -- it's crazy, but we have to ask questions because we can't put words in your mouth, why did you feel it was crazy to have it on a military base?

Appellee: I'm formulating a sentence.

Agent: Okay.

. . .

Appellee: . . . I can understand why the doll would not be good because that is representative of a real life human being.

(Id.) (emphasis added).

The doll was shipped from Shenzhen, China, on 24 April 2019. (JA at 166.) The package arrived at CS's home approximately three weeks before Appellee's interview with AFOSI. (JA at 093.) CS did not know what was in the box because Appellee never told him. (JA at 053, 092.) Once the package arrived, CS dropped if off at Appellee's dorm room. (JA at 054.) Appellee said he was "very excited" when he received the doll. (JA at 139.) He named it 'Adele' after a friend he had in middle school. (JA at 093.)

At first, Appellee suggested to the agents that he only engaged in non-sexual activities with the doll. (JA at 094-101.) Eventually, the agents asked Appellee why he would have an anatomically correct doll with vaginal, anal, and oral orifices, and whether he was intimate with it. (JA at 101-04.) Appellee said the extent of his intimacy with the doll was "[m]aybe some cuddles" and "[a] kiss on the che[e]k goodnight." (JA at 103.) After Appellee continued to deny being intimate with the doll, SA JL said, "I don't like to put you in a hard spot and make you tell us stuff you don't want to tell us." (JA. at 105.) Appellee responded, "I

put myself in a hard spot, really, it's got me here. I mean I made the decision to get anything like that and that's my fault." (Id.) Appellee then admitted there was more than just a friendship between him and the doll. (JA at 107.)

Appellee said what he did with the doll was "very inappropriate." (JA at 112.) Asked to elaborate, Appellee admitted he had vaginal and anal sex with the doll three times, but "[m]ostly up the butt, up the buttocks."[4] (JA at 116.) Appellee explained the first time he had sex with the doll was the night he received the doll. (JA at 111.) That night, Appellee said he "got excited, I got a little too excited." (Id.) Appellee dressed the doll in different outfits, including a dress he bought for the doll and a "shirt that was too big that looked really cute . . . I like cute things." (JA at 114.) Appellee contrasted his desire for "cute things" with his last girlfriend, whom he described as being 6 feet, one inch tall with thick legs. (Id.)

When agents asked Appellee how he "worked up" to having sex with the doll that night, Appellee responded, "I think it had something to do with her clothes." (JA at 119.) Appellee said he had sex with the doll again one week later, and again five days before the interview. (JA at 117-18.)

Next, agents questioned Appellee on his pornography preferences. (JA at 121-37.) Agents asked Appellee if his "obsession with cute roll[ed] over" into

[4] Appellee defined "having sex" as "[p]utting it inside." (JA at 115.)

animated Japanese pornography. (JA at 122.) Appellee said he had "quite a few, Lolli pictures." (Id.) Appellee explained that "Lollies are generally characters that are depicted as underage girls."[5] (JA at 176 (disc) at 3:06:37-41.) When asked about the age range of Lollies, Appellee said it "ranges from 8 to 12, but it can also go up to like 16, but really -- it's not really an age range, it's more of a body type, like very petite, very petite." (JA at 123.) Appellee then agreed that the doll's body was similar in appearance to Lollies. (JA at 135.)

Appellee said he felt "sad" the first night he had sex with the doll. (JA at 139.) When asked why, Appellee had the following exchange with the agents:

> Appellee: Because I thought to myself, what if this was a life, what if this was real, and yeah, it's sad, so I stopped. I felt dirty.
>
> Agent: What do you mean, like a real child not just a doll?
>
> Appellee: Yes. That's when I stopped.
>
> Agent: Okay.
>
> Appellee: I can't see myself doing that to an actual child.
>
> . . .

[5] The trial transcript does not contain the word "underage" because that word was "indiscernible" to the court reporter. (JA at 122.) Therefore, the United States instead cites to the video recording of Appellee's interview, in which Appellee audibly said the word "underage." Lest there be any doubt, shortly after this exchange, Appellee adopted SA JL's characterization of Lollies as "characters depicting underage girls." (*See* JA at 123.)

Agent: Okay. And it got too real for you basically.

Appellee: Yeah.

(JA at 140.)

Despite feeling "sad" the first time, Appellee said he had sex with the doll two more times because he was "thinking about Lollies and demon Lollies specifically." (Id.) Both times, Appellee said "[i]t turned real" and he had to stop. (JA at 140-41.) Appellee explained:

> I felt bad because I did like it up until to [sic] point where I started thinking about if it were like, say, somebody's daughter and I kind of felt disgusted with myself, you know . . . It was more like, if this was my daughter, I wouldn't have somebody doing this, I would kill them.

(JA at 141.)

Appellee's Trial Motion

At trial, Appellee filed a motion entitled "Defense Motion to Dismiss – Failure to State an Offense." (JA at 198.) Appellee argued the indecent conduct specification did not state an offense because the conduct it alleged as criminal – engaging in sexual acts with a sex doll with the physical characteristics of a female child – "constitutes private consensual sexual activity," was not accompanied by any aggravating factors, and was therefore constitutionally protected pursuant to Lawrence v. Texas, 539 U.S. 559 (2003). (JA at 200-01.) The written motion "did not specifically assert a lack of constitutionally required fair notice that Appell[ee's] conduct was criminal." (JA at 005; *see* JA at 198-201.) During oral

argument on the motion, trial defense counsel reiterated the argument that Appellee's sexual acts with the doll were "purely private." (JA at 047.) Not once during oral argument did trial defense counsel mention the words "notice" or "fair notice." (*See* JA at 046-49.)

The government filed a response to the motion. (JA at 206-12.) While the government cited various cases concerning the "fair notice" and "void for vagueness" doctrines (JA at 207), the government's argument entirely focused on responding to Appellee's claim that his conduct with the doll was constitutionally protected under Lawrence. (*See* JA at 209-10.)

The military judge denied the motion. (JA at 050, 214-17.) Applying the test in United States v. Dear, 40 M.J. 196 (C.M.A. 1994), the military judge determined the indecent conduct specification stated an offense because it alleged the essential elements of the offense and provided protection against double jeopardy. (JA at 215-17.) He also determined the indecent conduct specification "provide[d] notice of the charge." (Id. at 217.) However, his use of the word "notice" in this context concerned whether the specification as drafted was sufficiently detailed "to place [Appellee] on notice of the allegation against which he must be prepared to defend" – not whether Appellee had constitutionally required fair notice that his conduct was subject to criminal sanction. (JA at 216.)

The AFCCA Opinion

For the first time on appeal at AFCCA, Appellee alleged he did not have fair notice that his convicted conduct – engaging in sexual acts with a sex doll with the physical characteristics of a female child – was criminal. (JA at 005.) Appellee conceded plain error review based on his failure to preserve the issue at trial. (JA at 158.) In a separate assignment of error, Appellee alleged his trial defense counsel was ineffective because she "never raised the issue of fair notice in her written filing for failure to state an offense or orally in her motions argument." (JA at 164.) Nonetheless, AFCCA reviewed the issue of fair notice de novo, reasoning that Appellee's claim at trial preserved the issue because it was a "similar attack still based on the Fifth Amendment's due process clause." (JA at 010.)

AFCCA's description of the facts foreshadowed its conclusion. AFCCA described the doll as "a short silicone doll with female physical characteristics, including oral, anal, and vaginal orifices and small breasts." (JA at 003.) Despite Appellee's numerous admissions that the doll was a *child* sex doll, AFCCA declined to make a finding that the doll was a representation of a child. (JA at 003 n.5.) AFCCA then credited Appellee's innocent explanations for his conduct surrounding the doll – that he purchased a small doll because "a larger doll would not fit well in his small dorm room," and that he "benefitted emotionally from the doll." (JA at 003-04.) At the same time, AFCCA entirely disregarded Appellee's more damaging admissions – that he knew he was buying a child sex doll that he

knew was "not good to have . . . on a military base" because it was "representative of a real life human being" (JA at 090, 098); that he enjoyed Lolli pornography which he admitted depicted underage girls (JA at 176 (disc) at 3:06:37-41); that he dressed up the doll in a little girl's dress (*See* JA at 114); and that he was drawn to having sex with the doll because he was thinking about Lollies. (JA at 140.)

Against this backdrop, AFCCA concluded Appellee did not have fair notice that his sexual acts with the doll were subject to criminal sanction. (JA at 010.) First, AFCCA reasoned Appellee's conduct did not involve the "hallmarks of criminally indecent conduct" because his sexual acts did not involve minors, non-consenting parties, or those unable to easily manifest lack of consent; prostitution, contraband, or other concurrent criminal conduct; nor were they committed in public or in an open and notorious manner. (JA at 010-11 (citing Lawrence, 539 U.S. at 578; United States v. Rollins, 61 M.J. 338, 345 (C.A.A.F. 2005); United States v. Izquierdo, 51 M.J. 421, 423 (C.A.A.F. 1999).) Second, AFCCA stated that nothing "in the *MCM*, federal law, military case law, military custom and usage, military regulations, or even state law" – the potential sources of fair notice identified in United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003) – "show that masturbating with a child sex doll was subject to criminal sanction." (JA at 011.) Finally, AFCCA determined Appellee was not on actual notice that his conduct was illegal. (JA at 012.) AFCCA reasoned that Appellee's furtive behavior

regarding the doll was not evidence of actual notice or consciousness of guilt, but rather merely Appellee's attempt to "conceal[] his 'weird' actions." (JA at 012.)

The dissent concluded Appellee had fair notice about the criminality of his actions. (JA at 016.) First, the dissent examined Appellee's admissions and determined "Appellee's admissions went further than embarrassment, reaching consciousness of guilt in the way he described concealing his purchase and possession of the doll and initially lying about how he used it for sexual gratification." (JA at 015.) The dissent also highlighted the fact that Appellee's admissions showed "awareness that the doll was 'obvious[ly]' incompatible with keeping it on a military installation." (Id.) Next, the dissent noted that because the offense of indecent conduct was an enumerated offense in Manual, the Manual defined "indecent conduct," and the offense withstood due process challenges in other contexts, Appellee had fair notice that his sexual acts with the doll were proscribed. (JA at 015-16.)

SUMMARY OF ARGUMENT

When analyzing an allegation that one did not have fair notice certain conduct was punishable under Article 134, UCMJ, military courts follow a straightforward procedure. First, courts look at the Manual to determine whether the charged offense is specifically enumerated by the President under Article 134, UCMJ. *See* Vaughan, 58 M.J. at 31 (first determining "child neglect" was not an enumerated offense); United States v. Bivins, 49 M.J. 328, 329 (C.A.A.F. 1998)

(beginning fair notice analysis by determining "[b]igamy is not an enumerated offense"). If the offense is enumerated, courts will then determine whether the plain language of the President's explanation of that offense provided fair notice to a reasonable service member of ordinary intelligence. *See* United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992) ("[w]e need to decide only whether appellant's conduct is plainly within the terms of the statute"); United States v. Sullivan, 42 M.J. 360, 366 (C.A.A.F. 1995) (concluding "any reasonable officer" would know the conduct at issue was punishable under Article 134, UCMJ). This focus on the plain language of the offense aligns with how the Supreme Court and other federal courts evaluate questions of fair notice, for "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 266 (1997).

AFCCA erred when it departed from this procedure. Despite recognizing that Appellee was charged with violating an enumerated offense, AFCCA conducted no analysis whatsoever as to whether the plain language of the President's explanation of the offense of "indecent conduct," as contained in the Manual, provided fair notice. Instead, AFCCA analyzed sources outside of the Manual and concluded that because there was nothing in those sources specifically criminalizing Appellee's conduct, Appellee did not have fair notice. (JA at 011.)

Had AFCCA followed the appropriate procedure, it would have concluded the plain language of "indecent," as defined by the President in the Manual, provides fair notice to a reasonable service member of ordinary intelligence that engaging in sexual acts with a child sex doll is subject to criminal sanction. Any reasonable service member would know that engaging in sexual acts with real children is indecent because such conduct is "grossly vulgar, obscene, repugnant to common propriety, tends to deprave morals with respect to sexual relations, and is clearly prohibited." MCM, pt. IV, para. 104.c.(1) (JA at 225). Knowing this, any reasonable service member would have no trouble concluding that engaging in sexual acts with an anatomically correct replica of a real child, constructed of silicone to simulate human flesh and complete with vaginal, oral, and anal orifices, meets the definition of "indecent" and is therefore subject to criminal sanction.

Even if this Court determines that the President's explanation of "indecent conduct" provides insufficient notice of what is prohibited, additional sources of law outside of the Manual provide the reasonable service member of ordinary intelligence fair notice that engaging in sexual acts with a child sex doll is prohibited. Military courts provide notice that otherwise non-indecent acts can be rendered indecent depending on the circumstances. United States v. Wilson, 13 M.J. 247, 250 (C.M.A. 1982). Based on this principle and military and federal laws proscribing obscene materials depicting what appear to be minors, the reasonable service member of ordinary intelligence would conclude that engaging

in vaginal and anal intercourse with a child sex doll clearly falls within the scope of indecent conduct.

Finally, Appellee's admissions regarding the child sex doll demonstrate he knew full well his conduct was proscribed and engaged in it anyway. Appellee knew he was buying a child sex doll. (JA at 096, 150.) He recognized "it's obvious it's not good to have something like that on a military base." (JA at 090.) He had the doll shipped to another airman's off-base residence without telling the airman what was in the package. (JA at 052-55, 090, 092.) He kept the doll concealed in his dorm room. (JA at 101.) And once he was caught, he initially lied to agents before finally admitting he "felt dirty" about having anal and vaginal intercourse with the doll—a doll so realistic it "turned real" mid-intercourse. (JA at 140-41.) Under these circumstances, it would not be *unfair* to determine Appellee had *fair* notice that his conduct was proscribed.

The Manual and sources outside of the Manual gave fair notice to Appellee that engaging in sexual intercourse with a child sex doll was proscribed. And Appellee's admissions demonstrate he was on actual notice of the criminality of his actions. Therefore, Appellee had constitutionally-required fair notice, and this Court should reverse the decision of the Air Force Court.

ARGUMENT

APPELLEE HAD CONSTITUTIONALLY-REQUIRED FAIR NOTICE THAT COMMITTING SEXUAL ACTS WITH A CHILD SEX DOLL WAS SUBJECT TO CRIMINAL SANCTION UNDER THE PRESIDENTIALLY-ENUMERATED ARTICLE 134, UCMJ, OFFENSE OF INDECENT CONDUCT.

Standard of Review

Appellee failed to raise the issue of fair notice at trial. (*See* JA at 046-49, 198-202.) As a result, trial counsel were deprived of the opportunity to present evidence or make arguments specifically rebutting an assertion that Appellee lacked constitutional fair notice. *See* United States v. Perkins, 78 M.J. 381, 390 (C.A.A.F. 2019) (citation omitted) ("[A] particularized objection is necessary so that the government has the opportunity to present relevant evidence that might be reviewed on appeal"). Therefore, Appellee's failure to preserve the issue of fair notice at trial warrants plain error review. United States v. Warner, 73 M.J. 1, 3 (C.A.A.F. 2013); *see, e.g.*, Mil. R. Evid. 103(a)(1)(B) (requiring parties to state the specific ground for an objection). Moreover, Appellee's concession before the lower court that plain error is the appropriate standard of review (JA at 158), coupled with his unqualified assertion that his trial defense counsel "never raised the issue of fair notice" during trial (JA at 164), only further demonstrate the appropriateness of the plain error standard.

Both the AFCCA majority and dissenting opinions relied on United States v. Saunders, 59 M.J. 1 (C.A.A.F. 2003) in determining that Appellee's motion to dismiss for failure to state an offense preserved the issue of fair notice, thereby warranting de novo review. (JA at 007, 013-14.) But in Saunders, the issue presented was whether the specification at issue failed to state an offense *because* the appellant did not have fair notice that his conduct was criminal, and the context of the opinion provides no reason to believe that the appellant did not raise the issue in the same manner at trial. 59 M.J. at 2, 6-10. In contrast, at his own trial, Appellee alleged the specification did not state an offense because his conduct was constitutionally protected under Lawrence, without any mention of a lack of fair notice. (*See* JA at 200-01.) Thus, Saunders is not applicable, and this Court should determine Appellee forfeited the issue of fair notice based on his failure to preserve that specific issue at trial. *Cf.* United States v. Davis, 26 M.J. 445, 446 n.1 (C.M.A. 1988) (evaluating the granted issue of whether a specification failed to state an offense, but finding that the issue of constitutional fair notice was "waived" because the appellant did not raise it at trial or on appeal).

Under plain error review, Appellee must demonstrate that: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of [Appellee]." Warner, 73 M.J. at 3 (quoting United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012)).

Law and Analysis

The Fifth Amendment to the Constitution provides "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[6] A fundamental requirement of due process is the concept of fair notice: that "a criminal statute [must] give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954); United States v. Williams, 553 U.S. 285, 304 (2008). Stated differently, "an individual [cannot be held] criminally responsible for conduct which he could not reasonably understand to be proscribed." Rose v. Locke, 423 U.S. 48, 49 (1975) (internal quotation marks and citation omitted).

AFCCA erred in analyzing Appellee's claim that he did have fair notice that engaging in sexual acts with a child sex doll was criminally proscribed. AFCCA erred not only in its conclusion that Appellee did not have fair notice, but also in *how* it came to that conclusion.

A. AFCCA erred when it failed to look first to the plain language of the President's explanation of the enumerated offense of "indecent conduct."

To begin, AFCCA's opinion was inconsistent with how this Court has analyzed the question of constitutional fair notice. In deciding whether an appellant had fair notice of criminality in McGuinness, this Court asserted "[w]e need to decide only whether appellant's conduct is plainly within the terms of the

[6] U.S. CONST. amend. V.

statute." 35 M.J. at 152 (internal quotation marks and citation omitted). This Court's focus on the plain language of the statute in McGuiness aligns with how the Supreme Court and other federal courts evaluate questions of "fair notice." The Supreme Court has said, "the touchstone is whether the statute, *either standing alone* or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." Lanier, 520 U.S. at 266 (emphasis added). In short, Lanier establishes that a statute, by itself, may be enough to meet the constitutional requirement of fair notice.

Indeed, federal courts follow this principle of looking to plain language first, and often to plain language exclusively. For example, in United States v. Cullen, the Second Circuit analyzed whether the words of a statute were "comprehensible to any ordinary person." 499 F.3d 157, 163 (2d Cir. 2007). Finding that the "common meanings" of the words and other provisions of the statute gave "adequate notice" that the defendant's actions were prohibited, the Court ended its inquiry into the notice issue. Id. at 163-64. Likewise, in United States v. Hunt, the Eighth Circuit looked solely to the plain language of a criminal statute, found that it covered the defendant's conduct, and determined that the defendant's "due process right to fair notice was satisfied." 526 F.3d 739, 744 (8th Cir. 2008). In fact, the Court rejected the defendant's pleas to look beyond the plain language of the statute to legislative history, because such inquiries are unnecessary "when the text of the statute is plain." Id. *See also* United States v. Wayerski, 624 F.3d 1342,

1349 (11th Cir. 2010) (statute's "plain language covered the defendants' conduct and satisfied the due process requirement for fair notice"); Hawai'i Wildlife Fund v. Cty. Of Maui, 881 F.3d 754, 767 (9th Cir. 2018) (citations and quotations omitted) ("In determining whether there has been fair notice, [a court] must first look to the language of the statute itself," and "[if] the plain language of statute is sufficiently clear to warn a party about what is expected, a court may find the party had 'fair notice' under the due process clause"), *modified by* 886 F.3d 737 (9th Cir. 2018), *vacated on other grounds*, Cty. Of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2019).

Although AFCCA considered as part of its analysis that there was no "military case law" criminalizing the type of conduct for which Appellee was convicted (JA at 011), that factor is of little importance. When evaluating fair notice, "it is immaterial that there is no litigated fact pattern precisely in point." United States v. Kinzler, 55 F.3d 70, 74 (2d Cir. 1995) (internal citations omitted). *See also* United States v. Martin, 1993 U.S. App. LEXIS 18849, at *7 (10th Cir. July 22, 1993) (unpub. op.) (citing Locke, 423 U.S. at 51) ("Where, as here, the language of the statute plainly covers the defendant's actions, the statute need not have been previously held applicable on the same facts to survive a vagueness attack").

The Sixth Circuit Court of Appeals applied the same logic in United States v. Blaszak, 349 F.3d 881 (6th Cir. 2003). The Court found that a defendant had

constitutional fair notice that a federal statute that prohibited the sale of testimony covered his sale of "truthful" testimony, even though there were "no reported cases, in [the Sixth Circuit] or other jurisdictions, sustaining a conviction for demanding payment in exchange for truthful testimony under" the statute. Id. at 886-87. The Court reasoned that a person of common intelligence would understand that the plain language of the statute prohibited accepting something of value in exchange for any testimony – truthful or untruthful – and that the defendant's conduct fell well within what was prohibited by the statute. Id. at 887-88.

In sum, if the plain language of a statute unmistakably covers an accused's conduct, an appellate court can find the accused had constitutional fair notice, without delving any further into alternate sources of notice.

In the Article 134, UCMJ, context, if an offense is enumerated, courts look first to the language pertaining to the enumerated offense as a source of notice.

It is true that the enumerated Article 134, UMCJ, offense of "indecent conduct" is not part of the statutory language of Article 134, UMCJ, 10 U.S.C. § 934. But there is no reason why courts should not treat the President's description of Article 134, UCMJ, offenses as the equivalent of statutory language for purposes of a fair notice analysis. Historically, "to determine the elements" of an Article 134, UCMJ, offense, this Court looks "at both the statute and the President's explanation in MCM pt. IV. . ." United States v. Zachary, 63 M.J. 438,

441 (C.A.A.F. 2006). And, in fact, this Court has recognized that "Presidential narrowing of the 'general' article through examples of how it may be violated is part of why Article 134, UCMJ, is not unconstitutionally vague." United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing Parker v. Levy, 417 U.S. 733, 753-56 (1974)).

A review of Parker v. Levy confirms that a fair notice analysis of an Article 134, UCMJ, offense can begin and end with the plain language of the President's enumerated examples and descriptions in the MCM. In Parker v. Levy, the Supreme Court rejected a challenge by Capt Levy that he did not have fair notice that his conduct – making various statements during the Vietnam War that were "design[ed] to promote disloyalty and disaffection" – was punishable under Article 134, UCMJ. 417 U.S. 733, 738-39, 755 (1974). In conducting its fair notice analysis, the Supreme Court could not rely solely on the plain language of Article 134, UCMJ, because "the literal language" of the article was "very broad." Id. at 754. Nonetheless, the Court observed that over time, military courts and military authorities narrowed the broad reach of Article 134, UCMJ, thereby creating "a substantial range of conduct to which [Article 134, UCMJ] clearly appl[ies] without vagueness or imprecision." Id. The Court reasoned that Capt Levy's conduct "squarely falls" within that range because the Manual for Courts-Martial specified that "certain disloyal statements by military personnel" could be punishable under Article 134, UCMJ, and even contained examples of such

disloyal statements that were similar to the statements made by Capt Levy.[7] Id. at 753-55. Although the Court concluded that the Manual for Courts-Martial put Capt Levy on fair notice, "the Court did not preclude future application of Article 134 to actions not specifically mentioned in the MCM . . . even though sizable areas of uncertainty as to the coverage of [Article 134, UCMJ] may remain . . . further content may be supplied even in these areas by less formalized custom and usage." Vaughan, 58 M.J. at 31 (internal quotation marks and emphasis omitted) (citing Parker v. Levy, 417 U.S. at 754).

As foreshadowed by the Parker v. Levy court, in Vaughan, a service member was charged under Article 134, UCMJ, for "actions not specifically mentioned in the MCM." Parker v. Levy, 417 U.S. at 754. In Vaughan, the appellant left her infant daughter unattended for six hours while she went to a club. 58 M.J. at 30. At trial, the appellant was convicted of "child neglect" in violation of Article 134, UCMJ. Id. On appeal, the appellant argued she did not have fair notice that her conduct was proscribed by Article 134, UCMJ. Id. This Court disagreed. Id. at 33. In analyzing the issue of fair notice, this Court began its analysis in the same way that the Supreme Court did in Parker v. Levy—by looking at the Manual for Courts-Martial for language that served as a source of notice to the appellant. *See*

[7] The Parker v. Levy court also found relevant to a fair notice analysis the fact that Article 137, UCMJ, requires the military to advise service members of the contents of the UCMJ. 417 U.S. at 751.

id. at 31. Unlike in Parker v. Levy, however, the Manual for Courts-Martial was not helpful because "child neglect" was not an enumerated offense under Article 134, UCMJ, and as a result this Court could not rely on the Manual for Courts-Martial for an explanation of what constituted "child neglect." *See* id. "Therefore, [this Court] look[ed] elsewhere to determine whether Appellant should have reasonably contemplated that her conduct was subject to criminal sanction." Id. After examining military case law, state law, and military custom and regulations, this Court concluded that these sources, as a whole, gave the appellant fair notice that her conduct was subject to military criminal sanction. Id. at 31-33.

These cases outline a straightforward procedure that military courts follow when assessing an allegation that one did not have fair notice certain conduct was punishable under Article 134, UCMJ. If an offense is specifically enumerated, courts do not have to look outside of the Manual for other sources of notice because the President also provides elements of the offense and defines important terms. *See* MCM, pt. IV, paras. 92-108 (enumerating, and providing definitions and elements for, 17 offenses under Article 134, UCMJ). The President's enumeration of an offense demonstrates the President's desire to put service members on notice that certain conduct not mentioned elsewhere in the Code may be subject to criminal sanction. By providing elements and definitions pertaining to each enumerated offense, the President is ensuring members receive clear—and thereby *fair*—notice as to what is prohibited.

Thus, if the charged offense is enumerated under Article 134, UCMJ, a court should look first to the plain language of the portions of the Manual pertaining to that enumerated offense for fair notice. While the President's descriptions may not list every imaginable way a service member might commit the enumerated offense, that is not required for constitutional fair notice. "Most statutes must deal with untold and unforeseen variations in factual situations . . . [c]onsequently, no more than a reasonable degree of certainty can be demanded." Boyce Motor Lines, Inc., 342 U.S. at 340. So long as the charged conduct is plainly within the President's descriptions, the inquiry is over. *See* Hunt, 526 F.3d at 744 (rejecting defendant's request to look beyond plain language of the statute because the text of the statute was plain). Adopting the alternative standard that AFCCA imposed in this case would not only be inconsistent with federal case law but would make it unduly burdensome for the government to prosecute indecent conduct that falls clearly within the plain language of the enumerated offense.

B. AFCCA erred when it looked outside of the Manual for notice because courts only do so after first determining the Manual provides insufficient notice – which AFCCA never did.

AFCCA erred by departing from the above procedure when analyzing Appellee's fair notice claim. AFCCA began its analysis by appropriately acknowledging that indecent conduct was an enumerated offense. (JA at 006.) And AFCCA recognized that the President had defined the term "indecent" in the Manual. (Id.) But rather than analyzing whether the plain language of the

definition of "indecent" could provide fair notice, AFCCA focused its attention elsewhere. (*See* JA at 010-13.) Despite conducting no analysis whatsoever as to whether the Manual's definition of "indecent," in and of itself, could give fair notice, AFCCA stated it was unable to find "anything in the MCM . . . that criminalized the *type of conduct for which Appell[ee] was convicted*." (JA at 011 (emphasis in original).) This was error.

When analyzing whether an offense charged under Article 134, UCMJ, provides fair notice, this Court looks outside of the Manual only if it first determines the Manual is insufficient—e.g., if the plain language of the relevant portions of the Manual is ambiguous, otherwise provides insufficient notice,[8] or if the charged offense is not an enumerated offense.

This was this Court's approach in cases such as Vaughan, Warner, and United States v. Merritt, 72 M.J. 483 (C.A.A.F. 2013). The common denominator in these cases was that they all involved *unenumerated* Article 134, UCMJ, offenses. Vaughan, 58 M.J. at 31 (unenumerated offense of "child neglect"); Warner, 73 M.J. at 3 (unenumerated offense of possessing "child erotica"); Merritt, 72 M.J. at 486 (unenumerated offense of "viewing child pornography"). Because the offenses were unenumerated, there were no definitions or elements in the

[8] The United States is unaware of any case in which a Court of Criminal Appeals or this Court determined that a presidentially-enumerated offense under Article 134, UCMJ, failed to provide fair notice to an appellant.

Manual pertaining to the offenses – and therefore the Court had to look to potential sources of notice outside of the Manual. These cases are largely inapplicable in situations where, as here, the case involves an enumerated offense; if an offense is enumerated in the Manual, the Manual itself serves as the best source of notice. *See* Parker v. Levy, 417 U.S. at 753-55.

Moreover, AFCCA's opinion seemed to focus on whether Appellee himself failed to realize his conduct was subject to criminal sanction. (*See* JA at 10-12.) In a fair notice inquiry in the military, however, the question is whether a reasonable service member of ordinary intelligence would have known, based on the plain language pertaining to an offense, that the conduct at issue was punishable. *See* Williams, 553 U.S. at 304 (emphasis added) (holding that statutes must provide "a person of *ordinary intelligence* fair notice of what is prohibited"); Parker v. Levy, 417 U.S. at 763 (Blackmun, J., concurring) (emphasis added) (recognizing that certain acts charged under Article 134, UCMJ, "are of a sort which *ordinary soldiers* know, or should know, to be punishable"); Sullivan, 42 M.J. at 366 (C.A.A.F. 1995) (emphasis added) (citation omitted) ("In our view, any *reasonable officer* would know that [the convicted conduct] is service-discrediting conduct under Article 134."), *overruled on other grounds* by United States v. Reese, 76 M.J. 297, 302 (C.A.A.F. 2017).

C. A reasonable service member of ordinary intelligence would know, based on the definition of "indecent conduct" contained in the Manual, that engaging in vaginal and anal intercourse with a realistic child sex doll was subject to criminal sanction.

Upon recognizing that indecent conduct was an enumerated offense, AFCCA should have analyzed whether a reasonable service member of ordinary intelligence would have known, based on the plain language of the portions of the Manual pertaining to indecent conduct, that engaging in sexual acts with a child sex doll was proscribed. After conducting this analysis, AFCCA should have concluded there was no error, much less plain error, for Appellee to be charged and convicted of engaging in conduct that is clearly proscribed by the Manual.

Appellee was charged with indecent conduct, an enumerated offense under Article 134, UCMJ. MCM, pt. IV, para. 104 (JA at 225). The specification alleged Appellee did:

> [O]n divers occasions, between on or about 24 April 2019 and on or about 20 May 2019, commit indecent conduct, to wit: engaging in sexual acts with a sex doll with the physical characteristics of a female child, and that said conduct was of a nature to bring discredit upon the armed forces.

(JA at 004.)

The President listed the elements of indecent conduct as follows: (1) the accused engaged in certain conduct; (2) the conduct was indecent; and (3) the conduct was either prejudicial to good order and discipline in the armed forces, of a nature to bring discredit upon the armed forces, or both. MCM, pt. IV, para.

104.b.(1)-(3) (JA at 225). The President defined "indecent" as:

> [T]hat form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

MCM, pt. IV, para. 104.c.(1) (JA at 225). The offense of indecent conduct "includes offenses previously proscribed by 'Indecent acts with another' except that the presence of another person is no longer required." MCM, pt. IV, para. 104.c.(2) (JA at 225).

Any reasonable service member of ordinary intelligence would know that engaging in sexual acts with a sex doll with the physical characteristics of a female child would constitute "indecent conduct" per the definition contained in the Manual. And it would not be absurd to draw this conclusion. As an initial matter, any reasonable service member of ordinary intelligence would conclude that engaging in sexual acts with real children is grossly vulgar, obscene, repugnant to common propriety, tends to deprave morals with respect to sexual relations, and is clearly prohibited. The service member would know that such behavior is patently offensive, condemned in the United States and the military, and in violation of social norms because children are meant to be protected rather than serve as sexual objects for adults. *See* Cullen, 449 F.3d at 163 ("to meet the fair warning prong an ounce of common sense is worth more than an 800-page dictionary"). Moreover, the service member would know that engaging in sexual acts with children

depraves morals with respect to sexual relations because sexual relations are meant to be between consenting adults, not between an adult and a child.

With this in mind, the reasonable service member of ordinary intelligence would turn his attention to the child sex doll at issue—'Adele'—and consider whether it would be "grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations" for him to engage in sexual acts with it. MCM, pt. IV, para. 104.c.(1) (JA at 225). The service member would immediately see that 'Adele' resembles a real, female child. Its silicone construction makes its body feel like real flesh. (JA at 100.) Its length and weight are similar to that of a small child. (JA at 166, 207, 214.) It has small, underdeveloped breasts, much like a prepubescent girl. (JA at 172-73.) Upon closer examination of 'Adele,' the service member would see this is no ordinary child-like doll.

The service member would see that 'Adele' has vaginal, oral, and anal orifices made of silicone. (JA at 172-73.) The service member would see that these orifices can accommodate an adult penis.[9] The service member would also

[9] This Court can, at the very least, infer that the child sex doll's anal and vaginal orifices were large enough to accommodate an adult penis based on Appellee's admissions that he inserted his penis into the doll's anal and vaginal orifices on numerous occasions. (*See* JA at 115-16.) *See also* Marie-Helen Maras & Lauren R. Shapiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, J. OF INTERNET L. 3, 4 (2017) ("Like their adult counterparts, child sex dolls are realistic reproductions of young (prepubescent) children in size and appearance with anatomically correct genitals and anus, with all orifices able to accommodate the

realize that 'Adele' comes with a device that emits "moaning" noises when turned on. (JA at 310.) Based on these observations, the service member would realize that 'Adele' is not simply a realistic-looking child doll. Nor is it an average sex doll. Rather, it is a realistic-looking *child sex doll*.

Applying his knowledge of society's condemnation of sexual acts involving children and materials normalizing and encouraging sexual activity with children, there would be no doubt the reasonable service member would then conclude that engaging in simulated vaginal and anal intercourse with 'Adele' meets the definition of "indecent" contained in the Manual and would be punishable as indecent conduct. First, the service member would recognize that the fact that 'Adele' is not a real child does not matter because the offense does not require the presence of another person. MCM, pt. IV, para. 104.c.(2) (JA at 225). Next, the service member would conclude that engaging in intercourse with 'Adele' would be considered despicable and repugnant to social norms because of the doll's obvious purpose – to serve as a sex object – and its close resemblance to a real child. And finally, the service member would conclude that such behavior tends to deprave morals with respect to sexual relations because there is no doubt that simulating sexual intercourse with perhaps the closest thing to a real female child tends to normalize and encourage sexual acts with children.[10]

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length and width of adult male genitalia.").

[10] Even if Appellee's conduct arguably presented a close call, that would not

As a final point, not only did AFCCA err by failing to analyze the plain language of the Manual, it compounded its error by explicitly considering a factor outside the plain language of the enumerated offense. In evaluating whether Appellee was on notice that his conduct was criminal, AFCCA considered whether his actions were "in public, or in an open and notorious manner." (JA at 011-12.) But the President has specifically announced that "the presence of another person is no longer required" for indecent conduct to be prosecutable under Article 134, UCMJ. MCM, pt. IV, para. 104.c.(2) (JA at 225). As a result, Appellee should have known that his conduct was indecent and criminally proscribed, even though he committed the sexual acts with the child sex doll alone in his dorm room.

In sum, AFCCA erred by failing to conduct any analysis into whether Appellee's actions were covered by the plain language of the President's enumerated indecent conduct offense. Because a reasonable service member of ordinary intelligence would conclude that engaging in vaginal and anal intercourse with a realistic child sex doll falls squarely within the definition of indecent conduct, this Court should determine – especially under a plain error standard – that Appellee had fair notice that his conduct was proscribed and end the inquiry there.

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change the result. It is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. 342 U.S. at 340.

D. A reasonable service member of ordinary intelligence would know, based on sources of law outside of the Manual, that engaging in vaginal and anal intercourse with a realistic child sex doll was subject to criminal sanction.

Even if this Court determines an examination of the Vaughan sources is necessary to evaluate fair notice, the outcome is the same: a reasonable service member of ordinary intelligence would understand that engaging in vaginal and anal intercourse with a realistic child sex doll is subject to criminal sanction.

1. Military law related to "indecent conduct" gives notice that the offense captures a wide range of deviant sexual conduct, and that otherwise non-indecent conduct can be rendered indecent depending on the circumstances.

While the offense of indecent conduct was known by different names and at times contained an additional element, the definition of "indecent" remained consistent. *Compare* MCM, pt. IV, para. 90.c. (2005 ed.) (JA at 219), *with* MCM, pt. IV, para. 45.a.(t)(12) (2008 ed.) (JA at 223), *and* MCM, pt. IV, para. 104.c.(1) (JA at 225). For many years, military courts used this definition to analyze whether certain conduct is indecent. And in conducting this analysis, military courts recognize the logical principle that "acts not inherently indecent . . . may be rendered so by the accompanying words and circumstances." Wilson, 13 M.J. at 250 (citation omitted) (evaluating the offense of indecent assault). Stated differently, courts recognize that otherwise non-indecent (legal) conduct can become indecent (illegal) depending on the totality of the circumstances surrounding the conduct.

Applying this principle, military courts determined a wide array of behavior to be indecent. In United States v. Hancock, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) determined the otherwise non-indecent conduct of holding one's erect penis in one's hand was "undoubtedly . . . indecent," because the appellant did so while standing over someone who was sleeping. No. NMCCA 201000400, 2011 CCA LEXIS 114, at *30 (N-M Ct. Crim. App. 28 June 2011) (unpub. op.) (JA at 251). In United States v. King, this Court determined the appellant's conduct—asking a female to reveal her breasts—constituted an attempt to commit an indecent act because the female was the appellant's fourteen-year-old stepdaughter. 71 M.J. 50, 52 (C.A.A.F. 2012).

Particularly relevant to this case is United States v. Jagassar, No. ACM 38228, 2014 CCA LEXIS 64 (A.F. Ct. Crim. App. 4 February 2014) (unpub. op.) (JA at 252-55). In Jagassar, AFCCA determined the appellant's act of persuading a consenting airman to send him pictures of herself inserting various items into her vagina was indecent, because the items he persuaded her to insert were "worms, goldfish, a hermit crab," "tree branches," and "a sea anemone." Jagassar, unpub. op. at *3 (JA at 252-53). AFCCA recognized that while "sexual acts some individuals might find offensive and repugnant are still protected in the privacy of one's bedroom . . . there are limits to that protection." Id. at *11 (JA at 254). "Wherever that line might fall, the insertion of living animals into the female sex organ clearly falls outside of that protection." Id.

Based on these cases, a reasonable service member of ordinary intelligence would understand there are limits to the type of sexual conduct he can engage in within the privacy of his dorm room, since courts have determined that otherwise legal conduct could become indecent depending on the surrounding circumstances. Here, the service member would recognize that engaging in sexual intercourse with 'Adele' transforms what might otherwise be legal masturbation into indecent conduct because of the circumstances surrounding 'Adele'—namely, that 'Adele' is not an ordinary masturbation aid, but rather a doll that *looks and feels like a real child*. Finally, the service member would know that courts have found a wide range of conduct to constitute indecent conduct. Like the sexual acts in Jagassar, he would conclude that, wherever the line for criminally indecent conduct might fall, engaging in sexual acts with a child sex doll clearly falls within it.

2. Military and federal law regarding child pornography and obscene materials involving the sexual abuse of children give notice that materials depicting what appear to be minors engaged in sexually explicit conduct are indecent, and therefore illegal.

Other military and federal laws proscribing obscene materials depicting what appear to be minors (rather than actual minors) also gave Appellee notice that his sexual acts with a child sex doll were criminally indecent.

Service members are on notice that "child pornography is a highly regulated area of criminal law." Warner, 73 M.J. at 4. In the military, service members are prohibited from possessing, receiving, viewing, distributing, and producing "child

pornography," which is defined as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." MCM, pt. IV, para. 95.c.(4). "Sexually explicit conduct" includes the "lascivious exhibition of the genitals of any person." MCM, pt. IV, para. 95.c.(10)(e). The military's ban on child pornography encompasses not only visual depictions of actual minors, but also "extends to visual depictions of what *appear* to be minors." MCM, pt. IV, para. 95.c.(1) (emphasis added).[11]

Child pornography is also prohibited by federal law. 18 U.S.C. §§ 2251-52, 2252A. Moreover, federal law prohibits the production or receipt of "obscene images," defined as "a visual depiction of any kind, including a drawing, cartoon, *sculpture*, or painting," that depicts minors, or what appears to be minors, engaging in sexually explicit conduct and "lacks serious literary, artistic, political, or scientific value." 18 U.S.C. §1466A[12] (emphasis added).

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[11] Arguably, based on the definitions contained in the Manual, possession of a child sex doll could constitute possession of child pornography. A child sex doll is "material." An unclothed child sex doll displaying its realistic-looking genitals (*see* JA at 172-73) could constitute "material that contains . . . an obscene visual depiction of a minor engaging in sexually explicit conduct" because it is a "lascivious exhibition of the genitals." MCM, pt. IV, paras. 95.c.(4), 95.c.(10)(e). And the fact that it is a doll and not a real child would not matter because the military's prohibition on child pornography extends not only to depictions of actual minors, but also what *appear* to be minors (MCM, pt. IV, para. 95c.(1)) – and 'Adele' undoubtedly appears to be a minor. (*See* JA at 077, 096, 168-73.)

[12] Child sex dolls were not explicitly banned by federal or state laws as of May 2019, when Appellee engaged in his convicted conduct. *See* Maras & Shapiro,

Based on these sources of law, a reasonable service member would know that possession of "obscene" virtual child pornography and receipt of an "obscene" sculpture depicting a child may be prosecuted under various laws. The service member would conclude that even though child sex dolls are not real children, they come very close to the type of material that both military and federal authorities would deem "obscene" and can criminally prosecute. Since "obscene" is part of the President's definition of "indecent," these other laws regulating obscenity gave Appellee notice that engaging in sexual acts with a child sex doll is considered "indecent" within our society. In other words, they provided Appellee notice that his conduct was criminal.

In sum, the Vaughan sources, "when addressed together," give a reasonable service member of ordinary intelligence additional notice that engaging in sexual acts with a child sex doll is subject to criminal sanction. Vaughan, 58 M.J. at 33.

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supra note 8, at 5 (noting that as of December 2017, no US laws explicitly prohibited child sex dolls and robots). Since then, five states enacted laws criminalizing the possession of child sex dolls. FLA. STAT. § 847.011(5)(a)(1) (2019) (JA at 226-29); HAW. REV. STAT. § 712-1216.5 (2021) (JA at 230); S.D. CODIFIED LAWS § 22-24A-3.1 (2021) (JA at 231); TENN. CODE ANN. § 39-17-910 (2021) (JA at 232); UTAH CODE ANN. §§ 76-10-1236, 76-10-1237 (2023) (JA at 233-34). Federally, two versions of the Curbing Realistic Exploitative Electronic Pedophilic Robots Act (CREEPER Act) were introduced in the House of Representatives but were not enacted. H.R. 4655, 115th Cong. (2018) (JA at 235-38); H.R. 73, 117th Cong. (2021) (JA at 239-41). Both iterations of the CREEPER Act sought to criminalize the importation of "child sex dolls"—defined as "an anatomically correct doll . . . with the features of, or with features that resemble those of, a minor, intended for use in sexual acts." H.R. 4655, 115th Cong. (2018) (JA at 236); H.R. 73, 117th Cong. (2021) (JA at 240).

Therefore, under a plain error standard or otherwise, this Court should determine Appellee had fair notice such conduct was indecent, and thus proscribed.

E. Appellee had actual notice that engaging in sexual acts with a child sex doll was subject to criminal sanction.

By its terms, the concept of fair notice is about *fairness*. Fair notice ensures that individuals are not *unfairly* held criminally responsible for conduct they could not reasonably understand to be proscribed. Locke, 423 U.S. at 49. But where, as here, "there is sufficient information in th[e] record" to conclude an individual had actual notice of the criminality of his conduct yet engages in it anyway, it is not unfair to hold him responsible for his conduct. United States v. Boyett, 42 M.J. 150, 154 (C.A.A.F. 1995) (determining there was sufficient information in "the record" to conclude there was adequate notice to the appellant of his potential criminality).

When Appellee purchased 'Adele,' he knew exactly what he was buying: a child sex doll. He knew it was a *sex doll* because he found the doll while browsing a website that sold sex dolls. (JA at 150.) And he knew it was a *child* doll. (JA at 098 ("It's a doll of a child . . . it is very – it is kind of obvious").) Aware of what he was purchasing and recognizing "it's obvious it's not good to have something like that on a military base" (JA at 090), Appellee had the doll shipped to CS's off-base residence instead of his own dorm room. (JA at 052-55, 090.) Appellee

never told CS the package contained a child sex doll. (JA at 092.) And after Appellee received the doll, he kept it concealed in his dorm room. (JA at 101.)

When interviewed about the doll, Appellee demonstrated consciousness of guilt. During the interview, Appellee knew the agents wanted to talk to him about the doll. (JA at 097.) He told the agents he was "stressed out" about the dorm inspection because he thought the doll would be confiscated. (Id.) But there was no reason for him to have those thoughts unless he believed the doll would be considered contraband. The dorm inspectors would have no reason to confiscate the doll if it was merely "weird." (*See* JA at 12 (characterizing Appellee's actions as "weird").) Moreover, Appellee began the interview by lying about what he did with the doll. Appellee first suggested his relationship with the doll was platonic and denied engaging in sexual acts with it. (JA at 094-103.) Only after agents continued to question Appellee on why he would have an anatomically correct doll did Appellee finally admit to engaging in sexual acts with the doll. (JA at 107.) Before elaborating on his sexual acts with the doll, Appellee became emotional and broke down crying. (JA at 176 (disc) at 2:13:50-2:27:30.) After calming down, Appellee explained he engaged in vaginal and anal intercourse with the doll on three separate occasions. (JA at 117.) He conceded that what he did with the doll was "very inappropriate." (JA at 112.) Appellee admitted that the first time he had sex with the doll, he had to stop because he "thought to [him]self, what if this was a life, what if this was real," and "felt dirty." (JA at 140.) Despite recognizing the

wrongfulness of his conduct with the doll, Appellee had sex with it two more times. (Id.) Appellee said that on both occasions, he stopped mid-intercourse because it "turned real"[13] – "I started thinking about if it were like, say, somebody's daughter and I kind of felt disgusted with myself." (JA at 141.)

Appellee's conduct both before and after he was caught indicates that he knew full well that his conduct was proscribed. Therefore, he cannot claim to be "one of the rare entrapped innocents" who had no idea his conduct was punishable as indecent conduct and was subsequently, and unfairly, convicted of the offense. McGuinness, 35 M.J. at 152 (internal quotation marks and citation omitted). Because the record demonstrates Appellee had actual notice that his conduct was subject to criminal sanction, it was not error, let alone plain error, for him to be charged and convicted of engaging in conduct he actually knew was proscribed.

F. This Court should remand this case to the Air Force Court to fully consider the constitutional questions left unanswered.

AFCCA's opinion professed that it did not reach the issue of whether Appellee's conduct was constitutionally protected under Lawrence v. Texas. (JA at 012 n.19.) Yet the Court cited Lawrence several times in concluding Appellee did not have "constitutionally required fair notice that the conduct at issue was criminally indecent," so the case merits some discussion. (JA at 010 n.14, 011,

[13] That the doll "turned real" to Appellee mid-intercourse is further proof of the doll's realism and close resemblance to a real female child.

012 n.18.) The United States maintains that Appellee's conduct did not fall within the limited liberty interest protected by Lawrence, namely "private, consensual sexual activity between adults," *see* United States v. Marcum, 60 M.J. 198, 207 (C.A.A.F. 2004), and that a reasonable service member would not believe that it did. Having vaginal and anal sex with a child sex doll – conduct that tends to normalize sex with children – is markedly different from the consensual sexual activity between adults protected under Lawrence. Moreover, this Court has recognized that "additional factors relevant solely in the military environment [] affect the nature and reach of the Lawrence liberty interest." Marcum, 60 M.J. at 207. This acknowledgment echoes this Court's repeated conclusion that the military may prosecute possession of virtual child pornography under Article 134, UCMJ, "even if such conduct would have been protected in a civilian context." United States v. Brisbane, 63 M.J. 106, 116 (C.A.A.F. 2006). *See also* United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006); United States v. Mason, 60 M.J. 15, 20 (C.A.A.F. 2004). If private possession of virtual child pornography can be constitutionally prosecuted in the military under Article 134, UCMJ, then it follows that committing sexual acts with a child sex doll in private can be as well. Lastly, "the military's unique interest in obedience and discipline" United States v. Goings, 72 M.J. 202, 206 (C.A.A.F. 2013), and the fact that Appellee committed his indecent conduct in a military dormitory place that conduct well outside the realm of constitutional protection. *See* United States v. McCarthy, 38 M.J. 398,

403 (C.M.A. 1993) ("[T]he threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home."). Prosecuting indecent conduct like Appellee's is essential for maintaining good order and discipline and ensuring the military can "function in a healthy and productive manner." *See* Whorley, 550 F.3d at 346.

If the United States prevails before this Court on the specified fair notice issue, this Court should ask the Air Force Court to fully address these other constitutional questions on remand.

CONCLUSION

WHEREFORE, this Honorable Court should decide AFCCA erred in concluding Appellee did not have constitutionally-required fair notice that his conduct was subject to criminal sanction, and exercise its authority under Article 67(e), UCMJ, to direct the Judge Advocate General to return the record of this case to AFCCA for further review in accordance with this Court's decision.

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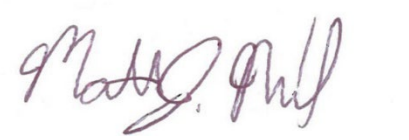

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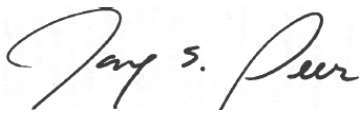
I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 May 2023.



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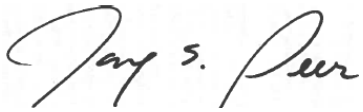

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