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' REPLY BRIEF Crim. App. Dkt. No. 40134 USCA Dkt. No. 23-0134/AF 12 June 2023

UNITED STATES' REPLY BRIEF

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

Pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States hereby replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.), filed on 31 May 2023.

ARGUMENT

Appellee begins his brief by claiming that "no law prohibited [Appellee's] conduct." (Ans. Br. at 1.) Appellee doubles down on this claim by arguing that the United States is unable "to name one law" that criminalized Appellee's conduct. (Id. at 2.) But, perhaps revealingly, nowhere in his brief does Appellee ever argue that his conduct does not fall within the definition of the very crime with which he was charged – indecent conduct in violation of Article 134, UCMJ.

Appellee engaged in vaginal and anal intercourse with an anatomically correct and realistic child sex doll on divers occasions. (JA at 002.) The law that prohibited this conduct is Article 134, UCMJ. In relevant part, Article 134, UCMJ, makes criminal "all conduct of a nature to bring discredit upon the armed forces." While it is true that Appellee was convicted of committing indecent conduct, a presidentially-enumerated offense, the law he was convicted of violating was Article 134, UCMJ. This Court has approved of the President's long-standing practice of enumerating offenses under Article 134, UCMJ: by enumerating offenses, the President is not creating a novel offense under the UCMJ, but is "merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met." United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010); United States v. Goings, 72 M.J. 202, 206 (C.A.A.F. 2013) (quoting U.S. CONST. art. II, §§ 2-3 and approving of the President's enumeration of offenses under Article 134, UCMJ, as "[c]onsonant with his authority to act as commander-in-chief and his duty to 'take care that the laws be faithfully executed'"). By enumerating the offense of indecent conduct, the President indicated that one of the "various circumstances" by which a servicemember could meet the elements of, and thereby violate, Article 134, UCMJ, was by committing conduct that was "indecent," which he defined as:

> that 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).

The crux of the United States' fair notice argument is that engaging in vaginal and anal intercourse with an anatomically correct and realistic child sex doll falls squarely within that definition and constitutes one of the "various circumstances" by which a servicemember could violate Article 134, UCMJ. (*See* Gov. Br. at 21-35.) But Appellee makes no attempt to apply this definition to his conduct and argue that he lacked fair notice because there is no convincing argument to the contrary. (*See* Ans. Br. at 39-42.)[1] This proves a significant error in his argument, because the Supreme Court has said that "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." Parker v. Levy, 417 U.S. 733, 757 (1974).

[1] Appellee spends much time in his brief describing how others, such as the dorm inspectors and agents, were unsure if Appellee had violated any law based on keeping the doll in his room. (Ans. Br. at 4-5.) But a fair notice inquiry is based on whether a statute, as written, is "sufficiently definite to apprise a person of ordinary intelligence that his anticipated behavior will transgress the law." United States v. Arcadipane, 41 F.3d 1, 5 (1st Cir. 1994). Individuals being unaware that a particular law exists to criminalize certain conduct is not relevant to a fair notice analysis, because the fair warning doctrine does not excuse "professed ignorance of the law." Id.

Indeed, it would be an impossible task for Appellee to explain why a reasonable servicemember would conclude that engaging in sexual acts with a child sex doll would not be "grossly vulgar, obscene, and repugnant to common propriety." MCM, pt. IV, para. 104.c.(1).

In failing to apply this definition to his conduct, Appellee ignores the very language that gave him fair notice that his conduct was indecent, service discrediting, and therefore criminal, in the first place – thereby repeating the error made by the Air Force Court of Criminal Appeals (AFCCA). Instead, Appellee makes various arguments which generally fall into the following categories: 1) that the President's enumeration of an offense under Article 134, UCMJ, can never provide fair notice (*see* Ans. Br. at 24-38); and 2) that Appellee's conduct is constitutionally protected. (*See* Ans. Br. at 15-24, 39-46.) For the reasons provided below, this Court should reject Appellee's arguments and conclude that Appellee had fair notice that his conduct was proscribed.

A. The President's explanation of the offense of indecent conduct provided fair notice that Appellee's convicted conduct was proscribed.

The fundamental disagreement in this case boils down to this: what role should Paragraph 104 of Part IV of the Manual (Paragraph 104) – the President's explanation of the enumerated offense of indecent conduct – play in a fair notice analysis? According to Appellee, Paragraph 104 should play no role at all. (*See*

Ans. Br. at 24-25.) Appellee's position amounts to a request for this Court to don judicial blinders and finds no support in the law.

The Supreme Court's opinion in Parker v. Levy directly refutes Appellee's position. In Levy, the Supreme Court agreed with the court below that, with one exception, "it would appear that each statement for which [Levy] was court-martialed could fall within the example given in the Manual." 417 U.S. at 755. Based on that, the Supreme Court concluded a few paragraphs later that "Levy had fair notice from the language of each article that the particular conduct which he engaged in was punishable." Id. If, in the seminal "fair notice" case in military law, the President's additions to the Manual could provide constitutional fair notice to Levy, then the President's definition of indecent conduct in the Manual provides constitutional fair notice to Appellee. In sum, Levy expressly contradicts Appellee's argument that, because the President's enumerations under Article 134, UCMJ, are not substantive law, this Court may disregard them when conducting a fair notice analysis. On the contrary, Levy clarifies that, when evaluating issues of fair notice, courts should look to the "[e]xtensive additional interpretive materials .

. . contained in the portions of the Manual devoted to Art. 134, which describe [] illustrative offenses." Id. at 753.[2]

Levy also calls into question the Air Force Court's assertion that it found nothing "in the *MCM*, federal law, military case law, military customs and usage, miliary regulation, or even state law that criminalized" Appellee's conduct. (JA at 011 (emphasis added).) The President's enumerated offense and definition of indecent conduct are "in the MCM," yet the CCA performed no analysis as to whether Appellee's conduct fell within the plain language of the definition of that offense. While, as Appellee asserts, AFCCA did discuss the definition of "indecent" in its opinion (Ans. Br. at 36), that is not the same thing as comparing Appellee's conduct to the President's definition. And AFCCA erred by seemingly requiring Appellee's conduct to be "public" or "open and notorious" (JA at 011), when the President's explanations state that "the presence of another person is no longer required." MCM, pt. IV, para. 104.c.(2).

[2] Like the President's explanations of Article 134, UCMJ, enumerated offenses in the Manual, federal courts have recognized that federal agency definitions and interpretations of statutes can provide an individual with constitutional fair notice that his conduct is criminal. *See* United States v. Norris, 39 F. App'x 361, 364 (7th Cir. 2002); United States v. Dodson, 519 F. App'x 344, 349 n.4 (6th Cir. 2013).

1. Appellee cannot claim a lack of fair notice simply because there is no "case on point" specifically prohibiting engaging in sexual acts with child sex dolls.

A common theme throughout Appellee's brief is the idea that his conviction came as a complete surprise because he believed that engaging in sexual acts with a child sex doll was legal. (*See* Ans. Br. at 2, 12, 15-24, 29-30, 38-42.) Despite his conduct falling squarely within the President's definition of "indecent," Appellee claims he learned his conduct was prohibited "only when the prosecutor came calling." (Id. at 13.) Among the ways Appellee claims surprise are his arguments that his conduct was constitutionally protected (*see* Ans. Br. at 15-24) and that there was no "case on point" prohibiting this type of conduct. (Ans. Br. at 29.) The United States responds to Appellee's constitutional arguments in Section B below.

As for Appellee's argument that there is no "case on point," the United States is likewise unaware of any cases involving a military member convicted of engaging in sexual acts with a child sex doll in his military dorm room. But 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). To hold otherwise would be inconsistent with the Supreme Court's fair notice jurisprudence, which recognizes that most laws "must deal with untold and unforeseen variations in factual situations." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). Moreover, taking

Appellee's argument to its logical conclusion would mean that never-before-seen forms of indecent conduct are immune from prosecution as indecent conduct under Article 134, UCMJ. This is not, and cannot be, the law. *See, e.g.*, United States v. Sanchez, 29 C.M.R. 32, 33-34 (C.M.A. 1960) (holding that a specification alleging the appellant "wrongfully and unlawfully commit[ted] an indecent act with a chicken by penetrating the chicken's rectum with his penis with intent to gratify his lust" properly stated an offense under Article 134, UCMJ); United States v. Mabie, 24 M.J. 711, 712 (A.C.M.R. 1987) (holding that a specification alleging the appellant committed sexual acts on a human corpse properly stated an offense under Article 134, UCMJ); United States v. Jagassar, ACM 38228, 2014 CCA LEXIS 64 at *3, *11 (A.F. Ct. Crim. App. 4 Feb. 2014) (unpub. op.) (JA at 252-54) (holding that the appellant's plea of guilty to indecent acts was provident because his acts – persuading another to send him pictures of herself inserting "worms, goldfish, a hermit crab," "tree branches," and "a sea anemone" – were indecent). These particular acts were not specifically prohibited by Article 134, UCMJ, and no prior court opinions had condemned them, yet the acts were still properly punished under Article 134, UCMJ.

2. The rule of lenity is inapplicable because the President's definition of "indecent" unambiguously encompasses Appellee's convicted conduct.

As a final argument, Appellee contends that this Court should apply the rule of lenity because there are ambiguities in the criminal statute at issue. (*See* Ans.

Br. at 54-55.) However, Appellee does not explain how the plain language of Paragraph 104 is ambiguous, much less demonstrate that it contains a "significant ambiguity" such that application of the rule is warranted.[3] *See* United States v. Mays, __ M.J. __, No. 23-0001, 2023 CAAF LEXIS 328, at *11 (C.A.A.F. 18 May 2023) ("[T]he rule of lenity applies only in cases of significant ambiguity"). In any event, there is no substantial ambiguity about whether one commits conduct that is "grossly vulgar, obscene, and repugnant to common propriety" and "tends to deprave morals with respect to sexual relations" when he engages in sexual acts with a child sex doll. As Appellee fails to demonstrate a significant ambiguity in the President's explanation of indecent conduct, and Appellee's convicted conduct falls squarely within that definition, this Court should find the rule of lenity inapplicable in this case.

In the end, Appellee's various arguments for why the language of Paragraph 104 should play no role in a fair notice analysis are unavailing. This Court should find that the plain language of the President's unambiguous definition of what

[3] No court has ever found that the definition of "indecent" adopted by the President in Article 134 is unconstitutionally vague. *See, e.g.*, United States v. Capps, ACM 38160, 2013 CCA LEXIS 842, at * 7-11 (A.F. Ct. Crim. App. 9 Oct. 2013) (unpub. op.); United States v. Hancock, NMCCA 201100466, 2012 CCA LEXIS 110, at *3-4 (N-M Ct. Crim. App. 29 Mar. 2012) (unpub. op.); United States v. Rheel, NMCCA 201100108, 2011 CCA LEXIS 370, at *8-9 (N-M Ct. Crim. App. 20 Dec. 2011) (unpub. op.); United States v. Dunn, NMCCA 200200020, 2005 CCA LEXIS 9, at *3 (N-M Ct. Crim. App. 14 Jan. 2005) (unpub. op.). Nor does Appellee advance that argument here.

constitutes "indecent" conduct," by itself, gave Appellee fair notice that his conduct was proscribed.

B. Appellee's convicted conduct is not constitutionally protected. [4]

Appellee claims his convicted conduct was constitutionally protected and, as a result, he could not have fair notice that his conduct was proscribed. (Ans. Br. at 16-24.) First, Appellee has cited no authority to support that this is an accepted way for courts to analyze the issue of fair notice. Indeed, if conduct is already constitutionally protected there is no need for a court to analyze whether an accused had fair notice that his conduct was punishable. The constitutionally protected conduct could not be prosecuted anyway, fair notice or not. Thus, the two inquiries are distinct.

But even if Appellee's analysis is correct, in setting the stage for his argument, he makes a fatal error: he characterizes his convicted conduct as "[p]rivate [m]asturbation with an [i]nanimate [d]oll." (Ans. Br. at 16.) While

[4] Because AFCCA's opinion did not expressly reach the issue of whether Appellee's conduct was constitutionally protected under Lawrence v. Texas, 539 U.S. 558 (2003), or otherwise, the United States did not provide extensive argument on this issue and instead requested this Court to ask AFCCA "to fully address these other constitutional questions on remand." (*See* Gov. Br. at 44-45.) In his brief, Appellee argues that a reasonable servicemember would not know that his convicted conduct is proscribed because of his belief that such conduct is constitutionally protected under Lawrence and Stanley v. Georgia, 394 U.S. 557 (1969). (Ans. Br. at 39-40.) Based on this argument, the United States believes discussion of whether Appellee's conduct was constitutionally protected is necessary to respond to Appellee's argument.

Appellee's overgeneralization of his convicted conduct is technically accurate, it is technically accurate in the same way that a servicemember convicted of viewing child pornography is guilty of "watching movies about kids," or a servicemember convicted of engaging in sexual acts with a human corpse is guilty of "masturbation with an inanimate object." Only by describing his convicted conduct in the most sterile of ways is Appellee able to argue that his conduct is constitutionally protected. Since the factual premise of Appellee's argument ignores the very circumstances that rendered his conduct criminal in the first place, this Court should reject it. Instead, if this Court chooses to reach this issue, it should analyze whether Appellee's charged and convicted conduct – "engaging in sexual acts with a sex doll with the physical characteristics of a female child" (JA at 002) – is constitutionally protected.

Appellee's convicted conduct is not constitutionally protected because it does not fall within the liberty interests envisioned in Lawrence and Stanley, and because there is no fundamental right to engage in such conduct. And even if his conduct would have been constitutionally protected in the civilian context, it was not constitutionally protected for servicemembers. Constitutional rights generally apply to members of the armed forces, "except in cases where the express terms of the Constitution make such application inapposite." United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004). "At the same time, these constitutional rights may apply differently to members of the armed forces than they do to civilians." Id. In

light of the fact that the military is a specialized society tasked with the mission of "providing an effective fighting force for the defense of our Country," this Court has held that constitutional rights may apply differently to servicemembers than they do to civilians and, importantly, that "servicemembers . . . do not share the same autonomy as civilians." Id. at 205-06 (citations omitted). *See also* Levy, 417 U.S. at 751 ("within the military community there is simply not the same autonomy as there is in the larger civilian community").

1. Appellee's convicted conduct is not constitutionally protected under Lawrence.

In Lawrence, the Supreme Court overruled its previous opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), and held that the Due Process Clause of the Fourteenth Amendment[5] prohibited the State of Texas from criminalizing private and consensual homosexual intimacy. *See* 539 U.S. at 578-79. This Court has rejected the notion that Lawrence established a constitutional protection for all offenses related to sexual activity. Goings, 72 M.J. at 206.

Applying the holding in Lawrence in the military context, this Court in Marcum articulated a three-part test to determine whether a military conviction violates Lawrence's liberty interest. 60 M.J. 198, 206-07 (C.A.A.F. 2004). A court must inquire: (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

[5] U.S. CONST. amend. XIV.

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, not addressed by the Supreme Court, that affect the nature and reach of the Lawrence liberty interest? Id. This Court identified an additional, but related, consideration in convictions for indecent conduct under Article 134, UCMJ: that "private consensual activity is not punishable as . . . indecent . . . absent aggravating circumstances." Goings, 72 M.J. at 205 (citing United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952) and United States v. Berry, 20 C.M.R. 325, 330 (C.M.A. 1956)).

An application of the Marcum test reveals Appellee's convicted conduct is not constitutionally protected. First, Appellee's conduct was not of a nature to bring it within Lawrence's liberty interest. As recognized by this Court, the "focal point" of the constitutional protection in Lawrence was a limited one: "sexual conduct between two individuals in a wholly private setting that was criminal for no other reason than the act of the sexual conduct itself." Goings, 72 M.J. at 207. Here, Appellee did not engage in intimate conduct with another consenting adult or mere masturbation. Rather, he had vaginal and anal sex with a silicone replica of a child, manufactured to have anatomically correct vaginal and anal orifices. (*See* JA at 098, 100, 116.) Therefore, Appellee's conduct fell nowhere near, let alone "fit squarely within," Lawrence's liberty interest. (Ans. Br. at 18.) It would be difficult indeed to imagine that the Lawrence court intended the limited liberty

interest identified in that case to provide sanctuary for Appellee's convicted conduct.

Second, Appellee's conduct encompassed behavior identified by the Supreme Court as outside the liberty interest in Lawrence. Conduct "involving" minors was specifically identified by the Supreme Court as conduct that falls outside of Lawrence's liberty interest. Lawrence, 539 U.S. at 578. At Appellee's trial, the Government alleged that Appellee's conduct with the child sex doll was accompanied by an aggravating circumstance: that Appellee engaged in the conduct "to simulate sexual acts with a minor." (Supp. JA at 258-59.) The military judge instructed the members that they must find the existence of this aggravating circumstance in order to convict Appellee of indecent conduct. (Id.) The members convicted Appellee of indecent conduct – which means the members concluded Appellee's conduct involved "a minor." Not only was this conclusion a logical one given the fact that the sex doll resembled a real child, it was also supported by the evidence. (*See* JA at 140, 176 (Appellee's admission that he had sex with the child sex doll on at least two occasions because he was "thinking about Lollies," which Appellee explained were "characters that are depicted as underage girls.").) While Appellee is correct that the child sex doll was not an actual minor (*see* JA at 045), this Court should conclude – based on the members'

findings – that Appellee's conduct involved a minor and therefore involved behavior identified by the Supreme Court as outside the liberty in Lawrence.

Third, even assuming Appellee's conduct meets the first two prongs of the Marcum test, his conduct fails the third because of the existence additional factors relevant solely in the military environment that limit the reach of the Lawrence liberty interest. The first military factor that exists in this case is that Appellee's conduct is service discrediting. Service discrediting conduct is conduct "which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." MCM, pt. IV, para. 91.c.(3). This Court stated the following about the purpose behind the general article's prohibition on service discrediting conduct:

> [W]hen it enacted the general article, Congress intended to proscribe conduct which directly and adversely affected the good name of the service. And most assuredly, when an accused performs detestable and degenerate acts which clearly evince a wanton disregard for the moral standards generally and properly accepted by society, he heaps discredit on the department of the Government he represents.

Sanchez, 29 C.M.R. at 33-34. Given Congress' intent in prohibiting service discrediting conduct, the fact that conduct is service discrediting "alone is sufficient to remove the conduct from the protection of the Constitution." United States v. Orellana, 62 M.J. 595, 601 (N-M Ct. Crim. App. 2005), *pet. denied*, 63 M.J. 295 (C.A.A.F. 2006).

Appellee contends there was "no evidence" that his conduct was service discrediting. (Ans. Br. at 16.) But here, the Government proved that Appellee engaged in the charged conduct which – given the circumstances – was sufficient by itself to prove that his conduct was service discrediting. *See* United States v. Phillips, 70 M.J. 161, 163 (C.A.A.F. 2011) (holding that proof of the conduct itself may be sufficient to demonstrate conduct was of a nature to bring discredit upon the armed forces). There can be little doubt that Appellee heaped discredit on the military when he: 1) ordered a realistic child sex doll on the internet (JA at 98, 150); 2) had it shipped from China to the off-base residence of an unknowing servicemember (JA at 090-92); 3) had that same unknowing servicemember deliver the child sex doll to the military dorms, where Appellee lived (JA at 054); used the child sex doll for its intended purpose within Government-provided quarters (JA at 116); and did so in order to simulate sexual acts with a minor. (Supp. JA at 259.) Therefore, even if Appellee's conduct remotely fell within Lawrence's liberty interest, the fact that his conduct was service discrediting placed his conduct outside of Lawrence's protections. Orellana, 62 M.J. at 601.

The second military factor is the fact that Appellee engaged in his convicted conduct in a military dorm room. "[T]he threshold of a [military] barracks/dormitory room does not provide the same sanctuary as the threshold of a private home." United States v. McCarthy, 38 M.J. 398, 403 (C.M.A. 1993); United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006) (same). Constitutional

protections apply differently in the military context because of the military's "fundamental necessity for obedience, and the consequent necessity for imposition of discipline." McCarthy, 38 M.J. at 401 (quoting Levy, 417 U.S. at 758).

> The critical difference . . . between appellant's dormitory room and a college dormitory or other dwelling place is the fact that appellant's is a *military* dormitory. . . . What happens in a barracks affects the unit. What is tolerated in a barracks sets the level of discipline in the unit. In the barracks, the impact that one servicemember can have on other persons living or working there demands that a commander have authority to regulate behavior in ways not ordinarily acceptable in the civilian sphere.

Id. at 403 (emphasis in original).

The "critical difference" between Appellee's dorm room and the "wholly private setting" involved in Lawrence was the fact that Appellee's dorm room was a military dormitory. Therefore, while Appellee enjoyed some measure of privacy in his dorm room, he is inaccurate in suggesting that he was entitled to the same degree of privacy in his dorm room as the petitioners in Lawrence. (*See* Ans. Br. at 16, 18.) Indeed, the fact that the child sex doll was found pursuant to a lawful military inspection of Appellee's dorm room (JA at 003, 063) provides further evidence that Appellee's dorm room was not a "wholly private setting." *See* United States v. Middleton, 10 M.J. 123, 128 (C.M.A. 1981) ("[D]uring a traditional military inspection, no serviceperson whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection."). Because Appellee engaged in his convicted conduct in a military

dorm room, in which any expectation of privacy was diminished by the countervailing military necessity for obedience and discipline, Lawrence's liberty interest did not encompass his conduct.

Finally, Appellee's conduct was not mere "private consensual activity . . . absent aggravating circumstances." Goings, 72 M.J. at 205. Consistent with Goings, the military judge in Appellee's case instructed the members as follows:

> In the absence of an aggravating circumstance, private consensual activity, including masturbation with or without any non-living object, is not punishable as indecent conduct. The government has asserted the existence of the following aggravating circumstance to prove the alleged conduct is indecent: the accused engaged in sexual acts with a sex doll, with the physical characteristics of a female child, *to simulate sexual acts with a minor*.
>
> To find the accused guilty of this offense, you must be convinced of the existence of this aggravating circumstance beyond a reasonable doubt.

(Supp. JA at 258-59 (emphasis added).). By convicting Appellee of indecent conduct, the members found beyond a reasonable doubt that Appellee's conduct with the child sex doll was aggravated by the fact that he engaged in such conduct "to simulate sexual acts with a minor." Thus, while Appellee claims here that he never thought of the doll as an actual child (Ans. Br. at 41-42), the members came to the opposite conclusion.

All three Marcum factors weigh heavily against Appellee's argument that his conduct was constitutionally protected pursuant to Lawrence. Moreover, his

conduct was accompanied by aggravating circumstances that rendered his conduct more than mere private consensual activity. Therefore, this Court should conclude that Appellee's convicted conduct was not constitutionally protected under Lawrence.

2. Appellee's convicted conduct is not constitutionally protected under Stanley.

Appellee claims his convicted conduct is also constitutionally protected under Stanley v. Georgia, 394 U.S. 557 (1969). (Ans. Br. at 18-21, 39-40.) Appellee's claim under Stanley is unavailing because his conduct renders his case factually distinguishable from Stanley. In Stanley, the police searched the appellant's home and found obscene films within. 394 U.S. at 558. The films "depicted nude men and women engaged in acts of sexual intercourse and sodomy." Stanley v. State, 224 Ga. 259, 259 (Ga. 1968), *rev'd*, 394 U.S. 557 (1969). The Supreme Court held that the statute prohibiting the possession of obscene material within the home was unconstitutional, Stanley, 394 U.S. at 568, reasoning that "a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." Id. at 565.

Appellee begins his argument by characterizing Stanley's holding as far-reaching. (Ans. Br. at 18.) While many of the statements in the Stanley opinion are broad, including the statement cited by Appellee – "private possession of obscene matter cannot constitutionally be made a crime" – this Court has since

held that Stanley was a narrow holding "strictly limited to its facts." United States v. Bowersox, 72 M.J. 71, 75 (C.A.A.F. 2013); United States v. Meakin, 78 M.J. 396, 402 (C.A.A.F. 2019) ("This Court has repeatedly limited Stanley to its facts and we see no reason to depart from our previous rulings."). Next, Appellee attempts to fit his conduct into the narrow holding of Stanley by claiming that the facts in Stanley are similar to the facts in his case. (Ans. Br. at 18; *see also* id. at 21 ("[Appellee's] case is directly in-line with Stanley.").) But Appellee's case shares little in common with Stanley. For one, Stanley was about the *possession* of obscene materials within the home. 394 U.S. at 568. In contrast, Appellee was not convicted of the possession of obscene materials, but rather engaging in obscene behavior by having sex with a child sex doll. *See* Meakin, 78 M.J. at 401 (citation omitted) ("This Court has long held that "indecent" is synonymous with obscene."). Additionally, Stanley concerned obscene materials depicting adults engaged in sexual acts. 224 Ga. at 259. Appellee had sex with a child sex doll. Moreover, it bears repeating that Appellee committed his convicted conduct in a military dorm room. In Bowersox, this Court rejected an argument similar to Appellee's: that the federal statute criminalizing his possession of obscene visual depictions of minors within his shared dorm room was unconstitutional under Stanley. 72 M.J. at 76. While this Court's holding was ultimately grounded on the fact that the appellant had a lower expectation of privacy in his *shared* barracks room, this Court cited favorably to the broader holding in McCarthy that "the

threshold of a dormitory room does not provide the same sanctuary as the threshold of a private home." *See* id. at 75 (quoting McCarthy, 38 M.J. at 403).

Finally, the United States will address Appellee's citation to this Court's recent decision in United States v. Byunggu Kim in support of his argument that his conduct is protected under Stanley. (Ans. Br. at 20.) In Byunggu Kim, the appellant pleaded guilty to, among other offenses, indecent conduct in violation of Article 134, UCMJ. __ M.J. __, No. 22-0234, 2023 CAAF LEXIS 292, at *1 (C.A.A.F. 5 May 2023). The act that formed the basis for appellant's convicted conduct was conducting an internet search for 'rape sleep' and 'drugged sleep.' Id. While this Court set aside the appellant's conviction of this offense, it was not because this Court found the appellant's conduct was constitutionally protected under Stanley. *See* id. at *7-10. Rather, this Court's decision rested on the determination that the military judge did not conduct a sufficient plea colloquy, id. at *10, and reaffirmed this Court's precedent that, in many cases, the same constitutional protections afforded to civilians do not apply to military members. Id. at *8 ("Conduct that is constitutionally protected for civilians could still qualify as . . . bringing discredit upon the military."). Therefore, Byunggu Kim provides no support for Appellee's argument that his conduct was constitutionally protected under Stanley.

This Court has repeatedly recognized that crimes involving virtual child pornography – including mere possession – can be constitutionally prosecuted

under the UCMJ even if they cannot be constitutionally prosecuted in civilian society. *See* United States v. Roderick, 62 M.J. 425, 428 (C.A.A.F. 2006); United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004); Drafters' Analysis, MCM A17-16 (collecting cases). If a servicemember can be prosecuted for mere possession of obscene virtual child pornography in a private residence without offending the Constitution, then he can also be constitutionally prosecuted for committing sexual acts in a military dorm room with an obscene, anatomically correct sex doll depicting a child. So long as both offenses are service discrediting, there is no reason why the first would be punishable, but the other would not be.

Appellee's convicted conduct renders his case factually distinguishable from Stanley, a case that is "strictly limited to its facts." Bowersox, 72 M.J. at 75. Therefore, this Court should reject Appellee's argument that his conduct is constitutionally protected under Stanley.

3. There is no right "deeply rooted in this Nation's history and tradition" and/or "implicit in the concept of ordered liberty" to engage in sexual acts with a child sex doll.

In his final argument that his conduct was constitutionally protected, Appellee provides this Court with the "history and tradition" of masturbation and sex aids. (Ans. Br. at 21-23.) Appellee then cites to two law review articles for the proposition that "the United States' tradition was to respect – and not criminalize – individual, private masturbation that occurred within the home, with or without, an inanimate object." (Id. at 23.)

Whatever history and tradition have to say about masturbation and sex aids in general, there is no history and tradition of respecting the decision of an adult to engage in sexual acts with a child sex doll. Indeed, neither of the articles cited by Appellee mentions child sex dolls. *See* Geoffrey P. Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 MICH. J. GENDER & L. 221 (2001); Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1 (2004). This is because the existence of realistic child sex dolls is a recent development:

> The sex toy industry had its origin in creating *simplistic devices* that simulate and stimulate genitalia (*e.g.*, dildos, artificial vaginas, vibrators) and *fetish items* that appeal to various sexual desires (*e.g.*, lashes, whips, feathers).
>
> . . .
>
> Although life-like adult sex dolls have been in existence for a while, what is relatively new are life-life child sex dolls. 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 length and width of adult male genitalia.

Marie-Helen Maras & Lauren R. Shapiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, J. OF INTERNET L. 3, 4 (2017) (emphases in original). Furthermore, as noted in the United States' opening brief, five states have recently

enacted laws to combat the spread of child sex dolls.[6] Appellee can point to no case holding any of those laws unconstitutional.

The "history" of child sex dolls is brief. The "tradition" – if it can even be called that – is to criminalize their possession. Simply put, neither history nor tradition weigh in Appellee's favor. Therefore, Appellee comes nowhere close to demonstrating that he has a right "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" to engage in sexual acts with a child sex doll. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (citation omitted).

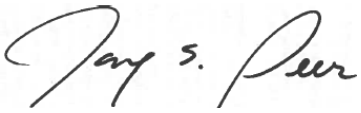
Appellee's convicted conduct is not encompassed by Lawrence or Stanley. Moreover, Appellee has failed to demonstrate a fundamental right to engage in such conduct. This Court should conclude that Appellee's conduct was not constitutionally protected. And given the Supreme Court's and this Court's repeated holdings that conduct that may be constitutionally protected in civilian society does not necessarily enjoy the same protections in the military, Appellee had no reason to believe that his conduct was constitutionally protected under the UCMJ.

[6] (*See* Gov. Br. at 39 n.11.)

CONCLUSION

In the end, Appellee does not and cannot explain why his sexual acts with a child sex doll did not fall within the President's definition of indecent conduct contained in the Manual under Article 134, UCMJ. As articulated in Parker v. Levy, the Presidential explanations in Article 134, UCMJ, themselves can be sufficient to give Appellee fair notice. 417 U.S. at 753, 755. And since Appellee has failed to demonstrate that the definition of indecent conduct is itself unconstitutionally vague, he was on fair notice that his conduct was criminal.

One of the purposes of Article 134, UCMJ, is to enable the military to prohibit and punish conduct that would "adversely affect[] the good name of the service," and would cause the public to think less of or lose trust in the institution. *See* Sanchez, 29 C.M.R. at 33-34. Appellee's conduct fell squarely into that category. The public would undeniably tend to think less of the Armed Forces if it knew its members engaged in sexual acts with child sex dolls in their on-base dorm rooms. The President has already explained that indecent conduct such as Appellee's is proscribed by Article 134, UCMJ, and Appellee was properly punished at his court-martial for his sexual conduct that was "grossly vulgar, obscene, and repugnant to common propriety" and service discrediting. Appellee had fair notice that his conduct was criminal, and this Court should reverse the Air Force Court's decision to the contrary.



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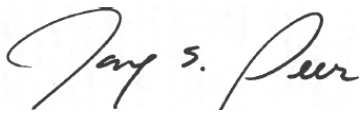
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 June 2023.



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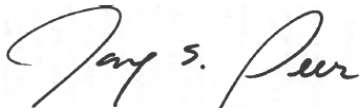

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Date: 12 June 2023

ATTACHMENT

Unpublished Cases

United States v. Capps

United States Air Force Court of Criminal Appeals

October 9, 2013, Decided

ACM 38160

Reporter
2013 CCA LEXIS 842 *; 2013 WL 5878664

UNITED STATES v. Airman First Class ZACHARY N. CAPPS, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. Capps, 2014 CAAF LEXIS 42 (C.A.A.F., Jan. 14, 2014)*

Review denied by *United States v. Capps, 2014 CAAF LEXIS 650 (C.A.A.F., June 5, 2014)*

Prior History: **[*1]** Sentence adjudged 6 April 2012 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Terry O'Brien (sitting alone). Approved Sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Counsel: For the Appellant: Lieutenant Colonel Patrick E. Neighbors and Captain Christopher D. James.

For the United States: Colonel Don M. Christensen; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Judges: Before HELGET, WEBER, and PELOQUIN, Appellate Military Judges.

Opinion by: WEBER

Opinion

OPINION OF THE COURT

WEBER, Judge:

Contrary to his pleas, a general court-martial composed of a military judge sitting alone convicted the appellant of two specifications of committing an indecent act, in violation of Article 120(k), UCMJ, *10 U.S.C. § 920(k)*. Specifically, the military judge convicted the appellant of wrongfully sending a photograph of his penis to a 13-year-old girl, and wrongfully requesting that she send him a photograph of herself without a shirt and a bra.[1] The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 4 months, and reduction to the grade of E-1.

Before this **[*2]** Court, the appellant alleges three errors: 1) The indecent acts UCMJ Article is constitutionally void for vagueness, as it failed to provide him fair notice of the criminality of his actions; 2) Specification 2 (requesting that the girl send an image of herself without a shirt and a bra) failed to state an offense; and 3) The military judge abused her discretion when she denied the appellant's motion to suppress a statement he made to investigators, along with derivative evidence from this statement.

Background

In March 2011, at the time of the charged offenses, the appellant was a newly-married 19-year-old Airman who had served on active duty for less than a year. The appellant's mother was dating the father of CT, who turned 13 years old shortly before the charged offenses. The appellant and his wife met CT at a gathering of the two families a month or two before the charged offenses. After the gathering, CT requested and received the cell phone numbers of the appellant and his wife from the appellant's mother. She then texted both of them and occasionally communicated with the appellant through other electronic means. During this time, the appellant was physically located in a different **[*3]** state than CT.

On or about 8 March 2011, the appellant initiated a text message conversation with CT. At the time, he believed CT was 12 years old, not realizing she had recently turned 13. After a brief exchange, the appellant texted a picture of his unclothed penis to CT. CT responded with a text that in substance read, "Hey to you too —

[1] The military judge excepted the words "on divers occasions" from the second specification.

laughing out loud — just kidding,"[2] followed by a "smiley face" emoticon. CT then texted a picture of herself clad only in a bra from the waist up. The appellant responded by asking CT to take off her bra. When CT responded, "But...," the appellant replied, "Please." CT deflected the appellant's request by suggesting she could "flash" him the next time she saw him, to which the appellant responded that this would be "not the same" as providing a picture of herself topless. Finally, CT informed the appellant that she needed to go to bed, ending the conversation.

Shortly after this, CT's mother looked through CT's phone with the aid of another daughter and discovered the images. CT's mother brought the phone to a civilian police department. After CT was interviewed, **[*4]** local authorities turned the case over to the Air Force Office of Special Investigations (AFOSI). AFOSI determined that the case did not fall within its purview to investigate, since there was no evidence of child pornography or physical contact between the two. However, AFOSI decided to jointly participate in the appellant's interview with an investigator from the Security Forces investigations section (SFOI). Although AFOSI procedures normally require subject interviews to be videorecorded, and although the AFOSI investigator served as the primary questioner, AFOSI elected not to record this interview, since it considered the investigation to belong to SFOI and SFOI did not require videorecording.

At the outset of the interview, before informing the appellant of his rights under Article 31, UCMJ, *10 U.S.C. § 831*, the AFOSI agent directed the appellant to complete an "administrative questionnaire," requiring certain identifying information about the appellant. One item of requested information on the form was the appellant's phone number, and in response the appellant listed his cell phone number that he had used to text CT. After the appellant completed the questionnaire, the agent **[*5]** informed the appellant of his *Article 31, UCMJ*, rights. The appellant waived his rights, and after initially denying that he sent and received the messages and images in question, he confessed to his actions.

At trial the appellant unsuccessfully moved to dismiss the Charge and its specifications on two grounds — that the underlying criminal prohibition on indecent acts was unconstitutionally void for vagueness, and that the Charge and its specifications failed to state an offense. He also unsuccessfully moved to suppress his confession to investigators and all derivative evidence on the grounds that the questionnaire constituted a violation of his *Article 31, UCMJ*, rights.

Due Process Right to Notice

The appellant first contends that his constitutional Due Process right to fair notice was violated because the indecent acts Article failed to provide fair notice or warning as to what conduct was prohibited, and improperly encouraged arbitrary and discriminatory enforcement. Specifically, he asserts that the definition of "indecent" was not specific enough to notify him or those charged with the Article's enforcement that "sexting"[3] among these two teenagers was criminally prohibited.

Whether a statute provides adequate notice of what is criminally prohibited is a question of law this Court reviews de novo. *United States v. Saunders, 59 M.J. 1, 6 (C.A.A.F. 2003)* (citing *United States v. Hughes, 48 M.J. 214, 216 (C.A.A.F. 1998))*.

The *Due Process Clause of the Fifth Amendment*[4] "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)* (citing *United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998))*. Due process "also requires fair notice as to the standard applicable to the forbidden conduct." *Id*. (citing *Parker v. Levy, 417 U.S. 733, 755, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974))*. In other words, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker, 417 U.S. at 757* (citing *United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954))*. Possible sources of "fair notice" for military criminal prohibitions **[*7]** include federal law, state law, military case law, military custom and usage, and military regulations. *United States v. Pope, 63 M.J. 68, 73 (C.A.A.F. 2006)*. In short, a void for vagueness challenge requires inquiry into whether a

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[2] Quotes from text messages have been translated to plain English throughout this opinion.

[3] "Sexting" **[*6]** refers to the exchange of sexually explicit text messages, including photographs, via cell phone. *United States v. Broxmeyer, 616 F.3d 120, 123 (2d Cir. 2010)*.

[4] *U.S. Const. amend. V*.

reasonable person in the appellant's position would have known that the conduct at issue was criminal. *See, e.g.,* Vaughan, 58 M.J. at 31 (upholding a conviction under the General Article for leaving a 47-day-old child alone on divers occasions for as long as six hours; while the Article did not specifically list child neglect as an offense, the appellant "should have reasonably contemplated that her conduct was subject to criminal sanction, and not simply the moral condemnation that accompanies bad parenting"); United States v. Sullivan, 42 M.J. 360, 366 (C.A.A.F. 1995) ("In our view, any reasonable officer would know that asking strangers of the opposite sex intimate questions about their sexual activities, using a false name and a bogus publishing company as a cover, is service-discrediting conduct under Article 134," UCMJ (citing United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994))).

In addition, due process requires that criminal **[*8]** statutes be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). This "more important aspect of vagueness doctrine" requires that the statute "'establish minimal guidelines to govern law enforcement'" rather than "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Id. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574-75, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)).

The statutory prohibition against indecent conduct applicable to the appellant provides that "[a]ny person . . . who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45.a.(k) (2008 ed.). The *Manual* defines "indecent conduct" as "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45.a.(t)(12).

We agree with the military judge that the appellant had fair notice that his conduct was criminal under the indecent acts statute. The appellant **[*9]** was nearly 20 years old at the time of his misconduct and was married. He texted an image of his unclothed penis to CT, a girl who had just turned 13 (and who the appellant believed was still 12 years old). When she responded by sending an image of herself clad only in a bra on her upper half, the appellant pressed her to send an image of her breasts, asked her to "please" comply with his earlier request, and rejected her counteroffer to "flash" him in person.

In addition, the appellant's conduct after this incident demonstrates his knowledge of the wrongfulness of his actions. After receiving the image of CT, the appellant deleted it, and when questioned, he initially denied committing the conduct at issue.[5] We reject the appellant's contention that his conduct represents the sort of "digital flirting" he asserts is becoming more commonplace among teenagers. The appellant and CT were not peers and there was no evidence of a lawful romantic relationship between CT and the appellant that might have given the appellant reason to believe his conduct was not prohibited. In addition, military case law aids in providing the appellant fair notice of the criminality of his actions, as court-martial **[*10]** convictions have ensued from somewhat similar behavior between consenting participants. *See, e.g.,* United States v. Nerad, 69 M.J. 138 (C.A.A.F. 2010) (appellant convicted of possessing child pornography for possessing sexually explicit images of his 17-year-old girlfriend). To the extent that the indecent acts statute might lend itself to "close cases" as to whether an accused's conduct is indecent, "[t]he problem is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." United States v. Williams, 553 U.S. 285, 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). The appellant was on fair notice that his conduct was "grossly vulgar, obscene, and repugnant to common propriety." Likewise, there is no reason to believe that the Article encourages arbitrary and discriminatory enforcement. The appellant had fair notice of the criminality of his actions and Article 120(k) is not unconstitutionally void for vagueness.[6]

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[5] We recognize that these actions do not necessarily demonstrate that the appellant understood his actions to be criminal, and that he merely may not have wanted others to find out about this behavior. Nonetheless, they provide some indication that he may have understood **[*11]** his actions were "grossly vulgar, obscene, and repugnant to common propriety," and that they may tend to "excite sexual desire or deprave morals with respect to sexual relations." *Manual for Courts-Martial (MCM)*, Part IV, ¶ 45.a.(t)(12) (2008 ed.).

[6] We do not discount the importance of providing specific notice of what is prohibited in this area, given the pervasiveness of technology and the apparent prevalence of sexting behavior. We note that since the conduct at issue in this case, Congress has more specifically addressed some

Failure to State an Offense — Specification 2

The appellant next alleges that his conviction as to Specification 2 should be set aside, asserting that the Specification failed to state an offense in that there was no completed indecent act. Specifically, he alleges that because CT never sent an image of herself without a bra on, he is guilty at most of an attempted indecent act.

Whether a specification states an offense is a question of law that is reviewed de novo. *United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006)*. In reviewing the adequacy of the specification, our analysis **[*12]** is limited to the language as it appears in the specification, which must expressly allege the elements of the offense, or do so by necessary implication. *United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011)*; *United States v. Fleig, 16 C.M.A. 444, 37 C.M.R. 64, 65 (C.M.A. 1966)*.

In *United States v. King, 71 M.J. 50 (C.A.A.F. 2012)*, our superior court reviewed whether a similar specification alleging an indecent act failed to state an offense. King was charged with requesting that his 14-year-old stepdaughter expose her breasts to him during an Internet audiovisual communication session. King alleged that the specification failed to state an offense because his request constituted "indecent language" which was not included under the definition of "indecent conduct." *Id. at 52*. The Court disagreed with the contention that King's misconduct was necessarily limited to "indecent language." Instead, the Court found that language can be conduct, and King's request was an "overt act" that constituted "direct movement toward the commission" of an indecent act. *Id*. The Court determined that "[b]ut for his stepdaughter's refusal to lift her shirt, King would have 'view[ed]' his stepdaughter's breasts using **[*13]** the webcam." *Id*. (second alteration in original). The Court found that "at a minimum, the facts support an attempted indecent act," and rather than request briefing as to whether the evidence was sufficient to establish the charged offense rather than the lesser included offense of attempt, the Court determined that it could affirm a finding of attempt that would not change the sentencing landscape, particularly since Congress had replaced *Article 120(k), UCMJ*, before the Court issued its decision. *Id. at 52-53*.

King does not stand for the proposition that a request to view a young teenager's breasts via electronic means can *never* constitute a completed indecent act. However, we do not find it necessary to hold that the appellant completed an indecent act. Consistent with our superior court's example, we affirm the lesser included offense of an attempted indecent act, which does not change the sentencing landscape.[7] We are confident that the military judge would have adjudged the same sentence had she found him guilty of this lesser included offense. *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*; *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*. We reassess the sentence to that **[*14]** adjudged, and we find that this sentence is appropriate, correct in law and fact, and, based on the entire record, should be approved.

Admission of Evidence

Finally, the appellant avers that the military judge erred by failing to suppress his confession to law enforcement investigators, along with all derivative results of that confession. He asserts that the appellant's confession resulted after investigators violated his *Article 31*, UCMJ, rights by requesting that he complete the administrative questionnaire which included a line for the appellant to list an incriminating piece of information (his phone number).

"In our consideration of a military judge's ruling on a motion to suppress under *Article 31(b)*, [UCMJ,] we apply a clearly-erroneous standard of review to findings of fact and a *de novo* standard to conclusions of law." *United States v. Norris, 55 M.J. 209, 215 (C.A.A.F. 2001)* (citing *United States v. Moses, 45 M.J. 132, 135) (C.A.A.F. 1996)*; *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995))*. "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous **[*15]** or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008)* (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)* (quoting *United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997)*; *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987))*.

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forms of technology-based sexual misconduct. *MCM*, Part IV, ¶¶ 45.b., c. (2012 ed.).

[7] *See United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012)*; MCM, Part IV, ¶ 4.e. (2008 ed.).

No person subject to the UCMJ may compel any person to incriminate himself or to answer any question the answer which may tend to incriminate him. *Article 31, UCMJ*. An interrogation or request that a person suspected of an offense provide a statement must be preceded by a rights advisement notification. *Id*. Where a technical violation of the *Article 31, UCMJ*, rights advisement requirement is followed by a proper rights advisement and then a confession, the subsequent confession is not presumed to be tainted. *United States v. Steward, 31 M.J. 259 (C.M.A. 1990)*. The appropriate inquiry in this situation is "whether the subsequent confession was voluntary **[*16]** considering all the facts and circumstances of the case including the earlier technical violation of *Article 31(b)," UCMJ*. *Id. at 265*.

After extensive motion practice on this issue, the military judge found that before interviewing the appellant, AFOSI had already obtained the appellant's cell phone number from a unit alpha roster. She found that the administrative questionnaire presented to the appellant was a standard form routinely used by AFOSI to collect personnel data for administrative purposes for witnesses, subjects, and alleged victims. She further found that the questionnaire did not facially appear to call for incriminating responses, but that in this case, the appellant's cell phone number was relevant to the offenses in question and could incriminate him. She also found that following completion of the questionnaire, the AFOSI agent properly advised the appellant of his rights (albeit without a cleansing statement to cover the appellant's provision of his cell phone number on the questionnaire), and that the appellant waived his rights and answered questions about the offenses at issue. The military judge ruled, as a conclusion of law, that asking the appellant for his **[*17]** phone number was likely to incriminate him under the facts of this case, and that this "arguably [] would be in violation of Article 31[, UCMJ,] rights." However, the military judge found the error harmless under the inevitable discovery exception since evidence of the appellant's cell phone number would have been obtained (and in fact, had already been obtained from the unit alpha roster).[8] Finally, she found that under the totality of the circumstances, the appellant's subsequent confession was voluntary based on a variety of factors surrounding the appellant's waiver of his rights.

The military judge did not abuse her discretion in denying the motion to suppress the confession and derivative evidence. Assuming that the request for the appellant's cell phone number constituted an *Article 31, UCMJ*, violation, such violation was technical and provided no information investigators did not already have. This questionnaire did not overcome the appellant's **[*18]** ability to exercise his rights as it provided little incriminating evidence. After waiving his rights, the appellant denied committing the misconduct at issue for several minutes before being presented with the text messages and images, indicating his provision of his cell phone number did not compel him to confess his misconduct. The military judge's ruling was a proper exercise of her discretion.[9]

Conclusion

The approved findings, as modified, and the sentence, as reassessed, are **[*19]** correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings, as modified, the and sentence, as reassessed, are

AFFIRMED.

End of Document

[8] The Government informed the military judge that it did not intend to offer the questionnaire with the appellant's cell phone number into evidence, rendering moot the question of whether the admission of the questionnaire should be suppressed.

[9] At trial, the appellant also moved to suppress the results of his confession because the Air Force Office of Special Investigations (AFOSI) failed to videorecord the interview. In essence, the appellant sought a prophylactic rule that demands suppression for AFOSI's failure to follow its own procedures requiring subject interviews to be recorded. The military judge denied this motion, and the appellant does not resurrect this claim on appeal. While AFOSI's decision not to record the subject interview in this instance appears ill-advised, we agree with the military judge that the appellant has no constitutional right to have an interview videorecorded, and thus suppression of the confession was not required.

United States v. Dunn

United States Navy-Marine Corps Court of Criminal Appeals

January 14, 2005, Decided

NMCCA 200200020

Reporter
2005 CCA LEXIS 9 *; 2005 WL 80949

UNITED STATES v. Brandy N. DUNN, Lance Corporal (E-3), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 30 April 2001. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, MAG 11, 3d MAW, MarForPac, MCAS Miramar, San Diego, CA.

Disposition: Affirmed.

Counsel: Capt E.V. TIPON, USMC, Appellate Defense Counsel.

Capt GLEN HINES, USMC, Appellate Government Counsel.

Judges: BEFORE Charles Wm. DORMAN, M.J. SUSZAN, C.P. NICHOLS. Chief Judge DORMAN and Judge SUSZAN concur.

Opinion by: Nichols

Opinion

NICHOLS, Judge:

A special court-martial composed of a military judge alone tried appellant on 30 April 2001. In accordance with her pleas, the appellant stands convicted of conspiracy to possess LSD, conspiracy to possess ecstasy, wrongful use of ecstasy, wrongful use of LSD, wrongful use of marijuana, wrongful distribution of LSD, and indecent acts in violation of Articles 81, 112a, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 881*, *912a*, and *934*. The military judge sentenced the appellant to be confined for six months, to forfeit $ 695.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The **[*2]** convening authority approved the sentence and, except for the bad-conduct discharge, ordered it executed. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 150 days.

The appellant raises two assignments of error. First, the appellant argues that indecent acts with another, charged under Article *134*, UCMJ, is unconstitutionally void for vagueness because it fails to give notice to a person of ordinary intelligence what conduct is forbidden by the statute and permits arbitrary and discriminatory enforcement. Appellant's Brief of 31 Mar 2004 at 3. Second, the appellant asserts that her pleas to Specifications 1, 5, and 6 under Article *134* are improvident because the plea inquiry failed to establish a factual basis that her conduct satisfied the definition of "indecent." *Id.* at 11.

We have examined the record of trial, the appellant's two assignments of error, and the Government's reply. Following that examination, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. *59(a)* and *66(c),* UCMJ.

Void for Vagueness [*3] Challenge

The appellant argues in her first assignment of error that indicated acts under Article *134*, UCMJ, is void for vagueness. We disagree. We hold that indecent acts charged under Article *134*, UCMJ, is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*. Sexual intercourse in the presence of a third person is an

indecent act. *United States v. Tollinchi, 54 M.J. 80, 83 (C.A.A.F. 2000)*.

In *Tollinchi*, the accused, a Marine Corps recruiter, persuaded a high school student to enlist in the Marine Corps. *id. at 81*. He convinced the recruit to allow him to have sexual relations with the recruit's 17-year-old girlfriend while the recruit watched. The court held that the evidence produced at **[*4]** trial was insufficient to sustain a charge of rape. However, the court found that the evidence established that the accused had sexual intercourse with the recruit's girlfriend in his presence. The court held that sexual intercourse under those circumstances was an indecent act. *Id. at 83*.

Tollinchi is analogous to the case at bar because in both cases, the accused had sexual relations in the presence of another. The appellant admitted at trial that she had oral sex performed on her in the presence of a third person. The military judge conducted the following inquiry with the appellant regarding the indecent act offenses:

> MJ: Regarding the indecent act offenses let's start with Specification 1 under Charge IV. Did this occur on the same day as these sodomy offenses we just discussed?
> ACC: Yes, sir.
> MJ: And on this occasion, did you - well, you already described for me that [GW] performed oral sex on you. Is that right?
> ACC: Yes, sir.
> MJ: Now, the distinction between this offense and the prior offense that we have already discussed seems to be that . . . [Cpl D] was watching?
> ACC: Yes, sir.
>
> MJ: So, he saw what was happening with you and [GW]. **[*5]** Is that fair to say?
> ACC: Yes, sir.

Record at 39-40. The military judge continued to question the appellant about the remaining specifications under the charge and why her actions constituted indecent acts.

> MJ: Let's talk about Specification 5, [Cpl D]. We already talked about sodomy regarding [Cpl D]. Now, why do you think this was an indecent act in this particular circumstance?
> ACC: Sir, because I did it while there were other people watching.
> MJ: Who were those people?
> ACC: [Cpl R] and [GW] and [LCpl W].
> MJ: Do you remember the definition of indecent that I gave you?
> ACC: Yes, sir.
> MJ: Do you think that the fact that these acts were committed in the presence of other people caused the acts to be indecent?
> ACC: Yes, sir.
> MJ: Were they there or were they watching you commit these acts?
> ACC: Yes, sir.
> MJ: Any doubt in your mind that they actually were sitting there and observing?
> ACC: No, sir.
> MJ: I take it regarding Specification 6 after you and [Cpl D] engaged in oral sex you had sexual intercourse?
> ACC: Yes, sir.
> MJ: Now, sexual intercourse is not a crime. So, what makes you think that this was indecent?
>
> ACC: Because **[*6]** there were people watching. [LCpl W] and [GW] were both watching us.
> MJ: You are sure that they were watching?
> ACC: Yes, sir.
> MJ: Did they, in your mind, see you having intercourse?
> ACC: Yes, sir.
> MJ: Do you believe that that makes the intercourse indecent in this particular circumstance?
> ACC: Yes, sir.

Id. at 41-42. Further, appellant stipulated that she committed an indecent act by having sexual relations in the presence of others. In the Stipulation of Fact, the appellant stated, "on or about 5 Aug 00, I wrongfully committed an indecent act with [GW] by receiving oral sex from her while [Cpl D] watched." Prosecution Exhibit 1 at 3. The appellant goes on to stipulate that she performed oral sex on [Cpl D] and had sexual intercourse with him while others watched. *Id.* at 4.

Tollinchi is significant to the case at bar because it held unambiguously that sexual intercourse in the presence of a third person constitutes an indecent act. Appellant's admissions during the providence inquiry and her stipulations in this case demonstrate that she engaged in sexual intercourse in the presence of a third person. They also establish that she was **[*7]** aware that this type of activity constituted an indecent act. The holding in *Tollinchi* also discourages arbitrary and discriminatory enforcement of Article *134* by providing a bright line interpretation of "indecent." Therefore, indecent acts charged under Article *134*, UCMJ, is not void for

vagueness because it is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Improvident Pleas

Appellant argues in her second assignment of error that the plea inquiry failed to establish a factual basis that her conduct satisfied the definition of "indecent." Appellant's Brief at 11. The plea inquiry established a factual basis that appellant's conduct satisfied the definition of indecent because it established that the appellant engaged in sexual intercourse and acts of sodomy in the presence of third persons. Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for each element exists. *United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996)*. A plea of guilty should **[*8]** not be overturned as improvident unless the record reveals a substantial basis in law and fact to question the plea. *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)*. "'Indecent' signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, P90c. Sexual intercourse in the presence of a third person constitutes an indecent act. *Tollinchi, 54 M.J. at 83*.

The providence inquiry and the stipulation of fact establish that the appellant received oral sex from GW while Cpl D watched; performed oral sex on Cpl D while LCpl W, Cpl R, and GW watched; and had sexual intercourse with Cpl D while LCpl W and GW watched. Record at 39-42; Prosecution Exhibit 1 at 3-4. Therefore, the plea inquiry established a factual basis that the appellant's conduct satisfied the definition of indecent because it demonstrated that the appellant engaged in acts of sexual intercourse and sodomy in the presence of observers. Given the content of the inquiry **[*9]** into the factual basis for the appellant's plea, we find the plea to be provident.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge SUSZAN concur.

United States v. Hancock

United States Navy-Marine Corps Court of Criminal Appeals

March 29, 2012, Decided

NMCCA 201100466

Reporter
2012 CCA LEXIS 110 *; 2012 WL 1075811

UNITED STATES OF AMERICA v. MARCHELLO K. HANCOCK, PRIVATE (E-1), U.S. MARINE CORPS

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 4 May 2011. Military Judge: LtCol David Jones, USMC. Convening Authority: Commanding General, 3d Marine Logistics Group, Okinawa, Japan. Staff Judge Advocate's Recommendation: LtCol E.H. Robinson, Jr., USMC.

Counsel: For Appellant: Capt Bow Bottomly, USMC.

For Appellee: LCDR Deborah S. Mayer JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

Judges: Before J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD, Appellate Military Judges. Senior Judge MAKSYM and Judge PAYTON O'BRIEN concur.

Opinion by: R.Q. WARD

Opinion

OPINION OF THE COURT

WARD, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of indecent acts, two specifications of burglary, and one specification of possession of child pornography, in violation of Articles 120, 129, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 920*, *929*, and *934*. The military judge sentenced the appellant to 40 months confinement, forfeiture of all pay and allowances, and a dishonorable discharge. The pretrial agreement had no effect on the sentence and the convening authority (CA) approved the sentence as adjudged.

The appellant submits two assignments of errors: first **[*2]** that *Article 120(k)* of the UCMJ is unconstitutionally vague and overbroad; and second, that Specification 2 of Charge IV alleging the offense of unlawful entry under *Article 134* fails to state an offense for want of the terminal element. As the Government points out, the appellant's second assignment of error is moot as the appellant pleaded not guilty to the unlawful entry offense which was later withdrawn by the Government pursuant to the pretrial agreement. After reviewing the record of trial and the parties' pleadings, we resolve the former assignment of error against the appellant. Although not raised as error, we find an inadequate factual predicate for Specification 2 of Charge I and set that finding of guilty aside, affirm a guilty finding to the lesser offense of housebreaking and reassess the sentence. We conclude that the findings as modified and the reassessed sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. *Arts. 59(a)* and *66(c)*, UCMJ.

Constitutionality of Article 120(k)

The appellant avers that *Article 120(k)* is unconstitutionally vague and overbroad. Appellant's Brief of 8 Dec 2011. He acknowledges **[*3]** this Court's recent opinion in *United States v. Rheel, No. 201100108, 2011 CCA LEXIS 370*, unpublished op. (N.M.Ct. Crim. App. 20 Dec 2011), and raises this summary assignment of error in order to preserve the issue for appeal. For the same reasons we cited in *Rheel,* we reject the appellant's claims that *Article 120(k)* is unconstitutionally vague or overbroad.[1]

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[1] In *Rheel,* we dealt with both a facial and an "as applied" vagueness and overbreadth challenge to *Article 120(k)*. We note that the appellant does not distinguish whether he raises a "facial" or "as applied" challenge; therefore, we will treat his claim as a facial challenge only.

The constitutionality of a statute is a matter we review *de novo*. United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

As we said in Rheel, we are not persuaded that the Article 120(t)(12) statutory definition of indecent conduct is inadequate to place an ordinary person on notice as to **[*4]** what conduct is forbidden. Simply because it may be difficult to determine if an incriminating fact is proven - i.e., whether the appellant's conduct is indecent by that definition -- does not render the statute void for vagueness. Those potential challenges are resolved by the requisite standard of proof beyond a reasonable doubt. United States v. Williams, 553 U.S. 285, 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Here, the statutory definition is sufficient to "provide a person of ordinary intelligence fair notice of what is prohibited" and is not "so standardless that it authorizes or encourages seriously discriminatory enforcement." Id. at 304 (citations omitted).

On the question of overbreadth, we do not find that the statute prohibits a substantial amount of speech protected under the First Amendment thereby making it overbroad. Indecent conduct, as defined by Article 120(t)(12), like obscenity, offends basic notions of decency and is not protected by the First Amendment. Id. at 288. We see no realistic threat that this statutory definition will have a chilling effect on protected speech and conduct.

Improvident Plea

Although not raised by the appellant, we find an inadequate factual predicate for his guilty plea **[*5]** to Specification 2 of Charge I. This specification alleges the crime of burglary with the intended underlying offense of indecent act. During the providence inquiry, the military judge explained the elements of this offense.[2] When the military judge asked the appellant why be believed he was guilty of this offense, the appellant initially stated that his intent when he entered Corporal (Cpl) V's barracks room was to videotape her sleeping without her permission. Record at 215-17. When asked by the military judge what was indecent about that conduct, the appellant explained that he would have achieved sexual gratification from the surreptitious nature of the act, but that unlike the other occasions[3] he did not know if it was his intent to masturbate when he entered the room. *Id*. at 218. When the military judge pressed him on this subject, the appellant conceded that it was more than likely his intention to masturbate based on his pattern of conduct from the other related offenses, but he had no independent recollection. *Id*. at 219-20, 224. After a prolonged discussion with the appellant, the military judge accepted the appellant's plea, noting:

> I'm still satisfied with the accused's **[*6]** plea. He's not a lawyer. He's trying to plead guilty. I understand his plea. And I understand that there wasn't a masturbation on this occasion. But I also understand that it's his intent to plead guilty and that he admits, on more than one occasion, that he had intent to commit an indecent act, therein. So I'm satisfied with the plea.

Id. at 226.

Prior to accepting a guilty plea, a military judge must make an inquiry of an accused to ensure a factual basis exists for the plea. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); *see* United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969); *see also* Art. 45(a), UCMJ. This inquiry must elicit sufficient facts to satisfy every element of the **[*7]** offense in question. R.C.M. 910(e). We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from a guilty plea *de novo*. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).

The providence inquiry reveals that, despite the military judge's best efforts to obtain the requisite factual support, the appellant never provided more than the suggested affirmative replies to the military judge's

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[2] The military judge had previously explained the elements of indecent acts during the providence inquiry on Charge II and its two specifications. Record at 179-84.

[3] The "other occasions" was a reference to the providence inquiry for Specification 1 of Charge I and the two specifications under Charge II to which the appellant also pleaded guilty. The gravamen of these offenses is that the appellant would video record himself masturbating while a female Marine lay asleep nearby.

leading and conclusory questions. The appellant's repeated statement that his intent to masturbate when he entered Cpl V's room was "more than likely" is an assumption on his part, as he had no independent recollection, and was based solely on his similar conduct on other occasions. We find that the military judge's reliance on the appellant's affirmative responses to his conclusory questions was inadequate to establish a factual basis for this element, and there is no evidence in the remainder of the record to establish this element. *See* United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002) **[*8]** (reviewing court may consider the entire record of trial in determining whether a providence inquiry is legally sufficient). The stipulation of fact merely reiterates the same allegation on the charge sheet by stating that the "breaking and entering were done with the intent to commit therein the offense of indecent act." Prosecution Exhibit 1 at 2.[4] Cpl V did not testify.[5] There is no other evidence in the record on this element save for the providence inquiry.

In sum, the providence inquiry never adequately established that, at the time of his entry into Cpl V's barracks room, the appellant specifically intended to commit the offense of indecent acts. At best, the inquiry established the specific intent to commit the lesser included **[*9]** offense of housebreaking.[6] Consequently, we set aside the guilty finding to Specification 2 of Charge I and affirm a guilty finding to the lesser included offense of housebreaking, a violation of Article 130, UCMJ.

Sentence Reassessment

Because of our above action on findings, we must now consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003)). We conclude that we can. While our action on findings ostensibly changes the sentencing landscape, **[*10]** the change is in no way so dramatic as to gravitate away from our ability to reassess. *Id*. The same corpus of evidence was before the military judge and the maximum sentence was only reduced from forty to thirty-five years. Furthermore, the military judge was far more influenced by the nature of the child pornography the appellant possessed than by his actions in Cpl V's room.[7] We are confident that the sentencing authority would impose, and the CA would approve, a sentence of at least 40 months confinement, forfeiture of all pay and allowances and a dishonorable discharge.

Conclusion

We affirm the findings, as modified, and the sentence approved by the convening authority and reassessed by this court.

Senior Judge MAKSYM and Judge PAYTON O'BRIEN concur.

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[4] Of note, the stipulation specifically states that the appellant "intended to masturbate inside of the room and commit an indecent act" in regard to the burglary offense in Specification 1 of Charge I. PE 1 at 2. However, it contains no such language with respect to Specification 2 of Charge I.

[5] PE 6 is a copy of Cpl V's testimony at the ***Article 32*** hearing. However, she testified that she remained asleep throughout the time that the appellant was in her room.

[6] The providence inquiry is more than sufficient to establish that at the time of the entry, the appellant intended to videotape Cpl V asleep without her permission, a simple disorder under ***Article 134***. *See* United States v. Webb, 38 M.J. 62, 69 (C.M.A. 1993) (evidence legally sufficient to prove offense of housebreaking with intent to peep); United States v. Foster, 13 M.J. 789 (A.C.M.R. 1982) (window peeping as a violation of ***Article 134***); United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978) (voyeurism as a violation of ***Article 134***).

[7] After announcing sentence, the military judge commented "I must say, for the record, that the content of the child pornography was some of the worst that I have seen." Record at 371.

United States v. Rheel

United States Navy-Marine Corps Court of Criminal Appeals

December 20, 2011, Decided

NMCCA 201100108

Reporter
2011 CCA LEXIS 370 *; 2011 WL 6372779

UNITED STATES OF AMERICA v. BRANDON L. RHEEL, SERGEANT (E-5), U.S. MARINE CORPS

Notice: NOT FOR PUBLICATION

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Review denied by *United States v. Rheel, 2012 CAAF LEXIS 349 (C.A.A.F., Mar. 23, 2012)*

Prior History: **[*1]** GENERAL COURT-MARTIAL. Sentence Adjudged: 1 November 2010. Military Judge: LtCol Robert Q. Ward, USMC. Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC. Staff Judge Advocate's Recommendation: LtCol J.W. Hitesman, USMC.

Counsel: For Appellant: Capt Michael D. Berry, USMC.

For Appellee: Capt Robert E. Eckert, Jr., USMC.

Judges: Before C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN, Appellate Military Judges. Chief Judge REISMEIER and Senior Judge CARBERRY concur.

Opinion by: B.L. PAYTON-O'BRIEN

Opinion

OPINION OF THE COURT

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of committing an indecent act[1] and communicating indecent language to a child under the age of 12, violations of Articles 120 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 920* and *934*. The appellant was sentenced to confinement for 18 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, pursuant to the terms of a pretrial agreement, suspended confinement in excess of 12 months and suspended forfeiture of pay and allowances in excess of **[*2]** $964.00 pay per month.

The appellant advances four assignments of error: (1) that he is not guilty of Charge I and its sole specification because *Article 120(k)*, UCMJ, Indecent Acts, is unconstitutionally vague and overbroad; (2) that he suffered a double jeopardy violation by receiving multiple convictions and punishments for a single criminal act; (3) that his guilty plea for communicating indecent language was improvident because his language alone was not indecent; and (4) that Specification 2 of Charge II failed to state an offense because it did not allege the terminal element of Article 134.

After careful consideration of the record of trial, the pleadings submitted by the parties, and the matters presented at oral argument, we resolve these assignments adversely to the appellant and conclude that no error materially prejudicial to the substantial rights of the appellant occurred. *Arts. 59(a)* and *66(c)*, UCMJ.

Factual Background

On 2 October 2009, the appellant engaged **[*3]** in sexually provocative cellular telephone text-message communications with his former fiancée's nine-year-old daughter, MGC. The conversation began just after 2300 on a Friday evening and carried over until almost 0100

[1] The indecent act specification, as drafted, included the language "a child who had not attained the age of 12 years." We note that under the offense of indecent act, the age of the victim is not an element of the crime.

Saturday morning. During the course of the conversation, they sent each other text-messages about various topics including kissing, touching, oral sex, and the former relationship between the appellant and the girl's mother. Additionally, in response to a question from the appellant, they discussed how MGC watched and listened under her mother's bedroom door while the appellant and her mother engaged in sexual activity. MGC specifically asked the appellant why her mother was so loud with him during this sexual activity. In response to that question, the appellant sent MGC two replies, via text-message. First he sent the message, "Cause it's so big," followed 20 minutes later by a second message, "Yup do you wanna see why ur mom was so loud?" Minutes later, the appellant sent MGC a picture of his naked erect penis via a multimedia cellular telephone message, followed by a text-message advising MGC "its our secret." The next morning, MGC's mother read the text-message **[*4]** conversation and viewed the picture on her daughter's cellular telephone, and reported it to local authorities, which lead to an investigation and ultimately the charges before us. After MGC's mother's discovery of the picture sent to MGC, the appellant sent a text-message to MGC advising her "to erase the pictures off ur phone."

The Constitutionality of Article 120(k)

In his first assignment of error, the appellant avers that *Article 120(k)* is unconstitutionally vague and overbroad. He claims it is vague because a reasonable person cannot determine what conduct it prohibits, and it is overbroad because it proscribes protected conduct. Appellant's Brief of 29 Mar 2011 at 4. We reject the appellant's claims as to the unconstitutionality of *Article 120(k)*.

The constitutionality of a statute is a question of law we review *de novo*. *United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005)*.

A. Vagueness

The appellant pleaded guilty to indecent conduct for sending a picture of his naked penis via a text-message to a nine-year-old girl. He neither challenged the specification prior to trial, nor requested a bill of particulars under the assertion that the specification was too vague. He now asserts **[*5]** on appeal for the first time that the statute is vague.

Due process requires fair notice that an act is forbidden and subject to criminal sanctions. *United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)* (citing *United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)*. It also requires fair notice as to the standard applicable to the forbidden conduct. *Parker v. Levy, 417 U.S. 733, 755, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)*. The potential sources of "fair notice" that one's conduct is definitively proscribed include federal law, state law, military case law, military custom and usage, and military regulations. *Vaughan, 58 M.J. at 31*. As the Supreme Court has stated "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker, 417 U.S. at 757* (citing *United States v., Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954))*. The void-for-vagueness doctrine also requires that penal statutes be defined in a manner that does not encourage "arbitrary and discriminatory enforcement" by law enforcement authorities. *Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)*. In determining the sufficiency of the notice, "a statute must of necessity **[*6]** be examined in the light of the conduct with which the defendant is charged." *Parker, 417 U.S. at 757*. *See also United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975)* ("vagueness challenges to statutes which do not involve *First Amendment* freedoms must be examined in light of the facts of the case at hand").

Thus, we must answer two basic questions in determining whether *Article 120(k)*, indecent conduct, is void for vagueness. First, did it provide fair notice or warning to the appellant as far as what is prohibited or required by the statute? Second, did it provide an ascertainable standard of guilt so that it did not encourage arbitrary and discriminatory enforcement? *Kolender, 461 U.S. at 357*. If the answer to both questions is in the affirmative, then the statute may be upheld against a void for vagueness challenge. *United States v. Powell, 423 U.S. 87, 92-93, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975)*.

The appellant argues that the failure of the legislature to adequately define "indecent conduct" under *Article 120(k)*, after this provision was moved from Article 134, leads to ambiguity, and that the phrase is now so vague that it violates the *Due Process Clause of the Fifth Amendment*. He further argues the law's lack of **[*7]** specificity on this issue makes the statute unclear as to when "conduct crosses from permissible to

forbidden,"[2] and it is "*impossible* to determine whether *any* conduct falls within the language of the statute."[3] This lack of specificity, in turn, would lead to indiscriminate results, as "[w]hat one person defines as immoral as it relates to sexual impurity can differ drastically from what another might think."[4]

The central issue in the present case is whether the appellant had fair notice of the criminal conduct proscribed by *Article 120(k)*. We find that he did.

Article 120(k) states that any servicemember who "engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial shall direct." Indecent conduct is defined as "that 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."[5]

We reject the appellant's position that he could not discern whether his conduct would cross from the **[*8]** permissible to the forbidden. Any reasonable person would know that sending such an offending photograph to a nine-year-old child via electronic message would be a crime. More significantly, when the appellant sent the offending photograph, he advised the minor child to keep it as a secret between them, and later that morning sent the victim an additional text-message advising her to delete it. In addition, common sense supports the conclusion that the appellant was on notice that his conduct violated the UCMJ. We have no doubt that the appellant, as a seasoned noncommissioned officer in the Marine Corps with over eight years of active duty experience, understood that under the circumstances his actions were repugnant to common propriety and in violation of service community norms. We simply find nothing in the UCMJ or in the cases presented by him that supports his contention that the conduct in this case cannot be sustained as a violation of *Article 120(k)*.

We do not find merit to the appellant's assertion that the definition of "indecent conduct" is unconstitutionally vague. The statutory definition provides adequate notice to an ordinary person about what conduct is forbidden. However, **[*9]** even if we determined the definition of indecent conduct to be imprecise, which we do not, an imprecise definition does not automatically equate to unconstitutional vagueness. Relief is granted where *no* standard of conduct is specified. *Parker, 417 U.S. at 755*. Such is not the case here.

Moreover, because the law's meaning is readily understood, we are convinced that it will not be applied by commanders, law enforcement, or the courts in an arbitrary or discriminatory manner. Accordingly, the appellant's vagueness challenge fails, both facially and as applied.

B. Overbreadth

The appellant also avers that *Article 120(k)* is overbroad. A criminal statute or regulation is overbroad if, in addition to prohibiting conduct which is properly subject to governmental control, it also proscribes activities which are constitutionally protected or otherwise innocent. *Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)*. A statute may be invalidated on the basis of overbreadth, but only if the overbreadth is substantial. *New York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)*. However, the overbreadth doctrine should be used with hesitation, and then "only as a last resort." *Id*. (citing *Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)*). **[*10]** There must be a realistic danger that the statute itself will significantly compromise recognized *First Amendment* protections of parties not before the court for it to be facially challenged on overbreadth grounds. *City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)*. The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. *Broadrick, 413 U.S. at 630* (Brennan, J., dissenting).

The appellant argues, *inter alia*, that *Article 120(k)* is unconstitutional because it might have a chilling effect on protected speech and conduct. We disagree. To prevail on this constitutional challenge, the appellant must show that the overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick, 413 U.S. at 615*.

The statute in question criminalizes indecent conduct which is grossly vulgar and repugnant to common propriety, which is an area not considered "pure

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[2] Appellant's Brief at 8.

[3] *Id*. at 9.

[4] Appellant's Reply Brief of 9 Jun 2011 at 3.

[5] *10 U.S.C. § 920(t)(12)*; *Article 120(t)(12)*, UCMJ.

speech." *Article 120(k)* does not merely prohibit merely rude or controversial speech, rather it prohibits certain conduct. The appellant has provided no realistic **[*11]** danger that *Article 120(k)* will significantly compromise recognized *First Amendment* protections.

In light of the heavy burden and standards of review stated above and on the facts of this case, particularly in light of the appellant's admissions during the providence inquiry, we are not persuaded by the appellant's argument, and decline to declare *Article 120(k)* unconstitutionally overbroad.

Double Jeopardy (Multiplicity)

In his second assignment of error, the appellant claims his convictions for both indecent language and indecent acts are multiplicious. We disagree.

Multiplicity, a constitutional violation under the *Double Jeopardy Clause*, occurs if a court, "'contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct.'" *United States v. Paxton, 64 M.J. 484, 490 (C.A.A.F. 2007)* (quoting *United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993))*.

There was no pretrial agreement provision requiring the appellant to waive multiplicity. In that the appellant failed to raise the issue of multiplicity as to the offenses referred for trial, his unconditional pleas of guilty forfeited the issue so long as the specifications **[*12]** are not facially duplicative. *United States v. Heryford, 52 M.J. 265, 266 (C.A.A.F. 2000)* (citing *United States v. Britton, 47 M.J. 195, 198 (C.A.A.F. 1997))*. Facially duplicative means "factually the same." *Id. at 266*. The test to determine whether two offense are facially duplicative, known as the "elements test," requires us to consider whether each provision of each specification "'requires proof of a fact which the other does not. *United States v. Hudson, 59 M.J. 357, 359 (C.A.A.F. 2004)* (quoting *Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932))*.

The specification under Charge I states that between on or about 1 October 2009 and on or about 31 October 2009, the appellant did "wrongfully commit indecent conduct, to wit: took a picture of his penis and sent it via cell phone to [MGC] a child who had not attained the age of 12 years." (As we noted previously, the age of the victim is not an element of this offense). Specification 2 under Charge II states that between on or about 1 October 2009 and on or about 31 October 2009, the appellant did "in writing communicate to [MGC] a child under the age of 16 years, certain indecent language, to wit: 'Do you want to see why your mother **[*13]** is so loud while having sex,' or words to that effect."[6]

The elements of indecent act, Article 120, are: (1) that the accused engaged in certain conduct, and (2) that the conduct was indecent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45(b)(11).

The elements of indecent language, Article 134, are: (1) that the accused communicated certain language in writing; (2) that such language was communicated to a child under the age of 16; (3) that such language was indecent; and, (4) that under the circumstances, the conduct of the accused was prejudicial to good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces. *Id*. at ¶ 89(b).

The primary question here is whether the appellant's indecent act (sending the picture of his naked erect penis via text message) and the indecent language (a text-message, "Yup do you wanna see why ur mom was so loud") involving the same victim amount to the "same act or course of conduct" or whether they are distinct and discrete acts, allowing separate convictions. *Teters, 37 M.J. at 373*. **[*14]** The appellant's contention is that this case involves a single transaction since the indecent language act is dependent upon the indecent act offense, that being the transmission of the picture. He contends that without the accompanying transmission of the picture, there can be no indecent language offense. His argument is that, on their face, the specifications are duplicative.

Our review of the indecent act specification satisfies us that it is not facially duplicative with the indecent language specification. Both the language of the specifications and the facts apparent on the face of the record are different, and not based upon the same course of conduct. *United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001)* (citing *Heryford, 52 M.J. at 266 (C.A.A.F. 1998)* and *United States v. Lloyd, 46 M.J. 19, 24 (C.A.A.F. 1997))*.

The elements of indecent act and indecent language differ. The indecent act in this case involves the doing of

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[6] In pleading guilty to indecent language, the appellant excepted the language "while having sex" from the specification.

an act which was indecent under the circumstances, that is, sending a picture of his penis via cell phone, while the indecent language offense involves the utterance of specific indecent words transmitted to a girl who was under 16 years of age, such conduct **[*15]** being service discrediting. Indecent act, charged under Article 120, does not involve proof of the indecent language or proof of the terminal element of Article 134. Although the two charged offenses occurred within a short time of each other, the indecent language offense was complete when the appellant uttered the words charged in the specification. As such, this indecent language required proof not required by the indecent act specification. Furthermore, we disagree with the appellant's claim that it was the picture of his naked penis alone that made the language he transmitted to MGC indecent, as we will further explain in our assessment of the third assignment of error. Given both the elements of these crimes and the particular facts of this case, we disagree with the appellant's second assertion of error.

Although not raised by the appellant, we also considered whether there was an unreasonable multiplication of charges as to indecent conduct and indecent language. In light of the five factors set forth in *United States v. Quiroz, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)* (en banc), *aff'd*, *58 M.J. 183 (C.A.A.F. 2003)* (summary disposition), we find no unreasonable multiplication **[*16]** of charges. First, the appellant did not object at trial. Second, since the indecent language occurred first in time, followed by the indecent act, these charges are directed at separate and distinct criminal acts. For the same reason, we conclude that the method of charging did not exaggerate the appellant's criminality. With respect to the last two *Quiroz* factors, the method of charging the appellant did not inappropriately expose him to greater punishment, nor is there any evidence of prosecutorial overreaching.

Providence of the Appellant's Plea

In his third assignment of error, the appellant avers that his guilty plea to communicating indecent language was improvident. We review a military judge's decision to accept or reject an accused's guilty plea for an abuse of discretion. *United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996)*. A decision to accept a guilty plea will be set aside only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*.

The appellant's asserts that the language in the specification on its face is innocuous, not indecent, and that taking into consideration **[*17]** the circumstances at the time of the communication of the language, there was an insufficient factual basis for the military judge to accept the appellant's plea of guilty. We disagree.

In this case, following an explanation of the elements, including a definition of the term "indecent language,"[7] and following an examination of the appellant in accordance with RULE FOR COURTS-MARTIAL 910, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)*, the military judge entered a finding of guilty consistent with the appellant's plea.

To sustain a guilty plea to indecent language, the appellant's communication must be language that has the "tendency to incite lustful thought" or "is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature." *United States v. Negron, 60 M.J. 136, 144 (C.A.A.F. 2004)*. Words that are not *per se* indecent can nevertheless meet the definition when considered within the context in which they were uttered. *United States v. Hullett, 40 M.J. 189, 191 (C.M.A. 1994)*; *United States v. Caver, 41 M.J. 556, 559-60 (N.M.Ct.Crim.App. 1994)*. Indecency "depends on a number of factors, including but not limited to

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[7] The military judge defined "indecent language" as that:

> "which is grossly offensive to the community sense of modesty, decency, or propriety or shocks the moral sense of the community 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 in (sic) libidinous thoughts that is a lustful, lewd, or salacious connotation, either expressly or by implication, from the circumstances under which it was spoken. The test is whether the particular language employed is calculated to corrupt morals or to incite libidinous **[*18]** thoughts and not whether the words themselves are impure. Now, 'community' as used in this article means the standards that are applicable to the military as a whole, not your unit."

Record at 82-83. This explanation was apparently derived in a combination from both the Department of the Army's Military Judges' Benchbook, and the definition set forth by the President in the MCM. However, we do not believe the appellant was prejudiced or misled by the explanation given, nor do we find the definitions provided incorrect.

[*19] fluctuating community standards of morals and manners, the personal relationship existing between a given speaker and his auditor, motive, intent and the probable effect of the communication . . . ." *Hullett, 40 M.J. at 191* (internal quotation marks and citation omitted). The relevant "community standard" for measuring indecency is that of the military community as a whole and not of the individual unit. *Id*.

In determining whether the language is indecent it must be evaluated in context, considering all of the surrounding circumstances. *United States v. Brinson, 49 M.J. 360, 364 (C.A.A.F. 1998)*. *See also United States v. French, 31 M.J. 57, 60 (C.M.A. 1990)* (affirming servicemember's conviction for indecent language by asking his 15-year-old stepdaughter if he could "climb into bed with her") and *United States v. Adams, 49 M.J. 182, 185 (C.A.A.F. 1998)* (a provoking-words case observing that "all the circumstances surrounding use of the words should be considered"). Our review of the circumstances of the communication of the appellant's language is not limited to the exact moment of the communication of the alleged innocuous language. We must examine the entire record of trial to determine **[*20]** the precise circumstances under which the charged language was communicated. *United States v. Green, 68 M.J. 266, 270 (C.A.A.F. 2010)* (citing *Brinson, 49 M.J. at 364*).

The appellant stated during the providence inquiry that he had engaged in a texting conversation with this young girl, where "[a]s the night had progressed, questions had arose, things were said." Record at 85. He then acknowledged sending the text-message in question followed a few moments later by the photograph. In fact, the appellant acknowledged that he had decided to send the photo while typing the aforementioned text-message to the victim. *Id*. at 101, 102, 108. When examining the entirety of this record, however, we find there was a good deal more to the story. In fact, the record betrays a significant and lengthy conversation between the appellant and this minor child that covered topics of a sexual nature spanning a one-hour time frame. The record reveals the following excerpts of the text-message conversation, taken from Prosecution Exhibit 2. The conversation immediately preceded the transmission of the offensive photograph which is relevant to our consideration of the surrounding circumstances:

> 11:34pm Rheel: **[*21]** U really want me dont u?
> 11:34pm MGC: Yes.
> 11:35pm Rheel: When ur 18 or now?
> 11:35pm MGC: Huh
> 11:39pm Rheel: Nevermind
> . . . .
> 11:43pm Rheel: So how bad do u want to kiss me
> 11:43pm MGC: Know what . . .
> 11:44pm MGC: I always wanted to . . .
> 11:45pm Rheel: Why didnt u
> 11:47pm MGC: I dont know you always kissed mom . . .
> 11:47pm Rheel: So tom if I come down?
> 11:48pm MGC: I kiss you . . .
> 11:48pm Rheel: Is that all u wanna do
> 11:49pm MGC: I don't know . . .
> 11:50pm Rheel: Are u blushing right now
> 11:51pm MGC: Whats that can I have a pic of you . . .
> 11:54pm Rheel: I dont have any of me in the shower just with clothes on
> 11:55pm MGC: Oh . . .
> 11:56pm Rheel: Nothing specific u wanna see?
> . . . .
> 12:09am Rheel: So you want me to kiss u
> 12:09am MGC: Yes . . .
> 12:10am Rheel: Nothing else u want me to do to you
> 12:11am MGC: Toch me like you did mom . . .
> 12:12am Rheel: Touch u were? N did you ever watch me n ur mom when we were alone in the bedroom?
> 12:13am MGC: I watch under the door and listned . . .
> 12:14am Rheel: Really did u like it?
> 12:14am MGC: Yes how come she was loud . . .
> 12:15am Rheel: Cause its so big
> 12:15am MGC: Oh did you hurt her . . .
> 12:16am Rheel: Nope she liked it
> 12:16am MGC: Will i . . .
>
> 12:17am Rheel: **[*22]** Yes if u want to do that with me
> 12:17am MGC: I do . . .
> 12:18am Rheel: Just let me know when ur ready prolly in a few yrs
> 12:20am MGC: I guess mom did it to you . . .
> 12:20am Rheel: A blowjob?
> 12:21am Rheel: Do u want ur mom in the room for it all
> 12:22am MGC: Yes and no . . .
> 12:22am Rheel: What do u mean
> 12:24am Rheel: U want to watch us do what? Kiss or have sex?
> 12:26am MGC: So i can watch for real . . .
> 12:26am Rheel: Yes u do

12:27am Rheel: Yup u wanna do it tom or wait a lil bit
12:28am MGC: Mom wont be home until 5 or 6
. . . .
12:35am Rheel: Yup do you wanna see why ur mom was so loud
12:43am Rheel: Guess not
12:44am MGC: I sayd yes . . .
12:45am Rheel: U gonna send me another pic in return?
12:45am MGC: Yes . . .
12:46am Rheel: Its sent but its our secret

Viewed in the context of the entire record, particularly the one-hour body of the appellant's text-message communications to the victim in this case, the appellant's statement meets the standard of indecency articulated by the Court of Appeals for the Armed Forces (CAAF). Viewing the conversation as a whole, the appellant's remark, "Yup do you wanna see why ur mom was so loud," was indecent. There is no doubt in our minds that the appellant **[*23]** intended these words, which we do not view in isolation as the appellant suggests, to corrupt morals or excite libidinous thoughts in the mind of this nine-year-old girl. As we earlier stated in our discussion of the second assignment of error, we do not agree with the appellant that the mere sending of the picture of his penis is what made his language indecent. While certainly we can envision a circumstance where the utterance of some language would require a pictorial to make the language indecent, this is not such a scenario. Given the context of the conversation, the audience, and the community standards, we find the language charged in the specification indecent.

We hold, therefore, that there is no substantial basis in law or fact to question the providence of the appellant's guilty plea to Specification 2 of Charge II.

The "*Fosler*"Issue

The appellant next asserts that in light of *United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)*, Specification 2 of Charge II failed to state an offense because it did not allege the terminal element. We resolve this assignment adversely to the appellant notwithstanding *Fosler*.

In *Fosler*, the CAAF held that the terminal element in an Article 134, **[*24]** UCMJ, offense must be expressly alleged or necessarily implied by the language of the specification in a contested trial. However, its decision did not specifically address the absence of the terminal element in the context of a guilty plea. We distinguish this case on that basis. We interpret *Fosler* as requiring challenges to Article 134 to be reviewed under the same standards applied to all other substantive offenses under the UCMJ. *Fosler* did not alter any preexisting standards for challenges to specifications. It instead addressed whether to apply those standards to *all* offenses. As such, the timing of the challenge to a specification is critical. Indeed, the *Fosler* holding relied in part on *United States v. Watkins, 21 M.J. 208 (C.M.A. 1986)*, a case that significantly distinguished a guilty plea from a contested case. In *Watkins*, the court stated:

> Where . . . the specification is not so defective that it "cannot within reason be construed to charge a crime," the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the **[*25]** basis of defects in the specification.

Id. at 210.

Here, the appellant entered into a pretrial agreement in which he agreed to plead guilty to the General Article offense.[8] Second, he entered into a stipulation of fact, PE 1. Third, the military judge provided him with the definitions and statutory elements including the terminal element, all of which the appellant stated he understood. Fourth, during the providence inquiry, the appellant admitted that his conduct was service discrediting.[9] Lastly, the appellant satisfactorily completed the providence inquiry. We find that the specification sufficiently stated an offense and, that the appellant suffered no prejudice in pleading guilty to the charge as drafted given these circumstances.

Even if *Watkins* should for some reason be overruled or severely limited, **[*26]** we note that the military judge, in informing the appellant here of the elements, included

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[8] Under the "Pleas of the Accused" section in the Pretrial Agreement, Appellate Exhibit XIX, it indicates the appellant's pleas, in relevant part, as follows:

> "Charge II: Violation of Article 134: **GUILTY**
>
> . . . .
>
> Specification 2: Indecent language: Guilty, except for the words "while having sex;" of the excepted words, Not Guilty; of the Specification as excepted, Guilty."

[9] Record at 104-05.

the "prejudice" and "discredit" aspects of the two statutory elements of Article 134. The appellant did not object to what is arguably a major change and thus waived the objection. *See* R.C.M. 603(d). He did not request repreferral, reinvestigation, rereferral, or the statutory delay afforded between referral and trial. *See also* *Art. 35*, UCMJ. We are satisfied, then, that the appellant enjoyed what has been described as the "clearly established" right of due process to "'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Fosler, 70 M.J. at 229* (quoting *Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948)*).

We emphasize that this was a guilty-plea case, unlike *Fosler*, and we note that the appellant has only now on appeal challenged the legal effect of the specification. "A flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *Watkins, 21 M.J. at 209* (citation omitted). If we were to set aside a finding on a guilty plea, we would have to determine a substantial **[*27]** basis in law or fact to do so. *Inabinette, 66 M.J. at 322*. Here, the appellant knowingly admitted facts that satisfied all the elements of the offense, the military judge ensured the appellant had actually communicated with the girl, and the appellant never provided facts inconsistent with his guilty plea. *See id*.

Even with the changes wrought by *Fosler*, we are satisfied that the unchallenged specification stated an offense, and that the military judge's informing the appellant of the nature of the terminal elements and the appellant's assurances that he and his counsel had had sufficient time to discuss the allegations and the elements of proof, militate against any substantial basis in law for setting aside the finding. We thus hold that Specification II of Charge II states an offense.

We therefore reject the appellant's fourth assignment of error.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge REISMEIER and Senior Judge CARBERRY concur.