

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DANIEL J. FIELDS  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200900589  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 17 April 2009.  
**Military Judge:** Col Timothy Dunn, USMCR.  
**Convening Authority:** Commanding General, Marine Corps  
Recruit Depot/Western Recruiting Region, San Diego, CA.  
**Staff Judge Advocate's Recommendation:** Col M.B.  
Richardson, USMC.  
**For Appellant:** Capt Michael Berry, USMC.  
**For Appellee:** Maj Jonathan Nelson, USMC.

**31 August 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

BEAL, Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of attempt to communicate indecent language to a child under sixteen years, indecent exposure, committing an indecent act, and communicating indecent language, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The members sentenced the appellant to three months of confinement, a dishonorable discharge, total forfeitures for three months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

The appellant assigns four errors: 1) the evidence was legally and factually insufficient to support the findings of guilt to Charge II and all specifications thereunder; 2) the indecent language offense is a lesser included offense of the attempted indecent language to a child offense and should be dismissed as multiplicitous; 3) the appellant's masturbation to an unknown party via webcam over the internet was factually insufficient to constitute indecent public exposure; and, 4) the military judge improperly denied the appellant's motion to dismiss Charge II and all specifications thereunder as an unconstitutional invasion of his privacy.

We have carefully considered the parties' pleadings and the record of trial. We find merit in the appellant's second assigned error and set aside the guilty finding for Specification 3 of Charge II (indecent communications) and dismiss the specification. Additionally, though not assigned as error, we find that the specifications alleging indecent exposure (Charge II, Specification 1) and indecent acts (Charge II, Specification 2) constitute an unreasonable multiplication of charges; accordingly, we set aside the guilty finding for Specification 1 of Charge II and dismiss the specification. We are satisfied that the remaining convictions and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Background**

On 14 February 2007, the appellant logged into Yahoo! Messenger under the username "bryanq0101" and entered an internet chat room named "militarychatroom21." Record at 211-14. There the appellant found an individual with the username "Nicole Carter" and initiated a private instant-message exchange with her. *Id.* In reality, "Nicole Carter," was undercover Special Agent (SA) Jennifer O'Hare, Naval Criminal Investigative Service (NCIS). *Id.* The appellant informed "Nicole" that he was a 28-year-old male from California and "Nicole" indicated that she was a 14-year-old female from North Carolina. *Id.*; Prosecution Exhibit 8. The appellant asked "Nicole" for a picture of herself and SA O'Hare sent him a picture of what appears to be a teenage female in an evening gown. PE 8; DE A. Upon receiving the photo sent by SA O'Hare, the appellant invited "Nicole" to view him on his webcam. The webcam displayed the appellant shirtless, with a large tattoo of an eagle, globe, and anchor on his chest. Visible in the background, were a set of dress blues with sergeant's chevrons and two sets of marine pattern camouflage utilities. PE 1, 2. A few moments later, the appellant turned the conversation sexual and attempted to persuade "Nicole," over her protests that her mother might catch her, to masturbate. A few moments later the appellant stood in front of his web cam, pulled down his pants exposing his penis and masturbated until he

ejaculated. Record at 211-19; PE 1, 8. The entire conversation spanned a total of 18 minutes and 30 seconds. PE 1, 8.

At trial, the appellant identified himself as the individual in the webcam video and admitted that he typed the messages, but testified that he could not remember the incident because he was drunk at the time. Record at 384-85. He testified that he would never knowingly or intentionally communicate with a 14-year-old in a sexual manner, and that he assumed everyone he met in the chat rooms was at least 18 years old because of the company's user agreement. *Id.* at 373-88.

### **Multiplicity**

The appellant was convicted of the sole specification under Charge I and Specification 3 of Charge II, which respectively allege that he attempted to communicate indecent language to a child and that he actually communicated indecent language to another person. The subject language is exactly the same in both specifications. Likewise, both specifications allege the recipient of this indecent language was SA O'Hare. The only different facts alleged between the two specifications is that with respect to the attempt offense the appellant thought SA O'Hare was "Nicole Carter" a child under the age of 16 years. The appellant unsuccessfully moved to dismiss Specification 3 of Charge II. We find that the military judge erred by denying the motion. A quick comparison of the elements for each specification reveals that the elements of the offense alleged in Specification 3 of Charge II constitute a subset of the elements of the offense alleged in the sole specification under Charge I. Accordingly, we find the actual communication of indecent language to SA O'Hare to be a lesser included offense of the attempted communication of indecent language to "Nicole Carter." We will take corrective action in the decretal paragraph.

### **Unreasonable Multiplication of Charges**

Though not assigned as error, at trial the appellant twice moved to dismiss Specification 1 of Charge II as being multiplicitious with Specification 2. Record at 47-48 and 515-520; Appellate Exhibit X. As each specification contains elements not found in the other, we concur with the military judge's assessment that the specifications were not multiplicitious. Nonetheless, even when charges are not multiplicitious for findings, we may set aside a finding of guilty where there is an unreasonable multiplication of charges. *United States v. Anderson*, 68 M.J. 378, 385-86 (C.A.A.F. 2010) (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)). Following *Quiroz*, we consider five factors: (1) Did the accused object at trial?; (2) Is each charge and specification aimed at distinctly separate criminal acts?; (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?; (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?; (5) Is

there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *Id.* at 386.

Using the above factors, we find the two specifications at issue constitute an unreasonable multiplication of charges. Factor one favors the appellant, as the appellant objected twice at trial. Record at 521; AE X. Factors two and three also favor the appellant, as the appellant exposed himself in the course of and for the purpose of masturbating, which was the indecent act alleged in Specification 2. Record at 218. Factor four also favors the appellant as the number of specifications unreasonably increased the appellant's punitive exposure and carried an additional conviction with six months of potential confinement. Concerning factor five, although the Government is entitled to pursue alternative charging, the military judge should have compelled the Government to choose one of the theories or merged them for findings. We will take corrective action in our decretal paragraph.

### **Legal and Factual Sufficiency**

In light of our dismissal of Specifications 1 and 3 of Charge II we only need address the appellant's legal and factual insufficiency argument as it pertains to Specification 2 of Charge II (indecent acts with another). We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. *Id.* at 325.

The facts of the appellant's case are strikingly similar to the facts of *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008). The appellants in both cases were subject to police sting operations in which law enforcement agents posed as 14-year-old girls in internet chat rooms. Both appellants initiated conversation with the agents via instant message and learned the age of the personas being portrayed by the agents. Shortly after initiating their chat dialogues, both appellants invited the person they were interacting with to watch them via web camera. After establishing a web camera connection with their new-found friends, both appellants masturbated to ejaculation in the view of the web camera.

In *Miller*, the Air Force Court of Criminal Appeals initially affirmed a conviction for attempted indecent liberties with a child. *United States v. Miller*, 65 M.J. 845 (A.F.Ct.Crim.App. 2007). The Court of Appeals for the Armed Forces reversed,

holding the elements of that offense required the appellant to be in the *physical* presence of the child and that *constructive* presence via web camera failed to satisfy the elements of the specifically intended offense (indecent liberties with a child). *Miller*, 67 M.J. at 90-91. The court remanded the case for the Air Force court's further consideration as to whether Miller was guilty of the lesser included offense of attempted indecent acts with another. *Id.* at 91. The elements of indecent acts with another under Article 134, UCMJ, are: (1) That the accused committed a certain wrongful act with a certain person; (2) That the act was indecent; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 90(b). Upon further review, the lower court concluded the evidence was factually sufficient to sustain a conviction for the lesser included offense. *United States v. Miller*, 2009 CCA LEXIS 128 (A.F.Ct.Crim.App. 30 Apr 2009), *aff'd*, 68 M.J. 487 (C.A.A.F. 2010).

In view of the record before us, we too are convinced beyond a reasonable doubt that the evidence legally and factually supports the appellant's conviction for indecent acts with another. The appellant interacted via instant-messenger chat and web camera with SA O'Hare, who identified herself as "Nicole Carter" a 14-year-old girl. The interaction lasted less than 19 minutes. Within moments of SA O'Hare identifying herself as a 14-year-old girl, the appellant initiated a sexually themed conversation in which the appellant typed words encouraging "Nicole" to masturbate while he masturbated in her virtual presence to the point of ejaculation. Record at 211-20, 285; PE 1, 8. The appellant met "Nicole Carter" in a military themed chat room, and displayed via web camera his large military tattoo on his chest while his uniforms appeared in the background with his rank insignia visible. The appellant recklessly disregarded who or how many people might be watching or whether he was being recorded. Additionally, the appellant also recklessly disregarded any harm he might cause to a child. Under these facts we are persuaded that all three elements of the offense are squarely met.

#### **Application of *Lawrence v. Texas***

Whether the appellant's conviction for indecent acts must be set aside in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), is a constitutional question we review de novo. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004). In *Marcum*, the court found that *Lawrence* applies to the military and adopted a three-part framework for determining when an offense is constitutional as applied to the facts of a given case: (1) Was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? (2) Did the conduct encompass behavior or factors identified by the Supreme Court as outside the analysis in

*Lawrence*? (3) Are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest? *Marcum*, 60 M.J. at 206-07. The conduct in this case was not within the liberty interest identified by the Supreme Court and it falls outside the Supreme Court's analysis in *Lawrence*, as it involved sexual acts with an agent posing as a minor and cannot be characterized as private, consensual conduct between two adults. See *Lawrence*, 539 U.S. at 577-78. There are also additional factors relevant solely in the military environment that weigh against constitutional protection. For reasons stated above, the appellant's conduct was of a nature to bring discredit to the armed forces. "That 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).

### **Sentence Reassessment**

If we can determine a sentence would have been at least of a certain magnitude, then we may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). Our conclusion about the sentence that would have been imposed must be made with confidence, and a "dramatic change in the penalty landscape" gravitates away from our ability to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). At trial, once the military judge found the two indecent language specifications multiplicitious for sentencing, the appellant faced a maximum punishment of confinement for 90 months, and a dishonorable discharge. Record at 514-20. The adjudged confinement of three months was well below the authorized maximum, and our action on findings (setting aside the indecent language and indecent exposure specifications) does not dramatically change the penalty landscape. We are confident in our ability to reliably determine the sentence that would have been imposed.

### **Conclusion**

We have carefully reviewed the record of trial, the briefs of the parties, and the assignments of error. The findings of guilty as to Specifications 1 and 3 of Charge II are set aside and the specifications are dismissed. The findings of guilty as Charge I and the sole specification thereunder, and Charge II and

Specification 2 thereunder are affirmed. The sentence, as approved by the convening authority, is affirmed.

Chief Judge REISMEIER and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL  
Clerk of Court