

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRANDON L. RHEEL
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100108
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.

For Appellant: Capt Michael D. Berry, USMC.

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

20 December 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of committing an indecent act¹ and communicating indecent language to a child

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.

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 \$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 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 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 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 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 (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. Harris*, 347 U.S. 612, 617 (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 (1983). In determining the sufficiency of the notice, "a statute must of necessity 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 (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 (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 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

² Appellant's Brief at 8.

³ *Id.* at 9.

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

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 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, 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

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

control, it also proscribes activities which are constitutionally protected or otherwise innocent. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (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 (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 (1973)). 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 (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 speech." Article 120(k) does not merely prohibit merely rude or controversial speech, rather it prohibits certain conduct. The appellant has provided no realistic 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 multiplicitious. 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 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 offenses 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 *Blockberger v. United States*, 284 U.S. 299, 304 (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 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, ¶ 45b(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

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

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 ¶ 89b.

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. 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 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 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 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 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

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

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*, 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 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 the precise circumstances under which the charged

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.

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: 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: 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 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, 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 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, we note that the military judge, in informing the appellant here of the elements, included 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 repreferal, 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 (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

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.

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 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.

For the Court

R.H. TROIDL
Clerk of Court