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

**Before**
**M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BRANDON W. BARRETT**
**INTERIOR COMMUNICATIONS ELECTRICIAN SECOND CLASS (E-5)**
**U.S. NAVY**

**NMCCA 201000330**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 4 December 2009.
**Military Judge:** CDR Kevin O'Neil, JAGC, USN.
**Convening Authority:** Commander, Navy Region Southwest, San Diego, CA.
**Staff Judge Advocate's Recommendation:** LCDR M.A. Marshall, JAGC, USN.
**For Appellant:** LT Ryan C. Mattina, JAGC, USN.
**For Appellee:** LT Ann Dingle, JAGC, USN.

**30 May 2013**

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**OPINION OF THE COURT**

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

JOYCE, Judge:

A panel of members sitting as a general court-martial convicted the appellant, contrary to his pleas, of carnal knowledge, sodomy with a child, four specifications of indecent language to a minor, two specifications of receipt of child pornography, one specification of possession of child pornography, one specification of transferring obscene material to a child, and two specifications of persuading a minor to

engage in sexually explicit conduct, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The members sentenced the appellant to 36 month's confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but suspended confinement in excess of 30 months.

After reviewing the pleadings of the parties and the record in its entirety, under the totality of the circumstances, we find that the Government's error in failing to plead the terminal element of the Article 134 indecent language offenses did not result in material prejudice to the appellant's substantial, constitutional right to notice, as the evidence was essentially overwhelming and uncontroverted.

**Procedural Background**

This case was originally submitted to this court without assignment of error. We specified a question of whether the appellant's waiver of appellate review was induced by the Government, and ordered a *DuBay*[1] hearing. Following the hearing we concluded that the waiver of review was improperly induced. At that time, the appellant raised one assignment of error: that Specifications 1, 2 and 3 under Charge I and Specification 1 under Additional Charge III fail to state the offense of indecent language to a minor because they do not allege the "terminal element" of the general article.

On 29 February 2012, we issued an opinion in this case affirming the four indecent language offenses under a *Fosler*[2] analysis. Although not assigned as error, we set aside the carnal knowledge offense, Additional Charge I, because it was improperly referred, and reassessed the sentence.[3] *United States v. Barrett*, No. 201000330, 2012 CCA LEXIS 74 at *14, unpublished op. (N.M.Ct.Crim.App. 29 Feb 2012). On 10 July 2012, the Court of Appeals for the Armed Forces (C.A.A.F.) reversed our decision

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[2] *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Specifically, our court construed the indecent language offenses liberally and held that the appellant was on notice as evidenced by his lack of objection at trial. *United States v. Barrett*, 201000330, 2012 CCA LEXIS 74 at *6, unpublished op. (N.M.Ct.Crim.App. 29 Feb 2012).

[3] The court recalculated the maximum authorized confinement from 168 to 148 years, and then reassessed and affirmed the sentence approved by the CA.

as to the indecent language offenses and as to the sentence; affirmed our decision in all other respects; and remanded the case for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).[4] Consequently, the appellant's case is again before this court for review on the sole issue of whether the appellant suffered material prejudice to a substantial right due to the Government's failure to plead the terminal element in the four Article 134 indecent language specifications.

**Humphries and the Terminal Element**

The indecent language offenses were charged under Article 134, UCMJ, and each of the four specifications failed to allege the terminal element of either conduct that is prejudicial to good order and discipline or service-discrediting. The appellant did not object to this omission at trial and raised this issue for the first time on appeal. Whether a specification is defective and the remedy for such an error are questions of law we review *de novo*. *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 43 (2012).

Pursuant to the C.A.A.F. decision in *Humphries*, it was error to omit the terminal element from these specifications under Article 134, UCMJ. 71 M.J. at 211 (citing *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *Ballan*, 71 M.J. at 28). However, "[t]he existence of error alone does not dictate that relief in the form of a dismissal is available." *Humphries*, 71 M.J. at 212. Rather, whether dismissal is warranted "will depend on whether there is plain error . . . ." *Id*. at 213 (citations and footnote omitted). The appellant has the burden of demonstrating that: (1) there was error, (2) that the error was plain or obvious and (3) the error materially prejudiced a substantial right. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

The C.A.A.F. has found the failure to allege the terminal element of Article 134, UCMJ, under similar circumstances is plain and obvious error. *Humphries*, 71 M.J. at 214. Further, "[b]ecause the law at the time of trial was settled and clearly contrary, it is enough that the error is plain now, and the error was forfeited rather than waived." *Id.* at 211 (citation omitted). However, the appellant has failed to demonstrate that the error materially prejudiced a substantial right.

[4] *Humphries* was decided on 15 June 2012.

**Harmless Error Analysis under *Humphries***

In *Humphries*, the C.A.A.F. noted that the issue was "whether [the appellant] was prejudiced by the Government's failure to allege the terminal element of an Article 134, UCMJ, charge . . . ." 71 M.J. at 216 n.8. The court explained that there were two circumstances under which an appellant would not be prejudiced by a lack of notice: (1) where "notice of the missing element is somewhere extant in the trial record," or (2) where "the element is "'essentially uncontroverted.'" *Id*. at 215-16 (quoting *United States v. Cotton,* 535 U.S. 625, 633 (2002) and *Johnson v. United States*, 520 U.S. 461, 470 (1997)). With respect to the first circumstance, if there is evidence in the record establishing that an appellant either already knew of the missing element, whether through some pre-existing knowledge or because the appellant was otherwise informed about the missing element through some medium other than the charge sheet, then the Government's failure to include the element on the charge sheet could not have prejudiced the appellant. *See United States v. Liboro*, 10 F.3d 861, 864 (D.C. Cir. 1993) (finding harmless the district court's failure to provide the required notice under Federal Rule of Criminal Procedure 11 when the appellant "was sufficiently apprised of the charges and comprehended them" as a result of the prosecution's statements during the plea proceeding); *see also United States v. Carr*, 303 F.3d 539, 544 (4th Cir. 2002) (finding pretrial brief filed by defense counsel clearly showed notice of element missing from indictment).

The second circumstance in which an appellant is not prejudiced by the Government's failure to provide adequate notice is when the evidence against the appellant with respect to the missing element was "essentially uncontroverted." *Humphries*, 71 M.J. at 216. The "essentially uncontroverted" test was defined in *Neder v. United States*, 527 U.S. 1, 9 (1999), and discussed in *Humphries.* 71 M.J. at 216. In *Neder*, the Supreme Court held that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, *such that the jury verdict would have been the same absent the error*, the erroneous instruction is properly found to be harmless." 527 U.S. at 17 (emphasis added). In *Neder*, the Court "believe[d] that where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are made.'" *Id.* at 9 (quoting

*Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). *See, e.g., United States v. Gomez*, 580 F.3d 94, 101 (2d Cir. 2009) (holding that "to sustain the conviction [based on overwhelming and essentially uncontroverted evidence, the court] must find that the jury would have returned the same verdict beyond a reasonable doubt.").

**Notice Determination**

Upon review of the record, we find no evidence of notice of the terminal element to the appellant regarding the indecent language offenses with the exception of the military judge's instructions on findings.[5] Record at 610, 623. Therefore, we conclude there is nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause of the terminal element of the Article 134, UCMJ, indecent language offenses, he had violated. The Government made no reference to the terminal element during its case on the merits, in argument, or even during the presentencing phase. While the civilian defense counsel raised a motion under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), on the four indecent language charges, neither party made any reference or mention to a terminal element, the lack of a terminal element, or the Government's failure to prove the terminal element.[6] *See* Record at 563-66. In conclusion, the indecent language offense specifications provide no notice of which terminal element or theory of criminality the Government pursued in this case, and no such notice is otherwise extant in the record.

**Overwhelming and Essentially Uncontroverted Evidence**

We now look to determine whether the evidence of the omitted element was "overwhelming" and "essentially uncontroverted." In *Humphries*, the C.A.A.F. also acknowledged the prejudice analysis considered in *Johnson*, *Neder*, and *Cotton,* where the Supreme Court inquired into the weight of the evidence presented on the omitted element in order to determine whether

[5] Although the military judge provided the parties with a copy of his draft panel instructions which correctly listed and defined the elements of Article 134, UCMJ, for the indecent language offenses, this came after the close of evidence, and did not alert the appellant to the Government's theory of guilt. *See Humphries*, 71 M.J. at 216.

[6] Given the state of the law at the time of trial, defense counsel's trial strategy should not be considered "an intentional relinquishment or abandonment of a known right." *See Humphries*, 71 M.J. at 212 (quoting *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008))).

it was overwhelming and uncontested, *i.e.*, whether the element was "essentially uncontroverted," thus rendering its omission harmless error. *See Cotton*, 535 U.S. at 633 and *Johnson*, 520 U.S. at 470.

Before analyzing whether the evidence regarding the terminal element was "essentially uncontroverted" so as to render the lack of notice harmless, we again recognize that it is constitutionally impermissible for us to consider any conduct as "per se" or "conclusively" service discrediting or prejudicial to good order and disciple. *United States v. Phillips*, 70 M.J. 161, 164-65 (C.A.A.F. 2011); *see also United States v. Valentin*, No. 201000683, 2013 CCA LEXIS 47, unpublished op. (N.M.Ct.Crim.App. 31 Jan 2013), *rev. granted*, __ M.J. __ (C.A.A.F. May 16, 2013). We will base our determination "upon all the facts and circumstances" surrounding the offenses. *Phillips*, 70 M.J. at 165. With this standard in mind, we turn now to an examination of the evidence in this case.

This case is based on the appellant's relationship with two young girls under the age of 16, LW and SP, both of whom he initially met on the Internet. During the summer of 2005, the appellant, who was then 24 years old, married, and stationed in Bremerton, Washington, met LW on MySpace (a social networking site). LW lived in Washington. Within a week, the appellant met LW at a local mall and began bringing her to his apartment to watch movies. Although the appellant knew LW was in high school and later learned she was 15 years old, he used sexually explicit and grossly offensive language, by texting, to induce LW to have sexual intercourse with him every time they would get together. This indecent language formed the basis of Specification 1 under Additional Charge III. At some point in time, the appellant met LW's parents, and began having sexual relations (to include anal sodomy) with LW at her parents' home. As part of their sexual relationship, the appellant gave LW a red cell phone so that she could send nude pictures of herself to him. She sent over 100 nude photos of herself to the appellant, and he would send nude photos of himself to her. LW never said no to his requests for photos because she just thought it was part of "being boyfriend and girlfriend." Record at 282. After the appellant transferred to San Diego, California, he nonetheless returned to Washington State in December 2005 and spent Christmas with LW and her family. In June or July of 2006, after LW turned 16 years old, the appellant joined LW and her family for a trip to Oregon to watch LW play in a softball tournament. In November 2006, the appellant made a video of him and LW having sex. He wanted her

to view the video, but she never did. This same month, the appellant broke up with LW, telling her that he met someone else (referred to as SP) on the Internet from San Diego and that she was 18 years old.

The appellant's relationship with SP began in the summer of 2006, after he initiated contact with her on the internet. *Id.* at 345-46. However, the appellant did not know at the time that SP was a 14-year-old girl in the 8th grade, as she was holding herself out to be 18 years old and using another girl's picture. The appellant identified himself as "Brandon Barrett," and SP eventually learned he was in the Navy because he used his Navy e-mail account. *Id.* at 346-47. Their relationship started with extensive phone conversations and texting, eventually resulting in SP's parents' suspension of her cell phone privileges. The appellant then gave SP the red cell phone he had previously provided to LW. SP told the appellant that her little sister would meet him to pick up the phone, but SP then actually met with the appellant. The appellant then used sexually suggestive and grossly offensive language in his text communications with SP in an effort to persuade her to engage in sexual conduct with him. In January 2007, after discovering the red cell phone, SP's parents asked the appellant to meet with them at their home, and he complied. They informed the appellant that SP was 14 years old, had SP apologize to him for lying, and after the appellant told SP's parents that she had low self-esteem, they told the appellant to no longer contact their daughter.

However, after SP's parents confronted the appellant, he continued communicating with SP and the communications between the appellant and SP became more sexually explicit in nature. The appellant continued to push to meet with SP in order to engage in sexual conduct. He would send SP pictures of himself masturbating or of his erect penis, and she would send him pictures of her vagina. The appellant would also tell SP what positions to pose in and asked her to send videos of herself masturbating. SP sent approximately 20 nude photos of herself to the appellant, while he sent between 50 to 100 nude photos of himself to her. *Id.* at 367. These communications formed the basis for Specifications 1, 2, and 3 of Charge I. When SP's parents learned that the appellant did not heed their demand, they contacted local law enforcement authorities, who in turn contacted the Naval Criminal Investigative Service.

We find the evidence of record, including the testimony of LW, SP, and SP's parents, to be overwhelming and uncontroverted evidence of the service discrediting nature of the appellant's

acts. "Clause 2 of Article 134, UCMJ, does not require testimony regarding either public opinion or even public knowledge of the misconduct for it to be service discrediting; rather, the evidence must be sufficient to show that the misconduct is 'of a nature' to bring discredit upon the armed forces." *United States v. Hudson*, __ M.J. __, 2013 CCA LEXIS 268 (A.F.Ct.Crim.App. 14 Mar 2013) (en banc) (citing *Phillips*, 70 M.J. at 166). While the Government has the obligation to introduce sufficient evidence of the appellant's allegedly service discrediting conduct to support a conviction, and the military judge must instruct the members as to how to evaluate that evidence, "the government is not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting." *Phillips*, 70 M.J. at 166. "Whether conduct is of a 'nature' to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which Appellant's conduct is known to others." *Id.*

At trial, the appellant did not contest that he engaged in relationships with LW and SP; instead, he attempted to minimize his conduct by emphasizing the openness of his relationship with LW and her family, and SP's lies about her age. However, with respect to LW, the appellant knew at the outset she was no more than 15 years old, living at home, and attending high school. And as for his relationship with SP, even if the appellant did not initially know that she was only 14 years old, he was well-aware of her age after her parents personally confronted him and told him to stay away from their daughter. In response, the appellant became more aggressive and sexually explicit in his communications with SP in an obvious effort to persuade her to have sex with him. In addition, the record reflects that LW did not want to view the video of the appellant having sex with her, and that SP did not want to have sexual intercourse with him. Perhaps most compelling is that when SP's father discovered obscene photos of his daughter and realized that the relationship between the appellant and his daughter was still ongoing, he contacted local law enforcement.

The appellant has not challenged the service discrediting nature of his sexually explicit language and graphic sexual entreaties to his two minor victims either at trial or on appeal. At most, his efforts to minimize or contextualize his misconduct perhaps could be characterized as potential evidence in mitigation or extenuation. Based upon all the facts and

circumstances, we find the appellant's actions in communicating the charged indecent language to two minors under the age of 16 was of a nature to bring discredit upon the armed forces; we also find evidence of that terminal element essentially uncontroverted and overwhelming. The appellant has simply failed to sustain his burden of demonstrating that the Government's failure to plead the terminal element materially prejudiced his substantial rights. *See Humphries*, 71 M.J. at 217, n.10. We also conclude, beyond a reasonable doubt, that the members would have returned the same verdict absent the error, thus rendering this error harmless.[7] *See Neder*, 527 U.S. at 17.

**Court-Martial Order Error**

Although not raised by the appellant, the court notes that the court-martial order (CMO) in this case incorrectly refers to "Assimilated Crimes Act" for Specifications 4 through 7 of Charge I and Specifications 2 through 4 of Additional Charge III. Each of these offenses was alleged as a violation of the United States Code made applicable under Clause 3 of Article 134, UCMJ, and not "as an adoption by Congress of state criminal laws" under the Federal Assimilative Crimes Act (18 U.S.C.S. § 13). Compare ¶ 60c(4)(c)(i) and (ii). In keeping with the principle that military members are entitled to records that correctly reflect the results of their court-martial proceedings, we will order corrective action in our decretal paragraph. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

**Conclusion**

[7] The military judge's instructions provided the members with two alternative theories of liability – "prejudicial to good order and discipline" or "service discrediting." Record at 610, 623. Consistent with our reasoning in *United States v. Miles,* 71 M.J. 671, 673 (N.M.Ct.Crim.App. 2012) (citing *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008)), we have concluded that Clauses 1 and 2 of Article 134, UCMJ, are two different theories of liability. "It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on *any theory* of liability submitted to the members." *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) (quoting *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987)) (emphasis added). While we find no evidence in the record that the appellant's conduct caused "a reasonably direct and obvious injury to good order and discipline," record at 610, there is overwhelming and essentially uncontroverted evidence that the appellant's conduct was of a nature to bring discredit upon the armed services.

Having considered the record in light of *Humphries* as ordered by the C.A.A.F., the guilty findings as to Specifications 1, 2, and 3 of Charge I, and Specification 1 of Additional Charge III are affirmed. The approved sentence is affirmed. The supplemental CMO shall reflect the proper offenses in this case by omitting the words "Assimilated Crimes Act" from Specifications 4 through 7 of Charge I and Specifications 2 through 4 of Additional Charge III. The approved findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Art. 66(c), UCMJ.

Senior Judge MODZELEWSKI and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court