

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES,	)	ANSWER ON BEHALF OF APPELLEE
Appellee	)	
	)	Case No. 201300272
v.	)	
	)	Tried at Camp Foster,
Gregory T. MILES,	)	Okinawa, Japan, on January 7,
Lance Corporal (E-3)	)	March 7, and April 3-4, 2013
U.S. Marine Corps	)	by a general court-martial
Appellant	)	convened by Commanding
	)	General, III Marine
	)	Expeditionary Force.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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Errors Assigned

I.

TOGETHER, BNC AND EED ENGAGED IN CONSENSUAL SEXUAL CONDUCT WITH LCPL MILES. LCPL MILES WAS THEN CHARGED UNDER ARTICLES 120 AND 125, UCMJ FOR THIS ONE ACT. THIS WAS AN UNREASONABLE MULTIPLICATION OF CHARGES.

II.

"INDECENT ACT," AS DEFINED BY ARTICLE 120(k), UCMJ, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

III.

"INDECENT ACT," AS DEFINED BY ARTICLE 120(k), UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES.

IV.

"SODOMY," AS DEFINED BY ARTICLE 125, UCMJ, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

V.

"SODOMY," AS DEFINED BY ARTICLE 125, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge and one year or more of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of attempted sodomy, indecent conduct, and adultery, in violation of Articles 80, 120, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 920, 934, (2006). The Military Judge sentenced Appellant to twelve months confinement, reduction to pay grade E-1, forfeitures of all pay and allowances, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

Statement of Facts

- A. Appellant took advantage of BNC and EED's intoxication to sexually assault them.

On February 3, 2012, BNC and EED, both civilian dependent spouses of Marines assigned to Okinawa (R. 76, 106-107.), Lance Corporal (LCpl) Snyder and two male, enlisted, Marine acquaintances had dinner and drinks at several off base bars in Okinawa, Japan. (R. 107.) While out in town BNC had approximately five drinks and described herself as "about a four" on a scale of one to ten, with ten being "drunk." (R. 108-109.) In order to meet curfew, the group returned to Camp Hansen and went to The Palms enlisted club on base. (R. 109.) While at The Palms, BNC lost her identification card and asked Appellant

and his group of friends for help finding it. (R. 109-10.) After recovering the identification, BNC and EED's group continued to drink and socialize with Appellant and his friends. (R. 110.) During the course of their conversation at The Palms, BNC and EED told Appellant that they were married to other Marines. (R. 80-81, 109-11.)

At some point, BNC was kicked out of The Palms for underage drinking as she was eighteen at the time and the drinking age on base was twenty. (R. 81, 112.) Prior to departing The Palms, EED and Appellant exchanged telephone numbers as she believed that Appellant "seemed like a nice guy" and she wanted to expand her circle of friends as she had only been on Okinawa for four months. (R. 82.) BNC stated that she neither had any physical contact nor engaged in any flirtatious conduct with Appellant at The Palms. (R. 113.)

After departing The Palms, BNC and EED went to LCpl Snyder's barracks to sleep as each of them were too drunk to drive back to their residence on another installation on Okinawa. (R. 78-79, 114.) When the group arrived at the barracks, they went to the barracks' smoke pit where Appellant joined them, after exchanging text messages with EED. (R. 82-83, 115; Pros. Ex. 16-19.) At this point in the evening, EED characterized her level of intoxication as a "nine, nine and a half" out of ten. (R. 84.) After socializing with EED and BNC's group at the

smoke pit for a period of time, Appellant followed BNC and EED's group when they went to a utility room used for martial arts training to continue socializing. (R. 85.) At no point during their interactions in the smoke pit or the utility room did BNC engage in any physical contact or flirtatious activity with Appellant. (R. 116-17.)

Eventually, Appellant followed BNC and EED upstairs to LCpl Snyder's barracks room. (R. 86.) ED did not recall anyone inviting Appellant to follow them to LCpl Snyder's room; nor did BNC recall anyone tell Appellant to stop following them. (R. 86, 117.) In LCpl Snyder's room, BNC recalled changing her clothes in the bathroom and then going to sleep on the bed. (R. 118-19.) The next thing BNC recalled was "waking up with [Appellant's] hand down [her] pants, rubbing and grabbing at [her] butt" as well as fondling and rubbing her vagina. (R. 119.) BNC had not consented to any sexual contact with Appellant. (R. 120.) BNC was menstruating that day and had been wearing a tampon; however, when she awoke, the tampon was no longer in her vagina and she did not know how it was removed. (R. 122-23.) She immediately got up, left the room to find LCpl Crane, another male acquaintance who also lived in those barracks. (R. 120-21, 160-61.)

LCpl Crane went to LCpl Snyder's room and when he entered he saw ED on the edge of the bed on her side sleeping and

Appellant next to her lightly stroking her arm. (R. 162.) LCpl Crane observed that Appellant ". . . had his boots off. He had his pants, kind of, not done up all the way but it was—he did have—and his skivvie shirt untucked . . ." (R. 166.) LCpl Crane directed Appellant to get out of the room. (R. 167.) ED remained unconscious throughout Appellant's sexual contact with her, and LCpl Crane's entrance into the room; and, she and did not awaken until after Appellant was already out of the room. (R. 88.)

In a subsequent statement to NCIS, Appellant admitted to engaging in sexual activity with both BNC and ED, but asserted that the sexual activity between them was consensual. (Pros. Ex. 20, at 2.) Appellant acknowledged that he did digitally penetrate BNC during his sexual activity with her:

I attempted to insert my penis into her vagina but could not get an erection probably because of the amount of alcohol. I was able to get my penis inside her vagina but just barely. I tried to place my penis inside her anus, but I was unable to penetrate. I was rubbing my penis between her legs trying to get an erection . . . I also placed my finger in her anus and vagina.

(Pros. Ex. 20, at 2.) Appellant, similarly claimed that ED consented to sexual contact with him:

ED woke up while I was trying to have sex with [BNC]. [ED] woke and started rubbing my back. I turned over and started to lay on my back. ED started rubbing my chest and stomach and I started rubbing her breast and vagina. Eventually we started kissing and ED helped

me pull her pants down to around her upper thigh because the pants she was wearing were pretty tight. While I was kissing and hugging ED BNC got up and left the room suddenly . . .

(Id.)

B. The Military Judge's special findings rejected Appellant's proffered defense of consensual sexual acts with BNC and EED.

Appellant was subsequently charged with false official statements, aggravated sexual assault, abusive sexual contact, wrongful sexual contact, indecent acts, sodomy, and adultery. (Charge Sheet, Dec. 21, 2012.) He elected to contest these charges before a military judge alone (R. 20) and was ultimately convicted of indecent acts (with exceptions and substitutions to the charged specifications), lesser included offenses of attempted sodomy, and adultery. (R. 234-35.)

The Military Judge exercised his discretion to enter special findings on the charges and specifications of which he convicted Appellant. (R. 236-43; Appellate Ex. XII.) Regarding the indecent acts, in expounding on how Appellant's conduct relative to BNC and EED was indecent, the Military Judge rejected Appellant's claims that the conduct at issue was wholly private and found ". . . that, under the circumstances, the sexual activity was open and notorious" citing both the presence of others in the barracks room and the substantial risk that the

acts could have been witnessed by someone else. (R. 237; Appellate Ex. XII, at 1-2.)

Relative to the finding of guilt as to the lesser included attempted sodomy of both BNC and EED, the Military Judge concluded that the acts were "done with the specific intent to commit the offense of sodomy" but the completion of the offense was interrupted by the unexpected intervening circumstance of Appellant being unable to ". . . get an erection at the time of his acts." (R. 238-39.) Specifically, the Military Judge found that Appellant placed his "penis on the anus of both BNC and EED and . . . [tried] to insert it," and that this was a substantial step "strongly corroborative of [Appellant's] criminal intent and [was] indicative of his resolve to commit the offenses" of sodomy. (R. 239.)

Summary of Argument

I.

The indecent acts and attempted sodomy offenses of which Appellant was convicted reflected distinct and discrete acts that Appellant took while sexually abusing BNC and EED. His convictions accordingly were not an unreasonable multiplication of charges and he is not entitled to relief.

II, III.

Indecent Acts, as defined under Article 120(k), UCMJ, is constitutional and clearly proscribes the criminal acts of which

Appellant was convicted. Article 120(k) is facially constitutional and constitutional as applied to Appellant.

IV, V.

Article 125 is not unconstitutionally vague. When considering whether a statute provides adequate notice, the statute must necessarily be analyzed in the context of the conduct charged against Appellant. Since any reasonable service member would understand that committing sodomy by force and without consent is something that is criminal, the statute is not vague. Since Appellant was convicted of attempted sodomy against BNC and EED without either's consent, the conduct falls outside of the liberty interests recognized in *Lawrence v. Texas* and *United States v. Marcum*.

Argument

I.

APPELLANT'S CONVICTIONS FOR INDECENT ACTS AND ATTEMPTED SODOMY WERE AIMED AT DISTINCT CRIMINAL ACTS AND THEREFORE WERE NOT AN UNREASONABLE MULTIPLICATION OF CHARGES. APPELLANT SUFFERED NO PREJUDICE AND IS NOT ENTITLED TO SENTENCING RELIEF.

A. This issue is reviewed for an abuse of discretion.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). "A military judge's decision to deny relief for unreasonable multiplication of charges is

reviewed for an abuse of discretion.” *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)). For the ruling to be an abuse of discretion, and thereby overturned, it must be “‘more than a mere difference of opinion’”; rather, it must be “‘arbitrary, fanciful, clearly unreasonable’ or ‘clearly erroneous.’” *United States v. Collier*, 67 M.J. 347, 347 (C.A.A.F. 2009) (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)). Finally, “a military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.” *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

B. Courts use the Quiroz factors to consider an unreasonable multiplication of charges claim.

Multiplicity and unreasonable multiplication of charges are distinct concepts. *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). “The prohibition against multiplicity is necessary to ensure compliance with the constitutional and statutory restriction against Double Jeopardy. . . .” *Id.* (citation omitted). In contrast, unreasonable multiplication of charges “addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion.” *Id.* Courts assess unreasonable multiplication of

charges by analyzing five *Quiroz* factors: (1) did the accused object at trial that there was an unreasonable multiplication of charges; (2) is each charge or 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; and (5) is there any evidence of prosecutorial overreaching or abuse in drafting the charges. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)); see also R.C.M. 1003(c)(1)(C). No single factor is determinative; each factor is a non-exhaustive guide. *Quiroz*, 55 M.J. at 338.

C. The indecent acts and attempted non-consensual sodomy of which Appellant was convicted had distinct elements and were aimed at distinct harms from his criminal acts.

Appellant was convicted of indecent acts for touching BNC's anus with his penis, digitally penetrating her vagina and anus, and touching her vagina and buttocks and under Charge II, specification 4. (Charge Sheet; R. 234-35.) He was similarly convicted of indecent acts for digitally penetrating EED's vagina and anus and rubbing her breast and vagina under specification 5 of Charge II. (*Id.*) The Military Judge found Appellant not guilty of the sodomy offenses charged under the

two specifications of Charge III, but found Appellant guilty of two specification of the lesser included offense of attempted sodomy for attempting to penetrate the anuses of BNC and EED with his penis. (*Id.*)

The former Article 120(k), UCMJ, in effect at the time of Appellant's offenses prohibits indecent acts, and states that "[a]ny person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct." 10 U.S.C. § 920(k) (2006). The Article defines "indecent conduct" 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." 10 U.S.C. § 920(t)(12) (2006).

The elements of an attempt under Article 80 are: "(1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense." MCM, Part IV, ¶4.b. Sodomy in violation of Article 125 requires: "that the accused engaged in unnatural carnal copulation with a certain other person. . . [and] that the act was done by force and without the consent of the other person." MCM, Part IV, ¶51.b. "Unnatural carnal

copulation" is defined as, among other acts, having "carnal copulation in any opening of the body, except the sexual parts, with another person. . ." MCM, Part IV, ¶51.c.

1. Appellant did not object at trial.

The first *Quiroz* factor favors the United States as Appellant did not object at trial that the charged indecent acts and sodomy offenses constituted an unreasonable multiplication of charges. (R. 220-30.)

2. The remaining *Quiroz* factors favor the Government, as the charged indecent acts and sodomy offenses are aimed at distinctly separate acts harms and the charged offenses neither misrepresented or exaggerated Appellant's criminality nor reflected Government overreach.

In *United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007), the Court of Appeals for the Armed Forces, held that the appellant's convictions for indecent acts, sodomy, and rape were proper where the offensive conduct underlying the charges took place on the same evening, but the reflected "distinct and discrete acts" during the course of the evening. *Paxton*, 64 M.J. at 490. In *Paxton*, the appellant first touched his minor daughter's breasts, then digitally penetrated her vagina, then forced her to orally copulate him and give him a "hand job," and then raped her. *Id.* Analogous to *Paxton*, though Appellant's indecent acts against BNC and EED, respectively, were temporally coextensive with the attempted sodomy offenses of which

Appellant was convicted as they occurred during the course of the evening of February 3, 2012, those offenses constituted distinct and discrete acts over the course of the night. See *Id.*; see also *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996) (recognizing that if it is "a distinct or discrete-act offense, separate convictions are allowed in accordance with the number of discrete acts").

Here, the legal predicate for Appellant's conviction for indecent acts against BNC were her testimony that she awoke to Appellant fondling her buttocks and vagina without her consent (R. 119-20), later realizing that her tampon had been removed (R. 122-23), and corroborated by Appellant's admissions that he did fondle her, digitally penetrate her anus and vagina, and attempted to achieve an erection by rubbing his penis on her. (Pros. Ex. 20.) Appellant's statement to NCIS established that he subsequently did attempt to sodomize BNC by attempting, but failing, to penetrate her anus with his penis before she awoke and left to seek out LCpl Crane. (Pros. Ex. 20, at 2.) The evidence in the Record establishes that, similar to the facts in *Paxton*, each of Appellant's indecent acts against BNC were discrete acts as he first sexually battered her while she was asleep, then attempted to arouse himself by rubbing his penis on her, and culminating in Appellant's attempts to sodomize BNC by anally penetrating her.

Similarly, Appellant's conviction for indecent acts against EED were supported by his admissions to rubbing with her breast and vagina (Pros. Ex. 20), EED's testimony as to her level of intoxication and inability to consent to that sexual contact (R. 88), and LCpl Crane's observations of EED's condition when he got to the room. (R. 162.) As with his sexual predation towards BNC, Appellant's conduct resulting in his convictions for indecent acts and attempted sodomy reflected the distinct and discrete acts which comprised his criminal misconduct.

Contrary to Appellant's argument that the indecent acts and sodomy offenses with which Appellant was charged and convicted relating to his misconduct with BNC and EED were coextensive (Appellant's Br. at 15), the charges and specifications alleged and were aimed at distinct and discrete acts committed by Appellant as he wrongfully touched each victim, attempted to sexually gratify himself, and then attempted to anally penetrate each woman. These charging decisions reflected what Appellant actually did and did not exaggerate his criminality or unreasonably increase his punitive exposure. Accordingly the second, third, and fourth *Quiroz* factors weigh strongly in favor of the United States.

Regarding the fifth *Quiroz* factor, there is no evidence of prosecutorial overreaching or abuse. Applying *Quiroz* to these facts, the specifications of indecent acts and sodomy relative

to BNC and EED addressed separate criminal acts committed by Appellant. *Campbell*, 71 M.J. at 24-25. The charging decisions here reflected Appellant's criminal misconduct in his sexual contact with and attempted sodomy of BNC and EED. In accordance with *Quiroz* and *Campbell*, this was an appropriate exercise of discretion.

- D. Even assuming error *arguendo*, Appellant was not prejudiced by any unreasonable multiplication of charges as his predatory criminal misconduct merited the adjudged sentence. Appellant is not entitled to sentence relief.

If this Court finds error and concludes that some of the charges and specifications were an unreasonable multiplication of charges and were required to be dismissed, this Court may consider whether reassessment of the sentence without a rehearing is possible, and if so, whether the sentence must be reduced. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986); *United States v. Moffeit*, 63 M.J. 40, 43 (C.A.A.F. 2006). In this case, the Court can be "reasonably certain as to the severity of the sentence that would have resulted in the absence of the error," *Sales*, 22 M.J. at 307 n. 3, and, therefore, reassess the sentence at this level.

Here the evidence is that Appellant, fully aware that BNC and EED were married to other Marines, took advantage of their obvious intoxicated state to sexually gratify himself and attempted to sodomize both BNC and EED during the course of the

night in LCpl Snyder's barracks room. Based on the predatory nature of Appellant's criminal misconduct, and the victimization of two young women who were incapacitated when Appellant sexually assaulted them, Appellant merited his adjudged sentence. This Court should be confident that any asserted error did not affect the severity of the sentence that Appellant would have otherwise received.

II, III.

ARTICLE 120(k), UCMJ, IS NEITHER UNCONSTITUTIONALLY VAGUE NOR OVERBROAD. APPELLANT'S CONVICTION FOR INDECENT ACTS COMMITTED AGAINST BNC AND EED WITHOUT THEIR CONSENT FALLS WITHIN THE AMBIT OF PROSCRIBED CONDUCT UNDER THE STATUTE.

A. This issue is reviewed de novo.

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

B. Article 120(k) is not unconstitutionally vague. The statute placed Appellant on notice that his acts of foisting himself sexually upon drunken, incapacitated victims was indecent conduct.

The vagueness doctrine arises from the Fifth Amendment Due Process Clause and requires that a statute not be "so vague that one cannot determine its meaning." *United States v. Brown*, 45 M.J. 389, 394 (C.A.A.F. 1996) (citations omitted). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that

his contemplated conduct is proscribed. In 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)). Thus, as long as a reasonable member of the military would understand that fondling the buttocks and vagina and removing the tampon of an intoxicated and incapacitated woman without her consent in an effort to foist oneself sexually upon her (R. 119-20, 122-23), admitting to digitally penetrating her anus and vagina, and then admitting to attempting to achieve an erection by rubbing ones penis on her (Pros. Ex. 20) would be criminal conduct, then Article 120(k), UCMJ, is not void for vagueness.

This Court analyzed the constitutionality of Article 120(k) in *United States v. Rheel*, No. 201100118, 2011 CCA LEXIS 370 (N-M. Ct. Crim. App. Dec. 20, 2011). *Rheel* involved an appellant convicted of indecent acts under the former Article 120(k), UCMJ, for engaging in sexually provocative cellular telephone text message conversations with a nine-year-old. *Id.* In that case, this Court rejected a void-for-vagueness challenge, and determined that the statutory language of Article 120(k), and the definition of "indecent conduct" in Article 120(t)(12), "provides adequate notice to an ordinary person about what conduct is forbidden." *Id.* at *8; see *United States v. Hancock*, No. 201100466, 2012 CCA LEXIS 110 (N-M. Ct. Crim. App. Mar. 29,

2012) (citing *Rheel* in rejecting claims that Article 120(k) is unconstitutionally vague or overbroad).

Likewise, the Air Force Court of Criminal Appeals recently in *United States v. Capps*, No. 38160, 2013 CCA LEXIS 842 (A. F. Ct. Crim. App. Oct. 9, 2013), declined to find this version of Article 120(k) void for vagueness. The appellant in *Capps* sent images of his genitalia to a thirteen-year-old girl and solicited sexually explicit images from the minor. The Air Force court held similar to *Rheel* and *Hancock* that the statutory prohibition against indecent conduct placed that appellant on fair notice that his conduct was criminal. *Capps*, 2013 CCA LEXIS 842, at *8-*9.

Appellant argues that the rationale in *Rheel* does not control this case, based on the counterfactual claims that Appellant was convicted of consensual sexual activity with BNC and EED. (Appellant's Br. at 21-23.) However, the Record does not present circumstances that would distinguish Appellant's case from *Rheel*. As in *Rheel*, this case also presents circumstances where the victims did not consent to the sexual activity at issue; in fact, the Military Judge entered special findings on the sodomy offenses that Appellant attempted to engage in sodomy with BNC and EED with the requisite "criminal intent." (R. 238-40 (emphasis added).) See *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011) (military judge is

Not a
finding
on
consent

presumed to know the law and apply it correctly when sitting as the trier of fact).

Appellant urges rejection of *Rheel* on the theory that the statutory definition of indecent conduct without reference to the terminal element of Article 134, UCMJ, does not place an accused on sufficient notice of what is proscribed conduct. (Appellant's Br. at 29-33.) Appellant's argument ignores that Articles 133 and 134, UCMJ, are written by Congress in even broader terms and would seem to provide even less notice than Article 120(k) regarding what is criminal. But those Congressional statutes were held not to be unconstitutionally vague by the Supreme Court in *Parker* because the accused, charged "with design to promote disloyalty and disaffection among the troops, publicly utter[ing certain] statements to divers enlisted personnel at divers times," could "have had no reasonable doubt" that his were both "unbecoming an officer and a gentlemen" and "to the prejudice of good order and discipline in the armed forces." *Parker*, 417 U.S. at 757.

The statutory language of Article 120(k), UCMJ, places all military members on notice that foisting themselves sexually upon drunken, incapacitated, young women without their consent is "grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." 10 U.S.C. § 920(t)(12). Therefore, this

OK?

Court should rule consistent with *Rheel* and reject Appellant's void-for-vagueness challenge.

C. Appellant's predatory sexual assaults of BNC and EED were not constitutionally protected expressive acts. Article 120(k) is not unconstitutionally overbroad.

1. A statute is overbroad only if it unduly burdens expression protected by the First Amendment.

The overbreadth doctrine only applies within the limited context of the First Amendment. *United States v. Salerno*, 481 U.S. 139, 745 (1987). Yet Appellant does not contend that his conduct was expressive, or that the statute at issue prohibits expressive conduct. Therefore, this court should not entertain Appellant's overbreadth argument. *Betancourt v. Bloomberg*, 448 F.3d 547, 554 (2d Cir. N.Y. 2006) ("Because [Appellant] has not raised a First Amendment challenge and is a person to whom a statute may constitutionally be applied, he will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.") (quoting *Parker v. Levy*, 417 U.S. 733 (1974)) (internal quotation marks omitted); See *Salerno*, 481 U.S. at 745; *United States v. Rheel*, No. 201100108, 2011 CCA LEXIS 370 (N-M. Ct. Crim. App. Dec. 20 2011). Nonetheless, the Government addresses overbreadth below.

A criminal statute is overbroad if, in addition to prohibiting conduct that is properly subject to governmental

control, it also proscribes activities which are constitutionally protected by the First Amendment. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). A person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). This means there must be a *realistic* danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for a law to be facially challenged on overbreadth grounds. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Thus, in order to prevail, Appellant must demonstrate 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 Supreme Court has "repeatedly expressed [a] reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *Parker*, 417 U.S. at 760. The overbreadth doctrine is "strong medicine," employed with "hesitation," and "only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982).

2. Under no possible reading of this Record were Appellant's indecent acts anything other than criminal sexual assaults. They were patently not First Amendment-protected speech or expressive conduct. Article 120(k) is not overbroad as applied to him.

The statute at issue, Article 120(k), prohibits indecent acts; defined by Congress as "indecent conduct" that is "obscene, and repugnant to common propriety." Art. 120 (t)(12). Although courts carefully review for overbreadth statutes that extend beyond regulating mere conduct, to also regulate expression, the statute at issue here regulates only vulgar and obscene conduct, which the Government is clearly justified in regulating. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Additionally, The Supreme Court has explicitly held that obscenity is unprotected by the First Amendment. *Miller v. California*, 413 U.S. 15, 24 (1973).

Again, Appellant's overbreadth challenge rests on the counterfactual claim that his sexual activity with BNC and EED was consensual; he does not claim that his conduct—fondling the buttocks, breast, and vagina of sleeping women with whom he had no romantic or sexual relationship, rubbing his penis on one in an attempt to achieve an erection, and attempting to engage in anal intercourse with both women—was expressive or otherwise constitutionally protected. Cf. *Betancourt*, 448 F.3d at 554.

Rather, the Record, especially the testimony of both BNC and EED that neither consented to any sexual activity with Appellant, establishes that his conduct was obscene, and thus afforded no First Amendment protection. *Cf. Miller*, 413 U.S. at 24.

Appellant has offered no realistic way in which this statute will infringe upon First Amendment rights of parties not before the Court. *Cf. Taxpayers for Vincent*, 466 U.S. 789, 801. Thus, Appellant's overbreadth challenge must fail.

In *Rheel*, this Court also considered the question of whether Article 120(k) is overbroad, facially or as applied. There, this Court held that Article 120(k) "criminalizes indecent conduct which is grossly vulgar and repugnant to common propriety," and does not "significantly compromise recognized First Amendment protections." *Rheel* at *10-*11. Appellant's case does not present circumstances that would distinguish his case. (Appellant's Br. at 21-23.) Therefore, this Court should reject Appellant's assignment of error.

IV, V.

APPELLANT'S CONDUCT FALLS OUTSIDE OF THE PROTECTED LIBERTY INTERESTS IN *LAWRENCE V. TEXAS*. THEREFORE, ARTICLE 125, UCMJ, IS CONSTITUTIONAL AS APPLIED TO THE FACTS OF HIS CASE.

A. Standard of Review.

See Assignment of Error II, III, section A, *supra* at 14.

B. Article 125, UCMJ is not facially unconstitutional.

Here, Appellant's facial challenge to Article 125, UCMJ, mixes two separate legal issues: (1) Whether Article 125 is unconstitutionally vague; with (2) Whether Article 125 is unconstitutional on its face because it criminalizes conduct protected by the Due Process Clause of the Fifth Amendment.

1. Article 125 is not unconstitutionally vague.

To determine whether a statute is unconstitutionally vague, the test is whether a person would reasonably know that the charged conduct was criminal:

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In 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 (U.S. 1974) (quotations omitted). Due process requires that a person have fair notice that an act is criminal before being prosecuted for it. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003). "Fair notice" that an act is criminal may come from multiple potential sources including: "federal law, state law, military case law, military custom and usage, and military regulations."

Article 125, UCMJ, refers to the act of committing "unnatural carnal copulation" with another person or animal. Article 125, UCMJ. The President, under his constitutional

powers to provide narrowing definitions and to further restrict the prosecutions of crimes in the military, has specifically limited the proscription against "unnatural carnal copulation" to certain specified sexual activity. Manual for Courts-Martial, United States (2008 ed.), Part IV, ¶ 51.c; *United States v. Contreras*, 69 M.J. 120, 121 (C.A.A.F. 2010). Therefore, the President's definition restricts the prosecution of acts that qualify as "unnatural carnal copulation." This narrow construction of what is proscribed by the statute is part of why it is not unconstitutionally vague, as "[t]he charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against. *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010).

Although the two specifications under Charge III did not allege that Appellant's acts against BNC and EED were "forcible" and/or "without consent"; this case is not *Castellano*, where lesser-included conduct of "consensual sodomy," not benefitting from that narrow construction, was the subject of the conviction. Cf. *United States v. Castellano*, 72 M.J. 217, 220 (C.A.A.F. 2013).



2. Although neither force nor lack of consent were alleged in the specifications under Charge III, Appellant's acts were committed against victims who did not consent to them and conducted in an open and notorious manner and therefore were outside of the liberty interest recognized in Lawrence.

In *Lawrence v. Texas*, the Supreme Court recognized a constitutionally protected liberty interest in private sexual activity between consenting adults. *Lawrence*, 539 U.S. 558, 578 (2003). In *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces applied *Lawrence* in the military context and upheld the constitutionality of Article 125, UCMJ, in The Court determined that the constitutionality of Article 125, UCMJ, must be analyzed as applied in each case. *Id.* at 206. The analysis of each case consists of three questions:

First, 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? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? . . . Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07.

In answering the first question, this Court must determine whether Appellant's conduct involved private, consensual sexual activity between adults. *Id.* at 207. In *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), the appellant was charged with forcible sodomy, but pled guilty to sodomy without

the force element. *Id.* at 303. As the concurrence in *Stirewalt* argues, based upon the attempt of which Appellant was convicted, and the testimony of BNC and EED that neither woman consented to any sexual contact with Appellant, the Record supports the conclusion that Appellant attempted to commit forcible sodomy, thereby bringing this case outside of any conduct protected by *Lawrence*. *United States v. Stirewalt*, 60 M.J. 297, 305 (C.A.A.F. 2004) (Crawford C.J., concurring).

Additionally, this case falls outside the ambit of *Lawrence* as this was not private sexual activity. The conduct at question in this case occurred with a third person sleeping in the same room, not in a private location with only the two participants. This non-private conduct falls outside any liberty interest identified by the Supreme Court in *Lawrence*.

Further, this conduct fails the second prong of the *Marcum* analysis as well. This Court must determine whether Appellant's conduct encompassed any of the behavior or factors that were identified by the Supreme Court as not involved in *Lawrence*. *Marcum*, 60 M.J. at 207. Sexual activity is open and notorious and flagrant when the participants know that a third person is present. *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999) (quoting *United States v. Berry*, 6 C.M.A. 609, 614 (C.M.A. 1956)). Although LCpl Snyder was asleep at the time of the sexual activity, Appellant's conduct was public conduct under a

Marcum analysis because it took place in the presence of LCpl Snyder. Again, Appellant's conduct falls outside of the protected liberty interest found in *Lawrence*.

Finally, the third prong of the *Marcum* analysis asks whether any uniquely military factors affect the reach and nature of the *Lawrence* liberty interest. *Stirewalt*, 60 M.J. at 304. Several military factors affect the analysis of Appellant's conduct. First, the conduct occurred in a military barracks onboard a Marine Corps installation. In both *Marcum* and *Stirewalt*, the court emphasized that the conduct occurred off-base. *Marcum*, 60 M.J. at 207; *Stirewalt*, 60 M.J. at 304.

Second, it occurred between a Marine and the civilian spouses of other Marines assigned to the same base. Although the sexual activity involved Appellant and civilians, and therefore did not implicate the same senior-subordinate issues identified in *Marcum* and *Stirewalt*, BNC and EED were married to Marines who were also assigned to billets on Okinawa and Appellant's victimization of BNC and EED undoubtedly had an adverse impact on the military readiness of their husbands. Third, this conduct occurred in the presence of another Marine, LCpl Snyder. This is not a situation as in *Marcum* where "no other members of the military were present at the time of the conduct." *Marcum*, 60 M.J. at 207. The military interests of good order and discipline impact upon this Court's consideration

of Appellant's liberty interest. *Stirewalt*, 60 M.J. at 304.
Here, the military factors involved in this conduct take it
outside of the protected liberty interest found in *Lawrence*.

Under all three prongs of the *Marcum* analysis, Appellant's
conduct falls outside of a protected liberty interest.
Therefore, Article 125, UCMJ, is constitutional as it is applied
to Appellant and the facts on this record.

Conclusion

WHEREFORE, the Government respectfully requests that this
Court affirm the findings and sentence as adjudged and approved
below.



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Appendix

1. *United States v. Capps*, No. 38160, 2013 CCA LEXIS 842 (A. F. Ct. Crim. App. Oct. 9, 2013).
2. *United States v. Hancock*, No. 201100466, 2012 CCA LEXIS 110 (N-M. Ct. Crim. App. Mar. 29, 2012).
3. *United States v. Rheel*, No. 201100118, 2011 CCA LEXIS 370 (N-M. Ct. Crim. App. Dec. 20, 2011)

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on March 16, 2014.



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

ACM 38160

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

2013 CCA LEXIS 842

October 9, 2013, Decided

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)

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.

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

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 be-

lieved 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 -- 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.

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

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.

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).

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* "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 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))).

4 U.S. CONST. amend. V.

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. Nera*, 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

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

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.

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

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)).

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 of-

fenses 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.

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.

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

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.

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.



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

NMCCA 201100466

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2012 CCA LEXIS 110

March 29, 2012, Decided

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. PAY-
TON-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 allowanc-

es, 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

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(i)(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(i)(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 he 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 occasions³ 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.

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.

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 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.

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.

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*.

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*).

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.

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.

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.



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

NMCCA 201100108

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2011 CCA LEXIS 370

December 20, 2011, Decided

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 act¹ and communicating indecent lan-

guage 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.

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.

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 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,"¹² and it is "impossible to determine whether *any* conduct falls within the language of the statute."¹³ 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."¹⁴

- 2 Appellant's Brief at 8.
- 3 *Id.* at 9.
- 4 Appellant's Reply Brief of 9 Jun 2011 at 3.

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

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

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 appel-

lant'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 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 multiplicitous. 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 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 *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

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

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 con-

duct 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 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 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.

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, ei-

ther 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.

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 [*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 tri-

al, 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.

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.

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 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, 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 CARRBERRY concur.