

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: <i>(Name of Investigating Officer - Last, First, MI)</i> Weck, Cory R	b. GRADE O4	c. ORGANIZATION III MEF IMA det. Okinawa, Japan	d. DATE OF REPORT 28 November 2011				
2a. TO: <i>(Name of Officer who directed the investigation - Last, First, MI)</i> Priddy, A.T.	b. TITLE Commanding Officer	c. ORGANIZATION 2nd Battalion, 1st Marines					
3a. NAME OF ACCUSED <i>(Last, First, MI)</i> Litton, Bobby R.	b. GRADE E3	c. SSN 511045312	d. ORGANIZATION 2/1				
			e. DATE OF CHARGES 25 July 2011				
<i>(Check appropriate answer)</i>			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">YES</td> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">NO</td> </tr> </table>		YES		NO
	YES		NO				
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i> Henderson, Clayton	b. GRADE O4	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(If any)</i> Faraj, Haytham	b. GRADE CIV				
c. ORGANIZATION <i>(If appropriate)</i> LSSS, CampPen, CA		c. ORGANIZATION <i>(If appropriate)</i>					
d. ADDRESS <i>(If appropriate)</i>		d. ADDRESS <i>(If appropriate)</i> 22167 Morley Ave, Dearborne, Michigan, 48124					
9. <i>(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)</i>							
a. PLACE CamPen, CA		b. DATE 9 November 2011					
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.							
c. SIGNATURE OF ACCUSED							
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">YES</td> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">NO</td> </tr> </table>		YES		NO
	YES		NO				
a. THE CHARGE(S) UNDER INVESTIGATION			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
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b. THE IDENTITY OF THE ACCUSER			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
d. THE PURPOSE OF THE INVESTIGATION			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
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e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
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f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
g. THE RIGHT TO CROSS-EXAMINE WITNESSES			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
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h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE <i>(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)</i>			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%; text-align: center;">X</td> </tr> </table>		X		
	X						
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL N/A							
NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."							

Block 13a.

Government Exhibits

1. DD Form 458 (charge sheet), dated 25 July 2011
2. Appointing letter
3. NCIS Investigation Executive Summaries dts 24 March 2010 and 2 Nov 2010
4. Statement of Bobby Litton dtd 20 January 2010
5. Statement of Patrica Riley dtd 19 January 2010
6. Statement of William Frank Smith Jr. dtd 19 January 2010
7. Statement of Nicholas Turner dtd 19 January 2010
8. Matrix of Suspected Child Pornography (3 pages)
9. Digital Evidence Brach-Final Report dtd 4 May 2010
10. Definitions of Sexual Maturity Rating Categories Used by the AFCCP
11. Computer data from Litton's Computer
12. DVD of Bobby Ray Litton's confession dtd 20 January 2010
13. DVD images of suspected and verified pornographic images involving minor children.

Defense Exhibits

1. None

Block 16:

Erwin Risher: is stationed in Atlanta and the government will incur significant costs to fly him to Camp Pendleton for a court-martial

Multiple Marine Witnesses: Multiple Marines mentioned in the investigation are no longer readily available and consideration must be given to the time, difficulty and expense of locating them and providing them for trial.

Block 17: Charges and specification are in correct form

Block 18: Please see conclusion below

Block 21: Defense objected to government proceeding without Litton's prior defense counsel Capt. King who was never relieved. Further defense objected to the testimony of Sgt. Smith and Lcpl

Investigative Hearing. The hearing opened on/or about 0900 and concluded at later the same day.

Summary & Analysis of Live Testimony.

1) Art Spafford:

Former NCIS Agent. Previously talked with Henderson about the case. He is a graduate of the University of Maine and a prior Marine Corps officer. He left active duty in 1980 to join NCIS. He remained with NCIS until October 2010, he is now retired.

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He was primarily responsible for investigating crimes against persons, but later became involved in child porn cases. He estimated he has conducted a dozen or less investigations into child pornography as the primary investigator, but assisted in less than 50. He has conducted over 1000 interrogations of suspects over the years.

He became involved in this case because he was the duty agent in Jan 2010. He was assigned the case and remained the lead case agent. He was first notified by the Bn Adjutant of 2/1 about a computer that had suspected child porn images present.

The computer has been identified to be owned by Litton.

According to his testimony, another Marine, LCpl Turner had borrowed Litton's computer and while using it discovered the images. He then notified his command of their presence through his chain of command.

That same evening he obtained a permissive search authorization from Litton. Spafford seized the computer, a thumb drive and DVD's. He took those to NCIS headquarters aboard the base and logged them into the evidence system.

He then made arrangements to speak with the accused on the 20th. Prior to the interview he spoke with LCpl Turner, Sgt. Smith and Sgt. Riley.

Litton was advised of his Art. 31(b) rights in an interview room of the 53 area NCIS office. Litton admitted he downloaded the files and looked at the images. This interview was recorded.

The computers were sent to USACIL which identified the owner of the computer as "Bobby".

Just two movies were identified to be "known" child pornographic images. Six other images or videos were classified as "suspected." There were other porn images on the computer, but nothing else was identified as possibly involving minors.

Litton wrote out his own statement. Spafford had not reviewed the videos/photos before interviewing him.

He does not know why Turner didn't notify the command when he first saw images on the computer in 2009 when he had borrowed the same computer.

He did not search any other rooms and a command representative was present during the permissive search.

A second permissive search was authorized by Litton on 20 January after the interview with Litton. He believes Litton to be truthful and honest and seemed to know what he did was wrong. He also does not think Litton was really mature enough to really appreciate what he was doing was wrong.

Spafford is a strong witness and will be difficult to impeach.

2) LCpl Turner:

Was the former roommate of Litton. He has been a Marine for 3 years. Started living with Litton in July 2009 and lived with him for 4 or 5 months. Sometimes another Marine would stay in the room (LCpl McLaughlin). He has used Litton's computers before.

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He first saw the images in Sept/Oct of 2009, but did not report it as he thought it was Litton's own business. When he saw them a second time, he was again using it with permission. It was not until he was discussing the file titles with another Marine that he was overheard by others who wanted to "go see it". When they opened it up, they immediately shut it down and went to let Sgt. Riley and Sgt. Smith of the issue.

Says most of the images were of grown women. McLaughlin said he too saw the file titles.

He has never personally used LimeWire, but he has spoken with Litton about this incident and said he was sorry it happened.

He also stated that Litton is very smart and tries very hard.

Everything he saw was already in the recycle bin and there was nothing else he saw in any other files.

Overall a good witness. It was obvious he did not want Litton to get into any real trouble, which would explain why he did not initially report the images in Sept/Oct.

3) Sgt. Smith:

Has been in the Marine Corps for 10 years. Knows Litton when he was in anti-armor with him. Came into the case when he got word that there were disturbing images on Litton's computer. Did not provided much more detail other than that already contained in his statement included in this report.

4) Erwin Risher:

Works in the labs in Atlanta, Georgia at USACIL. He is highly qualified to examine computers. He described what he received and what he did to examine the computers for the presence of child pornography.

He then compared the data on the computer to previously obtained and identified child porn victims. He also identified that the computer was registered to "Bobby".

The files on the computer were downloaded from a file sharing program called "LimeWire." He was able to identify at least two videos containing known child porn victims.

He has never qualified as an expert in "child porn", but has qualified as an expert in computer forensics at least nine times.

Analysis of the Charges.

Charge I: Violation of Art 134

Specification 1:

The specification essentially charges Litton of conduct which was of a nature to bring discredit upon the armed forces in violation of Art. 134 of the UCMJ by possessing child pornography.

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This essentially incorporates the Federal law which states "[v]iolated 18 U.S.C. § 2252 by wrongfully distributing one or more visual depictions of a minor engaging in sexually explicit conduct."

The defense cannot contest the fact that Litton was found to have in his possession known child pornography and he has admitted to having them in his possession. The sole issue is to what degree the images reviewed have "a tendency to bring the service into disrepute or which tends to lower it in public esteem." MCM, Part IV para 60c(1).

In U.S. v. Sapp, 53 M.J. 90 (CAAF. 200) it was held that in discussing the parameters of Art. 134, "we have no doubt that the knowing possession of images depicting sexually explicit conduct by minors, *when determined to be service-discrediting conduct*, is a violation of Art. 134".

So the crux of the government's case rests on whether or not it can prove Litton's possession of the child porn is "discrediting".

"Discredit" means to injure the reputation of. This clause of Art. 134 makes punishable conduct which as a tendency to bring the service into disrepute or which tends to lower it the public esteem. In this case, were the public to find out about the conduct may injure the reputation of the service and the Marine Corps simply because of societies zero tolerance policy regarding possession of such images.

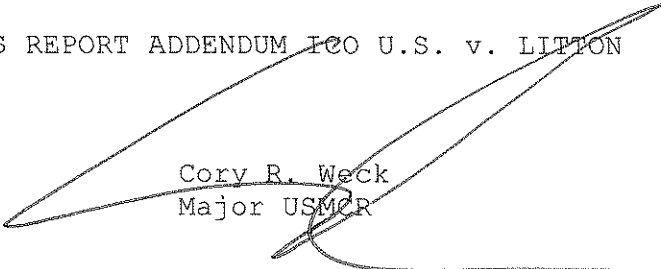
Conclusion.

Typically cases involving possession of child pornography are considered felony level offenses for which a person will be required to register as a sex offender.

However, like murder, there are degrees of criminality and on the one extreme is the person who not only possesses, but trades and even may produce copious amounts of video/images containing child pornography involving small children and then on the other side is a case like this.

Litton had very few images that are even suspect, and only two that are confirmed images of exploited children. Those two "confirmed" images are of two teenagers not much younger than Litton. While his conduct is not excusable, it certainly doesn't warrant the convening of a general court martial or even a special court-martial. This investigating officer has handled far worse cases, and based on the level of "criminality" I recommend the case be referred to a summary court-martial.

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Cory R. Weck
Major USMC