



THE LAW FIRM OF PUCKETT AND FARAJ, PC

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Via email crw@wtw-law.com

Major Cory R. Weck
2068 Orange tree lane
Suite 215
Redlands, CA 92374

Re: Defense Article 32 summary in the case of U.S. v. LCpl Litton

Dear Major Weck:

The defense raises the following four issues for your consideration:

1. Whether the government presented any evidence that supports a finding that the conduct is Prejudicial to good order and discipline or service discrediting?

- a. The Government charged Article 134 in this case. The Government's selection of this particular article is instructive. Normally cases of child pornography are charged using the Assimilated Crimes Act. In this case, such a charging mechanism was not available to the Government. The reason it was not available is because 18 U.S.C. §2252 recognizes an affirmative defense to a charge related to sexual exploitation of a minor when there are less than three images and the accused took reasonable steps to destroy the images. (Emphasis added). The facts in this case clearly revealed that the images were all in the recycling bin of the computer. Additionally, the Government's own forensic computer expert testified that an item in the recycling bin cannot be viewed or played unless it is restored. He also testified that when something downloaded from Lime wire is restored from the recycling bin, the file is moved to the "saved" file in Lime wire. That is the location of the files on LCpl Litton's computer. The lack of evidence sufficient to sustain a conviction and perhaps even a referral under the Assimilated Crimes Act appears to have been the impetus for the Government's decision to charge under Article 134.
- b. By charging under Article 134, the government created for itself the burden of proving the terminal elements of the charge: prejudice to good order and discipline or service discrediting conduct. The Government utterly failed to do so. The Government failed to present a scintilla of evidence regarding the terminal elements of the charge. The activities of the unit, the Marines, and law

enforcement in investigating the charge cannot be used as the factual basis to support the charge. Those actions are a consequence of the investigation into misconduct and not a consequence of the alleged misconduct. Courts have long held that efforts in investigating and bringing charges may not be used against the accused. In this case, any inference that may go towards the terminal elements of the charge arises from the conduct of the members of the command and investigators in investigating and bringing charges. To meet its burden, the Government was required to present some independent evidence of prejudice to good order and discipline or service discrediting conduct to meet its burden. It did not do that.

2. Whether the Government met its burden to prove that the computer containing the videos was sufficiently under the dominion and control of LCpl Litton when at least two witnesses testified that they regularly used the same computer and that it was not password protected?

- a. To meet its burden on this particular issue the Government will seek to use LCpl Litton's interrogation video and his written statement. And that is where the analysis of this issue will begin. While the defense recognizes that it is not a clear case of coercion, the subtleties of the techniques used by the NCIS agent interrogation are informative. NCIS Agent Spofford took advantage of the natural assumption LCpl Litton has that Spofford has authority over him. Although military courts rarely find that NCIS has authority over young Marines and the regulations governing NCIS authority supports those findings, the truth is that Marines rarely believe that NCIS does not have authority over them. Young Marines almost always succumb to subtle coercive tactics under the belief that they must speak regardless of what the paper put in front of them says. NCIS agents know this and understand that Marines are trained to follow orders and obey. And so agents like Spofford take advantage of that knowledge, lie and use trickery to subtly coerce Marines into giving statements. While Spofford demanded LCpl Litton tell him the truth and then told LCpl Litton what he wanted to hear, he lied to LCpl Litton. He lied about what he knows; he lied about a file that allegedly contained 11 year old children and 13 year old children. He lied when he told him that all he has to do is speak and everything will be ok and that he will get LCpl Litton help. If this goes to trial Agent Spofford, the former artillery "officer," will have to face officers and Staff NCOs and explain why it is ok for him to lie while he demands the truth from others.
- b. Despite Spofford's lies and coercion, LCpl Litton was still able to get the truth out when he was provided an opportunity to write the actual facts and not merely mimic Spofford's suggestions to spin the story Spofford desired. His written statement which was not written under direct pressure from the Spofford because

the lying NCIS Agent was not in the room at the time, makes no admission.¹ It simply recalls a time in LCpl Litton's past when he was 13 or 14 when he was attracted to girls his age. That statement stands in stark contrast to the testimony and lies demanded by Spofford, the teacher who has the answer sheet and is looking to see if he will get it from his student.

3. Whether the government met its burden to prove that LCpl Litton possessed or viewed child pornography when the only evidence of child pornography is a video that was recovered from the trash and placed back on LCpl Litton's community computer?

- a. The Government has a substantial problem with this case. The evidence of any child pornography is a video that was removed from the recycling bin on LCpl Litton's computer and moved back to a regular file. The only evidence of anyone viewing the videos is that of the Marines who were so eager to see what was on the computer and who actually restored the video from the recycling bin to view it. Accordingly, but for the restoration of the video by the Marines from the recycling bin and the subsequent playing of the video, there would be no evidence. Even if LCpl Litton had possessed and watched videos in the past a mere admission could not support a conviction without corroboration. In this case the evidence to corroborate the statement, assuming it is an admission, is evidence that was placed on the computer by third parties, arguably Government agents. Such so called evidence could not support a conviction even if LCpl Litton's statement is considered an admission.

4. Whether the videos recovered even assuming, *arguendo*, that the Government can overcome all the other problems with proving the charge in this case, are of a nature and made under circumstances that would cause a reasonable person to believe justice demands a conviction at a court-martial for the person possessing it?

- a. Only 2 of the videos have "known" victims. The people in the video, however, were teenagers who willingly made the video while engaged in consensual acts. The people in the video are older than LCpl Litton now but were not much younger in age than he at the time the time he arguably viewed the video. While the Government alleges that the people in the video are "victims." Use of the word victims requires some inquiry before acceptance. The so called "victims" made the video themselves while engaged in a consensual sexual act. Certainly kids that age do not always think through the consequences of their actions. One consequence that was clear, however, is what happens to videos after they are recorded. They are normally played or broadcast. The actors in this video knew that and arguably intended to have it played. The so called "victims" were not

¹ While law enforcement has been given a pass to lie in the course of investigations, such a pass does not absolve the conduct from being subjected to moral judgments. Spofford was a Marine Corps officer and was eager to invoke it in his interrogation of LCpl Litton. Accordingly, he will be criticized for being a liar and judged as any Marine Corps officer would who engages in such reprehensible conduct.

