IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20100580
Specialist (E-4) **RYAN A. BOWERSOX,** United States Army, Appellant	)	USCA Dkt. No. 12-0398/AR

JAMES P. CURTIN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 35499

RICHARD E. GORINI
Major, Judge Advocate
Branch Chief, Defense Appellate Division
USCAAF Bar No. 35189

IMOGENE M. JAMISON
Lieutenant Colonel, Judge Advocate
Deputy Chief, Defense Appellate Division
USCAAF Bar No. 32153

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF Bar No. 31186

INDEX OF FINAL BRIEF ON BEHALF OF APPELLANT

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Courts of Criminal Appeals

Federal Courts

Statutes

Uniform Code of Military Justice

Other

Regulations and Publications

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee.	) FINAL BRIEF ON BEHALF OF APPELLANT
v.	) Crim. App. Dkt. No. 20100580
	) USCA Dkt. No. 12-0398/AR
Specialist (E-4) **RYAN A. BOWERSOX,** United States Army, Appellant.	)

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

Granted Issue Presented

WHETHER APPELLANT'S CONVICTION OF VIOLATING 18 U.S.C. 1466A(b)(1), AS IMPORTED THROUGH CLAUSE 3 OF ARTICLE 134, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO HIM BECAUSE THE MINORS DEPICTED IN THE MATERIAL AT ISSUE WERE NOT ACTUAL MINORS. SEE ASHCROFT v. FREE SPEECH COALITION, 535 U.S. 234 (2002); UNITED STATES v. WHORLEY, 550 F.3d 326 (4th Cir. 2008).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals ["Army Court"] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice ["UCMJ"]; 10 U.S.C. § 866 (2006). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On November 12, 2009, February 19, March 30, and July 13-15, 2010, a military judge sitting as a general court-martial

tried appellant. Contrary to his pleas, the military judge convicted appellant of two specifications of possessing obscene visual representations of virtual minors engaged in sexually explicit conduct in violation of Article 134, Uniform Code of Military Justice ["UCMJ"]; 10 U.S.C. § 934 (2006). Consistent with his plea, the military judge found appellant not guilty of one specification of possessing child pornography in violation of Article 134, UCMJ. The military judge sentenced appellant to be reduced to E-1, to forfeit all pay and allowances, to be confined for four months, and a bad-conduct discharge. (JA 318). The convening authority approved the adjudged sentence. (JA 322).

The Army Court affirmed the finding of guilty and the sentence in a published opinion on February 24, 2012. *See United States v. Bowersox*, 71 M.J. 561(Army Ct.Crim.App. 2012) (JA 3-9). Appellant was subsequently notified of the Army Court's decision.

On July 13, 2012, this Court granted Appellant's Petition and ordered Briefs filed under Rule 25. Appellant, through counsel, herewith is files his Brief and Joint Appendix.

Statement of Facts

The government charged the appellant with possession of obscene visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §1466A(b)(1). (JA 12). The

appellant provided a sworn statement to investigators where he described downloading and viewing animated images of children engaged in sexual activity. (JA 319-21). The appellant admitted that he downloaded these images onto his computer which was password protected. (JA 320). The military judge admitted this statement into evidence. (JA 16). Investigators also seized various digital media storage devices from the appellant's side of a shared barracks room. (JA 66-67). The computer forensic examiner that analyzed digital media seized from the appellant's barracks room testified that he did not discover any actual child pornography during the course of his search. (JA 251). The investigator also testified that the appellant's descriptions of the series aligned with the images discovered on the digital media storage devices seized from appellant's room. (JA 263).

On July 14, 2010, the military judge convicted appellant of possessing two computer hard drives containing approximately 224 obscene visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. §1466A(b)(1) and Article 134, UCMJ, clause 2.[1] (JA 317). The military judge found the appellant not guilty of possession of actual child pornography. (JA 317). The Army Court found that appellant

[1] Appellant was not charged with conduct prejudicial to good order and discipline in the Armed Forces under clause 1 of Article 134.

possessed 193 obscene visual depictions instead of 224. *Bowersox*, 71 M.J. at 563.

Summary of Argument

The dissenting opinion in *United States v. Whorley*, 550 F.3d 326, 335-37 (4th Cir. 2008)(Gregory, J., concurring in part and dissenting in part), represents a clearer and more logically sound interpretation of 18 U.S.C. §1466A than does the majority opinion. As such, this Court should hold that of §1466A(b)(1) requires proof that the depictions in question represent actual children.

Additionally, 18 U.S.C. §1466A(b)(1) is unconstitutional as applied to the appellant because he merely possessed animated depictions of minors engaged in sexually explicit conduct on a password protected laptop stored in his shared barracks room located on land within the special maritime and territorial jurisdiction of the United States. Application of this statute to the appellant violates appellant's First Amendment right to free speech.

Accordingly this court should set aside the findings of guilt and the sentence and dismiss the charge.

Granted Issue Presented and Argument

WHETHER APPELLANT'S CONVICTION OF VIOLATING 18 U.S.C. 1466A(b)(1), AS IMPORTED THROUGH CLAUSE 3 OF ARTICLE 134, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO HIM BECAUSE THE MINORS DEPICTED IN THE MATERIAL AT ISSUE WERE NOT ACTUAL MINORS. SEE ASHCROFT v. FREE SPEECH COALITION, 535 U.S. 234 (2002); UNITED STATES v. WHORLEY, 550 F.3d 326 (4th Cir. 2008).

1. 18 U.S.C. §1466A(b)(1) Requires the Government to Prove an Actual Minor is Depicted while 18 U.S.C. §1466A(b)(2) Proscribes Animated Drawings Depicting Fictitious Minors.

The language of 18 U.S.C. §1466A(b)(1) is almost identical to the language of §1466A(a)(1), and should be analyzed the same.[2] In *United States v. Whorley,* the Fourth Circuit considered a challenge to 18 U.S.C. §1466A(a)(1) on the grounds

---

[2] The relevant portions of 18 U.S.C. §1466A(a) and (b) are:

(a) In General.--Any person who . . . knowingly produces, distributes, receives, or possesses with the intent to distribute, a visual depiction of any kind, including drawing a drawing, cartoon, sculpture, or painting, that --

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene

. . .

(b) In General.--Any person who . . . knowingly possesses a visual depiction of any kind, including drawing a drawing, cartoon, sculpture, or painting, that --

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene

that, to be constitutional, the statute required the government to prove that the images in question depicted actual minors, as any other reading would violate the Supreme Court's holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *United States v. Whorley*, 550 F.3d 326, 335-37 (4th Cir. 2008). The court rejected this argument for two reasons.

First, the court held that when all of the provisions of §1466A(a)(1) are read together, the plain language avoids the constitutional problem in *Ashcroft v. Free Speech Coalition* by only criminalizing obscene visual depictions, including cartoons, of minors engaged in sexually explicit conduct. *Id.* at 336. The court specifically referred to §1466A(c) which states "it is not a required element of any offense under this section that the minor depicted actually exist." *Id.*

Second, the court noted that the Supreme Court in *Ashcroft v. Free Speech Coalition* held that the First Amendment to the U.S. Constitution protects the possession of non-obscene depictions of virtual child pornography. *Id.* The court noted that §1466A(a)(1)(B) specifically requires the images to be obscene and, therefore, the images fall outside of the protection of the First Amendment. *Id.* at 337.

Although the majority in *Whorley* upheld a conviction for receiving cartoon depictions of minors engaging in sexually explicit conduct pursuant to 18 U.S.C. §1466A(a)(1), the dissent

disagreed with the majority's interpretation of the statute. *Whorley*, 550 F.3d at 351-53 (Gregory, J., concurring in part and dissenting in part). In his dissent, Judge Gregory agreed that §1466A(a)(1), as drafted, does not violate the constitution, but he nonetheless interpreted that section to require the government to prove that the depictions in question depict actual children as opposed to images created entirely from imagination. *Id.* A plain reading of 18 U.S.C. §1466A(b)(1) demonstrates that it only criminalizes material that depicts actual children. *See Id.*

Subsection (b)(1) requires a visual depiction to show "a minor engaging in sexually explicit conduct" while subsection (b)(2) requires a visual depiction to show "an image that is, or appears to be, of a minor . . . ." There must be some distinction or difference in meaning in order to reconcile these two different formulations. The only possible way to reconcile the different language used in subsection (b)(1) with (b)(2) is to conclude that (b)(1) refers to actual minors while (b)(2) could include fictitious individuals that appear to be minors. Otherwise, Congress would not have drafted two subsections, one covering minors and another covering images that appear to be minors.

This common sense interpretation is supported by the definition of the word "minor." Pursuant to 18 U.S.C. §2256(1),

a "minor" is "any person under the age of eighteen years." "A person is defined as a living human being and a human being with legal rights and duties." *Whorley*, 550 F.3d at 351 (Gregory, J., concurring in part and dissenting in part)(internal quotation marks and citations omitted). In contrast, "[a] child that is a figment of an illustrator's imagination is not living, is not a human being with legal rights, and is certainly not natural in the legal sense of the word." *Id.*

Further, a comparison of the elements contained in 18 U.S.C. §1466A(b)(1) and (b)(2) "reveal that the only way to avoid making subsection [(b)(2)] superfluous is to assume that Congress only required a real child in subsection [(b)(1)]." *Whorley*, 550 F.3d at 351 (Gregory, J., concurring in part and dissenting in part). For instance, subsection (b)(1) simply requires "sexually explicit conduct" while subsection (b)(2) "criminalizes a more limited type of conduct - i.e., 'graphic bestiality, sadistic or masochistic abuse, or sexual intercourse.'" *Id.* at 351-52. This comparison shows that (b)(1) "is less demanding, presumably because the conduct involves the abuse of real minors." *Id.* at 352. Again, there is no reason to create two subsections if subsection (b)(1) also applied to fictitious images.

The Supreme Court has acknowledged that a statute should be construed in a way that gives meaning to all of the provisions

and does not render any provisions superfluous. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). When a statute uses certain language in one provision and different language in another provision, courts do not ascribe the same meaning to the different language. *See* 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 46:6, pp. 249-51 (7th ed. 2007). Additionally, when interpreting penal statutes, courts should give effect to the plain meaning of the words contained within the statute while also giving effect to the intent of Congress. *United States v. Corbett*, 215 U.S. 233, 243 (1909). When applied to §1466A, these rules of statutory construction support Judge Gregory's conclusion in *Whorley*. This Court should adopt that interpretation.

While 18 U.S.C. §1466A(c) provides that "[i]t is not a required element of any offense under this section that the minor depicted actually exist, . . . [t]he intent of subsection (c) is to relax the evidentiary requirements necessary to find an individual guilty under this statute, thus relieving the Government from the burden of exhaustively searching the country to identify conclusively the children involved in the production of the child pornography." *Whorley*, 550 F.3d at 351 (Gregory, J., concurring in part and dissenting in part)(citation omitted). In addition, the fact that an actual child passed away before trial, such that he or she would not "actually

exist" under subsection (c), would not prevent a prosecution under subsection (b)(1). *Id.* at 351 n.4.

The court in *Whorley* also considered whether the Supreme Court's holding in *United States v. Stanley* extended First Amendment protection to Whorley's receipt and possession of obscene material. *Whorley*, 550 F.3d at 334. The court rejected Whorley's argument noting: "Thus, whatever protection *Stanley* may have afforded to the possession of obscene matter in the privacy of the home, it cannot be said to have created a right to "receive" obscene materials using instruments of commerce. *Id.* at 334-35. However, the court's holding in *Whorley* is factually distinguishable from the facts of the present case for the reasons outlined below.

2. *Stanley* Does Not Allow the Government to Criminalize Mere Private Possession of Obscene Material.

In *Stanley*, law enforcement officials obtained a search warrant for the defendant's home to look for evidence of "bookmaking activities." *Stanley*, 394 U.S. at 558. Very little evidence of "bookmaking activities" was found, but three reels of eight-millimeter film were found and determined to be obscene. *Id.* The State charged the defendant with "knowingly having possession of obscene matter" in violation of Georgia law. *Id.* The issue was the constitutionality of "a statute

imposing criminal sanctions upon the mere knowing possession of obscene matter." *Id.* at 559.

The Court held that "the mere private possession of obscene matter cannot constitutionally be made a crime." *Id.* The Court provided the following rationale:

> It is now well established that the Constitution protects the right to receive information and ideas. This freedom of speech and press necessarily protects the right to receive. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. Moreover, in the context of this case - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

Id. at 564 (internal quotation marks and citations omitted). The Court found that the "mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments." *Id.* at 565.

3. Appellant was Convicted and Punished for Privately Possessing Obscene Material.

The government charged appellant with violating 18 U.S.C. §1466A(b)(1), which criminalizes the knowing possession of visual depictions showing "a minor engaging in sexually explicit conduct" that is obscene. Similar to the defendant in *Stanley*,

appellant was convicted even though he merely possessed obscene material in the privacy of his own home.[3] "In the military context, the barracks or dormitory often serves as the servicemember's residence, his or her home." *United States v. Macomber*, 67 M.J. 214, 219 (C.A.A.F. 2009). Thus, 18 U.S.C. §1466A(d)(5), which provides that 18 U.S.C. §1466A(b)(1) is an offense in the special territorial jurisdiction of the United States and which appellant was convicted of violating, is unconstitutional as applied to appellant.

Appellant should not lose the liberty protection provided in *Stanley* simply because his home is in the territorial jurisdiction of the United States and not Georgia. Yet this is specifically what the Army Court's opinion allows by finding "[t]here is no constitutionally recognized right to possess such material, under these circumstances, on property within the special maritime and territorial jurisdiction of the United States and no authority to extend *Stanley* into this province." *Bowersox*, 71 M.J. at 564. Essentially, the Army Court found 18 U.S.C. §1466A(b)(1) applicable in the special territorial jurisdiction of the United States under 18 U.S.C. §1466A(d)(5) and that the "limited" reach of *Stanley* only applies to

---

[3] Possession of child pornography is criminalized whether it is obscene or not because of the real harm done to actual children. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002). Appellant was not convicted of possessing child pornography; thus, those concerns are not at play in appellant's case.

possession on state land as opposed to possession on federal land. There is no rational reason for such a spurious distinction.

Moreover, the Army Court also found *Stanley* inapplicable because "the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home." *Id.* However, the material in question was not in plain view in appellant's barracks room, or even locked in appellant's wall locker. Instead, this material was contained in appellant's password-protected computer. This Court has specifically held "that an individual sharing a two-person dormitory room has a reasonable expectation of privacy in the files kept on a personally owned computer." *United States v. Conklin*, 63 M.J. 333, 337 (C.A.A.F. 2006). Even assuming that appellant has less of a privacy interest than *Stanley* because appellant's home is a shared two-person barracks room versus a traditional house, the Army Court failed to address the reasonable expectation of privacy that appellant had in his password-protected personally owned computer. Stated differently, *Stanley* applies to this case because appellant maintained this material *in his personally owned computer* within his home.

The government should have charged appellant under one of the four scenarios described in 18 U.S.C. §1466A(d)(1)-(4) since any of the four would require appellant to receive obscene

material in interstate commerce. *See United States v. Reidel*, 402 U.S. 351, 354-55 (1971) (rejecting argument that a defendant's right to possess obscene material in the privacy of his own home encompassed a right to receive such material through channels of commerce); *see also Whorley*, 550 F.3d at 335 (recognizing that *Stanley* protects the possession of obscene matter in the privacy of one's home but does not protect the right to receive such material using instruments of interstate commerce).

4. Assuming the Court Finds Appellant's Conduct Constitutionally Protected under *Stanley*, the Evidence is Legally Insufficient that Appellant's Conduct was of a Nature to Bring Discredit upon the Armed Forces under Clause Two of Article 134, UCMJ.

The government did not present evidence that any member of the public was aware of the fact that appellant possessed animated, cartoon-like drawings depicting pornography. In fact, there was no indication that anybody other than appellant and SA Ellis had seen the animated drawings that appellant was convicted of possessing. Of course, this is only the starting point for the analysis under clause two of Article 134, UCMJ, because "evidence that the public was actually aware of the conduct is not necessarily required." *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011). Nonetheless, "the extent to which conduct is constitutionally protected may impact whether the facts of record are sufficient to support a

conviction." *Id.* at 166. Assuming that *Stanley* governs appellant's case, then constitutional implications are at play in determining whether appellant's conduct was service-discrediting. Specifically, appellant's First Amendment rights would be at stake. *See Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (noting that *Stanley* "was firmly grounded in the First Amendment"). *Contra United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123, 126 (1973)(stating that "*Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home").

Given that appellant's First Amendment rights are at stake, *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), provides insight:

> We conclude that a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory. If such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some members of the public, or even many members of the public, would find offensive. And to use this standard to impose criminal sanctions under Article 134, UCMJ, would surely be both vague and overbroad.

Id. at 448-49. The government presented no evidence of a direct and palpable connection between appellant's conduct and the

military mission or environment. Thus, the lesser included offense of service-discrediting conduct is not sustainable in this case. *See also United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991)(stating that "if a servicemember cross-dresses in the privacy of his home, with his curtains or drapes closed and no reasonable belief that he was being observed by others or bringing discredit to his rating as a petty officer or to the U.S. Navy, it would not constitute the offense.").

Conclusion

Although the Supreme Court's holding in *Ashcroft v. Free Speech Coalition* does not limit Congress's authority to proscribe virtual child pornography, specifically cartoons, as obscene materials, the language of the statute required the government in the present case to prove that the cartoons in the appellant's possession depicted actual children. The majority's interpretation of 18 U.S.C. §1466A in *Whorley* is flawed and this Court should decline to follow it.

The Army Court concluded that there was "no constitutionally recognized right to possess such material, under these circumstances, on property within the special maritime and territorial jurisdiction of the United States and no authority to extend *Stanley* into this province." *Bowersox*, 71 M.J. at 564. Appellant recognizes and appreciates the

"limited" holding in *Stanley*. But appellant is not asking this Court to find a new constitutionally recognized right to possess obscene material. Instead, appellant is asking this Court to apply *Stanley* to him because the "circumstances" of appellant's case are similar to the circumstances in *Stanley*. Therefore, the appellant requests that this Court set aside the findings of guilt and the sentence and dismiss the charge.

Wherefore, appellant respectfully requests this Court grant the requested relief.

JAMES P. CURTIN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, #3210
Fort Belvoir, Virginia 22060
(703)693-0725
USCAAF No. 35499

RICHARD E. GORINI
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 35189

IMOGENE M. JAMISON
Lieutenant Colonel, Judge Advocate
Deputy, Defense Appellate Division
USCAAF No. 32153

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF No. 31186

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

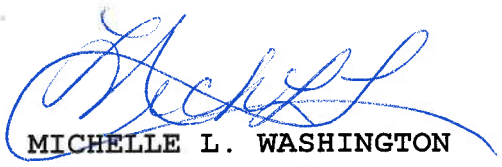
1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 3,346 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface (12-point, Courier New font) using Microsoft Word, Version 2007 with no more than ten and a half characters per inch.

JAMES P. CURTIN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, #3210
Fort Belvoir, Virginia 22060
(703)693-0725
USCAAF No. 35499

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Bowersox*, Crim.App.Dkt.No. 20100580, USCA Dkt. No. 12-0398/AR, was electronically filed with both the Court and Government Appellate Division on August 28, 2012.



MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737