

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES, ) APPELLANT'S REPLY TO BRIEF  
Appellee. ) ON BEHALF OF APPELLEE  
)  
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

**Argument**

1. This Court need not expand the Supreme Court's holding in Stanley in order to find in favor of appellant.

Despite the government's claims to the contrary, appellant is not asking this Court to extend the Supreme Court's ruling in *Stanley v. Georgia*, 394 U.S. 557 (1969). Appellant is merely asking this Court to rationally apply the Supreme Court's reasoning in *Stanley* to the present case. The government cites a number of cases where courts have specifically declined to extend the constitutional protection recognized in *Stanley* beyond mere possession of obscenity in the privacy of the home to other areas, such as a correlative right of receiving obscenity. See, e.g., *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973). The Supreme Court's reluctance to extend *Stanley* beyond possession of obscenity

cannot be interpreted, as the government suggests, as a signal that the Supreme Court would sanction the evisceration of the reasoning underlying the holding of *Stanley*.

In *Ashcroft v. Free Speech Coalition*, the Supreme Court, in the process of striking down a federal law that expanded the definition of child pornography to include depictions that "appeared" to be child pornography, relied upon *Stanley* and reiterated its underlying rationale:

The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

*Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2001).

The Court made no distinction based on whether the object of this thought was labeled child pornography or obscenity. While the Supreme Court left open the possibility that certain activity dealing with virtual child pornography can be properly proscribed if the virtual child pornography meets the definition of obscenity, the Court never indicated that virtual child pornography fell outside of the protection of *Stanley*, even if it is obscene. *Id.* at 256.

When analyzed in light of the reasoning underlying the holding in *Stanley*, the government's desire to distinguish mere possession of obscenity in the privacy of one's home from the mere possession of obscenity in files located in a personally owned, password protected, laptop in a barracks room within the territorial jurisdiction of the federal government, amounts to a distinction without a difference. The Court in *Stanley* acknowledged that Stanley was asserting his "right to read or observe what he pleases . . . the right to be free from state inquiry into the contents of his library." *Stanley*, 394 U.S. at 565 (1969). In the end, the Court vindicated that exercise of Stanley's First Amendment rights. *Id.* at 568. In response to Georgia's argument, the Court observed, "We are not certain that this argument amounts to any more than the assertion that the State has the right to control the moral content of a person's thoughts." *Id.* at 565. The Court concluded that this argument is "wholly inconsistent with the philosophy of the First Amendment." *Id.*

Specialist Bowersox was convicted of two specifications of knowing possession of "obscene visual depictions of a minor engaging in sexually explicit conduct." (JA 12, 317). No matter how immoral these depictions are, Specialist Bowersox has the right to possess them pursuant to the First Amendment of the United States Constitution. As an enlisted member of the United

States Army, Specialist Bowersox swore an oath to support and defend the Constitution of the United States. 10 U.S.C § 502 (2006). In turn, he must enjoy the protection of a “constitutional heritage [that] rebels at the thought of giving government the power to control men’s minds.” *Stanley*, 394 U.S. at 565.

In *United States v. Forney*, this Court held that possession of virtual child pornography is not necessarily protected under military law. *Forney*, 67 M.J. 271 (C.A.A.F. 2009). However, when analyzing the protections of the First Amendment enjoyed by members of the armed forces, as Judge Erdmann reiterated in dissent, “we must ensure that the connection between any conduct protected by the First Amendment and its effect in the military environment be closely examined.” *Id.* at 281 (Erdmann and Ryan, JJ., dissenting) (citing *United States v. O’Connor*, 58 M.J. 450, 455 (C.A.A.F. 2003)). Appellant’s case is unlike those cases where this Court upheld a conviction for possession of virtual child pornography under clause one or two of Article 134, UCMJ, or Article 133, UCMJ. See *Forney*, 67 M.J. 271 (C.A.A.F. 2009) (Navy officer downloaded and viewed child pornography on a government computer on a Navy ship underway); *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006) (Air Force non-commissioned Officer showed pornography to step-daughter and told fellow Staff Sergeant that he possessed child pornography); *United*

*States v. Mason*, 60 M.J. 15, (C.A.A.F. 2004) (Air Force Major received child pornography using government computers and participated in teen chat rooms on the same computers); *cf.* *United States v. Guerrero*, 33 M.J. 295 (C.A.A.F. 1991) (“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 [Article 134, UCMJ]”).

In the present case, the fact that Specialist Bowersox was living in a shared barracks room is insufficient to support a decision to strip Specialist Bowersox of his First Amendment rights and sustain a conviction pursuant to either clause two or clause three of Article 134, UCMJ.<sup>1</sup>

---

<sup>1</sup> A *Beaty* issue would arise if this Court finds appellant’s conviction under 18 U.S.C. § 1466A(b)(1) is unconstitutional as applied, yet still affirms appellant’s conviction under clause two of Article 134, UCMJ. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). “Because [a]ppellant’s offense is (1) not listed in the MCM, (2) not included in or closely related to any other offense listed in Part IV of the M.C.M, and (3) not provided for in the United States Code, the maximum punishment is that ‘authorized by the custom of the service.’” *Id.* at 44. (citation omitted). Similar to the offense at issue in *Beaty*, there is no “custom of the service” applicable to appellant’s offense. *Id.*

2. This Court should decline the government's invitation to view speech that is of a nature to bring discredit upon the armed forces as a separate category of speech which, like obscenity, does not fall under the protection of the First Amendment.

The government claims "conduct that is service discrediting can be a distinct category of unprotected speech." (Appellee's Br. at 24). The appellant urges this Court to reject this notion. Instead, this Court should hold a view consistent with precedent that speech the First Amendment would ordinarily protect in the civilian context may, *under certain limited circumstances*, lose its protection with regard to servicemembers if that speech is service discrediting. See *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) ("the extent to which conduct is constitutionally protected may impact whether the facts of record are sufficient to support a conviction"); *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008) ("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").

3. Regardless of how this Court interprets the statutory language in 18 U.S.C. §1466A(b)(1), *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008) has limited applicability to the present case.

The appellant in *Whorley* was convicted, *inter alia*, of a violation of 18 U.S.C. §1466A(a)(1) for knowingly receiving

cartoons depicting minors engaging in sexually explicit conduct. *Whorley*, 550 F.3d at 330. As the government correctly notes, the Supreme Court has consistently rejected the idea that the right to possess obscene materials, as acknowledged in *Stanley*, does not include a correlative right to receive or acquire obscene materials. (Appellee's Br. at 15). Specialist Bowersox, however, was convicted of a violation of 18 U.S.C. §1466A(b)(1) for knowingly *possessing* obscene depictions of a minor engaging in sexually explicit conduct. (JA at 12, 317). Additionally, the conduct that led to Whorley's conviction occurred in a public place using a State owned computer and printer. *Whorley*, 550 F.3d at 330-31. Appellant's conduct was of a wholly different sort; he possessed cartoons in his own barracks room utilizing a personally owned, password protected laptop. The appellant's case is factually distinct from *Whorley* and, implicates clearly established constitutional rights.

#### **Conclusion**

The Supreme Court has recognized a right to possess obscene material in one's home. This holding is based on the concept that a man is free to think and view materials as he wishes without fear of government intrusion. Although application of constitutional rights may differ in a military context, they are not, and ought not be, completely forsaken. The appellant is not seeking to expand this recognized right, he is merely

seeking its application. Appellant's conduct in this case, even assuming *arguendo* that it is of a nature to bring discredit upon the armed forces, should not be the basis of a criminal conviction without sufficient evidence that his conduct had a direct and palpable connection to his military service. There is no such evidence in this case. Finally, the Fourth Circuit's conclusions regarding the constitutional implications of 18 U.S.C. §1466A(a)(1) have no bearing on appellant's ultimate argument regarding the constitutionality of 18 U.S.C. §1466A(b)(1) as applied to him under the facts of this case.

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



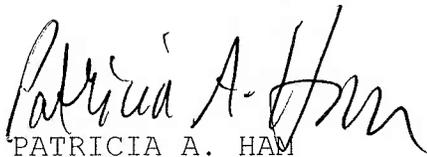
JAMES P. CURTIN  
Captain, Judge Advocate  
Appellate Defense Counsel  
Defense Appellate Division  
U.S. Army Legal Services Agency  
9275 Gunston Road, #3210  
Fort Belvoir, Virginia 22060  
(703)693-0725  
USCAAF No. 35499



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



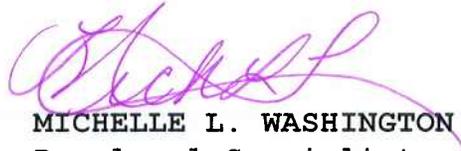
IMOGENE M. JAMISON  
Lieutenant Colonel, Judge Advocate  
Deputy, Defense Appellate Division  
USCAAF No. 32153



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

**CERTIFICATE OF 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 October 24, 2012.



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