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) APPELLEE
v.	)
	) USCA Dkt. No. 12-0398/AR
Specialist (E-4) **RYAN A. BOWERSOX** United States Army, Appellant	) Crim. App. Dkt. No. 20100580

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

Granted Issue

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).

Summary of the Argument

Congress may prohibit obscene virtual child pornography because obscenity is an unprotected class of speech under the First Amendment. *Stanley v. Georgia* did establish a right to possess obscenity in the privacy of one's home.[1] However, the rule in *Stanley* has never been applied to any area outside of the home. Section 1466A(b)(1) is constitutional as applied because (1) it only applies to unprotected obscenity; and (2) appellant's shared barracks room on federal land is not a home. In short, appellant does not have a fundamental right of privacy to possess obscene virtual child pornography in a shared barracks room in the territorial jurisdiction of the United States.

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[1] 394 U.S. 557, 565 (1969).

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).[2] This Court has jurisdiction under Article 67(a)(3), UCMJ.[3]

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas,[4] 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).[5] The military judge sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for four months, and a bad-conduct discharge.[6] The convening authority approved the adjudged sentence.[7]

Statement of Facts

At the time of these offenses, appellant resided in a shared barracks room on Fort Bragg, North Carolina.[8] According to appellant, he "developed an addiction to Anime" in 2002 and

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[2] 10 U.S.C. § 866 (2008); JA 3 (*United States v. Bowersox*, 71 M.J. 561 (Army Ct. Crim. App. 2011).
[3] 10 U.S.C. § 867(a) (2008).
[4] R. at 133.
[5] JA at 317.
[6] JA at 318.
[7] JA at 322; Action.
[8] JA at 4.

downloaded several of these images to his laptop computer.[9] The particular kind of anime that appellant sought and downloaded were computer generated images of children engaged in various sexually explicit acts.[10]

During one search for these virtual child images, appellant accessed a website that contained actual child pornography.[11] Appellant then showed two images of child pornography to his roommate.[12] A few weeks later, appellant's roommate alerted the chain of command and appellant's computers were lawfully seized by law enforcement.[13] The search of appellant's computers showed that they contained numerous obscene computer generated images of minors engaged in sexually explicit conduct.[14] Law enforcement did not find child pornography involving actual children.[15]

Standard of Review

The constitutionality of an act of Congress is a question of law that this court reviews de novo.[16] When an appellant

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[9] JA at 319.
[10] JA at 320-21; JA at 323.
[11] JA at 319; R. at 149-50.
[12] R. at 149-50.
[13] JA 4; R. at 152-54.
[14] JA at 4.
[15] *Id.*
[16] *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012) (citing *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005)).

argues that a statute is unconstitutional as applied, this Court will conduct a fact specific inquiry.[17]

Argument

I. A Brief History and Overview 18 U.S.C. § 1466A

In *Ashcroft v. Free Speech Coalition*, the Supreme Court held that the Child Pornography Protection Act of 1996 (CPPA) was overbroad and unconstitutional because it proscribed speech that was neither child pornography under *New York v. Ferber* nor obscene under *Miller v. California*.[18] *Ferber* held that child pornography can be proscribed regardless of whether the images are obscene because the state has a compelling interest in protecting children from sexual exploitation.[19] *Miller* established the three-part test to determine what constitutes unprotected obscene speech.[20]

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[17] *Id.*

[18] *Free Speech Coalition,* 535 U.S. 234, 256 (2003). *Ferber*, 458 U.S. 747 (1982); *Miller*, 413 U.S. 15 (1973).

[19] *Ferber,* 458 U.S. at 761 (1982) ("It is irrelevant to the child [who has been abused] whether or not the material ... has a literary, artistic, political or social value . . . We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.)

[20] *Miller*, 413 U.S. at 24 ("The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (citations omitted).

In response to *Free Speech Coalition,* Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act) and enacted new obscenity laws to address virtual, animated, or simulated child pornography.[21] The PROTECT Act created a new statute, 18 U.S.C. § 1466A(b), which proscribes the possession of obscene visual depictions of minors engaged in sexually explicit conduct.[22] Section 1466A(b)(1), the specific provision appellant was charged with violating, states:

> Any person who, in a circumstance described in subsection (d), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that--
>
> **(1)(A)** depicts a minor engaging in sexually explicit conduct; and
>
> **(B)** is obscene . . .
>
> or attempts to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties

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[21] Pub. L. No. 108-21, § 504(c), 117 Stat. 650, 680-82 (2003) (codified as amended at 18 U.S.C. §1466A) [hereinafter PROTECT Act]. *See also* H.R. REP. No. 108-66, at 25-26 (2003) (Conf. Rep.) (noting that the technology will soon exist, if it does not already, to computer generate realistic images of children); S. REP. No. 108-2, at 4, 6 (2003) (noting that *Free Speech Coalition* had "greatly impaired the government's ability to bring successful child pornography prosecutions" and stating "[w]hether real or life-like (but virtual), child pornography fuels the fantasies of pedophiles, often leading to the actual abuse of real children.").

[22] 18 U.S.C. § 1466A(b)(1) (2003).

> provided for cases involving a prior conviction.[23]

The term "visual depiction" includes undeveloped film and videotape, data stored on a computer disk, any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means.[24] According to the statute, the term "sexually explicit conduct" has the same meaning given the term in 18 U.S.C. §§ 2256(2)(A) or 2256(2)(B).[25] 18 U.S.C. § 2256(2)(A) states that "sexually explicit conduct" is:

> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (ii) bestiality;
>
> (iii) masturbation;
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> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the genitals or pubic area of any person.[26]

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[23] JA 12; § 1466A(b). 18 U.S.C. § 2252A(b)(2) establishes a 10 year maximum sentence for first time child pornography offenses and a 10 year minimum sentence (20 year maximum) for those with applicable prior convictions. § 2252A(b)(2) (2008).
[24] § 1466A(f)(1).
[25] § 1466A(f)(2).
[26] 18 U.S.C. § 2256(2)(A) (2008).

Section §2256(2)(B) defines "sexually explicit conduct" as:

> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
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> (ii) graphic or lascivious simulated;
>
> (I) bestiality;
>
> (II) masturbation;
>
> (III) sadistic or masochistic abuse; or
>
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.[27]

Although the statute does not define "obscene," federal courts construe the term to trigger the test established in *Miller v. California*.[28] *Miller* set forth a three-part test to determine what unprotected obscenity is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks

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[27] 18 U.S.C. § 2256 (2)(B) (2008).

[28] *Hamling v. United States*, 418 U.S. 87, 114-16 (1974); *United States v. Schales*, 546 F.3d 965, 972 (9th Cir. 2008).

> serious literary, artistic, political, or scientific value.[29]

Whether a work is obscene per contemporary community standards is a question for the finder of fact.[30] In military courts-martial, the community standard is generally determined by the accused's branch of service.[31]

Subsection (d) of §1466A sets forth five circumstances where federal jurisdiction attaches for this offense. Under the statute, possession of such images is illegal when:

> **(1)** any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;
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> **(2)** any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

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[29] *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

[30] *Smith v. United States*, 431 U.S. 291, 299-301 (1977). *See also Miller,* 413 U.S. at 26 ("In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.").

[31] *See United States v. Maxwell*, 45 M.J. 406, 426 (C.A.A.F. 1996) (holding that the Air Force community was the appropriate community standard).

> **(3)** any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;
>
> **(4)** any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or
>
> **(5)** the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.[32]

Finally, § 1466(c) states that "[i]t is not a required element of any offense under this section that the minor depicted actually exist.[33]

II. Section 1466A(b)(1) is constitutional as applied because Congress may prohibit obscene virtual child pornography images inside the territorial jurisdiction of the United States.

The decision in *Free Speech Coalition* did not confer constitutional legitimacy to obscene virtual or animated child pornography images. Obscene material has long been considered an unprotected category of speech.[34] Moreover, *Free Speech*

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[32] § 1466A(d).
[33] § 1466A(c)
[34] *See Ashcroft v. ACLU* 535 U.S. 564, 574 (2002) (indicating that "[o]bscene speech . . . has long been held to fall outside the purview of the First Amendment"); *Roth v. United States*, 354

Coalition itself expressly acknowledged that obscenity may be prohibited without violating the First Amendment.[35] Accordingly, Congress may regulate or prohibit obscenity when it implicates interstate commerce or when the possession occurs in the territorial jurisdiction of the United States.[36]

In regards to obscenity, *Free Speech Coalition* merely held that the CPPA could not be read to prohibit obscene images because the text made no mention of an obscenity element.[37] Section 1466A(b)(1) does not suffer from the same constitutional infirmity that existed in the CPPA. Contrary to the CPPA, §1466A(b)(1)(B) expressly states the images must be obscene thus, triggering the required *Miller* test. Regardless of whether the minors depicted are real or virtual, Congress may still prohibit virtual or animated child pornography so long as it is obscene.

Notwithstanding the virtual nature of the images, §1466A(b)(1) is constitutional as applied because, in this instance, it only proscribes unprotected obscenity inside a shared barracks room within the territorial jurisdiction of the

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U.S. 467, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech").

[35] *Free Speech Coalition*, 535 U.S. at 245-46.

[36] § 1466(d)(5). *Cf. United States v. Whorley*, 550 F.3d 326, 333 (4th Cir. 2008) (rejecting appellant's constitutional claim because that the focus of 18 U.S.C. § 1462 was interstate commerce).

[37] *Id.* at 248.

United States.[38] Similar to Congress's plenary power to regulate commerce, Congress's power to exercise exclusive legislation over federal lands and territories is also an enumerated power found in the very text of the Constitution.[39] Congress has the power to exercise exclusive legislation over all places purchased by the consent of the legislature of the state, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.[40] When land is purchased for military purposes with the consent of the state legislature, federal jurisdiction is exclusive of all state authority.[41] "This follows from the declaration of the Constitution that congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.'"[42] "Exclusive legislation" also means the federal government has exclusive jurisdiction over the same areas.[43]

Correspondingly, § 1466A(d)(5) states that federal courts have jurisdiction when the offense is "committed in the special

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[38] *See* § 1466A(d)(5).
[39] U.S. CONST. art I, § 8, cls. 1, 17.
[40] U.S. CONST. art I, § 8, cl. 17.
[41] *Fort Leavenworth v. Lowe*, 114 U.S. 525, 532 (1885). *See also McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971) ("[u]pon cession by a state to the national government of jurisdiction over property to be used for military purposes, the Congress has exclusive jurisdiction legislate in respect thereto.").
[42] *Lowe*, 114 U.S. at 532.
[43] *Surplus Trading Co. v. Cook*, 281 U.S. 647, 456 (1930).

maritime and territorial jurisdiction of the United States or in any territory or possession of the United States."[44] The "special maritime and territorial jurisdiction of the United States," consists of:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, or other needful building.[45]

There is no real dispute whether the federal government can exercise "exclusive legislation" or jurisdiction over appellant's shared barracks room on Fort Bragg. Here, the Government charged appellant with possessing obscenity "at or near Fort Bragg, North Carolina, land owned by the United States Government."[46] The federal government purchased the specific area where appellant committed his offense, with the consent of the North Carolina legislature in 1918.[47] Altogether these facts indicate that appellant's shared barracks room falls within the federal government's exclusive jurisdiction as set forth in both Article I and 18 U.S.C. § 7.

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[44] 18 U.S.C. § 1466A(d)(5) (2003).
[45] 18 U.S.C. § 7 (2001); JA 71 (the military judge took judicial notice of 18 U.S.C. § 7).
[46] JA 12.
[47] JA 73-74.

Because obscenity is an unprotected class of speech, the federal government can generally prohibit its possession within the territorial jurisdiction of the United States just as it can prohibit its transport in interstate commerce. Although *Stanley v. Georgia* held that an individual has a right to possess obscenity inside the home,[48] there is no constitutional right to possess obscenity outside of the home and within the territorial jurisdiction of the United States. Notwithstanding the virtual nature of the images, §1466A is constitutional as applied to appellant because it only proscribes unprotected obscenity outside of the home.

III. This Court should decline to extend *Stanley v. Georgia* to areas outside of the home.

Appellant alleges that §1466A(b) is unconstitutional as applied because §1466A(d)(5) proscribes mere possession of obscene materials.[49] But unlike *Stanley*, appellant was not convicted for merely possessing obscenity inside his home. He was convicted for possessing virtual child pornography in a shared barracks room within the territorial jurisdiction of the United States.

In *Stanley v. Georgia*, the Supreme Court held that the First and Fourteenth Amendments prohibit making mere private

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[48] 394 U.S. 557, 565 (1969).
[49] Appellant's Brief (AB) at 11-12.

possession of obscene material within the home a crime.[50] However, appellant's reliance on *Stanley* is misplaced because its holding was especially narrow. *Stanley* only held that the power to regulate obscenity does not extend to mere possession in the privacy of the home.[51] Despite this limitation, the *Stanley* Court still explicitly recognized that the government still retains broad power to regulate obscenity.[52]

Significantly, the Supreme Court has consistently rejected expanding *Stanley* to areas outside of the home. In *Smith v. United States*, the Supreme Court summarized that "*Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home."[53] Likewise, there exists no right to send obscene materials through the mail.[54] There is also no right to import obscene materials, even for future private use:

> That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone

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[50] *Stanley*, 394 U.S. at 565.
[51] *Id.* at 568.
[52] *Id.*
[53] 431 U.S. 291, 307 (1977) (citation omitted).
[54] *United States v. Reidel*, 402 U.S. 351, 355-56 (1971).

> neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search . . . Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking . . . to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad whether for private use or public distribution.[55]

Again, in *United States v. 12 200-Ft. Reels of Super 8mm. Film*, the Court upheld another federal law prohibiting private importation of obscene materials solely for private use and possession.[56] The Court rejected the defendant's argument that *Stanley* created a correlative right to acquire obscene material for personal use.[57] Instead, the Court once more declined to extend the narrow holding of *Stanley* past the confines of the home:

> We are not disposed to extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene materials simply because it is imported for private use only . . . We have already indicated that the protected right to possess obscene materials in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. Nor is there any correlative right to transport obscene material in interstate commerce. It follows that *Stanley* does not permit one to go

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[55] *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971).
[56] 413 U.S. 123, 128-29 (1973).
[57] *Id.*

> abroad and bring such material into the country for private purposes. '*Stanley*'s emphasis was on the freedom of thought and mind in the privacy of the home.'[58]

The Court based much of its decision on the fact that the Constitution gives Congress broad powers to regulate commerce with foreign countries.[59]

Since being decided, *Stanley* has only applied to one place, the home. *Stanley* did not create any other correlative rights not already addressed in the original decision. Just as the Supreme Court rejected expanding *Stanley* to areas outside the confines of the home, this Court should likewise resist expanding its narrow holding to a shared barracks within the territorial jurisdiction of the United States.

IV. Appellant does not have a fundamental right to possess obscenity because a shared barracks room is not the equivalent to a home.

The seemingly most important question here is whether appellant's barracks room is equivalent to a home. For that reason, it is crucially important to determine exactly which constitutional right is being asserted. This is not a case about appellant's Fourth Amendment expectation of privacy in the context of search and seizure. It is already well-established that a Soldier in a shared barracks room has an expectation of

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[58] *Id.*

[59] *Id.* at 125-26 (citing U.S. CONST. art I, § 8, cl. 3).

privacy in the files kept on a personally owned computer.[60] But that is not what this case is about. Rather, this case is about whether appellant has a fundamental right of privacy to possess this particular type of obscenity in his shared barracks room. Since appellant's shared barracks room is not a home he cannot claim that he has a fundamental right to possess obscene virtual child pornography.

The right to possess obscenity in the home is grounded in the right of privacy in the home.[61] As the Supreme Court made clear in *Paris Adult Theater I v. Slaton,* the decision in *Stanley* was nothing more than "a reaffirmation that 'a man's home is his castle.'"[62] The Constitution does not explicitly mention a right of privacy, however the Supreme Court has declared the right of privacy to be a fundamental right guaranteed by the Constitution.[63] Only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the federal guarantee of the right of personal privacy.[64] The fundamental right of privacy includes

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[60] *United States v. Conklin*, 63 M.J. 333, 337 (C.A.A.F. 2006).
[61] *12-200 Foot Reels*, 413 U.S. 123, 126 (1973) (stating that *Stanley* depended not on any First Amendment right to possess obscenity but on the privacy in the home).
[62] 413 U.S. 49, 66 (1973).
[63] *Id.* at 65-66. *See Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (stating that the Court has recognized a right of personal privacy despite the term's absence in the Constitution).
[64] *Slaton*, 413 U.S. at 65 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Roe*, 410 U.S. at 152 (1973)).

activities such as marriage and marital privacy, procreation, child rearing and education, contraception, and abortion.[65] In contrast to the fundamental rights listed above, the right to possess obscenity is limited to one specific place - the home.[66]

Appellant has not established that he has a fundamental right to possess obscene virtual child pornography in his shared barracks room. *Stanley* was simply a reaffirmation that a person's home is his or her castle; the same cannot be said of a shared barracks room. This Court has unequivocally held that "the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home."[67] The D.C. Circuit has also recognized that a Soldier "cannot reasonably expect the Army barracks to be a sanctuary like his civilian home."[68] Although these cases address the Fourth Amendment's reasonable expectation of privacy they are nonetheless instructive to show that a Soldier's barracks is not his home (or castle).

Correspondingly, R.C.M. 302(e)(2) defines private dwellings as single family houses, duplexes, and apartments either on or

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[65] *Roe*, 410 U.S. at 152-53 (citations omitted).
[66] *Slaton,* 413 U.S. at 67 n.13 (stating that the protection afforded by *Stanley* is restricted to a place, the home).
[67] *United States v. McCarthy*, 38 M.J. 398, 403 (1993).
[68] *Comm. for GI Rights v. Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975).

off a military installation.[69] However, private dwelling does not include "living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places."[70] This too shows that appellant's shared barracks room is unlike a home or dwelling.

Appellant's shared barracks room lacks other archetypical hallmarks of the home. A Soldier does not have a titled property right to a barracks room. For this and other reasons, the Soldier cannot sell, rent out, improve, or otherwise transfer the property. Likewise, the Soldier has no right of quiet enjoyment that a lessee would have. The command may lawfully order the Soldier to abandon quarters or order the Soldier to move to new quarters.[71] In addition, a Soldier's barracks are always subject to military inspection to ensure military readiness.[72] Similar to *United States v. McCarthy*, appellant likely did not choose his barracks room or his roommate.[73] Typical inside most barracks, it is also likely that appellant was prohibited from having overnight guests or even cooking in his room.[74] In sum, the need for discipline means

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[69] R.C.M. 302(e)(2) (2008).
[70] *Id.*
[71] *McCarthy*, 38 M.J. at 403.
[72] MIL. R. EVID. (M.R.E.) 313.
[73] *McCarthy*, 38 M.J. at 403.
[74] *Id.*

that the barracks will always be subject to more military regulation and oversight than the home.

Altogether, appellant has failed to show that his barracks is in fact a home. Appellant may have a Fourth Amendment expectation of privacy in his computer files in a shared barracks room.[75] But it does not necessarily follow that he has a fundamental right of privacy to possess obscene virtual child pornography in that same place so as to preclude criminal prosecution. Simply put, appellant has not established that the threshold of the barracks provides the same sanctuary as the home.[76]

V. Under a plain reading, § 1466A does not require the government to prove that the minors depicted are actual children.

Akin to the dissent in *United States v. Whorley*,[77] appellant argues that the word "minor" in 18 U.S.C. § 1466A(b)(1) should be construed to mean "actual minor." However, § 1466(c) unambiguously states that "[i]t is not a required element of any offense under this section that the minor depicted actually exist."[78] Both the dissent in *Whorley* and appellant's argument ignore the plain meaning rule which courts are required to apply first.

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[75] *Conklin*, 63 M.J. at 337.
[76] *McCarthy*, 38 M.J. at 403.
[77] *Whorley*, 550 F.3d 326, 351-52 (4th Cir. 2008).
[78] § 1466(c).

When a statute's language is plain and not absurd, the sole function of the courts is to enforce it according to its terms.[79] If the language is clear and not unreasonable, the Court may not go outside the statute to give it a different meaning.[80] The courts are bound to give effect to the expressed intent of Congress and may not flout unmistakable legislative purpose expressed in a clear congressional command.[81] By the same token, the reviewing Court will look to the actual text of the statute for guidance, not by what it thinks the legislature said.[82] Finally, when the plain meaning rule applies, there is no reason to resort to the other rules of statutory construction.[83]

Section 1466A(c) plainly states that the government is not required to prove that the minor depicted actually exist. Given that the statute is specifically meant to address obscene visual depictions, drawings, cartoons, sculptures, or paintings, the

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[79] *United States v. Matthews*, 68 M.J. 29, 36 (C.A.A.F. 2009); *People to End Homelessness, Inc. v. Develco Singles Apartments Associates*, 339 F.3d 1, 5 (1st Cir. 2003).

[80] *See United States v. Graham*, 16 M.J. 460, 462 (C.M.A. 1983)(stating that "[i]t is elemental that '[i]f the words used in the statute convey a clear and definite meaning, a court has no right to look for or to impose a different meaning.'") (citation omitted).

[81] *United States v. Henning*, 344 U.S. 66, 76 (1954).

[82] *Mission Critical Solutions, v. United States*, 91 Fed. Cl. 386, 395 (Fed. Cl. 2010) (quoting Norman J. Singer & J.D. Shambie Singer, STATUTES & STATUTORY CONSTRUCTION § 46:3, at 165-69 (7th. ed. 2007).

[83] *United States v. Ware*, 1 M.J. 282, 285 (C.M.A. 1976); *United States v. Wayerski*, 624 F.3d 1342, 1347 (11th Cir. 2010) (noting that when the plain text of the statute sets forth clearly perceived boundaries, the court's inquiry is ended).

plain reading of §1466(c) does not lead to an absurd or unreasonable result. The dissenting judge in *Whorley* reached a different interpretation of what Congress intended "minor" to mean only after ignoring the plain reading of § 1466A(c) and incorporating solitary definition from a wholly separate statute.[84] When the plain reading of a statute does not lead to an absurd result, a reviewing court should be precluded from giving terms new meanings. This is especially so if the interpretation is directly contrary to the text and directive of the statute. It is axiomatic that the text of the statute itself is the best evidence of the Congress's intent or will.[85] Hence, this Court should not go out of its way to construe the term "minors" in a way that is directly contrary to Congress's express words.

IV. Appellant's possession of virtual child pornography is still service-discrediting under clause 2, Article 134.

Even if the § 1466A is deemed unconstitutional as applied, clear precedent permits this court to affirm appellant's conviction under clause 2, Article 134.[86] Military law does not

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[84] *Whorley*, 550 F.3d at 351-52.

[85] *Mission Critical Solutions,* 91 Fed. Cl. at 395 (quoting 2A Norman J. Singer & J.D. Shambie Singer, Statutes & Statutory Construction § 46:3, at 165-69 (7th. Ed. 2007).

[86] *See United States v. Mason*, 60 M.J. 15, 20 (2004); *United States v. O'Connor,* 58 M.J. 450, 454 (C.A.A.F. 2003) ("We have recognized in the past that an improvident plea to a CPPA-based clause 3 offense under Article 134 may be upheld as a provident

distinguish between what is virtual or real when examining the service-discrediting nature of images depicting children engaged in sexually explicit conduct.[87] The absence of a clause 3 element would not suddenly make appellant's possession of virtual child pornography constitutionally protected.

While mere possession of virtual child pornography in the home might be allowed for a civilian, this does not mean it is entirely protected under military law.[88] In *United States v. Mason,* CAAF unequivocally held that virtual child pornography offenses could be charged as conduct prejudicial to good order and discipline or service-discrediting without violating the constitutional rights of servicemembers.[89] The *Mason* Court, concluded that the limited constitutional protections afforded to virtual child pornography are of no consequence when deciding whether to affirm child pornography cases under clauses 1 or 2.[90] Similarly, *United States v. Forney* held that possession of

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plea to a lesser-included offense under clause 2 of Article 134."); *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) ("[I]n a contested case, a reviewing court must consider whether or not the prosecution proceeded on the premise or theory that the conduct alleged under clause 3 was also prejudicial to good order or service discrediting in order to affirm under clauses 1 or 2 in the event the clause 3 theory is invalidated.").

[87] *See Mason*, 60 M.J. at 20.

[88] *See United States v. Forney*, 67 M.J. 271, 275 (noting that servicemembers are not excluded from the constitutional protections but the different character of the military community necessitates a different application of those protections).

[89] *Mason*, 60 M.J. at 20.

[90] *See id.* at 19-20.

virtual child pornography may constitute conduct unbecoming an officer under Article 133 regardless of any constitutional rights to possess such material.[91] CAAF echoed this principle again in *United States v. Brisbane*, when it held that possession of either actual or virtual child pornography images is equally service-discrediting.[92]

Recently in *United States v. Barberi*, this Court stated that under appropriate circumstances conduct that is constitutionally protected in civilian society can nonetheless bring discredit upon the armed forces.[93] In other words, conduct that is service discrediting can be a distinct category of unprotected speech. Accordingly, it is the potential impact upon the esteem of the armed forces by which the criminality of conduct under clause 2 is measured.[94]

The overall evidence and circumstances surrounding appellant's conduct show that his possession of virtual child pornography tended to bring the service into disrepute. The images that appellant possessed consists of realistic computer generated animations of minors engaged in sexually explicit

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[91] *Forney*, 67 M.J. 271, 274-75 (C.A.A.F. 2009).
[92] *Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006). *See also United States v. Roderick*, 62 M.J. 425, 428 (C.A.A.F. 2006) (noting that possession of virtual child pornographic images can be service-discrediting or prejudicial to good order and discipline).
[93] *Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012).
[94] *See Mason* 60 M.J. at 20.

conduct.[95] These computer generated animations are more realistic than traditional cartoons and the characters depicted closely resemble real children. Many of the images are intended to be viewed as a series, not unlike a comic book or illustrated novel, and portray different stages of sexual exploitation. Both the images and spoken captions clearly indicate that they are intended to elicit a sexual response. These images are not available in the open market. Finally, almost all of the images depict either adult-on-child or child-on-child, vaginal intercourse, oral and anal sodomy, and incest.

Under these facts and circumstances, any reasonable trier of fact could have found that appellant's conduct tended to bring discredit upon the service even if that conduct would have been protected in a purely civilian context.[96] Servicemembers do not have an absolute right to possess obscene materials which are separately deemed to be of a nature to bring discredit upon the armed forces. In this case, the evidence was sufficient to show that appellant's possession of this particular type of obscenity, in a shared barracks room on a military post, would have tended to bring discredit upon the armed forces had the public known of it.[97] But most importantly, under military law

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[95] JA 323 (and corresponding sealed exhibit).
[96] *See Brisbane*, 63 M.J. at 116.
[97] *Cf. United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

the nature of appellant's virtual child pornography images are equally service-discrediting as actual child pornography.[98] Both sets of images depict minors being sexually exploited. In the end, appellant cannot claim that the images were constitutionally protected under clause 2, Article 134.

[98] *See Mason*, 60 M.J. at 20.

Conclusion

Wherefore, the Government respectfully requests this Honorable Court affirm the decision of the Army Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on October 9th 2012 and contemporaneously served electronically on military appellate defense counsel, Captain James Curtin.

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