9 July 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) LAURENCE H. FINCH, USAF, *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 13-0353/AF USCA Dkt. No. 13-5007/AF Crim. App. Dkt. ACM 38081

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUES PRESENTED

I.

WHERE THE ARTICLE 134 CHILD PORNOGRAPHY SPECIFICATIONS OF WHICH APPELLANT WAS CONVICTED DID NOT ALLEGE THAT THE IMAGES DEPICTED ACTUAL MINORS AND WHERE THE MILITARY JUDGE ADVISED APPELLANT DURING THE PROVIDENCY INQUIRY THAT "THERE IS NO REQUIREMENT THAT THE IMAGES IN THIS CASE INCLUDE ACTUAL IMAGES OF MINORS," IS THE MAXIMUM AUTHORIZED CONFINEMENT FOR EACH SPECIFICATION LIMITED TO FOUR MONTHS?

II.

IF THE COURT FINDS THAT THE SPECIFICATIONS SUFFICIENTLY ALLEGED THAT THE VISUAL DEPICTIONS WERE OF ACTUAL MINORS BUT THAT THE MILITARY JUDGE'S DEFINITIONS WERE INCONSISTENT WITH THE ALLEGED SPECIFICATIONS, WHAT IS THE APPROPRIATE REMEDY, IF ANY, TO BE GIVEN?

[1] Pursuant to this Court's 17 June 2013 order, this consolidated brief includes the United States' position on the granted issue as well as the certified issue.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under both Article 67(a)(2) and Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(2) and § 867(a)(3) (2008).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF THE FACTS

In November 2008, agents from Immigration and Customs Enforcement ("ICE") received information from the German National Police that a person using a computer IP address in the Shreveport local area had been downloading and distributing images of child pornography. (J.A. 325.) Further investigation revealed that Appellant was that individual. (J.A. at 333.) Based on this investigation, ICE obtained a search warrant to seize Appellant's computer media. (J.A. at 318-24.) Initial analysis of the media revealed thousands of images of child pornography. (J.A. at 333.) A comprehensive analysis of the media revealed over 170,000 images of suspected child pornography. (Id.)

On 18 December 2008, ICE interviewed Appellant, and Appellant admitted to downloading and distributing child pornography using file sharing networks. (Id.)

On 21 June 2011, the charge and specifications at issue in this case were preferred against Appellant. (J.A. at 14.) On 8 August 2011, an Article 32 investigation was conducted into the charge and specifications. (J.A. at 349.) On 30 August 2011, the charge and specifications were referred to trial by general court-martial. (J.A. at 15.)

Appellant's recitation of the remaining facts is accepted with two exceptions. First, Appellant's characterization of the two specifications as "novel" is rejected. Unfortunately, Appellant's abhorrent crimes are so prevalent as to justify the creation of a listed Article 134 offense for the prosecution of child pornography possession and distribution. *See* Manual for Courts-Martial, United States part IV, para. 68.b. (2012 ed.) Second, Appellant's assertion that the military judge advised Appellant that whether the images at issue were of actual children were "irrelevant" is incorrect. (App. Br. at 4.) The military judge did not advise Appellant in that way. (J.A. at 116.)

Additional facts necessary to the disposition of the case are set forth in the argument below.

SUMMARY OF THE ARGUMENT

This Court's precedent makes clear that it is the alleged specification that determines the maximum punishment. As this Court has already recognized in United States v. Leonard, 64

M.J. 381 (C.A.A.F. 2007), the alleged specifications, which are substantially the same as the one involved in Leonard, are directly analogous to a federal statute and therefore, the military judge's calculation of the maximum punishment in this case was correct.

Appellant's assertion that the specifications which alleged the criminal images were of "a minor" were not directly analogous to a federal statute because they did not allege "an actual minor" is without merit and contrary to this Court's precedent. If this Court determines that the specifications sufficiently allege that the visual depictions were of actual minors, but that the military judge's definitions during the providency inquiry were inconsistent with the alleged specifications, the Court should review the providency inquiry and the record in its entirety to determine whether there is a substantial basis in law or fact for questioning Appellant's guilty pleas. Doing so will conclusively demonstrate that this experienced, dedicated, and knowledgeable collector of child pornography affirmatively searched out, received, and possessed thousands of images of actual minors engaged in disturbing sexual acts. Other than the military judge's singular reference to virtual images, this matter was never an issue in this investigation or trial. This case simply was not about the prosecution of virtual images. The specifications sufficiently

alleged actual minors, and Appellant providently pled to the alleged specifications.

ARGUMENT

I.

THE ALLEGED SPECIFICATIONS WERE DIRECTLY ANALOGOUS TO A FEDERAL STATUTE AND THEREFORE THE MILITARY JUDGE'S CALCULATION OF THE MAXIMUM PUNISHMENT WAS CORRECT.

Standard of Review

The maximum punishment authorized for an offense is question of law reviewed de novo. United States v. Beaty, 70 M.J. 39, 41 (C.A.A.F. 2011).

Law and Analysis

"An offense not listed in Part IV [of the Manual for Courts-Martial] and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service." R.C.M. 1003(c)(1)(B)(2). For a specification to be "closely related" to an offense punishable as authorized by the United States Code, the two offenses must be "essentially the same." Leonard, 64 M.J. at 384. In other words, the specification must allege every element in the federal statute, not including the jurisdictional element. Id.; Beaty, 70 M.J. at 42. This Court has made clear that it is "well settled" that it is the language of the alleged specification itself that governs the maximum

punishment. Id. at 44 fn8 *citing* U.S. Const. Amend. V; United States v. Hemingway, 36 M.J. 349, 352 (C.M.A. 1993).

The alleged specifications in this case are not novel. In fact, this Court has reviewed the issue of maximum punishment with regards to a substantially identical specification in Leonard. 64 M.J. at 382. In doing so, this Court held that a specification, alleging wrongful and knowing receipt of "visual depictions of minors engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces" was directly analogous to a federal statute. [2] Id. at 384.

The specifications in this case are substantially the same as the one involved in Leonard. The specifications allege

[2] Specifically, the specification was directly analogous to 18 U.S.C. § 2252(a)(2). The specification in Leonard and the two specifications at issue here are also directly analogous to 18 U.S.C. § 2252A(a)(2). This statute criminalizes the knowing receipt and distribution of child pornography. "Child pornography" is defined in 18 U.S.C. 2256 as,

> any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaged in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

However, it is unnecessary to address the applicability of 18 U.S.C. § 2252A as this Court has already resolved this matter by finding the specification in Leonard, which is substantially the same as the specifications in this case, is directly analogous to 18 U.S.C. § 2252(a)(2).

knowing and wrongful possession and distribution of "visual depictions of a minor engaging in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces." (J.A. at 16.) Since it is "well settled" that the alleged specification governs the maximum punishment as this Court held in Beaty, and since the specification alleged in Leonard, which substantially match those at issue here, is directly analogous to a federal statute, there is no question that a determination that the maximum punishment is equal to that directly analogous federal statute is correct. Application of this Court's prior precedent mandates this inescapable conclusion. Thus, the military judge's advisement that the maximum punishment in this case included a thirty year confinement term and a dishonorable discharge was correct. (J.A. at 140.)

Appellant argues that the alleged specifications did not sufficiently allege "actual minors" and therefore there is no directly analogous federal statute. (App. Br. at 12.) This argument lacks merit. Not only did this Court expressly hold in Leonard that a substantially identical statute was directly analogous to a federal statute, but also this Court recognized that the term "minor" in an alleged specification means an actual person. Beaty, 70 M.J. at 43. The implication that in

order to meet the directly analogous standard, a specification for this offense must allege the conduct involves "an actual minor" or taken to the extreme, "a no-kidding, real, living, breathing, minor" is simply ridiculous. In 18 U.S.C. 2256(1), the term "minor" is defined as "any *person* under the age of eighteen years." (emphasis added). This language is sufficient for an alleged specification to put an accused on notice that he/she is being prosecuted for actual minors both in the federal statute as well as the directly analogous specifications at issue here.

The alleged specifications determine the maximum punishment authorized. Here, the military judge, before accepting Appellant's guilty pleas, properly advised Appellant that he could be sentenced to confinement for 30 years, reduction to the grade of E-1, forfeit all pay and allowances and receive a dishonorable discharge. (J.A. at 140.) Appellant knowingly and voluntarily continued with his pleas to the alleged specifications. Application of this Court's precedent necessarily results in a conclusion that the military judge properly calculated the maximum punishment in this case, resolving the granted issue adversely to Appellant.

II.

THE MILITARY JUDGE'S SINGULAR REFERENCE TO VIRTUAL IMAGES DOES NOT RENDER APPELLANT'S GUILTY PLEAS IMPROVIDENT TO THE SPECIFICATIONS AS ALLEGED.

Standard of Review

A military judge's acceptance of an accused's guilty plea is reviewed for abuse of discretion. United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008).

Law and Analysis

As articulated above, the specifications sufficiently alleged that Appellant received, possessed, and distributed images involving actual minors. If this Court finds that the military judge's definitions were inconsistent with the alleged specifications, it is necessary to review the providency of Appellant's guilty pleas to determine what remedy, if any, is appropriate.

A military judge has a duty to obtain an adequate factual basis from an accused to support a guilty plea. United States v. Nance, 67 M.J. 362, 365 (C.A.A.F. 2009). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea--an area in which we afford significant deference." Id. This factual predicate is sufficiently established if the factual circumstances as revealed by the accused himself objectively support that plea.

United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980). A guilty plea acceptance will not be overturned unless there is a substantial basis in law and fact for questioning the guilty plea. United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991). The "mere possibility" of a conflict between the accused's plea and statements or other evidence in the record is not a sufficient basis to overturn the trial results. United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996); *see also* United States v. Jordan, 57 M.J. 236 (C.A.A.F. 2002).

A review of the providency inquiry and the record in its entirety[3], demonstrates that regardless of the military judge's singular reference to virtual minors, there is no substantial basis in law or fact for questioning Appellant's guilty pleas to the specifications that sufficiently alleged that Appellant received, possessed, and distributed images involving actual minors. After providing the elements and definitions, the military judge asked Appellant to explain, in his own words, why he thought he was guilty. Appellant responded,

> Sir, between July 1, 2006 and 18 December 2008, I knowingly received and possessed visual depictions of minors engaging in sexually explicit conduct. I received such

[3] It is the United States' position that this Court's holding, "[w]hen considering the adequacy of the plea, this Court considers *the entire record* to determine whether the dictates of Article 45, UCMJ, 10 U.S.C. § 845 (2000), Rule for Courts-Martial 910, and Care and its progeny have been met[,]" means exactly that. United States v. Barton, 60 M.J. 62, 64 (C.A.A.F. 2004)(emphasis added). Therefore, review of the entire record in this case is fully consistent with this Court's prior precedent.

> images by using peer-to-peer file sharing network. I searched for a variety things, to include child pornography. I would set my search parameters in the morning before leaving for work and I would let the file sharing program run all day while I was away from home. When I returned home at the end of the day, I would see what was downloaded and select from the files what I wanted to keep. I saw that images of minors engaged in sexually explicit conduct were downloaded and I knowingly kept them on my computer. I possessed these images wrongfully because I did not have a legal justification for having them.

(J.A. at 119-20.) Notably, Appellant, at his first opportunity to admit the facts of his crimes, did not state that he only searched for or received virtual images. Rather, he stated without qualification that he "saw that images ***of minors*** engaged in sexually explicit conduct were downloaded" and that he kept those images. (Id.)(emphasis added). These were his words just moments after the military judge defined the term "minor" as any ***person*** under the age of 18 years. (J.A. at 116.)(emphasis added).

With regards to the distribution specification, Appellant responded to the military judge's request for Appellant to again explain why he thought he was guilty by stating:

> Sir, between 1 July of 2006 and 18 December of 2008, I knowingly and wrongfully distributed visual depictions of minors engaged in sexually explicit conduct. I did so by using a peer-to-peer file sharing network. The default settings on the file sharing program is set to share files. I

> knew that the setting was set to share and I did not turn it off. The setting allowed other users of the file sharing program to access one folder on my computer, which contained visual depictions of minors engaging in sexually explicit conduct. I knew it was possible to be distributing visual depictions of minors engaging in sexually explicit conduct, because I knew the settings allowed for that.

(J.A. at 133.) Here again, Appellant had a blanket opportunity to use his own words and provide his own understanding of why he was guilty of the crimes he was charged with committing. Appellant stated without qualification that he "knowingly and wrongfully distributed visual depictions ***of minors*** engaged in sexually explicit conduct." (Id.)(emphasis added). He did not state that he only distributed virtual images, fake images, cartoons, or drawings. Rather, he clearly stated the images were "of minors." In fact, in his responses throughout the providency inquiry, he used the phrase "of minors" without qualification. (J.A. 119-39.) In light of Appellant's own statements and utter lack of any mention of virtual images, the inquiry as a whole shows that both the military judge and Appellant understood that Appellant was pleading guilty as charged to images involving a minor rather than images of only what appeared to be a minor. United States v. Finch, ACM 38101 (A.F. Ct. Crim. App. 25 January 2013)(unpub. op.);(J.A. at 4.)

The crux of Appellant's argument is that the providency inquiry did not establish that the images were of actual minors. The essence of this argument is that Appellant did not admit to receiving, possessing, and distributing images of actual minors but rather only admitted to receiving, possessing, and distributing what appeared to be minors. Appellant's own responses to the military judge's questions convincingly demonstrate that Appellant knowingly received, possessed, and distributed images of actual minors. First, Appellant told the military judge that he affirmatively searched out "child pornography." (J.A. at 116.) He did not say that he searched for "virtual child pornography" or "what appeared to be child pornography."

Second, Appellant entered search terms into the file sharing program that were "strictly to find child pornography." (J.A. at 123.) Appellant never stated that he was only interested in virtual child pornography or that he ever only received, possessed, or distributed only virtual child pornography. Rather, he consistently characterized the images in his own words as those "of minors" without qualification. (J.A. 119-39.)

Third, when presented the opportunity to minimize his conduct and assert that the minors involved were only virtual vice actual, Appellant quickly declined to do so. During the

inquiry, the military judge asked Appellant why he believed the individuals in the images were under the age of 18. Appellant began to say, "Sir, they appeared- -" but stopped himself and restarted, saying, "their bodies were not developed." (J.A. at 126.) When asked the same question by the military judge regarding the distribution specification, Appellant did not even start with "they appeared." Appellant distinctly stated, "Sir, the females were not developed in their breast and pubic areas. The males were not developed in muscle structures or in their pubic areas." (J.A. at 137.) Viewing these statements in context clearly shows that Appellant was talking about actual minors, not virtual minors.

In an attempt to support his argument, Appellant points to the military judge's singular reference to virtual minors. (J.A. at 116.) Fundamentally, what the military judge instructed in this regard was not erroneous[4], but was not consistent with the specifications as alleged. As discussed above, the specifications alleged "a minor," not "a virtual minor," or even "what appeared to be a minor." The express language of the charged offenses placed Appellant squarely on notice that he was being charged with the criminal conduct of

[4] This is why Appellant does not challenge the providency of the guilty pleas but argues that he only pled to "what appears to be minors." This argument (and his corresponding request for unwarranted relief) fails however, because that is not what he was charged with committing. So the pivotal question is whether he pled providently to the charged offenses as alleged, not as he wished they were alleged.

receiving, possessing, and distributing this material that included sexually explicit conduct of "a minor," meaning a person, not a virtual person. Yet, because the military judge's instruction was not consistent with the alleged specifications, the question presented is whether that rendered Appellant's guilty pleas to the alleged specifications improvident. Under the circumstances of this case, it does not.

"For a guilty plea to be provident, the accused must be convinced of, and be able to describe, all of the facts necessary to establish guilt." United States v. O'Connor, 58 M.J. 450, 453 (C.A.A.F. 2003). In other words, a factual predicate must be established. As this Court made clear many years ago, a factual predicate for a guilty plea is sufficiently established if the factual circumstances ***as revealed by the accused himself*** objectively support that plea. Davenport, 9 M.J. at 367. For all the reasons mentioned above, Appellant's own statements demonstrated that he understood the nature of his offense and his responses firmly established that he sought out, received, possessed, and distributed images involving actual minors. Looking at Appellant's own words, a factual predicate was obtained and the military judge did not abuse his discretion when he accepted Appellant's guilty pleas to the charged offenses.

If this Court finds that there is a substantial basis in law or fact for questioning Appellant's guilty pleas to the charged offenses, the Court has multiple potential remedies. Appellant argues that the Court should affirm the guilty pleas, but limit the maximum punishment to Beaty-like offenses. This unwarranted resolution is the most inappropriate remedy conceivable. It is important to recognize that the specifications alleged are not analogous to those alleged in Beaty. The language "what appears to be" is not in the specifications. Thus, either Appellant pled providently to the alleged specifications or he did not. If he did not, the Court can decide whether he pled providently to a lesser offense and affirm that conviction. *See e.g.* United States v. Augustine, 53 M.J. 95 (C.A.A.F. 2000). If he did not providently plea to any lesser offense, the Court should reverse the conviction and send the case back for a rehearing on findings and, if necessary, sentence. *See e.g.* O'Connor, 58 M.J. at 455.

Regarding the Court's potential remedy of affirming a lesser offense, the Court can affirm the lesser offenses of an attempted receiving and possessing of these materials as well as the attempted distribution of these materials based upon Appellant's statements made to the military judge. Appellant stated that he entered search terms looking for child pornography, and that he received, possessed and distributed

child pornography. (J.A. at 119-20.) Even if the Court is not convinced that he admitted to receiving, possessing, and distributing images of actual minors, there is absolutely no question that Appellant's statements established a factual predicate for an attempt to do so. *See* United States v. King, 71 M.J. 50 (C.A.A.F. 13 March 2012)(illustrative of the Court's power to affirm, at a minimum, an attempt conviction under Article 80, UCMJ where the evidence is legally sufficient to do so). Should this Court do so, Appellant's maximum sentence would include a maximum of 20 years of confinement, not four months. Manual for Courts-Martial, United States part IV, para. 4.e. (2008 ed.) Importantly, the United States urges this Court, should the Court take this course of action, to make it clear in the decretal paragraph that the United States is permitted to prove up the completed act (the higher offense) as alleged in the charged offenses.[5]

Should the Court find that Appellant's guilty pleas to the charged offenses were not provident and that the Court cannot affirm attempt convictions, the Court should overturn the convictions and send the case back for a rehearing on findings

[5] The evidence in this case, which included a valid search and seizure of Appellant's computer media as well as a knowing and voluntary confession to the alleged offenses, is extraordinarily strong. (J.A. at 146-285, 325, 333.) This evidence also includes images of multiple known victims on Appellant's media, including his own niece. (J.A. at 173, J.A. at 333.) The United States has always had the intention of ensuring this Appellant's criminal record and sentence accurately reflects the uniquely extensive nature of his child pornography offenses.

and sentence. Appellant's requested windfall of simply limiting the maximum sentence to that of an uncharged Beaty-like offense is unjustified and inappropriate. The charge and specifications in this case properly alleged that Appellant received, possessed, and distributed images involving minors, not virtual minors or "what appear to be" minors. Either Appellant pled providently to the alleged specifications or he did not. If he did, as the Air Force Court of Criminal Appeals has determined, then Appellant's convictions and sentence should remain undisturbed. If he did not, this Court should affirm attempts or altogether overturn the guilty pleas and send this case back to trial.

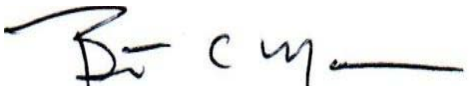
Evaluating Appellant's own statements though, there is but one inevitable conclusion, that Appellant never minimized his conduct by limiting his answers to "virtual minors." Instead, he consistently and unequivocally admitted to receiving, possessing and distributing sexually explicit images of minors. The military judge's singular reference to virtual minors did not derail Appellant's understanding of his criminal conduct.[6] Nor did this reference undermine Appellant's clear statements that he received, possessed, and distributed images "of minors."

[6] *See* United States v. Martens, 59 M.J. 501 (A.F. Ct. Crim. App. 2001) *aff'd* 62 M.J. 369 (C.A.A.F. 2005) (affirming guilty plea to child pornography specifications where the military judge utilized the definition that included "what appears to be" because Martens admitted the images depicted individuals under 18 years of age illustrating that he believed the images were of real children).

Thus, the military judge did not abuse his discretion in finding a factual predicate had been obtained and in accepting Appellant's knowing and voluntary guilty pleas

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.



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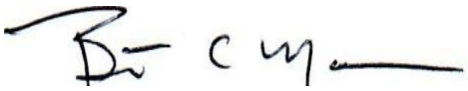
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 9 July 2013.



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