8 August 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee/Cross Appellant,*	)	CONSOLIDATED ANSWER AND REPLY BRIEF ON BEHALF OF APPELLANT & CROSS-APPELLEE
v.	)	Crim. App. No. 38081
	)	USCA Dkt. No. 13-0353/AF
Laurence H. Finch Technical Sergeant (E-6) United States Air Force, *Appellant/Cross-Appellee.*	)	USCA Dkt. No. 13-5007/AF

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

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure and this Honorable Court's Docketing Notice of 17 June 2013, files this consolidated answer and reply to the United States' final brief.

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 PROVIDENCE 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?

The alleged specifications were not directly analogous to a federal statute, neither as written nor as explained by the

military judge. Therefore, the military judge's calculation of the maximum punishment was incorrect.

A. *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007), and its use of 18 U.S.C. § 2252A(a)(2) to determine the maximum sentence, is not controlling on this case.

The Government's reliance on *Leonard* as the basis for the automatic importation of 18 U.S.C. § 2252A(a)(2) is mislaid. *See* Appellee's Final Brief at 6-7.

This case hinges on whether Appellant was charged with, properly instructed on, and providently pled to offenses involving "actual minors." *See United States v. Nickaboine*, 3 C.M.A. 152, 155, 11 C.M.R. 152, 155 (1953). In *Leonard*, the matter of "actual" minors was not at issue or in dispute: "During the providence inquiry, Appellant admitted that he wrongfully and knowingly received from the Internet, and downloaded onto his home computer . . . , visual depictions of **actual minors** engaging in sexually explicit conduct." *Leonard*, 64 M.J. at 382 (emphasis added). The issue at the crux of this case was not present or decided in *Leonard*, so it is not dispositive as asserted by the Government.

B. 18 U.S.C. § 2252A(a)(2) is not a directly analogous federal statute to the conduct alleged, instructed on, and pled to in this case.

Both the Air Force Court of Criminal Appeals and the Government cite 18 U.S.C. § 2252A(a)(2) as an analogous federal statute for specification in this case. Appellant concedes that

the printed text of this statute does not contain the word "actual." However, this does not make such a statute directly analogous to the conduct (as charged or as defined in the guilty plea inquiry) absent this word.

For § 2252A to be valid as a federal statute, it must be read consistent with the First Amendment, U.S. CONST. amend I, and *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 256 (2002). These require a reading of the federal statute to include depictions of actual minors. *See United States v. Beaty*, 70 M.J. 39, 44 (C.A.A.F. 2011) ("the Supreme Court in *Ashcroft* specifically held that § 2252A was unconstitutionally overbroad to the extent it prohibited the possession of what 'appears to be,' rather than actual, child pornography.").[1]

The Government asserts, "this Court recognized that the term 'minor' in an alleged specification means an actual person. Beaty, 70 M.J. at 43." Appellee's Final Brief at 7. This is inaccurate. The cited discussion by this Court affirms that the term "minor" in the *federal statutes* (not a military specification) must mean "actual." *Beaty*, 70 M.J. at 43-44. However, this case was not tried in federal district court; instead, it involved Article 134, UCMJ, under which images of

[1] Further, this Court noted that one of the key terms of § 2252A--the "indistinguishable from" language--effectively imports the "actual" requirement. *Beaty*, 70 M.J. at 40-41 n2 ("A depiction is not 'indistinguishable' unless 'an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct." 18 U.S.C. § 2256(11) (2006). Moreover,

minors engaging in sexually explicit conduct--regardless of whether they are actual, fictional, morphed, or otherwise fabricated or altered--is an offense. *See Beaty,* 70 M.J. at 45. In a specification under Article 134, UCMJ, the minors must be charged, instructed, and found to be "actual" in order to authorize the § 2252A punishments. Possession and distribution of images beyond actual minors is a uniquely military offense, properly charged under Article 134, UCMJ; however, the maximum punishment, per offense, is four months of confinement, reduction to E-1, and forfeiture of two-thirds pay per month for four months. *Id*.

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?

Even if this Court finds that the specification must be read to include only "actual" minors, it is inappropriate to import the 18 U.S.C. § 2252A(a)(2) maximum punishment regime.

A. The proper maximum punishment is the issue in this case; the guilty plea to a violation of Article 134, UCMJ was provident.

The Government bases its argument for the certified issue on a false premise: that the plea could be improvident due to the assertion of the military judge that "[t]here is no requirement

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the term 'does not apply to depictions that are drawings, cartoons,

that the images in this case include actual images of minors." J.A. 116; Appellee's Final Brief at 9. As discussed above, however, Appellant providently pled guilty to a violation of Article 134, UCMJ. He committed certain acts, and admitted that they were prejudicial to good order and discipline and of a nature to discredit the service. *See* J.A. 127-29, 138. As in *Beaty*, this satisfies the requirements of a conviction under Article 134, UCMJ. 70 M.J. at 45.

The Government notes, "He did not state that he only distributed virtual images, fake images, cartoons, or drawings." Appellee's Final Brief at 12. This is irrelevant. The military judge instructed that it did not matter, and it does not; any of these things would violate Article 134, UCMJ (given Appellant's admission that such distribution prejudiced good order and discipline and was of a nature to discredit the service). *Beaty*, 70 M.J. at 45.

B. The Government must charge, instruct, and find beyond a reasonable doubt any sentence-enhancing factors. It did not do so in Appellant's case, where the military judge instructed that the distinction between actual and virtual images does not matter under Article 134, UCMJ.

In order to rely on an aggravating or penalty-enhancing factor to trigger any greater punishment than that of a general disorder, the Government must prove that aggravator beyond a reasonable doubt. *See Alleyne v. United States*, __ U.S. __, 133

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sculptures, or paintings depicting minors or adults.'").

S.Ct. 2151, 2160 (2013). The Supreme Court recently ruled that "[c]onsistent with common-law and early American practice, . . . any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id*. (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Further, the Supreme Court held "that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt." *Id*. (citing *Apprendi*, 530 U.S. at 484).

Despite this recent jurisprudence, the notion that an aggravating or sentence-enhancing matter must be properly charged, instructed on, and found beyond a reasonable doubt is not new to military jurisprudence. For example, this Court has observed that termination by "apprehension is not an element of the offense of desertion, but rather [is] in the nature of an aggravating circumstance." *United States v. Nickaboine*, 3 C.M.A. 152, 155, 11 C.M.R. 152, 155 (1953). But "to justify the imposition of the greater punishment provided in such a case," the fact of apprehension must "be (1) alleged in the specification, (2) covered by instructions, and (3) established as part of the Government's case beyond a reasonable doubt." *Id*.; *see also* R.C.M. 307 Drafters' Analysis, App. 21 at A21-22, MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM) (2012 ed.) ("facts that increase maximum authorized punishments must be alleged and proven beyond a reasonable doubt").

Even if this Court finds the specifications in question to be adequate, the record does not show an admission to images of "actual" minors, as required to import § 2252A's punishments. Such a fact was not found in this case--to the contrary, the military judge deemed the distinction irrelevant. J.A. 116. Therefore, the Government failed in both of the last two requirements of *Nickaboine* (instruction and finding beyond a reasonable doubt); this is a conjunctive, not disjunctive, list of requirements for the alteration of punishment. *See Nickaboine*, 11 C.M.R. at 155. To merely bootstrap the aggravator through an assertion that it was silently contained in the specifications is insufficient. As the Court noted in *Nickaboine*, the proof of the aggravator "must clearly be one of bare fact, unweighted by any sort of presumption." *Id*.

For example, larceny under Article 121, UCMJ has different maximum punishments depending on whether the stolen item is valued over or under $500. MCM, ¶ 46.e.(1) (2012 ed.). If a larceny charge failed to specify the value of the item stolen, it would fail the charging requirement for the aggravator; only the lower maximum sentence would be available. Similarly, even if theft of an item valued over $500 was properly charged, the aggravated version of the sentence would still be inappropriate if a military judge instructed the accused, "there is no requirement that the item be of a value greater than $500; theft of an item, whether worth more or less than $500, is an offense

under Article 121, UCMJ." Finally, even if the theft of an item over $500 was properly charged and properly instructed (with a value distinction maintained by the military judge), it still would not satisfy the aggravated sentence requirement if the accused never admitted that the item was of a value greater than $500. All three features must be present to enhance a maximum sentence.

Such an example was similarly contemplated in the plurality portion of Justice Thomas's opinion in *Alleyne*, 133 S.Ct. at 2159, and such an example is analogous to Appellant's case. The aggravation fails on all three fronts here. Even if Appellant was charged with possessing and distributing images of "actual" minors as asserted in the certified issue, the military judge never found him guilty of such--to the contrary, the military judge asserted, "[t]here is no requirement that the images in this case include actual images of minors;" and the images "whether actual or virtual" would satisfy Article 134, UCMJ. J.A. 116. This fails each of the second two *Nickaboine* criteria. The aggravating factor was not established.

WHEREFORE, this Honorable Court should affirm only so much of Appellant's sentence as provides for confinement for eight months, a bad-conduct discharge, and reduction to the lowest enlisted grade.

Respectfully submitted,

Matthew T. King, Major, USAF
CAAF Bar No. 32710
Appellate Defense Division
1500 W. Perimeter Rd., Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
matthew.king@pentagon.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on August 8, 2013.

Matthew T. King, Major, USAF
CAAF Bar No. 32710
Appellate Defense Division
1500 W. Perimeter Rd., Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
matthew.king@pentagon.af.mil

Counsel for Appellant