IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellee,<br><br>v.<br><br>Specialist (E-4)<br>**Jacob D. Moon,**<br>United States Army,<br>Appellant | ) | FINAL BRIEF ON BEHALF OF APPELLANT<br><br>Crim. App. Dkt. No. 20120112<br><br>USCA Dkt. No. 13-0536/AR |


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

## Issues Granted

I

WHETHER SPECIFICATION 2 OF THE ADDITIONAL CHARGE IS VOID FOR VAGUENESS BECAUSE APPELLANT WAS NOT GIVEN FAIR NOTICE THAT THE CHARGED CONDUCT OF POSSESSING "MULTIPLE IMAGES OF NUDE MINORS AND PERSONS APPEARING TO BE NUDE MINORS" WAS FORBIDDEN AND SUBJECT TO CRIMINAL ACTION.

II

WHETHER THERE IS A SUBSTANTIAL BASIS IN LAW TO QUESTION APPELLANT'S GUILTY PLEA TO SPECIFICATION 2 OF THE ADDITIONAL CHARGE, WHICH ALLEGES THAT APPELLANT POSSESSED "MULTIPLE IMAGES OF NUDE MINORS AND PERSONS APPEARING TO BE NUDE MINORS."

## Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over

this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

**Statement of the Case**

On January 31, and February 1, 2012, a military judge sitting as a general court-martial tried Specialist (SPC) Jacob D. Moon (appellant) at Fort Polk, Louisiana. The military judge convicted appellant, pursuant to his pleas, of possession of child pornography (two specifications) and possession of images of "nude minors and those appearing to be nude minors," in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for six months, and a bad-conduct discharge. The convening authority approved the adjudged sentence.

On March 29, 2013, the Army Court affirmed the findings and the sentence. (JA 1). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review. The Judge Advocate General of the Army designated the undersigned military counsel to represent appellant, who entered their appearance, and filed a Supplement to the Petition for Grant of Review under Rule 21. On July 10, 2013, this Honorable Court granted appellant's

petition for review. On December 23, 2013, this Honorable Court ordered final briefs on the granted issues.

**Statement of Facts**

In Specification 2 of the Additional Charge, the government charged appellant with:

> Knowingly possess[ing] multiple images of nude minors and persons appearing to be nude minors, which possession was to the prejudice of good order and discipline in the armed forces and was of a nature likely to bring discredit upon the armed forces.

(JA 2).

The military judge first discussed the elements of The Specification of The Charge and Specification 1 of The Additional Charge, charged as the possession of child pornography as defined by 18 U.S.C. 2256(8), images of minors engaged in sexually explicit conduct, to include the lascivious exhibition of the genitals or pubic area. (JA 15-20). The military judge listed factors he would consider when determining whether an exposure of the genitalia or pubic area was lascivious, to include whether the setting is sexually suggestive and whether the setting is intended to elicit a sexual response. (JA 23); *see United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

The military judge also defined "prejudicial to good order and discipline" and service discrediting. The military judge

noted that service discrediting conduct was conduct that tended to harm the reputation of the service while conduct prejudicial to good order and discipline caused a reasonably direct and obvious injury to good order and discipline. (JA 20).

During the providence inquiry into the possession of child pornography, appellant detailed that he obtained the images from a naturalist (nudist) website. (JA 24). The military judge responded "I noticed there are a lot of images that would appear to be from a naturalist community where people are playing games, apparently swimming on the beach and everyone is nude." (JA 84). Without making a distinction between child pornography and the images of nude minors charged separately in Specification 2 of The Additional Charge, the military judge asked appellant whether he knew it was wrong to possess "child porn." (JA 24-25). Appellant responded in the affirmative. Appellant further stated this conduct might affect good order and discipline in the military, was of a nature to bring discredit on the armed forces, and that a specific civilian, Ms. Schnoop, was shocked by appellant's conduct. (JA 26-27).

The military judge also addressed Specification 2 of The Additional Charge, stating that this offense involved "images of nude minors or those that appeared to be minors." (JA 20-21). The military judge defined nude as the "plain, ordinary meaning which is not being covered by clothing," and later, all parties

agreed that the definition "include[s] any minor not wearing clothes between his shoulders and knees." (JA 21, 35). Once again, the military judge defined "prejudicial to good order and discipline" and service discrediting and used the same definitions he provided for The Specification of The Charge and Specification 1 of The Additional Charge. (JA 21-23).

During the providence inquiry into Specification 2 of The Additional Charge, the military judge stated that "ordinarily the possession of images of nude minors or persons appearing to be nude minors is not criminalized under the federal code nor under the [UCMJ]." (JA 29). The military judge defined the nude minors specification as a "catchall" and as all other images that do not otherwise qualify as child pornography under the federal statute. (JA 36).

The military judge distinguished between images that are child pornography and those that are nude minors, but then asked appellant whether the nude minor images involved children performing sex acts or posed in a sexual manner. (JA 38-40). Appellant agreed. (JA 40). In continuing his inquiry into Specification 2 of The Additional Charge, the military judge also discussed sexual coyness and unnatural poses, factors to consider when determining whether an exhibition of genitalia is lascivious. (JA 42). Appellant agreed again. (JA 42). With regard to the second element, appellant admitted that possession

of images of nude minors might prejudice good order and discipline in the military and is of a nature to bring discredit upon the armed forces. (JA 44). Appellant did not directly state how his conduct impacted the military mission or whether it caused actual discredit to the military. The stipulation of fact also failed to provide this.

The military judge revisited the providence inquiry on Specification 2 of The Additional Charge again, and asked appellant whether he believed that possessing images of nude minors was criminal and not protected by the First Amendment to the Constitution. (JA 52-53). Appellant agreed. (JA 53).

The military judge issued specific findings on all of the images at issue. (JA 4). If an image did not meet the definition of child pornography, the military judge evaluated the image to see if it fell within the catchall definition of a nude minor. (JA 47). Many of the images the military judge determined were charged under Specification 2 of The Additional Charge featured nude children playing games, walking or dancing on the beach, or featured only the child's breasts or buttocks (See, e.g., Pros. Ex. 7/8, images 1, 6, 61, 206). Appellant never detailed that he understood which images in the military judge's specific findings qualified as images either of child pornography or nude minors.

## Summary of Argument

Due process requires fair notice that an act is forbidden and subject to criminal sanction. Specification 2 of The Additional Charge alleged possessing images of nude minors or those appearing to be nude minors. (JA 11). By charging appellant in this manner, the government placed appellant in a position where he was unaware that his act of possession was criminal. Federal law, military law, and relevant state law do not prohibit the possession of these types of images without sexually explicit conduct. Additionally, several federal circuit courts have noted this content to be legal, while this Court has stated this content is constitutionally protected. *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012); *United States* v. Vosburgh, 602 F.3d 512 (3rd Cir. 2010); *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006); *United States v.* Amirault, 173 F.3d 28, 35 (1st Cir. 1999). Specification 2 is therefore void for vagueness because appellant could not have known his conduct was criminal. Thus, the specification should be set aside.

Additionally, the military judge, during the providence inquiry failed to ensure appellant understood the difference between the images that constituted child pornography and those that were merely nude minors. Thus, there is a substantial basis to question appellant's plea to this specification.

Finally, the charged images do not depict children in sexually explicit or lascivious poses, the possession of which is clearly prohibited. Instead, they depict nude minors engaged in otherwise innocuous activities. Possessing this material is not prohibited by statute and is constitutionally protected. *Barberi*, 71 M.J. 127. This Court held in *United States v. Wilcox* that when proving the terminal elements of an offense that criminalizes constitutionally protected speech, the government must show a direct and palpable impact on the military mission. 66 M.J. 442 (C.A.A.F. 2008). The military judge here failed to elicit from appellant just how his conduct affected his unit or how his conduct was not constitutionally protected. *Cf. id.; United States v. Hartman*, 69 M.J 467, 468 (C.A.A.F. 2011). Therefore, his conviction for Specification 2 of The Additional Charge should be set aside.

## Argument

### I

**WHETHER SPECIFICATION 2 OF THE ADDITIONAL CHARGE IS VOID FOR VAGUENESS BECAUSE APPELLANT WAS NOT GIVEN FAIR NOTICE THAT THE CHARGED CONDUCT OF POSSESSING "MULTIPLE IMAGES OF NUDE MINORS AND PERSONS APPEARING TO BE NUDE MINORS" WAS FORBIDDEN AND SUBJECT TO CRIMINAL ACTION.**

### I. Standard of review

Whether a specification is void for vagueness is a question of law this Court reviews de novo. *United States v. Pierce*, 70

M.J. 391, 393 (C.A.A.F. 2011). In a case involving a potentially void specification due to vagueness, the sufficiency of the notice must be examined in light of the conduct with which the accused is charged. *Parker v. Levy*, 417 U.S. 733, 757 (1974). Simply pleading guilty to a specification does not waive the issue of vagueness because a vague specification fails to state an offense. *United States v. Boyett*, 42 M.J. 150, 152 (C.A.A.F. 1995); Rule for Courts-Martial [hereinafter R.C.M.] 907(b)(1)(B).

**II. Law**

Void for vagueness means that criminal responsibility should not attach when one cannot reasonably understand that his conduct is proscribed. *Parker*, 417 U.S. at 757. For an act to be forbidden and subject to criminal sanction, the accused must be given fair notice that his actions are contrary to law. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). Fair notice is viewed under a reasonableness standard. *United States v. Frazier*, 34 M.J. 194 (C.M.A. 1992). The way to determine if an accused should reasonably be aware of the criminality of his conduct is through other sources of law or through the history of the crime. *United States v. Warner*, __ M.J. __, slip op. at 8 (C.A.A.F. Dec. 6, 2013) (*citing Vaughan*, 58 M.J. at 31); *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998). The facts established in the record can help to determine if an

accused had proper notice of the criminality of his conduct. *Boyett*, 42 M.J. at 154; *United States v. Johnson*, 30 M.J. 53, 56 (C.M.A. 1990).

**III. Analysis**

Specification 2 of The Additional Charge should be set aside because it is vague. There is no relevant statute in the federal, state, or military system that proscribes the conduct charged. As such, appellant could not have had fair notice that possessing the charged content was illegal.

In *Bivins* and *Vaughan*, a plethora of information existed in the record to provide the appellants notice of their wrongful conduct. This Court, in *Bivins*, reviewed a bigamy charge declaring that the appellant received fair notice because there was information suggesting that bigamy was prohibited by law throughout this nation's history. 49 M.J. at 330. In *Vaughn*, this Court analyzed a charge of child neglect to determine if the specification was void for vagueness. Looking at various laws from the states and military regulations and customs, this Court held that there was fair notice because the criminalization of child neglect is prevalent throughout the body of law examined. 58 M.J. at 36.

*Boyett* and *Johnson* involved examining the record to show that the accused was aware of the criminal nature of his specific actions through personal knowledge. In *Boyett*, the

accused had notice of his criminality for fraternization because of training and two counselings that he had received. 42 M.J. at 154. Similarly, in *Johnson*, when charged with aggravated assault due to his transmission of HIV to another, this Court was satisfied that the specification stated a clear offense because medical personnel made the accused aware of the dangers of transmitting the virus. 30 M.J. at 56. Fair notice is thus determined on a case-by-case basis using a reasonableness standard to determine if the accused would know his conduct is illegal.

In *United States v. Warner*, this Court ruled that appellant did not have fair notice that the possession of captioned images of scantily clad minors was criminal. *Warner*, at 8. This Court noted that child pornography is a highly regulated area of criminal law, and Congress issued a specific definition of child pornography. *Id.* at 5. Further, this Court stated that none of the potential sources identified in *Vaughn* provided notice that the images at issue were criminal under Article 134. *Id.* at 6.

Here, appellant did not have fair notice that the images alleged in Specification 2 of The Additional Charge were criminal. Unlike *Vaughn* and *Bivins* described above, a review of relevant federal, military, and relevant state law does not reveal the criminalization of the possession of images of nude children outside what is commonly known as child pornography as

defined by 18 U.S.C. § 2256. At least three federal circuits have recognized child erotica as legal to possess. *Vosburgh*, 602 F.3d at 528; *Gourde*, 440 F.3d at 1070; *Amirault*, 173 F.3d at 35 (holding that mere "nakedness and . . . youth" are not enough to make a photo lascivious because the law avoided penalizing people for simply possessing pictures of naked children). The U.S. Supreme Court has also stated that depictions of nudity, without more, constitute protected expression. *United States v. Osbourne*, 495 U.S. 103, 111 (1990)(*citing New York v. Ferber*, 458 U.S. 747, 765 (1982)). Further, state statutes in Louisiana, the state in which Fort Polk exists, also do not criminalize the images at issue in this case. *See* La. Rev. Stat. Ann. § 14:81.1.

In *Gourde* and *Vosburgh*, the government intended to introduce child erotica against the defendants in their prosecution for possessing sexually explicit material. The trial judge in *Vosburgh* noted that the images of child erotica were constitutionally protected content, but stated they were admissible against a defendant charged with child pornography offenses to show an intent to commit the charged offense. 602 F.3d at 537. The court in *Gourde* recognized that images of child erotica are legal to possess. 440 F.3d at 1068, 1070. Likewise, the first circuit analyzed images using the *Dost* factors and determined that a minor simply standing naked was

not enough to meet the standard for sexually explicit conduct even though the image displayed genitals. *Amirault*, 173 F.3d at 35 (citing *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986)).[1]

Because appellant did not have fair notice that his conduct was proscribed, Specification 2 is void for vagueness. Seeing as the federal courts consider this content to be legal, and that this Court has found that related material is legal, appellant could not have been on notice that the charged conduct was illegal. The vagueness of Specification 2 stems from his lack of notice of the criminality of his actions. Child erotica is legal content as seen in *Vosburgh, Gourde,* and *Amirault* above. Thus, there is no way appellant should have known that this content was illegal to possess.

This is different from *Bivins* where there was enough information to show that bigamy was a crime. 49 M.J. at 330. In *Vaughan*, the history of a varied set of rules, to include 33 separate state statutes that prohibited the charged conduct, demonstrated the same. 58 M.J. at 36. Both cases, therefore, correctly indicated that the appellants had fair notice that

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[1] Consideration of the *Dost* factors is important to the analysis in this case because the military has adopted these factors to help determine whether images are child pornography. Thus, *Amirault's* examination of the image using the *Dost* factors to conclude that it is child erotica, and therefore legal content is appropriate and a persuasive manner of analysis because it is the same method used by the military courts.

their actions were criminal. However, contrary to *Bivens* and *Vaughan*, Specification 2 criminalizes what case law has deemed *legal content*. This weighs heavily in favor of deeming Specification 2 void for vagueness.

Furthermore, nothing in the record supports the fact that appellant was made aware through other means that his conduct was criminal. Unlike *Boyett* and *Johnson*, where the record established the accused's notice through counselings, training, or medical advice, here appellant did not have the benefit of any such notice. The specification itself is vague, and the record is devoid of information to show that he had notice that his conduct was criminal at the time he possessed the images.

Therefore, the conviction for Specification 2 of The Additional Charge should be set aside and sent back to The Judge Advocate General for sentence reassessment as the specification is void for vagueness.

## II

**WHETHER THERE IS A SUBSTANTIAL BASIS IN LAW TO QUESTION APPELLANT'S GUILTY PLEA TO SPECIFICATION 2 OF THE ADDITIONAL CHARGE, WHICH ALLEGES THAT APPELLANT POSSESSED "MULTIPLE IMAGES OF NUDE MINORS AND PERSONS APPEARING TO BE NUDE MINORS."**

## I. Insufficient Providence Inquiry

### A. Standard of Review

A military judge's acceptance of an accused's guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea." *Id.* at 322. A guilty plea will be set aside if the record of trial shows a substantial basis in law and fact for questioning the plea. *Id.*

### B. Guilty Plea

A providence inquiry must set forth, on the record, "the factual bases that establish that 'the acts . . . of the accused constitute the offense or offenses to which he is pleading guilty.'" *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009)(quoting *United States v. Care*, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969)). Therefore, a military judge must explain the elements of the offense. *United States v. Schell*, __ M.J. __, slip op. at 17 (C.A.A.F. July 8, 2013); *see United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003) (noting

that the accused must be convinced of and be able to describe all of the facts to establish guilt); *see also* R.C.M. 910(e). The military judge must also sufficiently provide definitions to ensure the appellant is on notice of what he is pleading guilty to. *Bullman*, 56 M.J. at 382.

If the appellant only admits the elements without discussing them in detail, such cursory legal conclusions cannot suffice to establish guilt. *O'Connor*, 58 M.J. at 453; *see also United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996) (holding that mere legal conclusions recited by an accused are insufficient to provide a factual basis supporting a plea). The totality of the inquiry must clarify the basis to support the appellant's actions, otherwise the plea cannot stand. *See United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (stating the record of trial must reflect not only that the military judge explained the elements, but also that the accused's acts constitute the offense to which he is pleading guilty).

When charged acts are constitutionally protected, the colloquy between the military judge and the accused must contain a discussion regarding the distinction between prohibited and constitutionally protected conduct. *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011); *see also Wilcox*, 66 M.J. 442 (requiring a direct connection between the crime and the

military mission when criminalizing constitutionally protected actions under Article 134, UCMJ).

**C. Analysis**

There is a substantial basis to question appellant's plea to Specification 2 of The Additional Charge because appellant confused images of nude minors with those that were charged as child pornography. While the military judge attempted to distinguish child pornography from the images of nude minors, he frequently oscillated back-and-forth between both. For instance, while conducting the providence inquiry into child pornography, the military judge discussed images of minors at a nudist colony that do not feature sexually explicit conduct. (JA 24).

Further, when the military judge inquired into the images of nude minors, he asked appellant whether some of the images featured children performing "sexual acts or posed in a sexual or promiscuous manner" and the lascivious exhibition of the genitalia. (JA 40-42). Appellant agreed. Further, the military judge made detailed written findings on which images qualified as child pornography and which qualified as images of nude minors, but the military judge never questioned appellant on whether appellant's understanding was consistent with these findings. *See Schell*, slip op. at 19 (reiterating that "the record [must] demonstrate that [appellant] understood how the

law related to the facts"). Thus, this Court should find appellant's plea to Specification 2 of The Additional Charge improvident and set aside the conviction.

Finally, as discussed below, these images are constitutionally protected material. As such, the military judge was required to discuss with appellant the distinction between permissible and prohibited conduct. *See Hartman*, 69 M.J. at 468-69 (stating that the constitutionality of the criminalized conduct needs to be discussed with appellant at a guilty plea). The appellant in *Hartman* answered questions about his conduct, sodomy, without discussing the framework established in *Lawrence v. Texas,* 539 U.S. 558 (2003) and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). *Id.* At the trial counsel's request, the military judge questioned the accused about issues related to *Lawrence* and *Marcum*, but failed to explain to appellant the significance of the questions. *Id.* Thus, Hartman did not understand the relationship between his act of sodomy and the Constitution. This Court overturned the findings and sentence because the plea was not provident.[2] *Id.*

Here the military judge's colloquy failed to elicit from appellant that appellant clearly understood the distinction

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[2] Once this discussion occurs, then the standard in *United States v. Wilcox* applies requiring an accused to explain how his conduct was a direct and palpable impact on the military mission. Without the *Hartman* discussion, the guilty plea is not provident and there is no need to conduct a *Wilcox* analysis.

between criminal and constitutionally permissible conduct. The military judge did express some concerns with the specification but concluded that the images of nude minors were not constitutionally protected. (JA 52-53). The military judge's actions did not meet the inadequate level of discussion in *Hartman*. In the absence of a dialogue helping the appellant understand the issue of criminality, the plea is not provident. *Id.* Thus, the totality of the inquiry for Specification 2 of The Additional Charge shows a lack of a basis to support the plea.

## II. First Amendment Violation

### A. Standard of Review

Although this Court reviews the sufficiency of a plea for an abuse of discretion, determining whether the conduct itself is protected by the First Amendment is reviewed de novo. *Wilcox*, 66 M.J. 442; *United States v. Young*, 64 M.J. 404 (C.A.A.F. 2007).

### B. Law

In *Ashcroft v. Free Speech Coalition*, the Supreme Court recognized the general principle that the First Amendment has certain limits and does not embrace obscenity and child pornography. 535 U.S. at 245. Other sexually suggestive content falling outside of this is constitutionally protected. *Id.*; *United States v. Barberi*, 71 M.J. 127, 130-31 (C.A.A.F.

2012). Depictions of sexual conduct not otherwise obscene are also constitutionally protected. *New York v. Ferber*, 458 U.S. 747, 765 (1982). The Supreme Court recognized certain categories of speech such as obscenity, child pornography, defamation and incitement as not protected by freedom of speech, and "speech that falls outside of these categories retains First Amendment protection." *Barberi*, 71 M.J. at 130.

Although the First Amendment permits the expression of ideas, even unpopular ones, the protection is less comprehensive in the military context. *Levy*, 417 U.S. at 758. When criminalizing First Amendment protected material, there must be a balance between the needs of the military and the right to speak. *United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972). If the content is not protected speech, or if all the elements under Article 134, UCMJ, are not met, then this balancing test is not necessary. *Wilcox*, 66 M.J. at 447.

Thus, when it is determined that the charged conduct is protected speech, criminalizing it under Article 134, UCMJ, requires proof of a direct and palpable connection between the content and the military mission or military environment. *Wilcox*, 66 M.J. at 448. This applies to both Clause 1 and Clause 2 offenses under Article 134, UCMJ.

Images that are not sexually explicit, such as child erotica, are not illegal and therefore are protected speech. *Barberi,* 71 M.J. at 130-31. Thus, the *Wilcox* standard regarding the terminal elements applies to Article 134, UCMJ, specifications criminalizing the possession of images not amounting to child pornography or obscenity.

**C. Analysis**

**1. The visual depictions of children in Specification 2 of The Additional Charge are protected by the First Amendment because they do not contain sexually explicit conduct and they are not obscene.**

The government charged appellant with the possession of material that is neither obscene under 18 U.S.C. § 1466A, nor sexually explicit as defined by 18 U.S.C. § 2256; therefore, these images are protected speech. *Barberi*, 71 M.J. at 130-31.

This Court, in *Barberi,* held that conduct that is not sexually explicit is constitutionally protected.[3] Although this Court acknowledged that per *Parker v. Levy*, constitutionally protected content can be prosecuted under Clause 1 and Clause 2 of Article 134, UCMJ, this case provided a guide as to what content is protected. *Id.* at 131 (citing *Levy*, 415 U.S. at 759

[3] The government charged three specifications, two on the possession of sexually explicit conduct of children and the other on the possession of nude minors or those appearing to be nude minors. (JA 2). By the very nature of the charging scheme, the government inherently concedes the content encompassed by Specification 2 of The Additional Charge is not explicit or lascivious.

(stating that speech that is protected in civilian society can still undermine the effectiveness of the command, and if it does, then it is not constitutionally protected)). The images in *Barberi* were of Barberi's twelve-year-old step-daughter in various stages of undress as she emerged from the shower with only a towel. The towel "barely and briefly" covered her pubic area, and she seemed to be posing. 71 M.J. at 134, 134 n.1 (Baker, C.J., dissenting). This Court held that this content was not "sexually explicit conduct" and therefore was constitutionally protected. *Id.* at 130-31 (majority opinion); *see also Ferber*, 458 U.S. at 765 n.18 (agreeing that nudity without more is protected expression).

Here, the images are also protected speech. The images appellant possessed in Specification 2 of The Additional Charge, like *Barberi*, do not depict the lascivious exhibition of genitalia, intercourse by children, or any other explicit conduct as defined by the military judge for Specification 1 of The Additional Charge or the Specification of The Charge. This Court stated in *Barberi* that these types images are not prohibited under the federal statute and constitutionally protected. *Id.* Just like those images where the child seemed to be posing partially nude, appellant's images depict the same content. Many children are nude, some are partially nude, but none of the images fall under the definition of sexually

explicit. *See id.* at 130. As those images were protected in *Barberi*, the images here too are constitutionally protected. 71 M.J. at 130-31.

In *Amirault*, the charged image involved a minor female completely naked. 173 F.3d at 35. When analyzing the image for lasciviousness, the court operated under a de novo standard to ensure that "the First Amendment ha[d] not been improperly infringed." *Id.* Thus, the court declared the image to not be lascivious and legal to possess. The circumstances in appellant's case are directly comparable.

Thus, as appellant's images are constitutionally protected, it is now a question of whether the images "undermine the effectiveness of the command" under clause 1 and clause 2 of Article 134, UCMJ. Since appellant did not establish this effect, the specification should be dismissed.

**2. The plea is insufficient because the appellant did not establish under clause 1 or 2 of Article 134, UCMJ, the direct and palpable impact his conduct had on the military mission.**

Although the military has restrictions on speech that do not apply to civilians, those restrictions are limited to speech that has a direct and palpable impact on the military mission. As the images in Specification 2 of The Additional Charge are constitutionally protected, the military judge was required to explain and inquire about the direct impact appellant's conduct

had on the military mission. *Wilcox*, 66 M.J. at 448; *see also Hartman*, 69 M.J. at 468. The military judge failed to do so in this case.

In *United States v. Wilcox*, this Court explicitly stated the requirement for a higher standard in proving the terminal elements when constitutionally protected content is at issue.[4] Wilcox posted extremist comments advocating racial intolerance on the internet. *Wilcox*, 66 M.J. at 444. This Court noted that these comments "while repugnant, are not criminal in the civilian world." *Id.* at 449. Thus, this Court held that these comments were protected by the First Amendment. *Id.* In order to criminalize protected speech, "there must be a 'reasonably direct and palpable' connection between the speech and the military mission." *Id.*

This case is exactly like *Wilcox* where appellant stated his conduct fell under Clause 1 and Clause 2 because people who viewed his racist comments *could* believe that the Army tolerated such speech and the public *could* develop a tarnished view of the Army. *Id.* at 445. This admission was not enough to show a

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[4] The military judge failed to comply with *Hartman* by not discussing with appellant the constitutionally protected status of the images charged in Specification 2 of The Additional Charge. In fact, the military judge found that the images were not constitutionally protected. This alone, as argued in Assignment of Error I, makes the plea improvident. However, the conviction should also be set aside because appellant failed to explain under *Wilcox* how his actions had a direct and palpable impact on the military mission.

direct and palpable effect because he did not say that his conduct caused the direct effect. *Id.* at 451-52. Appellant admitted that possession of images of nude minors might prejudice good order and discipline in the military and is of a nature to bring discredit upon the armed forces. (JA 44). There is no evidence of the *actual* palpable connection to the armed forces.

Appellant addressed only that his conduct *could* cause discredit instead of *actually* causing it. In cases involving constitutionally protected speech, establishing that the charged conduct *tends* to discredit the armed forces is insufficient to satisfy the clause 2 element of Article 134, UCMJ. "A direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense 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 member of the public . . . would find offensive." *Wilcox*, 66 M.J. at 448-49. By simply stating what *might* occur if the public discovered these actions, appellant failed to meet this *Wilcox* standard and was thereby not provident to Specification 2.

This Court has considered cases in the past that deal with the difference between protected and unprotected speech in an

Article 134, UCMJ, context. Although in appellant's case there is no issue between virtual and actual content, the same analysis in the below cases applies because these cases address the difference between protected and unprotected speech, which triggers the *Wilcox* analysis.

In *United States v. Mason,* a commissioned officer was charged with receiving and viewing pornographic images on his government computer. 60 M.J. 15, 20 (C.A.A.F. 2004). The fact that his conduct occurred at the office on his government computer proved that his conduct had a direct and palpable impact on the military mission. In light of these circumstances, the constitutional distinction between "actual" (unprotected) or "virtual" (protected) child pornography images was of no consequence in assessing the providence of Mason's plea. *Id.* Even if the images were in fact "virtual," according to *Mason* that would not have mattered because there was a direct and palpable impact on the military mission. *Id.*

This Court again visited the constitutional "actual" versus "virtual" issue in *United States v. Brisbane*, where this Court upheld an Article 134 conviction where the record was not clear if the child pornography was of actual or virtual children. 63 M.J. 106, 117 n.10 (C.A.A.F. 2006). In *Brisbane*, this Court assumed the images were virtual. *Id.* In upholding the conviction, the Court found that the appellant told his

neighbor, a noncommissioned officer [hereinafter NCO], that he had seven pictures of child pornography. *Id.* at 116. This alarmed the NCO to the point that he contacted law enforcement to determine if any of the pictures were of his children. *Id.* Because the NCO neighbor was alarmed enough to contact law enforcement, *Brisbane* held that "'any rational trier of fact' could have found beyond a reasonable doubt that Appellant's possession of the pictures in question was prejudicial to good order and discipline or service-discrediting." *Id.* at 116-17 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987)). Therefore, it did not matter whether the images were virtual or actual because the facts established a direct and palpable impact to the military mission.

As demonstrated in these cases, this Court is aware of the circumstances that meet the reasonably direct and palpable standard. Appellant was required to explain to the military judge why his conduct had a direct and palpable impact on the military mission because Specification 2 of The Additional Charge criminalized constitutionally protected speech. *See generally Wilcox,* 66 M.J. at 451 (cited in *United States v. Andersen,* 2010 WL 3938363, at *9 n.11 (Army Ct. Crim. App. Sept. 10, 2010)(mem. op.)(regarding criminalizing child erotica, the court stated "[w]e cannot blithely dispense with the significant

First Amendment and Due Process concerns that might arise . . . . [to include] what would constitute the offense and how would a service member be on notice of what conduct is prohibited?")) (JA 31). However, the military judge here did not elicit these details. (JA 23). The distinctions between actual and virtual child pornography in *Mason* and *Brisbane* created First Amendment concerns that apply here. Both cases involved a direct impact on the military mission; thus, it did not matter whether the images were actually protected because the terminal elements were proven at the higher standard for protected speech. *Brisbane*, 63 M.J. at 116-117; *Mason*, 60 M.J. at 20.

The images appellant possessed are protected. As such, a direct impact to the military is what appellant was required to discuss at his guilty plea. Since the military judge failed to elicit this from appellant, appellant's plea is insufficient to support the conviction and should be set aside.

**Conclusion**

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss Specification 2 of The Additional Charge and return to The Judge Advocate General for sentence reassessment.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Moon, Crim. App. Dkt. No. 20120112, Dkt. No. 13-0536/AR, was delivered to the Court and Government Appellate Division on February 6, 2014.

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