IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE ON SPECIFIED ISSUES
v.	)	
	)	**USCA Dkt. No. 13-0536/AR**
Specialist (E-4) **JACOB D. MOON** United States Army, Appellant	)	Crim. App. Dkt. No. 20120112

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Specified Issues:

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 OR FACT 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."

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

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

A military judge sitting as a general court-martial tried and 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.[1] The military judge sentenced appellant to confinement for six months, reduction to the grade of E-1, and a bad-conduct discharge.[2] The convening authority approved the sentence as adjudged.[3]

On March 29, 2013, the Army Court found that eleven of forty-six images in the Specification of the Charge were not child pornography, but affirmed the findings and sentence.[4] On July 10, 2013, this honorable court granted appellant's petition for review and specified two issues for review without briefing. On December 23, 2013, this honorable court ordered briefs to be filed.

Statement of Facts

Appellant was charged with three specifications of violating Article 134, UCMJ, under clause 1 and 2 theories of liability.[5] The Specification of the Charge and Specification 1 of the Additional Charge both alleged knowing and wrongful possession of "multiple images of child pornography, as defined by 18 U.S.C. § 2256(8)."[6] Specification 2 of the Additional Charge alleged knowing possession of "multiple images of nude

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[1] (JA at 14, 54). The military judge made special findings for each individual image charged. (JA at 4-8).
[2] (JA at 65).
[3] (JA at 66).
[4] (JA at 2).
[5] (JA at 9, 11).
[6] (JA at 9, 11).

minors and persons appearing to be nude minors."[7] The government referenced the ten-year maximum confinement provided at 18 U.S.C. § 2252A(b)(2) for each of the two "child pornography" specifications.[8] The "nude minors" specification was charged as a simple disorder and carried a maximum sentence to confinement of four months.[9]

During the plea colloquy, the military judge began his inquiry into Specification 2 of the Additional Charge by noting that it potentially covered conduct that "ordinarily . . . is not criminalized under the federal code nor is it criminalized under the Uniform Code of Military Justice in either a numerated [sic] offense or an explicit Article 134 offense."[10] He provided several examples of non-criminalized images like "bathing" photos and "artistic depictions."[11] Pressed by the military judge to provide a viable theory of criminality, the trial counsel explained that the specification was aimed at images focused on nude children where there was "no artistic depiction, or artistic value" and which were "used for sexual gratification purposes."[12]

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7 (JA at 11).
8 (JA at 45).
9 (JA at 45).
10 (JA at 29).
11 (JA at 30).
12 (JA at 30-31).

After discussion between the military judge and trial counsel regarding what kinds of "nudity" might be properly criminalized under the specification, the trial counsel defined "nude" as "completely nude . . . from knee to shoulders."[13] The military judge refined that definition further to mean "uncovered in the genital or pubic area" and "you can see the pubic area."[14] Defense counsel and appellant repeatedly acknowledged and agreed with the government's theory and definitions throughout the plea colloquy.[15] Appellant admitted that the specification as defined accurately described his conduct.[16]

As the providence inquiry continued, the military judge sought to clarify the distinction between "child pornography" under 18 U.S.C. § 2256 and "images of nude minors."[17] The trial counsel had previously differentiated the images of "nude minors" as those not otherwise covered by the definition of "child pornography" "based on an evaluation of the factors set forth in the statute [18 U.S.C. § 2256]."[18] Initially, the military judge attempted to explain the distinguishing feature of "nude minors" as:

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13 (JA at 31-35).
14 (JA at 32-33).
15 (JA at 31-33, 35-37).
16 (JA at 38).
17 (JA at 36-38).
18 (JA at 36).

> a little bit outside the definitions of child pornography, but still are images of children who are naked . . . In other words there must not be a lascivious display of their pubic area or something along those lines. You heard me express my concerns that there are legitimate reasons a person might possess a picture of a nude minor or there might be artistic depictions of nude minors.[19]

The military judge then asked appellant, "Do you believe these images that you had for [sic] outside of the boundaries?"[20] Realizing the explanation and question were awkwardly phrased, the military judge declared, "That was a long way of explaining it. Let's start again."[21]

Starting anew, the military judge asked appellant to describe "in your own words what was depicted in those images" charged as "nude minors."[22] Appellant described the images as depictions of "[p]ersons under the age of 18 posing nude" with "[u]derdeveloped breasts, hips, and no pubic hair."[23] The military judge asked, "Were the children in the images performing sexual acts or posed in a sexual or promiscuous manner?"[24] Appellant admitted that in "not all of the images but

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[19] (JA at 38-39).
[20] (JA at 39).
[21] (JA at 39).
[22] (JA at 39).
[23] (JA at 39).
[24] (JA at 40).

in many of them" that was true.[25] The military judge asked, "So you know what I'm talking about with regard to promiscuous or kind of coy or sexually inviting pose, would you agree with that?" and appellant said yes.[26] The military judge then restated the definition of "lascivious" provided earlier in the providence inquiry for "child pornography" possession:

> whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or inappropriate attire considering the child's age, and whether the child is partially clothed or nude, whether the depiction suggests sexual coyness or a willingness to engage in sexual activity and whether the depiction is intended or designed to elicit a sexual response in the viewer. Those are elements that you can consider that I am going to consider in determining whether this was an offense.[27]

The military judge asked if the images covered by the "nude minors" specification depicted "children posed in those kinds of poses" and appellant answered yes.[28] The military judge reminded appellant that the "setting of the position of the child" was one of the factors used to differentiate "child pornography" from "images of nude minors."[29] As an example, "a child leaning back on a bed with her legs spread could easily be concluded to

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25 (JA at 40).
26 (JA at 41).
27 (JA at 23, 41).
28 (JA at 41).
29 (JA at 42).

be designed to be appealing to somebody's sexual desires."[30] The military judge asked, "So if there are images in that nature there [under Specification 2 of the Additional Charge] you would agree that might fall more into the child pornography category?"[31] Appellant agreed.[32] Appellant also admitted that "many of these images were produced in such a way to excite sexual desires or lust" and "that is what it achieved in [appellant]."[33] The military judge then asked, "Did you have any authority to possess images of child pornography?"[34] Appellant said no and one question later, the military judge corrected himself by stating, "I'm sorry, I mentioned child pornography a minute ago; of course I meant nude children or minors."[35] Appellant acknowledged the misstatement and said he understood what the military judge meant to say.[36]

The plea colloquy then moved on to a discussion of the terminal elements of Article 134, UCMJ. Appellant acknowledged and admitted that his conduct "might cause problems in good order and discipline in the armed forces" because it would be "kind of creepy" to the "average Soldier" and that they would

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30 (JA at 42).
31 (JA at 42).
32 (JA at 42).
33 (JA at 42).
34 (JA at 42).
35 (JA at 42-43).
36 (JA at 43).

"look down on [him]," "avoid [him]," and "be a little frightened of [him] with regard to their children and family."[37] Appellant also acknowledged and admitted that his conduct was "of a nature to bring discredit upon the armed forces" because "[i]t's just something that is Army standards" and that "a person in the general public knowing" of his conduct "might lower their esteem for the armed forces."[38] Appellant also agreed that society attached a "stigma" to "people who have naked pictures of children."[39]

In a stipulation of fact entered into evidence without objection, appellant admitted that his conduct "tends to harm the reputation of the Service" and "lowers the public esteem about the Armed Services."[40] Appellant specifically admitted that a civilian who came into possession of appellant's hard drive saw the charged images contained on the drive and found them "shocking, sexual, and unacceptable."[41] The civilian was "mortified and feared for the safety and security of her child."[42] Appellant also admitted that his conduct "degrades the trust and authority [appellant] would otherwise hold in his unit" and that knowledge of appellant's conduct "degrades his

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37 (JA at 43-44).
38 (JA at 44).
39 (JA at 45).
40 (SJA at 2, para. 8).
41 (SJA at 1, para. 4).
42 (SJA at 2, para. 8).

position in the eyes of his leadership, peers, and subordinate Soldiers."[43]

After reviewing the evidence, but before accepting appellant's guilty pleas and rendering findings, the military judge conducted additional inquiry and discussion into the considerations that would be relevant to determining which images were "child pornography" and which were "nude minors."[44] Again the military judge distinguished images which would be for "artistic expression" and reiterated that the charged images "weren't artistic models."[45] Appellant agreed that the images were not artistic and that his possession was also not for a "medical purpose," but purely for "sexual gratification."[46] For these reasons, appellant admitted that his conduct was knowing, criminal and not protected under the First Amendment.[47] The military judge then accepted appellant's pleas and rendered findings.[48]

Summary of Argument

As this court noted in *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013), the dispositive analysis applicable to this case is one of "fair notice" rather than void for vagueness.

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43 (SJA at 2, para. 7).
44 (JA at 46-48).
45 (JA at 52).
46 (JA at 52).
47 (JA at 52-53).
48 (JA at 54).

The military judge defined "nude minors" consistent with federal statutes and case law defining a "lascivious exhibition of the genitals or pubic area." Appellant had fair notice that his conduct, as defined, was subject to criminal sanction under Article 134, UCMJ, even when not charged as a direct or analogous violation of 18 U.S.C. § 2252A.

The plea colloquy demonstrates that appellant was fully informed of the relevant constitutional considerations pertaining to the limits of criminal liability in this case. Appellant affirmatively acknowledged that his conduct was not protected speech under two theories of criminality commonly defined by a "lascivious exhibition of the genitals or pubic area" and distinguished by their degree of lasciviousness. Appellant's reliance on *Barberi* is an unwarranted attempt to sweep away the distinction between *Miller* obscenity and *Ferber* lewdness in order to presumptively extend First Amendment protection to "lascivious" images that are not "child pornography" as defined by the CPPA.

Specified Issue 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.

Standard of Review

Generally, "[t]he question of whether a specification states an offense is a question of law, which this Court reviews de novo."[49] However, "[w]hen not objected to at trial, defects in an indictment are reviewed for plain error."[50] Under plain error review, appellant must demonstrate that: (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right of the accused.[51]

Law and Argument

"Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction."[52] The "void for vagueness doctrine" "incorporates notions of fair notice or warning" and is designed to ensure legislatures "set reasonably clear guidelines for law enforcement officials and triers of

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[49] *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted).
[50] *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013) (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002)).
[51] *Id.* (citing *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012)).
[52] *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).

fact in order to prevent 'arbitrary and discriminatory enforcement.'"[53]

A. The military judge applied a limiting construction of the specification sufficient to give fair notice to appellant

> The first and second clauses of Article 134, UCMJ, permit the criminalization of certain conduct not otherwise prohibited that is either prejudicial to good order and discipline or service discrediting. Article 134, UCMJ. It is settled that a servicemember may be prosecuted for service-discrediting conduct even if the conduct is not specifically listed in the *Manual for Courts-Martial. United States v. Saunders,* 59 M.J. 1, 6 (C.A.A.F.2003) (citing *United States v. Vaughan,* 58 M.J. 29, 31 (C.A.A.F.2003)). However, due process requires that a servicemember "have 'fair notice' that his conduct [is] punishable before he can be charged under Article 134 with a service discrediting offense." *Vaughan,* 58 M.J. at 31 (quoting *United States v. Bivins,* 49 M.J. 328, 330 (C.A.A.F.1998) (brackets in original), and citing *Parker v. Levy,* 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974)). Potential sources of fair notice may include federal law, state law, military case law, military custom and usage, and military regulations. *Vaughan,* 58 M.J. at 31.[54]

Appellant had fair notice that the charged conduct of possessing images of "nude minors" was criminal because the military judge defined and explained the term "nude" to mean a subset of "child

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[53] *Parker v. Levy*, 417 U.S. 733, 752 (1974) (citing *Smith v. Goguen*, 415 U.S. 566, 572-3 (1974)).

[54] *Warner*, 73 M.J. at 3 (internal footnote omitted). In *Warner*, this court noted that because the appellant lacked fair notice that the alleged conduct was forbidden, the appellant's void for vagueness challenge was not addressed. *Id.* at 3 n.2.

pornography" as defined and understood under the federal code and case law to be a "lascivious exhibition of the genitals or pubic area."[55] In the providence inquiry, the military judge specified that "nude" meant "uncovered in the genital or pubic area" and "you can see the pubic area." (JA at 32-33). He then clarified further that the nudity as defined also had to be "lascivious," such as

> whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or inappropriate attire considering the child's age, and whether the child is partially clothed or nude, whether the depiction suggests sexual coyness or a willingness to engage in sexual activity and whether the depiction is intended or designed to elicit a sexual response in the viewer. Those are elements that you can consider that I am going to consider in determining *whether this was an offense*.[56]

By defining "nude minors" as a "lascivious exhibition of the genitals or pubic area" under the *Dost* factors, the military judge narrowly construed a broadly worded specification to reach only conduct that was also criminal if charged as a violation of 18 U.S.C. § 2252A. As a result, appellant's convictions reflect possession of two classes of child pornography. One class of child pornography covered under the Specification of the Charge

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[55] 18 U.S.C. § 2256(2)(A)(v); *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006) (citing the factors from *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

[56] (JA at 41) (emphasis added). *See also Roderick*, 62 M.J. at 429 (listing the *Dost* factors).

and Specification 1 of the Additional Charge met the statutory definition under 18 U.S.C. § 2256 and resulted in higher maximum punishments under 18 U.S.C. § 2252A.[57] Appellant's possession of a second class of "lascivious" images, determined by applying *Dost* analysis, was charged under Specification 2 of the Additional Charge as a simple disorder offense. Nowhere in the providence inquiry for Specification 2 of the Additional Charge is there any use of the term "child erotica" by the military judge, trial counsel, defense counsel or appellant to describe the images covered by the specification.[58]

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[57] Images depicting sexual conduct listed in 18 U.S.C. § 2256(2)(A)(i)-(iv) and images depicting a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(A)(v) by satisfying all six *Dost* factors would be in this category. The military judge characterized such images as "the kind of graphic, hard-core child pornography I have seen in some other cases" and "when I say graphic, hard-core, generally I am talking about penetration." (JA at 37). Images representative of this category of child pornography are: Evidence #230 and #237 from Exhibit 7/8, listed at paragraph 1.a. in the special findings; all images from Exhibit 4 listed at paragraph 2.a. in the special findings; and Image 1 from Exhibit 13 listed under paragraph 2.b. of the special findings. (JA 5-7).

[58] *See Warner*, 73 M.J. at 3-4 (discussing general legal status of "child erotica" under federal law and absence of prohibition "against possession of images of minors that are sexually suggestive *but do not depict nudity or otherwise reach the federal definition of child pornography*") (emphasis added). *See also, e.g., United States v. Vosburgh*, 602 F.3d 512, 520 n.7 (3rd Cir. 2010) (describing the government's definition of "child erotica" as material which is not "sufficiently lascivious" to meet the definition for "sexually explicit conduct" under 18 U.S.C. § 2256).

As appellant and his defense counsel readily acknowledged throughout the providence inquiry, Specification 2 of the Additional Charge covered conduct that was criminal under federal statutes and case law regulating child pornography. Appellant therefore had fair notice that his conduct was criminal, even when charged as a simple disorder under Article 134, UCMJ, without explicit reference in the specification to 18 U.S.C. § 2256. This court has previously noted "[c]harges for the possession of child pornography could be brought pursuant to clauses (1) or (2) of Article 134 without reference to the definitions laid out in the [Child Pornography Prevention Act (CPPA), 18 U.S.C. §§ 2252A-2260 (2006)], thereby creating a completely different set of elements required for conviction."[59]

Here, the military judge, *sua sponte*, addressed concerns of fair notice, overbreadth, vagueness, and free speech by defining the specification so narrowly and specifically that it amounted to a charge of simple disorder child pornography possession.[60]

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[59] *United States v. Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012). This case presents the court with an opportunity to address the viability of charging child pornography possession without reference to the definitions in the CPPA. Although a specified child pornography offense is now in the *Manual for Courts-Martial*, its definitions and maximum punishments are based on 18 U.S.C. § 2252A. *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶¶ 68b.c(1), c(7), e, analysis at A23-22.

[60] The government's maximum punishment calculation shows that appellant faced twenty years confinement for the child

Accordingly, because appellant had fair notice that his conduct could be criminalized, the specification was not impermissibly vague or overbroad as applied to appellant in this case.[61]

B. Appellant had fair notice that possession of images "appearing to be nude minors" was criminal under Article 134, UMCJ and faced the appropriate maximum punishment

In *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), this court held that the act of possessing what "appears to be" child pornography was not punishable as an offense analogous to or "closely related" to an offense under the federal code.[62] However, such conduct could still be punishable under Article 134, UCMJ, as a general or simple disorder, with a maximum sentence of four months of confinement and forfeiture of two-thirds pay per month for four months.[63] This court took care to note that *Ashcroft* did not render the charged conduct

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pornography offenses and four months for the "nude minors" offense. (JA at 45).

[61] *Cf. United States v. Castellano*, 72 M.J. 217, 222-23 (C.A.A.F. 2013) (recognizing that "there is no question that where, as here, an otherwise unconstitutional criminal statute is construed in such a way as to limit its reach to conduct that may constitutionally be subject to criminal sanction, the facts under that 'saving construction' have constitutional significance. These facts are critical to a conviction as, absent such facts, the conduct is not criminal") (citing *Skilling v. United States*, 561 U.S. 358 (2010)).

[62] *Id.* at 43-44 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002)).

[63] *Id.* at 45 (citations omitted). *See also United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004) (noting that the receipt or possession of both "actual" and "virtual" child pornography can be service-discrediting or prejudicial to good order and discipline).

unconstitutional, but rather that the government could not reference the punishment for a violation of 18 U.S.C. §§ 2252 and 2252A in determining the maximum punishment.[64]

In this case, the military judge considered both images of actual "nude minors" and those "appearing to be nude minors" when defining "nude minors."[65] Pursuant to *Beaty*, appellant had fair notice that possession of images of "nude minors" and images of what "appears to be nude minors" was criminal. Under the government's theory and the military judge's definition of the specification, appellant's conduct amounted to a general or simple disorder for which he faced the maximum allowable punishment under *Beaty*.[66]

C. Review of images identified in the special findings

Examining the images which the military judge found to be images of "nude minors" as defined, at least nineteen of those images meet the *Dost* factors for a "lascivious exhibition of the genitals or pubic area" under the CPPA and are "lewd and lascivious" depictions of nude minors as construed under state

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[64] *Id.* at 44.
[65] (JA at 29-44). Appellant never made any statements during the providence inquiry to indicate that the charged images were anything other than actual minors or what he believed to be actual minors.
[66] (JA at 45).

statutes upheld before the enactment of the CPPA.[67] All these images depict actual minors or individuals whose physical and anatomical features indicate that they are minors. The minors are posed or positioned in an unnatural or sexually suggestive manner, regardless of the overall "outdoor" setting in many images, or the images are cropped such that the clear focus is on their exposed breasts and genitals or pubic area.[68] These nineteen images met the military judge's definition of "nude minors" in that they also met the CPPA, *Ferber*, and *Osborne* standards for "lewd and lascivious." The fact that appellant sought, obtained and used these images, regardless of the "naturalist" or "nudist" provenance of the images, along with more "hardcore" child pornography for his sexual gratification

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[67] *See generally Osborne v. Ohio*, 495 U.S. 103 (1990); *Ferber v. New York*, 458 U.S. 747 (1982). These nineteen images are: Images 7-10, and 58 from Exhibit 4; Evidence # 62 (154, 279), 72 (73), 79 (175), 85 (183), 94, 100, 147, 195 from Exhibit 7/8; Image 6 from Exhibit 12. Parentheticals indicate duplicates within the same exhibit.

[68] *Cf. Dost*, 636 F. Supp. at 833 (describing a photograph of a child "sitting on the beach" in an unnatural and sexually suggestive manner). *See also United States v. Johnson*, 639 F.3d 433, 441 (8th Cir. 2011) ("A reasonable jury could also have concluded that because the video clips show the females generally from their shoulders to their calves, including their naked breasts in the frontal views, that [the appellant] attempted to obtain images portraying them as sexual objects and that their facial features were apparently of little or no importance") (citing *United States v. Brown*, 579 F.3d 672, 684-85 (6th Cir. 2009)).

is but another factor in the "totality of the circumstances" analysis.[69]

Admittedly, many of the other images that the military judge found met the definition of "nude minors" meet the first and fourth *Dost* factors because they depict minors fully nude with exposed pubic areas or genitals, but the setting, posing and expressions of the minor do not meet the second, third and fifth *Dost* factors.[70] Still others show minors fully nude with arguably unnatural, coy, or sexually suggestive poses, but the pubic area is not visible.[71] If this court finds that any of

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[69] *See Roderick*, 62 M.J. at 430 (discussing the application of the sixth *Dost* factor to the appellant's conduct). *See also Dost*, 636 F. Supp. at 832 (noting that the sixth factor considers the eliciting of a sexual response in "perhaps not the 'average viewer', but perhaps in the pedophile viewer").

[70] *Cf. United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999) (discussing an image of a nude child in a "beach setting" that was not a "lascivious exhibition of the genitals"). In contrast to *Amirault*, however, many of the images of "nude minors" in this case feature fully exposed public areas or genitalia "in the center of the composition." *Id.* Depending on the circumstances of each case, the composition of the image, including the posing of the child, can outweigh a neutral or non-sexually suggestive setting. *See United States v. Russell*, 662 F.3d 831, 844 (7th Cir. 2011) (noting that the posing of the child can be dispositive even where the producer disclaims "any intent to create a sexually suggestive image"); *Brown*, 579 F.3d at 681 (noting that the age of the minor affects the weight or relevance of the fifth *Dost* factor). *But see United States v. Villard*, 885 F.2d 117, 123-24 (3rd Cir. 1989) (noting that the depiction of a boy's erect penis may not be "lascivious" in all cases, depending on the "context of the total photograph").

[71] *See Roderick*, 62 M.J. at 430 (noting that depiction of the genitals or pubic area is a "requirement of [18 U.S.C.] § 2256(2) and prerequisite to any analysis under *Dost*"). *See also*

these "close call" images failed to meet a strict construction of the "lascivious exhibition" definition employed by the military judge, that error concerns the sufficiency of the evidence, not fair notice or void for vagueness.

If there was error in this case, it was not that the military judge applied an impermissible or ill-defined standard to all images, but that he applied a low threshold for what is "lascivious," to many individual images that did not meet enough of the *Dost* factors. That error was not plain or obvious because *Dost* analysis is nuanced, image-specific, fact intensive, and imprecise.[72] The fact-intensive and often

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Barberi, 71 M.J. at 130 ("under the definition provided by the military judge, in order for the images to constitute child pornography they must contain an exhibition of the genitals or pubic area and that exhibition must be lascivious").

[72] *See Mason*, 60 M.J. at 19 (noting that "[s]uch inquiry must *necessarily* be undertaken on a case-by-case basis") (emphasis added). Many of the images charged as "nude minors" in this case present a challenge to a factfinder and an appellate court because they satisfy some, if not all, *Dost* factors to varying degrees and the final determination turns on the factfinder's weighing and balancing of those factors. *See United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) (noting that courts are in dispute over "how many [*Dost*] factors must be present in an image for it to qualify as 'lascivious'") (citations omitted). Appellant would have this court find that all images of "nude minors" in this case be deemed protected speech because many do not clearly meet some combination of the first five *Dost* factors, such as those showing naturalist or nudist settings. (Appellant's Br. 6). Yet when the images meet some of the *Dost* factors, even if a "close call," the overall setting should not be dispositive. *See Shoemaker v. Taylor*, 730 F.3d 778, 786, 788 (9th Cir. 2013) (rejecting appellant's claims that images of nude minors taken at a nudist colony were "innocuous" when

imprecise nature of *Dost* analysis may have complicated the military judge's task of defining the offense and determining guilt, but that does not "automatically equate to unconstitutional vagueness. Relief is granted where *no* standard is specified."[73] While application of the *Dost* factors on appeal might lead this court to determine that some images were not sufficiently "lascivious" to constitute a basis for the conviction, appellant cannot maintain that he had no notice that possession of "lascivious" images of "nude minors" was criminal.

D. Under plain error review, there was no error and no prejudice

The military judge identified an obvious potential notice problem with the specification and took it upon himself to address it. The resulting definition and criteria used by the military judge for "nude minors" avoided the kind of plain error that this court held had occurred in *Warner*.[74] Appellant had fair notice that possession of lewd and lascivious images of "nude minors" was criminal under federal law and all the more so as a general or simple disorder under Article 134, UCMJ. He was essentially convicted of a third specification of child

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produced, despite meeting the first five *Dost* factors, and that their subsequent posting on a pornography website was immaterial to whether they met the definition of child pornography).

[73] *Parker v. Levy*, 417 U.S. 733, 755 (1974).

[74] 73 M.J. at 4.

pornography possession that was charged, in the alternative, as a general or simple disorder.

The government's charging scheme, as narrowed by the military judge's "saving construction," amounted to a separation of degrees of child pornography possession, not the creation of a novel "child erotica" theory for which appellant would not have had fair notice.[75] If this court determines that many of the images which formed the basis of the conviction did not meet the military judge's definition of "nude minors" because they did not depict a "lascivious exhibition of the genitals or pubic area," this court may amend the special findings and affirm the conviction based on the nineteen images that did meet the definition as discussed above.

Even assuming, *arguendo*, that it was somehow error for the military judge to convict appellant of a simple disorder offense for which he had fair notice and for which there was sufficient evidence, or alternatively, that some of the images were insufficient, appellant has failed to show prejudice when the

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[75] The government indicated in its supplemental bill of particulars that "[t]he images covered by Specification 2 are all images including nude minors or persons appearing to be nude minors, to include, but not limited to, all images already listed in this Supplemental Bill of Particulars or the previously provided Bill of Particulars." (SJA at 11).

adjudged sentence to confinement was six months out of a possible adjusted maximum of twenty years.[76]

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[76] In his special findings, the military judge specifically listed images of CPPA-defined "child pornography," but identified those images which depicted "nude minors" by exclusion. (JA at 4-8). These findings show that the images of "nude minors" likely had only a marginal impact on the military judge's sentencing calculus.

Specified Issue II

WHETHER THERE IS A SUBSTANTIAL BASIS IN LAW OR FACT 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."

Standard of Review

The military judge's acceptance of a guilty plea is reviewed for an abuse of discretion.[77] The test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea.[78] A ruling based on an erroneous view of the law constitutes an abuse of discretion.[79] Questions of law arising from a guilty plea are reviewed de novo.[80] In reviewing the adequacy of the factual basis for a plea, this court affords "significant deference."[81] The court examines "the totality of the circumstances of the providence inquiry, including the stipulation of fact, as well as the relationship between the accused's responses to leading

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[77] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).
[78] *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014) (citing *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013)).
[79] *Id.* (citing *Inabinette*, 66 M.J. at 322).
[80] *Schell*, 72 M.J. at 342 (citing *Inabinette*, 66 M.J. at 322).
[81] *Inabinette*, 66 M.J. at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

questions and the full range of the accused's responses during the plea inquiry."[82]

Law and Argument

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'"[83] "With respect to the requisite inquiry into the providence of a guilty plea, the colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior."[84]

A. The military judge conducted extensive discussion and inquiry into what types of images are protected speech and appellant affirmatively acknowledged that the charged images were not protected speech

In criminalizing conduct under Article 134, UCMJ, that implicates the First Amendment, "the proper balance must be struck between the essential needs of the armed services and the

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[82] *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009).
[83] *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (quoting *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)).
[84] *Id.* (citing by comparison *O'Connor*, 58 M.J. at 453, and *Mason*, 60 M.J. at 19) (internal citations omitted).

right to speak out as a free American."[85] Prior to applying this balancing test, two "threshold determinations" must be made: 1) the speech must be examined to determine if it is otherwise protected under the First Amendment, and 2) the Government must prove the elements of an Article 134, UCMJ, offense.[86]

Child pornography is not protected by the First Amendment, even if it might not be obscene under *Miller v. California*, 413 U.S. 15 (1973), because it "bears so heavily and pervasively on the welfare of children engaged in its production" that "the balance of competing interests is clearly struck."[87] Nonetheless, the term "lewd exhibition of the genitals" describes a class of materials that can be criminalized, depending on the specific wording and construction of the statute, as both child pornography and obscenity.[88]

As a threshold matter, this case is not a retread of the questions addressed recently by this court in *Warner*.[89] The term

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[85] *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008) (quoting *United States v. Priest*, 45 C.M.R. 338, 344-61, 21 C.M.A. 564, 570-72 (1972)) (internal quotations omitted).
[86] *Id.*
[87] *Ferber*, 458 U.S. at 764. *Accord Osborne*, 495 U.S. at 108-10 (reiterating the "gravity of the State's interests" in criminalizing the possession of child pornography).
[88] *Id.* at 765 (citing *Miller*, 413 U.S. at 25). "Lewd" and "lascivious" are synonymous terms for purposes of reviewing the constitutionality of child pornography statutes. *Frabizio*, 459 at 94 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994)).
[89] 73 M.J. 1.

"nude minors," in contrast to the undefined term "sexual objects" in *Warner*, was defined, for all intents and purposes, by the military judge in this case to mean "lascivious exhibition of the genitals or pubic area."[90] In the course of arriving at that agreed-upon definition, the military judge took care to exclude from the potential reach of the specification an "overwhelming number of cases" where no criminal liability could attach.[91] Again, later in the plea colloquy, the military judge

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[90] It should be noted that this court's broad holding in *Warner* that the appellant had no notice that possession of images depicting minors as "sexual objects or in a sexually suggestive way" was "subject to sanction" is inconsistent with the view of other federal appellate courts. In *United States v. Knox*, the Third Circuit stated that an unnatural focus on a minor child's *clothed* genital area treats the child "as a *sexual object* and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal." 32 F.3d 733, 750 (3rd Cir. 1994) (emphasis added). Even as early as 1987, the Ninth Circuit characterized images as a "lascivious exhibition" because "[e]ach of the pictures featured the child photographed as a *sexual object*." *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (emphasis added). The "sexual objects" specification in *Warner* may have failed on notice grounds because it was used to charge the possession of "child erotica," but if the specification was construed to mean a "lascivious exhibition of the genitals or pubic area," the appellant would have had no basis to claim he was not on notice that his conduct, as alleged, was criminal. Whether the images in *Warner* would have been "lascivious" after *Barberi* was a question alluded to by Chief Judge Baker in his dissent. *Warner*, 73 M.J. at 8 (Baker, C.J., dissenting).

[91] (JA at 30). Examples provided included "a picture of an infant bathing," "taking pictures of children that may be topless could be considered an artistic endeavor," "great paintings," "classical art," and "artistic depictions of the human body." (JA at 30).

clarified with appellant that his possession of images of "nude minors" depicting a "lascivious exhibition of the genitals or pubic area" was not for artistic or medical purposes, but for his sexual gratification.[92] Appellant then explicitly agreed "that's part of why possession of these images isn't protected under the First Amendment of the United States Constitution as a free expression" and why "this was actually a crime."[93]

Even though *Ferber* held that the standard for "lewd and lascivious" images of minors need not rise to the standard for obscenity under *Miller* to be criminalized, the military judge's definition of "nude minors" combined the "lewd and lascivious" standard of *Ferber* and the *Miller* standard that the images "appeal to the prurient interest in sex" and have no "serious literary, artistic, political, or scientific value."[94] Through specific examples, the military judge used "lay terminology" to establish appellant's understanding of "the relationship between the supplemental questions and the issue of criminality."[95] Appellant's plea was fully informed by a correct understanding of the First Amendment's scope of protection, as required by

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[92] (JA at 52).
[93] (JA at 52-53).
[94] *Miller*, 413 U.S. at 24. By applying a more restrictive standard than was necessary under *Ferber*, the conduct to be prohibited was "adequately defined by the applicable [constitutional] law, as written or authoritatively construed." *Ferber*, 458 U.S. at 764.
[95] *Hartman*, 69 M.J. at 469 (citing *O'Connor*, 58 M.J. at 454)).

Hartman, and was therefore provident. Because appellant's conduct, as defined and admitted, did not involve protected speech, no *Wilcox* analysis or discussion was required.[96]

Furthermore, appellant cannot claim that the military judge impermissibly applied a "narrowed construction" of the specification to "save" the "nude minors" specification or to serve as a "catchall" for images which would not meet the CPPA definition of "child pornography" under the first two specifications. In *Osborne*, the Supreme Court took no issue with the Ohio Supreme Court's construction of the state's child pornography statute in response to the appellant's overbreadth claim.[97] "[A] statute as construed 'may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t].'"[98] The military judge's definition of "nude minors" afforded appellant fair notice that his conduct fell outside the umbrella of *Miller* and fell squarely within the ambit of *Ferber*, if not the CPPA.

B. The plea colloquy shows appellant understood his conduct was criminal under two alternative theories of criminality and that the factual circumstances supported his plea

As discussed above for the first specified issue, the military judge defined and explained the constitutional

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[96] *Wilcox*, 66 M.J. at 447.
[97] 496 U.S. at 115.
[98] *Id.* (citing *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7 (1965)).

considerations and criteria that would differentiate "child pornography" from lascivious images of "nude minors." Appellant made no objection to the military judge's definitions and expressed his understanding of why his conduct was criminal under two alternative theories. Appellant understood that the definition of "lascivious" applied to both theories.[99] Appellant also understood that the extent to which certain images met the definitional factors for "lascivious" would determine if they were "child pornography" under the CPPA or "nude minors."[100] The military judge did not "oscillate," contrary to appellant's characterization, between two theories.[101] He stated the common defining factors of "lascivious" for both "child pornography" and "nude minors" and went on to explain that the distinction between the two categories would turn on how each image met the factors. The colloquy was the military judge's effort to explain the essence of *Dost* analysis to a lay person.

Appellant now claims, contrary to the record, that he "confused" images of "nude minors" with "child pornography" during the plea colloquy.[102] The government provided appellant

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[99] (JA at 41) ("it also covers those that we talked about earlier that did qualify as child pornography").
[100] (JA at 42) ("So if there are images in that nature there you agree that might fall more into the child pornography category").
[101] (Appellant's Br. 17).
[102] (Appellant's Br. 17).

with two bills of particulars and the military judge went to great lengths to explain the definitions and criteria that distinguished "child pornography" from images of "nude minors." General examples and specific examples with descriptions of images from the evidence were provided to appellant to clarify and elicit his understanding of both the law and its application to the facts. Before the Army Court, appellant raised no assignments of error and submitted his case on its merits to this court. Only after this court specified the issues in this case did appellant challenge the factual basis of his plea by claiming "confusion." Appellant's understanding of the law and its application to the facts reflect a correct understanding of how courts have defined "lascivious" in the years since *Ferber* was decided. The degree of clarity that appellant now apparently seeks on appeal, above and beyond what is evident in the record, has yet to be achieved by our military and federal courts as the law on child pornography continues to evolve.

Just as there is no substantial basis in law to question appellant's plea, the record in this case clearly demonstrates that there is no substantial basis in fact to question the plea. As a matter of legal or factual sufficiency of the evidence, appellant's conviction is supported by at least nineteen images that met the definition of "lascivious." By disputing other individual images, appellant now attempts to contest intensive

factual determinations that he chose not to "subject to the test of the adversarial process" when he pled guilty.[103] However, the adequacy of appellant's plea must be analyzed in terms of its providence, not the sufficiency of the evidence.[104]

The factual circumstances revealed by appellant objectively supported his plea.[105] With the record containing all the evidence the government would have used to prove its case at a contested trial and bills of particulars that appellant requested, he cannot plausibly claim that he was not "personally convinced of his guilt based upon an assessment of the government's evidence."[106] Due to the nature of the evidence and *Dost* analysis, this court is left to evaluate, as the military judge and the Army Court did, the minutest of details such as the smile of a child, the way an arm is placed on a hip, the slightest contorting of a leg, and the forlorn look on a pre-pubescent girl's face directed hauntingly toward the camera as her nude body is fully displayed. The court must also consider whether such details, separately and as a whole, were intended or designed to elicit a sexual response in "perhaps not the

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[103] *Jordan*, 57 M.J. at 238.
[104] *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).
[105] *See id.* (citing *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).
[106] *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011) (citing *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977)).

'average viewer', but perhaps in the pedophile viewer" like appellant.[107]

Ultimately, whether all these details constituted a "lascivious exhibition" in more than one image is now largely a question of factual sufficiency that appellant readily conceded at trial and which the Army Court answered in the affirmative under its broad Article 66, UCMJ, powers.[108] It is for this court to decide whether appellant had to recollect all these details for each and every image in order to demonstrate that he understood why he was guilty of a crime. To answer that question in the negative, this court should draw all the same reasonable inferences against appellant that were justifiably drawn by the military judge at trial.[109]

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[107] *See Dost*, 636 F. Supp. at 832.

[108] *Cf. United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013) ("When the conduct being charged does not fall directly within the focal point of [*Lawrence v. Texas*, 539 U.S. 558 (2003)] . . . and where, as here, the predicate sexual conduct is criminal because of some additional factor (in this case, the violation of clauses 1 and 2 of Article 134, UCMJ), the burden of demonstrating that such conduct should nonetheless be constitutionally protected rests with the defense at trial . . . the [appellant] must develop facts at trial that show why his interest should overcome the determination of Congress and the President that the conduct be proscribed") (citations omitted).

[109] *See United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)). After *Barberi* and *Warner*, cases such as this may necessitate a reevaluation of the role and purposes of the *Care* inquiry in child pornography cases. *See United States v. Andersen*, ARMY 20080669, 2010 WL 3938363, at *12 (A. Ct. Crim. App. 2010) (mem. op.), *rev. denied by* 69 M.J. 451 (C.A.A.F.

C. Appellant's reliance on *Barberi* to question the providence of his plea is inapposite and an attempt to apply an unwarranted presumption of First Amendment protection to "lascivious" images of "nude minors"

In questioning the providence of his plea, appellant also attempts to avail himself of the holding in *Barberi* that any images that do not meet the CPPA definition of "child pornography" are by definition presumptively protected speech.[110] Appellant's reliance on *Barberi* is both inapposite to this case

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2010) (SJA at 40-41). The Army Court's Judge Ham observed that "*Care* and forty years of its progeny do not exist so that the parties in the military justice system can base a guilty plea on the government's attaching to the record the evidence it would use to prove the case if it was fully contested, or submitting evidence to demonstrate what it could prove in the absence of a plea." *Id.* "If that were the case, a 'stipulation of fact,' would be nothing but the enclosures, there would be no requirement that the military judge conduct a *Care* inquiry . . . and both Article 45, UCMJ, and R.C.M. 910 would be rendered null." *Id.* Judge Ham surmised that a thorough *Care* inquiry, well-drafted stipulation, and the parties' awareness of the distinction between "child erotica" and "visual depictions of minors engaged in sexually explicit conduct" would suffice. *Id.* at *13. But Judge Ham also observed in closing that "[t]he latter is 'child pornography,' the possession of which is a serious criminal offense; the former is not, and therefore cannot form the basis of a charge or conviction for possession of child pornography." *Id.* Under an expansive reading of *Barberi* and *Warner*, what is not "child pornography" under the CPPA is "child erotica" and protected speech. Had Judge Ham written today, it is unlikely she would place as much faith in the military justice system's capacity to ensure the reliability of guilty pleas in cases where the line separating a "serious criminal offense" from a constitutional right is as elusive as it has thus far proven to be with child pornography.

[110] (Appellant's Br. 19-20); *Barberi*, 71 M.J. at 130-31.

and an overly broad reading of that decision.[111] The dispositive fact in *Barberi* was that four of six images did not depict "any portion of the minor's [SD's] genitalia or pubic area."[112] The images are only described elsewhere as showing "SD in various stages of undress."[113] Based on these predicate facts, the obvious inference is that the images were not "lewd" or "lascivious" under *Ferber*, not obscene under *Miller*, and therefore protected speech.

Yet a sweeping presumption of First Amendment protection cannot be extended to nude images of minors simply because the genitals or pubic area is not visible, where the depiction may still be "lewd" or "lascivious" upon application of the *Dost* factors.[114] While an exhibition of the genitals or pubic area is a requirement of *Dost* analysis in the statutory framework of the CPPA, the absence of such an exhibition does not presumptively

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[111] A major point of dispute between the majority and dissent in *Barberi* concerned the question of "presumptive" protection to images that do not meet the CPPA definition of "child pornography." 71 M.J. at 131 n.4.

[112] 71 M.J. at 129 (internal quotations and citation omitted).

[113] *Id.*

[114] *See id.* at 134 (discussing the viability of a non-CPPA definition of "child pornography" based on "lasciviousness" even in the absence of visible genitals or pubic area) (Baker, C.J., dissenting). *See also Osborne*, 495 U.S. at 114 n.11 ("The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks").

obviate *Dost* analysis when the CPPA is not the basis for a charge brought under clause 1 or 2 of Article, 134.[115]

The most problematic aspect of appellant's reading of *Barberi* is that it sweeps away the zone of unprotected speech that exists between *Miller* obscenity and *Ferber* lewdness. "[I]f speech does not squarely fall within a category of unprotected speech, that speech's protection under the First Amendment is not clearly established."[116] An appellate court "'has an obligation to make an independent examination of the whole record' to evaluate whether the speech is protected or whether it actually falls into a category of unprotected speech" and may be lawfully restricted under the First Amendment.[117] If the court finds that the speech falls within "any unprotected category," it "'confine[s] the perimeters of [the] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.'"[118] Through this process, "the parameters of unprotected speech categories are continually being defined" and the court need not "carve out a separate exception for [specific types of] images of children

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[115] *Roderick*, 62 M.J. at 430; *Barberi*, 71 M.J. at 134 (Baker, C.J., dissenting).
[116] *Shoemaker*, 730 F.3d at 787.
[117] *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); also citing *Ferber*, 458 U.S. at 774 n.28).
[118] *Id.* (quoting *Bose*, 466 U.S. at 505).

engaging in sexual activity in order to hold that such speech is unprotected."[119] Instead, "the Court may decide that such speech is unprotected *as a part of an existing category of unprotected speech like child pornography.*"[120]

The Ninth Circuit's analysis of "morphed" images of child pornography in *Shoemaker* provides an apt description for what the military judge did in this case and demonstrates why any presumptive protection should not be extended to images that do not meet the CPPA definition of "child pornography." The analysis in *Shoemaker* also provides a framework to assess the viability of non-CPPA specifications on a case-by-case basis. *Barberi* should not be invoked to avoid or eliminate careful and nuanced application of the *Dost* factors to images that occupy the murky and often loosely-defined realm between *Miller* obscenity and *Ferber/Osborne* "lasciviousness." Nor should *Barberi* be used for the proposition that images that do not meet the CPPA definition of "child pornography" are by default, "child erotica" and protected.

Finally, in rejecting appellant's sweeping First Amendment claims, this court should consider applying the searching examination described in *Shoemaker* to the entire body of images at issue in this case. Many of them depict minors, some

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119 *Id.*

120 *Id.* at 787-88 (emphasis added).

undeniably very young, fully nude with pubic areas completely exposed and genitals partially or fully visible at the center of the composition, smiling and striking poses directly at the viewer up close in the frame. The range of backdrop settings in the images include beach areas, Amazonian jungle canopy, grassy fields, and indoors. These are obviously staged photographs where the producer's intent was to put a nude child on display and to capture that exhibition, such that it is lascivious to varying degrees.[121] If at least some of the *Dost* factors are otherwise met, criminalizing such images is fully consistent with the "balance of competing interests" that was essential to the holding in *Ferber*.[122] These images cannot seriously be likened to a "Sears catalogue" or even innocuous "bath tub" photos.[123] Appellant's "private fantasies" are not what the government criminalized in this case, nor was appellant's admission of his intent to sexually gratify himself in

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[121] *See Johnson*, 639 F.3d at 440 (noting that "even images of children acting innocently can be considered lascivious if they are intended to be sexual" based on the framing and focus of the image on "nude bodies from their shoulders to below their knees").

[122] *Ferber*, 458 U.S. at 764. *See also Knox*, 32 F.3d at 750 ("The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles").

[123] *See Amirault*, 173 F.3d at 34; *Johnson*, 639 F.3d at 439 ("videos of teenage minor females disrobing and weighing themselves in the nude cannot reasonably be compared to innocent family photos, clinical depictions, or works of art").

possessing these images the dispositive factor in determining if the images were "lascivious," even if that fact was critical to proving the service-discrediting nature of his conduct.[124]

Just as the military judge did in this case, when the definition of "lascivious exhibition of the genitals or pubic area" places the factfinder's focus on the content of the image in accordance with *Dost* and *Ferber*, the factfinder may determine that the images were intended to "elicit a sexual response in the viewer."[125] The military judge explained all these considerations to appellant in eliciting appellant's affirmative responses during the plea colloquy before taking the additional step of independently reviewing all the evidence. For all of the foregoing reasons, there is no substantial basis in law or fact to question appellant's plea.

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[124] *See Wiegand*, 812 F.2d at 1245.
[125] *Johnson*, 639 F.3d at 440.

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and uphold the findings and sentence. In the alternative, the Government respectfully requests that this Honorable Court amend the special findings to identify and strike specific images it deems legally insufficient for Specification 2 of the Additional Charge and otherwise affirm the decision of the Army Court.[126]

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[126] As an administrative matter, the special findings contain two minor scrivener's errors. The first image (Image 39) listed under paragraph 3c should be renumbered as Image 29. The last image (Image 11) listed under paragraph 3d should be renumbered as Image 112.

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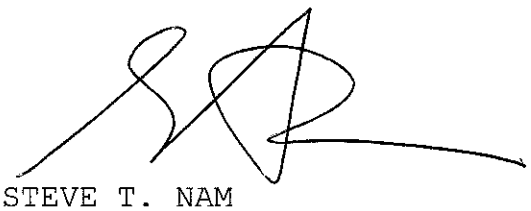

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