IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20120499
Private (E-2) **GARY D. WARNER,** United States Army, Appellant	)	USCA Dkt. No. 13-0435/AR

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UNITED STATES, Appellee, v. Private (E-2) Gary D. Warner, United States Army, Appellant	)	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20120499 USCA Dkt. No. 13-0435/AR

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

Issues Granted

I

WHETHER SPECIFICATION 3 OF CHARGE I IS VOID FOR VAGUENESS BECAUSE THE APPELLANT WAS NOT GIVEN FAIR NOTICE THAT THE CHARGED CONDUCT OF POSSESSING "SEXUALLY SUGGESTIVE" MATERIAL OF MINORS AS "SEXUAL OBJECTS" WAS FORBIDDEN AND SUBJECT TO CRIMINAL ACTION.

II

WHETHER SPECIFICATION 3 OF CHARGE I IS LEGALLY INSUFFICIENT WHEN THE GOVERNMENT FAILED TO PROVE THAT THE POSSESSION OF CONSTITUTIONALLY PROTECTED IMAGES OF MINORS AS "SEXUAL OBJECTS" AND IN "SEXUALLY SUGGESTIVE" POSES HAD A DIRECT AND PALPABLE EFFECT ON THE MILITARY MISSION AND THEREFORE ACTUALLY SERVICE DISCREDITING AS REQUIRED BY *UNITED STATES V. WILCOX*, 66 M.J. 442 (C.A.A.F. 2008).

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 May 21, 2012, a military judge sitting as a general court-martial convicted Private (PV2) Gary D. Warner, contrary to his pleas, of obstruction of justice, possession of drug paraphernalia, possession of child pornography, and possession of visual depictions of minors engaging in sexually explicit conduct and possession of visual depictions of minors "as sexual objects or in a sexually suggestive way," in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). The military judge sentenced PV2 Warner to confinement for 100 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On February 14, 2013, the Army Court of Criminal Appeals issued its summary affirmance on the Article 66, UCMJ, appeal regarding PV2 Warner. (JA 1). On April 2, 2013, appellant filed for reconsideration of the decision on the same grounds as raised in the supplement to the petition for grant of review. The Army court denied the motion to reconsider.

Private Warner 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 has, contemporaneously with this supplement, filed a Petition for Grant of Review. The Judge Advocate General of the Army designated the undersigned military counsel to represent PV2 Warner, who entered their appearance, and filed a Supplement to the Petition for Grant of Review under Rule 21. On May 20, 2013, this Honorable Court granted appellant's petition for review.

Statement of Facts

The government charged PV2 Warner with two specifications under Article 134, UCMJ, that are relevant to this appeal. In Specification 2 of Charge I, the government alleged that he possessed child pornography, while Specification 3 alleged possession of images that "depict minors as sexual objects or in a sexually suggestive way." (JA 4). To prove that PV2 Warner possessed these images, the government introduced the actual pictures into evidence. (R. at Pros. Ex. 7). Additionally, to distinguish between the two specifications, the military judge took judicial notice of 18 U.S.C. § 2252A and its definitions, which applied to the child pornography specification. (JA 9). The remaining images were not child pornography, but were allegedly images of minors in "sexually suggestive" poses.

Unlike the child pornography specification, neither the military judge nor the government defined the terms in

Specification 3 of Charge I. There is nothing in the record defining "sexually suggestive" and "sexual objects."

Finally, with regard to the terminal elements, the government attempted to prove that the conduct for Specification 3 was service discrediting simply by implying it through argument. (JA 16). However, there was no evidence presented to show that the conduct actually discredited the service, and there was no evidence presented to prove that the conduct had an effect on the military mission as the military judge found PV2 Warner not guilty under clause 1.

Summary of Argument

Due process requires fair notice that an act is forbidden and subject to criminal sanction. By charging PV2 Warner with possessing visual depictions of minors as "sexual objects or in a sexually suggestive way," the government placed him in a position where he was unaware that his act of possession was criminal. State law, federal law, and military law do not prohibit the possession of these types of images. Additionally, several federal circuits have declared this content to be legal. *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 3 of Charge I is therefore void for vagueness because PV2 Warner

could not have known his conduct was criminal. Thus, the specification should be set aside.

The charged images do not depict children in sexually explicit or lascivious poses, possession of which is prohibited. Instead they depict minors posing while wearing revealing clothes or while partially nude. Possessing this material is not prohibited by any statute and is constitutionally protected. *Barberi*, 71 M.J. at 131. 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 government made no mention of how PV2 Warner's conduct affected his unit or how his conduct was not constitutionally protected. *Id.; United States v. Hartman*, 69 M.J 467, 468 (C.A.A.F. 2011). Therefore, his conviction for Specification 3 should be set aside.

Argument

I

SPECIFICATION 3 OF CHARGE I IS VOID FOR VAGUENESS BECAUSE THE APPELLANT WAS NOT GIVEN FAIR NOTICE THAT THE CHARGED CONDUCT OF POSSESSING "SEXUALLY SUGGESTIVE" MATERIAL OF MINORS AS "SEXUAL OBJECTS" 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).

II. Law

Void for vagueness means that criminal responsibility should not attach when one cannot reasonably understand that his conduct is proscribed. *Id.* 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. *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 3 should be set aside because it is vague. There is no statute in the federal, state, or military systems that proscribe, or even define, the conduct charged. As such, PV2 Warner 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. 58 M.J. at 36. 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. *Id.*

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 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.

Here, Specification 3 is wholly unclear as to what type of conduct it is criminalizing. "Sexually suggestive" and "sexual objects" have no definition in the military context and are protected materials under civilian case law. Unlike the cases described above, a review of federal, military, and state law does not reveal any jurisdiction criminalizing the possession of images of partially nude children or child erotica in any form outside what is commonly known as child pornography as defined by 18 U.S.C. § 2256. To the contrary, 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).

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 legal 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 PV2 Warner did not have fair notice that his conduct was proscribed, Specification 3 is void for vagueness.

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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 and videos 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.

The federal courts consider this content to be legal which shows that PV2 Warner could not have been on notice that the charged conduct was illegal. The vagueness of Specification 3 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 PV2 Warner should have known that this content was illegal to possess when there is no regulation or statute prohibiting their possession.

This is especially true because Specification 3 uses the same language as *Vosburgh*, where the court accepted child erotica as images that depict young girls as "sexual objects or in a sexually suggestive way." 602 F.3d at 520 n.7. In *Vosburgh*, the images were not illegal to possess; thus, PV2 Warner's possession must also be deemed legal because he was never put on notice that this conduct could be criminalized in the military. Consequently, Specification 3 does not state an offense, and PV2 Warner could not have had notice of the criminality of his conduct. Without notice, the specification is void for vagueness.

This is different from *Bivins* where there was enough information to show that bigamy was a crime. 49 M.J. at 330. And in *Vaughan*, the history of a varied set of rules demonstrated the same. 58 M.J. at 36. Both cases, therefore,

indicated that the appellants had fair notice that their actions were criminal.

Here, possessing "sexually suggestive" material is not defined by statute or regulation and it is not otherwise prohibited. Thus, contrary to *Bivens* and *Vaughan*, Specification 3 contains language that actually criminalizes what history and case law have deemed legal content. This weighs heavily in favor of deeming Specification 3 void for vagueness.

Furthermore, nothing in the record supports the fact that PV2 Warner 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 PV2 Warner did not have the benefit of any such notice. The specification itself is vague, and the record is devoid of any information to support the contention that he should have known his conduct was criminal at the time he possessed the images.

Therefore, the conviction for Specification 3 should be set aside and sent back to The Judge Advocate General for sentence reassessment as the specification is void for vagueness.

II

WHETHER SPECIFICATION 3 OF CHARGE I IS LEGALLY INSUFFICIENT WHEN THE GOVERNMENT FAILED TO PROVE THAT THE POSSESSION OF CONSTITUTIONALLY PROTECTED IMAGES OF MINORS AS "SEXUAL OBJECTS" AND IN "SEXUALLY SUGGESTIVE" POSES HAD A DIRECT AND PALPABLE EFFECT ON THE MILITARY MISSION AND THEREFORE ACTUALLY SERVICE DISCREDITING AS REQUIRED BY *UNITED STATES V. WILCOX*, 66 M.J. 442 (C.A.A.F. 2008).

I. First Amendment Violation

A. Standard of Review

Determining whether the offense 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; *see also New York v. Ferber*, 458 U.S. 747, 765 (1982). Other sexually suggestive content falling outside of this may be constitutionally protected. *Ashcroft*, 535 U.S. at 245; *Ferber*, 458 U.S. at 765; *United States v. Barberi*, 71 M.J. 127, 130-31 (C.A.A.F. 2012). 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 3 of Charge I are protected by the First Amendment because they do not contain sexually explicit conduct and they are not obscene.

The government charged PV2 Warner 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.[2] 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 (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. *Id.* at 134, 134 n.1 (Baker,

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[2] The government charged two specifications, one criminalizing the possession of sexually explicit conduct of children and the other criminalizing the possession of sexually suggestive material of children. (JA at 4). By the very nature of the charging scheme, the government concedes the content encompassed by Specification 3 is not explicit or lascivious, lest it be incorporated into Specification 2.

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 protected speech. The images PV2 Warner possessed in Specification 3, like *Barberi*, do not depict a lascivious exhibition of genitalia, intercourse by children, or any other explicit conduct. This Court explicitly stated in *Barberi* that these images are constitutionally protected. 71 M.J. at 130-31. Just like those images where the child seemed to be posing partially nude, PV2 Warner's images depict the same content. Some children are posed, twenty-three of the images depict clothed children, and two images show partial nudity that does not focus on the genitalia. (Pros. Ex. 7). 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.[3]

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

[3] If this Court finds that at least some of the images are constitutionally protected while the remainder is not, then the specification must also fail because of the general verdict of guilt. *See Barberi*, 71 M.J. at 128-29.

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 PV2 Warner's case are less egregious. In fact, the images PV2 Warner possessed are most similar to those described in *Barberi*, seeing as they contain minors in various stages of undress as opposed to fully nude like *Amirault*. Where this Court deemed Barberi's images constitutionally protected, it logically follows that PV2 Warner's images should also be deemed constitutionally protected.

This logical link starts with the language of Specification 3. The government charged PV2 Warner with possessing images of minors as "sexual objects or in a sexually suggestive way." (JA 4). As noted in Assignment of Error I above, *Vosburgh* acknowledged this exact language in a footnote where this material was described as child erotica and deemed legal. 602 F.3d at 520 n.7. The images charged under this language here are similar to the images charged in *Barberi*, which this Court labeled as child erotica and deemed constitutionally protected. Thus, images described by this language in Specification 3 are not only legal content, but also protected by the First Amendment.

Thus, as PV2 Warner'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. *Wilcox*, 66 M.J. at 448-49. Since the government did not establish this effect, the specification should be dismissed.

2. The conviction is insufficient because the government did not establish under clause 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 3 are constitutionally protected, the government was required to prove the direct and palpable impact PV2 Warner's conduct had on the military mission. *Wilcox*, 66 M.J. at 448. Here, the military judge found PV2 Warner not guilty of the prejudicial to good order and discipline language in Specification 3. The government also did not prove to the *Wilcox* standard that PV2 Warner's conduct had a direct impact on the military mission in order to meet the clause 2 element. Therefore, the conviction is legally insufficient.

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. 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 appellant's statements and the military mission." *Id.*

This case is exactly like *Wilcox* where the Court states that Wilcox's 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 was not enough to show a direct and palpable effect because the government did not prove that the conduct caused the direct effect. *Id.* at 451-52. The government simply argued that Specification 3 of Charge I was "service discrediting" and nothing more. (JA 16). There is no evidence of the *actual* palpable connection to the armed forces, and this Court's prior allowance of inferences to prove the service discrediting element in child pornography cases is insufficient when dealing with content that does not meet the definition of child pornography. *See United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011).

Here, the government only argued that his conduct was service discrediting instead of *actually* causing discredit. 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. The government did not meet this high standard, instead they only argued that PV2 Warner's conduct "is also prejudicial to good order and discipline, and service discrediting." (JA 16). This is not enough to prove that the service discrediting nature of the conduct had a direct and palpable impact on the military mission, as required by *Wilcox*.

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 PV2 Warner's case there is no issue between virtual and actual content, the analyses in the below cases apply. This is because these cases address the difference between protected and unprotected speech, which triggers the *Wilcox* analysis.

In *United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004), a commissioned officer was charged with receiving and viewing pornographic images on his government computer. *Id.* at 20. 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 it 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. The government was required to prove to the fact finder beyond a reasonable doubt why PV2 Warner's conduct had a direct and palpable impact on the military mission because Specification 3 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 19). However, this did not occur. 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 PV2 Warner possessed, in contrast to the above cases, do not contain sexually explicit conduct; therefore, they are protected. As such, a direct, negative effect on the military is what the government was required to adequately prove.

Since the government failed to do so, PV2 Warner's conviction is legally insufficient and should be set aside.

Conclusion

WHEREFORE, PV2 Warner respectfully requests this Honorable Court set aside and dismiss Specification 3 of Charge I and return to The Judge Advocate General for sentence reassessment.

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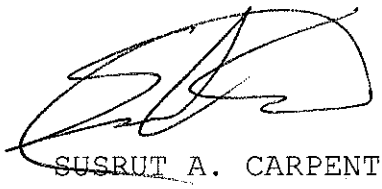

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I certify that a copy of the forgoing in the case of United States v. Warner, Crim. App. Dkt. No. 20120499, Dkt. No. 13-0435/AR, was delivered to the Court and Government Appellate Division on July 10, 2013.

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