IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	) BRIEF ON BEHALF OF APPELLEE
	) Crim.App. Dkt. No. 20120499
v.	) **USCA Dkt. No. 13-0435/AR**
Specialist (E-4) **GARY D. WARNER,** United States Army, Appellant	)

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

Granted Issues

I.

WHETHER SPECIFICAION 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.

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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(b) [hereinafter UCMJ].[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

Statement of the Case

A military judge, sitting alone as a general court-martial, convicted appellant, contrary to his pleas, of possession of child pornography, possession of images that depict minors as sexual objects or in a sexually suggestive way, obstruction of justice, and wrongful possession of drug paraphernalia, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (hereinafter UCMJ).[3] The military judge sentenced appellant to be confined for 100 days, and to be discharged from the service with a bad-conduct discharge.[4] The convening authority approved the sentence as adjudged.[5]

Statement of Facts

The relevant facts in this case are fairly straightforward. Appellant was discovered to have numerous images and videos of

[1] UCMJ, art. 66(b), 10 U.S.C. §866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. §867(a)(3).
[3] JA at 11, 18.
[4] R. at 149.
[5] Action.

minor girls in various stages of undress on his digital media.[6] The government charged appellant with possessing both "child pornography" and "images that depict minor girls as sexual objects or in a sexually suggestive way," under Article 134, UCMJ.[7]

All of the images for which appellant was convicted are contained within Prosecution Exhibit (PE) 7. Relevant to this appeal are 23 images which do not directly display the exposed genitalia or pubic region of the minor girl pictured. Three of those images[8] depict a very young, minor girl directly exposing her naked breasts.[9] The remaining 20 all display multiple shots of very young, minor girls posing provocatively in highly revealing clothing.[10] Each of those 20 images have been

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[6] JA at 10-13.
[7] JA at 4.
[8] File names: !Amatuer 03 preteen Jeune 15 years young nude sexy hair angel pussy teens ex fucking hard sex incest bitch Lolita nude ~ 1.jpg; Carl David Hyman Jr – PTHC 105 3yo witch nudist naked penis preteen vagina little girls ass 8yr child panties gay ~1.jpg; jailbait in little lacy white panties on a young blonde with cute little titties and pink nipples real incest.jpg.
[9] PE 7.
[10] File names: !White Girl Jailbait BANG #025 Ass in a Thong kdquality pedo lolita pthc hussyfan preteen ptsc nymphets novinhas 9 ~1.jpg; STUPID YOUNG GIRLS IN THONGS #001 JailBait – pedo Lolita pthc hussyfan preteen pussy ptsc nymphets novinhas 9yo 10yo 11yo ~1.jpg; Pure Jailbait 002 – White Girl Suck Cock! Daughter in a Thong pedo Lolita pthc hussyfan preteen pussy ptsc nymphets novinha ~1.jpg. The latter file name represents 18 different images, with the underlined number being the only distinguishing change. The remaining 17 images under the latter

superimposed with various statements, including: “Plow her pussy,” “White Girls Give Head,” “Pussy,” “Get some pussy,” “Pound her pussy,” “This white girl gives head,” “Make this bitch give head until her face turns red,” “Cum in her mouth,” “This girl loves sucking cock,” “You want some pussy, don’t cha,” and “Got pussy.”[11]

GRANTED ISSUES AND ARGUMENT

I.

WHETHER SPECIFICAION 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.

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Summary of the Argument

Lewd images of minors are not protected speech under the First Amendment. To the extent that *United States v. Barberi*,[12] held that any image of a minor which does not meet the technical

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file name are numbered 003, 007, 008, 009, 013, 014, 015, 017, 026, 027, 028, 032, 035, 039, 040, 042, and 046.

[11] PE 7.

[12] 71 M.J. 127 (C.A.A.F. 2012).

definition of child pornography under 18 U.S.C. § 2256 is constitutionally protected, that decision must be overturned. It conflicts with relevant Supreme Court and state jurisprudence concerning the scope of First Amendment protections.

As applied to this case, appellant was certainly on notice that possessing lewd images of minors could correctly be punishable under Article 134, UCMJ.

Finally, even assuming that this Court finds that lewd images of minors which do not meet the federal definition of "child pornography" are constitutionally protected, the heightened evidentiary standard announced in *United States v. Wilcox*,[13] does not apply here. *Wilcox* should be applied solely to that "core" level of speech protected by the First Amendment, and not to lewd images of minors.

Standard of Review

Whether a specification states an offense and whether the evidence supporting the conviction for that offense is legally sufficient are both questions of law reviewed de novo.[14]

However, when presenting constitutional challenges for the first time on appeal, those issues are reviewed for plain

[13] 66 M.J. 442 (C.A.A.F. 2008).
[14] *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011).

error.[15] "Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused."[16] In this case, not only did appellant fail to raise this issue at trial, but he failed to raise it initially on appeal. The first time appellant presented these arguments to a court was within a motion for reconsideration of the Army Court's initial disposition. Based on that, he has forfeited the issue and it must therefore be reviewed for plain error.

Law and Analysis

Appellant's arguments concerning his positions that the specification at issue is void for vagueness and legally insufficient under *United States v. Wilcox* are premised on the principle that the images for which he was convicted are constitutionally protected under *United States v. Barberi*. Before addressing the substantive arguments concerning the void for vagueness doctrine and the application of the *Wilcox* standard, the question of the constitutionality of the underlying images must first be resolved.

[15] *United States v. Goings*, 72 M.J. 202, slip op. at 7-8 (C.A.A.F. 2013); *United States v. Easter*, 981 F.2d 1549, 1557 (10th Cir. 1992);
[16] *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).

I. "Child Erotica" is Not Protected Under the First Amendment to the United States Constitution.

Appellant was charged with possessing images that depict "minors as sexual objects or in a sexually suggestive way,"[17] otherwise known as "child erotica."[18] Appellant relies on *United States v. Barberi*[19] to establish that the images he was convicted of possessing are constitutionally protected under the First Amendment.

To the extent that *United States v. Barberi* held that images of minors which do not technically meet the federal definition of child pornography under 18 U.S.C. § 2256 are *per se* constitutionally protected speech, that decision must be overruled.

This section will address relevant Supreme Court and State jurisprudence concerning the extent of the First Amendment protections to pornographic images of minors, culminating in an explanation as to why the decision in *Barberi* runs afoul of the law and must be overruled.

A. *United States v. Barberi*

In *United States v. Barberi*, a panel convicted the accused of possessing child pornography, in violation of Article 134, UCMJ, for possessing six images of a minor girl in various

[17] JA at 4.
[18] JA at 16.
[19] 71 M.J. 127 (C.A.A.F. 2012).

stages of undress.[20] Both the Army Court and this Court agreed that four of the six images did not in fact constitute child pornography under the federal statute, 18 U.S.C. § 2256(2)(A)(v), because the images did not depict any portion of the minor's genitalia or pubic area.[21]

This Court began by citing to the general principles discussed in *Ashcroft v. Free Speech Coalition*,[22] that the First Amendment does not protect certain categories of speech, to include defamation, incitement, obscenity, and pornography produced with real children, but that speech falling outside of those categories retains First Amendment protection.[23] This Court then summarily concluded that because the images in question did not meet the federal definition of child pornography (because they did not depict the genitalia or pubic region), they "constitute[d] constitutionally protected speech."[24]

As discussed herein, this conclusion runs afoul of Supreme Court and State jurisprudence which hold that "child pornography," for constitutional purposes, need only be "lewd" to lose First Amendment protection and need not display the genitalia or pubic region. It is also based on the fundamental

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[20] *Barberi*, 71 M.J. at 129.
[21] *Id*. at 130.
[22] 535 U.S. 234 (2002).
[23] *Barberi*, 71 M.J. at 130 (citing *Ashcroft*, 535 U.S. at 245-46).
[24] *Barberi*, 71 M.J. at 130-31.

flaw that the *federal* definition of "child pornography" is the same as the *constitutional* definition of "child pornography."

B. The Foundation for Denying Constitutional Protection to Pornographic Images of Children

In *New York v. Ferber*,[25] the Supreme Court unequivocally held that child pornography is not protected by the First Amendment. At issue in the case was the constitutionality of New York's Article 263 of its Penal Law, which was "directed at and limited to depictions of sexual activity involving children."[26]

The Court began by pointing out that it had long held that "obscenity is not within the area of constitutionally protected speech or press,"[27] because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[28] However, due to the "inherent dangers of

[25] 458 U.S. 747 (1982).
[26] *Ferber*, 458 U.S. at 753. The New York statute defined "sexual conduct" as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or *lewd exhibition of the genitals*." §263.00(3) (emphasis added).
[27] *Ferber*, 458 U.S. at 754 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)).
[28] *Id*. (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

undertaking to regulate any form of expression,"[29] constitutionally infirm obscenity was limited to "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[30]

The question in *Ferber*, though, was whether a statute prohibiting images which might not necessarily meet the obscenity standard in *Miller* is constitutionally acceptable. As the Court pointed out, "the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[31] In addition, "[i]t is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value."[32]

The Court went on to present five separate reasons why pornographic depictions of children are not entitled to constitutional protection under the First Amendment.

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[29] *Ferber*, 458 U.S. at 755 (citing *Miller v. California*, 413 U.S. 15, 23 (1973)).
[30] *Miller*, 413 U.S. at 24.
[31] *Ferber*, 458 U.S. at 761.
[32] *Id*. (citing Memorandum of Assemblyman Lasher in Support of § 263.15).

First, the Court found it to be "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[33] It noted that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[34] The Court concluded that "[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[35]

Second, "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[36] Those images are a "permanent record of children's participation and the harm to the child is exacerbated by their circulation," and the distribution network itself must be closed in order to effectively prevent the exploitation of children.[37]

Third, "the advertising and selling of child pornography provide an economic motive for and are thus an integral part of

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[33] *Ferber*, 458 U.S. at 756-57 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).
[34] *Id*. at 757.
[35] *Id*. at 758.
[36] *Ferber*, 458 U.S. at 759.
[37] *Id*.

the production of such materials, an activity illegal throughout the Nation."[38]

Fourth, "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[39]

Fifth, "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with [its] earlier decisions."[40] The Court concluded that "[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[41]

In recognizing that child pornography is not protected by the First Amendment, the Court required only that it be "adequately defined by the applicable state law," and that "[t]he category of 'sexual conduct' proscribed must also be suitably limited and described."[42] It also made clear that the

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[38] *Id*. at 761.
[39] *Id*. at 762.
[40] *Id*. at 763.
[41] *Ferber*, 458 U.S. at 764.
[42] *Id*. at 764.

Miller standard for obscenity did not apply, but may be used in comparison for the purpose of clarity.[43]

In upholding the constitutionality of New York's statute, the Court found that not only was the definition of child pornography sufficiently concrete, but that the definition itself would meet the *Miller* standard for obscenity.[44]

What *Ferber* did not answer is whether definitions of child pornography broader than New York's would pass constitutional muster. That question was answered eight years later in *Osborne v. Ohio*.[45]

C. Lewd Images of Minors are not Constitutionally Protected, Regardless of whether they Depict the Genitalia or Pubic Region

In *Osborne v. Ohio*, the Supreme Court reviewed the constitutionality of Ohio's child pornography statute which defined child pornography as images of a "minor . . . in a state of nudity."[46] While the Court noted that "nudity, without more, constitute[s] protected expression,"[47] it recognized the Ohio State Supreme Court's interpretation of that statute as prohibiting only "the possession or viewing of material or

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[43] *Id*.
[44] *Id*. at 765 (citing *Miller*, 413 U.S. at 25 (specifically recognizing "lewd exhibition of the genitals" as an example of obscenity.)).
[45] 495 U.S. 103 (1990)
[46] *Osborne*, 495 U.S. at 106-07; Ohio Rev. Code Ann. § 2907.323.
[47] *Osborne*, 495 U.S. at 112 (citing *Ferber*, 458 U.S. at 765 n.18).

performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals."[48] The Court found this construction sufficient to ensure that the statute "avoided penalizing persons for viewing or possessing innocuous photographs of naked children."[49]

While the Court in *Osborne* incorrectly read the Ohio State Supreme Court's interpretation of the statute to require a "lewd exhibition of the genitals,"[50] as opposed to either a "lewd exhibition" or "graphic focus on the genitals,"[51] the Court made clear that distinctions based on which particular body areas or body parts are depicted are not constitutionally significant.[52] Rather, "[t]he crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals

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[48] *Osborne*, 495 U.S. at 113 (citing *State v. Young*, 37 Ohio St.3d 249, 252, 525 N.E.2d 1363 (1988)).
[49] *Osborne*, 495 U.S. at 114.
[50] *Osborne*, 495 U.S. at 114, n.11. Ohio courts have clearly interpreted the language from *State v. Young* to include either a "lewd exhibition" or a "graphic focus on the genitals," not a "lewd exhibition of the genitals." *See State v. McDonald*, 2009 WL 684145 at *7 (Ohio Ct. App. Mar. 16, 2009)("a close reading of the decision in *Young* demonstrates that the nudity need only constitute a lewd exhibition *or* involve graphic focus on the genitals."); *State v. Graves*, 184 Ohio App. 3d 39, 42, 919 N.E.2d 753, 755 (2009); *State v. Gann*, 154 Ohio App. 3d 170, 176, 796 N.E.2d 942, 947 (2003).
[51] The dissent in *Osborne* makes this same argument, pointing out that for the majority's reading to be grammatically correct the Ohio State Supreme Court would have been required to say: "[W]here such nudity constitutes a lewd exhibition *of* or involves a graphic focus on the genitals." *Osborne*, 495 U.S. at 131, fn.4 (Brennan, J., dissenting)(emphasis original).
[52] *Osborne*, 495 U.S. at 114 n.11.

or the buttocks."[53] This makes clear that the majority's mis-reading of the Ohio Supreme Court's interpretation of the statute was irrelevant to its decision. Its decision was predicated on the "lewdness" requirement, not the "genitalia" requirement. Had the majority read the language differently, the result would have been the same.

The scope of constitutional protections relating to child pornography therefore does not depend on which particular body part is displayed. The requirement is simply "lewdness." A lewd image of a minor which does not depict the genitalia is "child pornography" for constitutional purposes, despite it not being "child pornography" under the federal statute.

This interpretation in *Osborne* comports with the Court's earlier holding in *Ferber*. Consider, for example, the following scenario: A pedophile father forces his minor, 10 year old daughter to pose for lewd photographs in various stages of undress. For hours the father photographs the daughter, taking 1,000 pictures of her in various states of nudity; however, none of the photographs depict her genitalia. Finally, with the last photograph, the father makes his daughter get completely naked and takes a lewd picture of her exposed genitalia.

It is unreasonable to say that the child was not harmed by the first 1,000 photographs, despite her genitalia not being

[53] *Osborne*, 495 U.S. at 114 n.11.

displayed. Or to say that if her father posted those images on the internet it would not be harmful to the physiological, emotional, and mental health of the child. This is why lewd images of minors, despite not displaying their genitalia, bear all the hallmarks of the reasons in *Ferber* why child pornography is not protected by the First Amendment. Those 1,000 lewd images of the minor girl undoubtedly constitute sexual exploitation and abuse that the government has a legitimate interest in preventing.[54] Those 1,000 lewd images would be a permanent record of the child's participation and would exacerbate the harm to the child.[55] Finally, the value of those 1,000 images of that child engaged in "lewd sexual conduct is exceedingly modest, if not *de minimis*."[56]

The Supreme Court was correct by stating that "[t]he crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks,"[57] in determining whether a particular image is protected by the constitution. "Child erotica," which by its nature constitutes lewd images of children not rising to the level of federal child pornography (i.e., they do not display

[54] *Ferber*, 458 U.S. at 756-57.
[55] *Ferber*, 458 U.S. at 759.
[56] *Ferber*, 458 U.S. at 762.
[57] *Id*.

the genitalia), is consequently unprotected "child pornography" for constitutional purposes.

Further, classifying images of minors by reference only to "lewdness" for the question of constitutional protection still sufficiently defines the class of unprotected material. The dissent in *Osborne* challenged the reach of Ohio's statute by arguing that its definition would encompass a host of innocent images, such as pictures of topless bathers, teenagers in revealing dresses, toddlers romping unclothed, and the "abundance of baby and child photographs taken every day without full frontal covering, not to mention the work of artists and filmmakers and nudist family snapshots."[58] The dissent attempted to brush aside the logical counterargument that those examples would not be punishable because they are not "lewd." It argued that the Ohio State Supreme Court failed to provide a sufficient definition of "lewd," and that term itself is too obscure to survive a vagueness challenge.[59]

Contrary to the concerns raised by Justice Brennan, the test for determining whether a particular image is "lewd" or "lascivious"[60] is well known to this Court and to virtually every

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[58] *Osborne*, 495 U.S. at 131 fn.5 (Brennan, J. dissenting).
[59] *Osborne*, 495 U.S. at 132-137 (Brennan, J. dissenting).
[60] "Lewd" and "Lascivious" are synonyms. *United States v. Gaskin*, 31 C.M.R. 5, 7, 12 U.S.C.M.A. 419, 421 (1961); *United States v. Johnson*, 4 M.J. 770, 771 (A.C.M.R. 1978); *United States v. Frabizio*, 459 F.3d 80, 84-85 (1st Cir. 2006)(collecting cases).

jurisdiction within the United States. This Court in *United States v. Roderick*,[61] joined every other federal circuit and adopted the *Dost* factors[62] to determine whether particular images are lascivious.[63]

Those factors include whether: (1) the focal point of the visual depiction is on the child's genitalia or pubic area; (2) the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) the child is fully or partially clothed, or nude; (5) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or (6) the visual depiction is intended or designed to elicit a sexual response in the viewer.[64] This Court analyzes those six factors with an overall consideration of the totality of the circumstances, consistent with a number of federal circuits.[65]

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[61] 62 M.J. 425 (C.A.A.F. 2006).
[62] *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).
[63] *Roderick*, 62 M.J. at 429.
[64] *Roderick*, 62 M.J. at 429 (citing *Dost*, 636 F. Supp. at 832).
[65] *Roderick*, 62 M.J. at 430 (citing *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999)); *United States v. Campbell*, 81 Fed.Appx 532, 536 (6th Cir. 2003); *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994).

While the focus on the genitalia or pubic area is a factor in the "lewd" and "lascivious" analysis, it is but one factor to consider in the totality of the circumstances. Even where the genitalia are not displayed, courts can still properly evaluate the image relying on the remaining *Dost* factors and the totality of the circumstances to determine whether the image is lewd and lascivious.

D. The Vast Majority of States Prohibit the Possession of Images of Minors which do not Necessarily Depict the Genitalia or Pubic Region

The vast majority of state child pornography statutes comport with the Supreme Court's determination that genitalia need not be depicted for an image to qualify as child pornography for constitutional purposes. In all, 33 states have definitions of child pornography broader than the federal definition, criminalizing images that do not display the genitalia or pubic region.[66] While some of those states have

[66] Arizona (Ariz. Rev. Stat. Ann. §§ 13-3551, 3553); Arkansas (Ark. Code Ann. § 5-27-601); Colorado (Colo. Rev. Stat. Ann. § 18-6-403); Connecticut (Conn. Gen. Stat. Ann. § 53a-193); Delaware (Del. Code Ann. tit. 11, §§ 1100, 1109); Georgia (Ga. Code Ann. § 16-12-102); Idaho (Idaho Code Ann. § 18-1507); Illinois (720 Ill. Comp. Stat. Ann. 5/11-20.1)(proposed legislation); Indiana (Ind. Code Ann. § 35-42-4-4); Iowa (Iowa Code Ann. § 728.1); Kansas (Kan. Stat. Ann. § 21-5510); Louisiana (La. Rev. Stat. Ann. § 14:81.1); Maine (Me. Rev. Stat. tit. 17-A, § 281); Massachusetts (Mass. Gen. Laws Ann. ch. 272, § 29C); Michigan (Mich. Comp. Laws Ann. § 750.145c); Montana (Mont. Code Ann. § 45-5-625); Nebraska (Neb. Rev. Stat. § 28-1463.02); New Hampshire (N.H. Rev. Stat. Ann. § 649-A:2); New Jersey (N.J. Stat. Ann. § 2C:24-4); North Dakota (N.D. Cent.

only expanded the definition by including images of the buttocks or rectal areas (Arizona, Louisiana, Maine, Michigan, New Hampshire, Vermont, and West Virginia), others go even further by allowing for images displaying only the female breast (Arkansas, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Virginia, and Washington).

Nine of the thirty-three states have definitions that are substantially broader than 18 U.S.C. § 2256 (Delaware, Iowa, Montana, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Wisconsin). Ohio, as discussed herein, requires only nudity, so long as the nudity is a lewd exhibition. Further, Delaware, Iowa, New Jersey, and Pennsylvania all define child pornography as including images of "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person

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Code Ann. § 12.1-27.2-01); Ohio (Ohio Rev. Code Ann. § 2907.323); Oklahoma (Okla. Stat. Ann. tit. 21, § 1024.1); Oregon (Or. Rev. Stat. Ann. § 163.665); Pennsylvania (18 Pa. Cons. Stat. Ann. § 6312); South Dakota (S.D. Codified Laws § 22-24A-2); Tennessee (Tenn. Code Ann. § 39-17-1002); Texas (Tex. Penal Code Ann. §§ 43.25, 43.26); Utah (Utah Code Ann. § 76-5b-103; *see also* SEXUAL EXPLOITATION AMENDMENTS, 2013 Utah Laws Ch. 290 (H.B. 282)); Vermont (Vt. Stat. Ann. tit. 13, § 2827); Virginia (Va. Code Ann. §§ 18.2-374.1, -390); Washington (Wash. Rev. Code Ann. § 9.68A.011); West Virginia (W. Va. Code Ann. § 61-8C-1); and Wisconsin (Wis. Stat. Ann. § 948.01).

who might view such depiction."[67] Finally, Montana, Oregon, and Wisconsin define child pornography as including images displaying only the "intimate parts" of a minor.[68]

E. *United States v. Barberi* Must be Overruled

The summary conclusion by this Court in *Barberi* that any image of a minor which does not meet the federal definition of child pornography is constitutionally protected directly conflicts with the Supreme Court's guidance that "[t]he crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks."[69] *Barberi* does not attempt to distinguish or clarify the Supreme Court's jurisprudence, nor does it even cite to *Osborne*.

The fundamental flaw that formed the basis of this Court's opinion in *Barberi* is that the *federal* definition of "child pornography" is the same as the *constitutional* definition of "child pornography." The holding in *Barberi* is premised on the incorrect assumption that Congress' legislation is co-extensive with the reach of the Constitution. This is contrary to the very foundation of American Constitutional jurisprudence: "It is

[67] Del. Code Ann. tit. 11, §§ 1100, 1109; Iowa Code Ann. § 728.1; N.J. Stat. Ann. § 2C:24-4; and 18 Pa. Cons. Stat. Ann. § 6312.
[68] Mont. Code Ann. § 45-5-625; Or. Rev. Stat. Ann. § 163.665; Wis. Stat. Ann. § 948.01.
[69] *Osborne*, 495 U.S. at 114 n.11.

emphatically the province and duty of the judicial department to say what the law is."[70]

"While Congress can seek to change the meaning of the Constitution through amendment, it may not do so through the passage of ordinary legislation."[71] "To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure."[72]

Congress can only pass laws that fit within the bounds of the Constitution; however, it has no authority to either expand or limit those bounds through simple legislative enactments. That Congress chose to limit the federal definition of child pornography to lascivious images of the genitalia or pubic region does not answer the altogether separate question of whether the First Amendment applies to a broader category of images. The true question is not how Congress has chosen to

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[70] *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803).
[71] *In re Young*, 141 F.3d 854, 859 (8th Cir. 1998)(citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).
[72] *Oregon v. Mitchell*, 400 U.S. 112, 205 (1970) (Harlan, J., dissenting); *see also Flores*, 521 U.S. at 529 (citing *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803)("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.'")).

define child pornography; rather, it is whether Congress could constitutionally enact a broader definition.[73]

Further, *Barberi* conflicts with a majority of States' interpretation of the First Amendment. According to this Court's holding in *Barberi*, all 33 of the listed state statutes are unconstitutional because they prohibit images that do not depict the genitalia or pubic region of the minor. To the contrary, these statutes have been routinely upheld.[74]

The holding in *Barberi* creates an improper conflict of constitutional law between the military and various states, particularly ones where major military installations are located.[75] The constitutionality of a particular image would impermissibly depend solely upon which statute an accused is charged under. More troubling, though, is if the Government were to assimilate a broader State statute under clause 3 of

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[73] Appellant utilizes the same faulty logic by arguing that because child erotica is "lawful," it is therefore constitutionally protected. The possession of child erotica under federal law is "lawful" only insomuch as it is not illegal. The fact that Congress has chosen not to criminalize the possession of child erotica does not answer the question of whether child erotica is constitutionally protected.

[74] *See, e.g., Com. v. Davidson*, 595 Pa. 1, 938 A.2d 198 (2007); *State v. Hunter*, 550 N.W.2d 460 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306 (Iowa 2000); *People v. Gezelman*, 202 Mich. App. 172, 174, 507 N.W.2d 744, 745 (1993); *Com. v. Sullivan*, 82 Mass. App. Ct. 293, 302, 972 N.E.2d 476, 484 (2012).

[75] For example: Arizona, Colorado, Georgia, Kansas, Louisiana, Texas, Virginia, and Washington.

Article 134, UCMJ, a military court would be required under *Barberi* to find that statute unconstitutional.

Because *Barberi* conflicts with the Supreme Court's interpretation of the scope of the First Amendment's protection for lewd images of minors, relies exclusively upon the federal definition of child pornography, and conflicts with a super majority of States' interpretation of the First Amendment, it must be overruled. Lewd images of minors are not protected under the First Amendment, regardless of whether they display the genitalia or pubic region.

F. The Images in this Case are not Constitutionally Protected

If *Barberi* is overruled, then the question with regard to the images in this case is whether they are sufficiently "lewd" to bring them outside the protections of the First Amendment, in line with *Ferber* and *Osborne*. This is admittedly a closer case based on the fact that 20 of the 23 images do not depict nudity. However, the Third Circuit has recognized that nudity is not an essential requirement for an image to be determined to be lewd.[76] The Court noted that "lasciviousness" refers to an image designed to "excite lustfulness or sexual stimulation in the viewer," and that "[s]uch a definition does not contain any requirement of nudity, and accords with the multi-factor test

[76] *Knox*, 32 F.3d at 745-46.

announced in *United States v. Dost*."[77] To be sure, the fourth *Dost* factor asks only "whether the child is fully or partially clothed, or nude,"[78] supporting the proposition that nudity is not essential for an image to be lewd and lascivious.

The Third Circuit supported its rationale by noting that scantily clad images could have the same effect on the pedophile viewer as do fully nude images:

> [I]t is not true that by scantily and barely covering the genitals of young girls that the display of the young girls in seductive poses destroys the value of the poses to the viewer of child pornography. Although the genitals are covered, the display and focus on the young girls' genitals or pubic area apparently still provides considerable interest and excitement for the pedophile observer, or else there would not be a market for the tapes in question in this case.[79]

In this case, despite the fact that most of the very young, minor girls are not nude, they are still lewd images. All of the images portray undoubtedly minor girls in seductive poses, either in inappropriate underwear for their ages, such as thongs, or string bikinis intended to display their buttocks or nearly naked bodies. Each of the girls is posed in such a way as to accentuate their sexual parts. These poses are undoubtedly sexually suggestive, focusing on the intimate parts

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[77] *Knox*, 32 F.3d at 745-46.
[78] *Dost*, 636 F. Supp. at 832.
[79] *Knox*, 32 F.3d at 745.

and prominently displaying the exposed buttocks for the viewer. The type of lingerie and other clothing utilized is entirely inappropriate for the extremely young ages of the girls.

Finally, the images are undoubtedly intended and designed to elicit a sexual response in the viewer. This is made more pronounced by the explicit language super-imposed on each image, inviting the viewer to "Plow her pussy," "Cum in her mouth," or to "Make this bitch give head until her face turns red." In one image of a very young blonde girl with braces, not only does the image show her exposing her buttocks and genitalia while wearing a thong, it also shows a close up view of her open mouth with the writing over it: "cum in her mouth." These types of captions may appropriately be considered as a factor in determining whether the particular images are lewd.[80]

The remaining three images go even further, actually displaying the exposed breasts of the minor girls, with one girl being represented in complete nudity.

There should be no question that these images represent the sexual abuse and exploitation of those minor girls. The psychological harm to them, compounded by the distribution of

[80] *See United States v. Moore*, 215 F.3d 681, 687 (7th Cir. 2000)(pictures of naked boys and girls in unnatural positions with sexually suggestive captions constituted lascivious exhibitions); *see also United States v. Rapp*, 2013 WL 1829157 (N.M. Ct. Crim. App. April 30, 2013)(unpublished)(recognizing that captions accompanying the depiction are relevant in evaluating lewdness).

those images through the internet is unknown, but undeniable. Though not child pornography under federal law, these images are unmistakably lewd, and appropriately fall outside the protections of the First Amendment.

II. The Charge is Not Void for Vagueness.

Appellant's arguments blend "the related issues of 'failure to state an offense,' which focuses on the adequacy of a specification, and 'void for vagueness,' which focuses on whether there is fair notice that the charged conduct is criminal."[81]

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[82] "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."[83]

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[81] *United States v. Amazaki*, 67 M.J. 666, 669 (Army Ct. Crim. App. 2009), *rev. denied* 68 M.J. 225 (C.A.A.F. 2009)(citing *United States v. Saunders*, 59 M.J. 1, 6-9 (C.A.A.F. 2003)(discussing, with regard to Article 134, UCMJ, the distinction between 'fair notice that one's conduct is subject to criminal sanction' and the notice of a specification's elements.")).

[82] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

[83] *Parker v. Levy*, 417 U.S. 733, 757 (1974) (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

In the military context, "[i]t is well settled that conduct that is not specifically listed in the *MCM* may be prosecuted under Article 134."[84] In addition, the conduct itself need not even constitute a crime.[85] However, "[t]he primary obstacle to prosecuting a servicemember under the general article is that the servicemember must be on 'fair notice' that his conduct was punishable under the Uniform Code."[86] This requires that "a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed."[87] "Criminal responsibility will attach where a reasonable man under the circumstances could reasonably understand that the statute proscribed that kind of conduct."[88]

Sources which might provide "fair notice" to an accused include "the *MCM,* federal law, state law, military case law, military custom and usage, and military regulations."[89]

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[84] *Saunders*, 59 M.J. at 6.
[85] *United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000)(quoting William Winthrop, *Military Law and Precedents*, 711-12 (2d ed. 1920 Reprint)).
[86] *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998); *see also Saunders*, 59 M.J. at 6 ("due process requires that a person have fair notice that an act is criminal before being prosecuted for it."); *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)("Due process requires "fair notice" that an act is forbidden and subject to criminal sanction.").
[87] *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006).
[88] *United States v. Zander*, 46 M.J. 558, 561 (N-M. Ct. Crim. App. 1997).
[89] *Vaughan*, 58 M.J. at 31; *see also Pope*, 63 M.J. at 73.

"In determining the sufficiency of the notice a [specification] must of necessity be examined in the light of the conduct with which a defendant is charged."[90] This means that the question in the Article 134, UCMJ, context, is not whether the underlying act itself is criminal, but rather whether that activity affects the "esteem of the armed forces or good order and discipline."[91] "Those are the yardsticks by which the criminality of conduct under clauses 1 and 2 are measured."[92]

A. The Specification in this Case Provides Fair Notice as to the Standard Applicable to the Forbidden Conduct.

"In addition to notice that an act is a crime, a person must also have 'fair notice as to the standard applicable to the forbidden conduct' against which they must defend."[93] However, this "does not necessarily require published notice of the precise wording of the elements."[94] In this case, contrary to appellant's arguments, the descriptors "sexual objects" and "sexually suggestive way" are not amorphous concepts wholly

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[90] *Parker v. Levy*, 417 U.S. 733, 757 (1974) (citing *Robinson v. United States*, 324 U.S. 282 (1945)).
[91] *United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004); *see also Zander*, 46 M.J. at 560-61 ("In determining the vagueness of a military disciplinary statute under Article 133, 10 U.S.C. § 933, one must analyze the alleged misconduct to determine whether it is disgraceful and compromising as contemplated by the statute.").
[92] *Mason*, 60 M.J. at 20.
[93] *Saunders*, 59 M.J. at 9; *see also Vaughan*, 58 M.J. at 31 ("It also requires fair notice as to the standard applicable to the forbidden conduct.").
[94] *Saunders*, 59 M.J. at 9.

unknown to the law. To the contrary, they constitute the generally accepted definition of "child erotica," and are well established principles associated with determining the lewdness and lasciviousness of particular images.

While there is no statutory definition of "child erotica," what can be gleaned from relevant case law, however, is that "child erotica" encompasses "lascivious images lacking an exhibition of the genitals or pubic area" of a minor.[95] "Child erotica" has also been described as minors depicted "as sexual objects or in a sexually suggestive way," but is not "sufficiently lascivious to meet the legal definition of sexually explicit conduct under 18 U.S.C. § 2256,"[96] and as "images that are not themselves child pornography but still fuel . . . sexual fantasies involving children."[97]

Further, the near universally adopted *Dost* factors specifically include in the definition of "lascivious" (synonymous with lewdness) the question of whether the image is "sexually suggestive, i.e., in a place or pose generally associated with sexual activity."[98] In addition, courts routinely look to whether an image portrays a child as a "sexual

[95] *United States v. Anderson*, 2010 WL 3938363 at *8 (Army Ct. Crim. App. 2010)(mem. op.)
[96] *United States v. Vosburgh*, 602 F.3d 512, 520 fn.7 (3d Cir. 2010).
[97] *United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir. 2006).
[98] *Dost*, 636 F. Supp. at 832.

object" in determining whether a particular image is lascivious.[99]

What is clear, therefore, from the context of how "child erotica" has been described is that it is simply lewd or lascivious images of minors which do not necessarily depict the genitalia or pubic region. This means that the determination of whether an image is "child erotica" turns on whether it meets the definition of lewd or lascivious under *Dost*.

Consequently, by utilizing the terms "minors as sexual objects or in a sexually suggestive way," the government was charging appellant with possessing images of "child erotica." The trial counsel confirmed as much during closing argument.[100]

Utilizing the definition of the term, as opposed to the term itself, does not render the specification void for vagueness. This is no different than charging an accused with possessing images depicting "a lascivious exhibition of the genitals," as opposed to possessing images of "child pornography," or by alleging an accused "wrongfully obtained"

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[99] *See Anderson*, 2010 WL 3938363 at *3; *United States v. Cook*, 2003 WL 25945957 at *1 n.5 (Army Ct. Crim. App. 31 March 2003); *United States v. Rapp*, 2013 WL 1829157 (N.M. Ct. Crim. App. 30 Apr 2013); United *States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011); *United States v. Ward*, 686 F.3d 879, 882 (8th Cir. 2012); *Wiegand*, 812 F.2d at 1244 (recognizing image was lascivious because the child was displayed as a sexual object); *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2011 ed.), 6.18.2252A.

[100] JA at 16.

property as opposed to "did steal" property. Either specification says the same thing as the other.

Because a finder of fact can appropriately rely on the terms "sexually suggestive" and "sexual objects" in determining whether a particular image is lewd, so too would an ordinary servicemember be able to adequately judge whether a particular image of a minor they choose to possess is lewd. As a result, the terms used by the Government in the specification provide "fair notice as to the standard applicable to the forbidden conduct" against which appellant must defend.[101]

B. Appellant was on Notice that Lewd Images of Minors May be Criminalized under Article 134, UCMJ.

An ordinary servicemember would be on notice that possessing "child erotica" can properly be punished under Article 134, UCMJ, as either being prejudicial to good order and discipline or likely to bring discredit to the service.

At their simplest terms, "child erotica," or images depicting "minors as sexual objects or in a sexually suggestive way," mean nothing more than "lewd images of minors" that do not amount to the federal definition of child pornography because they do not contain a focus on the genitalia or pubic region.[102]

[101] *Saunders*, 59 M.J. at 9; *see also Vaughan*, 58 M.J. at 31 ("It also requires fair notice as to the standard applicable to the forbidden conduct.").
[102] *See* Discussion, *infra*.

Just as "[i]t is intuitive that the viewing of child pornography discredits those who do it, as well as the institutions with which those persons are identified,"[103] so too would it be intuitive for an ordinary servicemember to understand that possessing lewd images of minors could potentially discredit the armed forces. The reasons why child pornography intuitively discredits the person viewing it and the institution to which they belong apply equally to lewd images of minors (child erotica).[104]

The conclusion that a servicemember would be on notice that possessing lewd images of minors could be criminalized under Article 134, UCMJ, is wholly supported by this Court's jurisprudence concerning the possession of "virtual child pornography." This Court has made explicitly clear that despite "virtual child pornography" being fully constitutionally protected speech in civilian society,[105] servicemembers are on notice of, and can appropriately be prosecuted for its possession under Article 134, UCMJ.[106] As this Court noted in *Mason*, "[w]hile the issue as to whether the images are 'virtual' or 'actual' may have a potentially dispositive effect in

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[103] *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008).
[104] *See Ferber*, 458 U.S. at 756-764; *see also Osborne*, 495 U.S. at 114 n. 11 ("The crucial question is whether the depiction is lewd.").
[105] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).
[106] *Mason*, 60 M.J. 15; *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009); *Amazaki*, 67 M.J. at 671-72.

prosecutions under the CPPA in both civilian and military settings, it is not inherently dispositive of their impact on the esteem of the armed forces or good order and discipline."[107]

If a servicemember is properly on notice that possessing constitutionally protected fake images of minors can be criminalized, there should be no question that a servicemember is on notice that possessing constitutionally infirm[108] lewd images of real minors can be punishable under Article 134, UCMJ. Whereas "virtual child pornography" does not "involve, let alone harm, any children in the production process,"[109] lewd images of actual minors (despite not depicting the genitalia or pubic region) undoubtedly injure those who are depicted within them.[110]

As pointed out by the Supreme Court when addressing the doctrine of void for vagueness, "[i]n actuality, what is at issue here are concepts of 'right' and 'wrong' and whether the civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a broader variety of relationships than one finds in civilian life."[111] "The law should, in appropriate circumstances, be flexible enough to recognize the moral dimension of man and his

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[107] *Mason*, 60 M.J. at 20.
[108] *See Osborne*, 495 U.S. at 114 n. 11, and discussion herein.
[109] *Ashcroft*, 535 U.S. at 241.
[110] *Ferber*, 458 U.S. at 756-764.
[111] *Parker v. Levy*, 417 U.S. 733, 763 (1974)(Blackmun, J., concurring).

instincts concerning that which is honorable, decent, and right."[112] Under these principles, it should be self evident to any servicemember that possessing a lewd image of a minor, otherwise known as child erotica, is "wrong" and can be penalized under Article 134, UCMJ.

C. Appellant was on Notice that the Images in this Case Could be Criminalized under Article 134, UCMJ

As discussed, herein, the images depicted on Prosecution Exhibit 7 are lewd images undeserving of constitutional protection. There should be no question to any reasonable servicemember that possessing images of partially naked and scantily clad minor girls, which are captioned to invite the servicemember to "plow her pussy," "cum in her mouth," and to "make this bitch give head until her face turns red" would have a tendency to discredit the service.

In addition, three of the images specifically depict the bare female breasts of a minor, which would directly violate Kansas' child pornography statute, the state in which appellant was assigned.[113] Kansas' statute would have put appellant on notice that these three specific images were subject to criminal penalty.

[112] *Parker v. Levy*, 417 U.S. 733, 765 (1974)(Blackmun, J., concurring).
[113] *See* Kan. Stat. Ann. § 21-5510.

Altogether, these are not innocent images of minors engaged in normal behavior. These are lewd images of minor girls posed and displayed in a sexually suggestive manner, intended to incite the lustfulness of the pedophile viewer. Each of the titles of the images contains common references to child pornography (pedo, Lolita, pthc, ptsc, nymphets, etc.). And most of the images contain graphic descriptors as to what the viewer should do to the minor girl depicted. It is intuitive that images of this nature would be subject to prosecution under Article 134, UCMJ, for their tendency to discredit the service.

III. The Evidence is Legally Sufficient Because *Wilcox* does not Apply in the Context of this Case.

It is without question that servicemembers may be prosecuted for speech or conduct which would normally be protected under the First Amendment. "[T]he right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country."[114] "Restrictions on speech may exist that have no counterpart in civilian society."[115]

This is so because "(m)ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in

[114] *Pope*, 63 M.J. at 75 (citing *United States v. Brown,* 45 M.J. 389, 396 (C.A.A.F.1996)).
[115] *Pope*, 63 M.J. at 75 (citing *Parker,* 417 U.S. at 759).

[the] federal judicial establishment."[116] "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ."[117] This need to ensure discipline results in the reality that "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[118]

In *United States v. Wilcox*,[119] this Court created a higher standard of evidence required to prove that speech by a servicemember charged under Article 134, UCMJ, is service discrediting.[120] This Court requires that "a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory."[121]

This standard differs markedly from that announced in *United States v. Philips*,[122] which requires only that the conduct be of a "nature" that "would tend to bring discredit on the armed forces if known by the public."[123] This means that, in

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[116] *Parker*, 417 U.S. at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).
[117] *Parker*, 417 U.S. at 744.
[118] *Parker*, 417 U.S. at 759 (citing *United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (C.M.A. 1972)).
[119] 66 M.J. 442 (C.A.A.F. 2008).
[120] *Wilcox*, 66 M.J. at 448-49.
[121] *Wilcox*, 66 M.J. at 448-49.
[122] 70 M.J. 161 (C.A.A.F. 2011).
[123] *Phillips*, 70 M.J. at 165-66.

general, "the government is not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting."[124] In the end, "[t]he responsibility for evaluation of the nature of the conduct rests with the trier of fact."[125]

In this case, if this Court appropriately overrules *Barberi* and finds that lewd images of minors are not constitutionally protected, then the heightened *Wilcox* standard does not apply and the evidence in this case is undoubtedly legally sufficient to sustain appellant's conviction. As pointed out in *Medina*, it is intuitive that the lewd images possessed by appellant are of a nature to discredit the armed services, and the military judge appropriately found as such.

However, should this Court continue to apply *Barberi*'s incorrect interpretation that lewd images of minors which do not display the genitalia or pubic region are protected under the First Amendment, the result is still the same. This is so because the *Wilcox* standard, while applicable in general to protected speech under the First Amendment, does not apply to the "speech" in this case.

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[124] *Philips*, 70 M.J. at 166.
[125] *Philips*, 70 M.J. at 166.

As this Court discussed in *Wilcox*, the underlying speech for which the accused had been charged, "while distasteful, constitute Appellant's ideas on issues of social and political concern, which has been recognized as 'the core of what the First Amendment is designed to protect.'"[126] The heightened standard was therefore created to ensure that "the entire universe of servicemember opinions, ideas, and speech would [not] be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive."[127]

However, merely because certain conduct or speech might fall within the rubric of the First Amendment does not require that the higher *Wilcox* standard need apply equally. The First Amendment treats different speech differently. As the Supreme Court has pointed out, "[o]ur First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least

[126] *Wilcox*, 66 M.J. at 446-47 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003).
[127] *Wilcox*, 66 M.J. at 449.

protection of all."[128] For example, as the Supreme Court earlier pointed out:

> even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment.[129]

In this case, even assuming that the images at question are constitutionally protected because either *Barberi* is upheld or because this Court does not find them to be sufficiently "lewd" to meet the *Osborne* standard, the *Wilcox* standard should not apply. These are reprehensible images of minor girls displayed for no other reason than to incite the sexual satisfaction of the pedophile viewer. They explicitly invite the viewer to "Plow her Pussy," "Make this bitch give head until her face turns red," and to "cum in her mouth."

To apply the *Wilcox* standard in this case to these images would elevate them to the same level as the "core political speech" which the First Amendment was undoubtedly drafted to protect. Though they might be deserving of some measure of constitutional protection, they are not deserving of the highest level of protection afforded by this Court in *Wilcox*. Rather,

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[128] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992)(Stevens, J., concurring).
[129] *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

the generally accepted standard of proof for establishing that conduct is service discrediting, recognized in *Parker*, is sufficient.

Applying the appropriate standard of evidence required to establish the service discrediting nature of appellant's misconduct, there should be no question that these images are of a "nature" that "would tend to bring discredit on the armed forces if known by the public."[130] As a result, the finding as to Specification 3 of Charge I is legally sufficient.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

//s//
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[130] *Phillips*, 70 M.J. at 165-66.

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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//s//

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on August 7, 2013.

//s//

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