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. Dkt. No. 20121135
Specialist (E-4) **DANA P. BLOUIN,** United States Army, Appellant	)	USCA Dkt. No. 14-0656/AR

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IN THE UNITED STATES COURT OF APPEALS
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U N I T E D S T A T E S, Appellee v. Specialist (E-4) **Dana P. Blouin,** United States Army, Appellant	FINAL BRIEF ON BEHALF OF APPELLANT Army Misc. Dkt. No. 20121135 USCA Dkt. No. 14-0656/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S PLEAS OF GUILTY TO THE SPECIFICATION OF THE CHARGE WHERE PROSECUTION EXHIBIT 4 DEMONSTRATED THAT THE IMAGES POSSESSED WERE NOT CHILD PORNOGRAPHY.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (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 December 14, 2012, Specialist (SPC) Dana P. Blouin, was tried at Wheeler Army Airfield, Hawaii, before a military judge sitting as a general court-martial. Pursuant to his plea, the military judge convicted SPC Blouin of possessing child

pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). The military judge sentenced SPC Blouin to confinement for six months, reduction to E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On May 28, 2014, the Army Court affirmed the findings and the sentence. (JA 1). Specialist Blouin was notified of the Army Court's decision and petitioned this Court for review on June 12, 2014. On October 23, 2014, this Honorable Court granted appellant's petition for review.

Statement of Facts

The government charged SPC Blouin with possessing child pornography under clause 1 of Article 134, UCMJ. (Charge Sheet). The charge specifically incorporated the definition of child pornography as provided in 18 U.S.C. § 2256(8). (Charge Sheet). The government asserted in its stipulation of fact that "only approximately one hundred and seventy-three (173) images *are likely* child pornography . . . ." (JA 52) (emphasis added). Of those 173 images, twelve images were included in Prosecution Exhibit 4.

During the providence inquiry, the military judge provided SPC Blouin with the definitions as provided in 18 U.S.C. § 2256. The military judge specifically referenced 18 U.S.C. §§ 2256(2)(B), 2256(8)(B), 2256(10). (JA 19-21). These sections provide the definitions pertinent to child pornography when

dealing with digital images. The military judge provided the following definitions:

> The phrase child pornography means any visual depiction, including any photography, film, video, picture, or computer, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. . . . When the visual depiction is a digital image, a computer image, or a computer-generated image that is or is indistinguishable from that of a minor engaging in sexual explicit conduct, the phrase 'sexually explicit conduct' means . . . graphic or simulated lascivious exhibition of the genitals or pubic area of any person. . . . Graphic, when used with respect to depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

(Id.).

Specialist Blouin admitted that he possessed digital images. (JA 23). Specialist Blouin also admitted that all the images he possessed were images of children lasciviously exhibiting their genitals or pubic areas. (JA 38-40).

The military judge found SPC Blouin guilty of The Charge and its specification. (R. at 67). During sentence deliberation, the military judge reviewed Prosecution Exhibit 4, which depicted twelve images of fully clothed children. (JA 46). The military judge found only three images to be child pornography. (JA 45). The images are as follows:

a. Image 1229721479281.jpeg (Image 1)

This image depicts a girl somewhere between the ages of ten and fourteen years-old lying on her side in a photography studio looking away from the photographer. Her hands are tucked under her cheek as if in a sleeping position. Neither the girl's genitals nor her pubic area is visible. Rather, she is wearing a floral swim shirt that comes below her belly button and a pair of white underwear that covers substantially the same area as a swimsuit bottom would cover. While her legs are spread apart, her genitals are not visible nor are they outlined by the underwear as her underwear are loose fitting. The image is imprinted with the words "magazine-fashion.com" and "Magazine Fashion." This photograph appears to have been taken in a studio and advertises an openly available website.

b. Image 1229720242042.jpeg (Image 2)

This image depicts a girl somewhere between the ages of ten and fourteen years-old standing up with her back to the camera as she slightly leans on a chair and looks over her right

shoulder. This photograph appears to have been taken in a photography studio and has the letters "vladmodels.ru" imprinted on it. The girl is wearing lingerie and underwear. Neither the girl's genitals nor her pubic area is visible. The image's focal point appears to be the girl's back and buttocks.

c. Image 1229718342693.jpeg (Image 3)

This image depicts the same girl as in Image 2 wearing the same clothes and presumably in the same photography studio. She is positioned on her knees with her buttocks elevated and her torso bent down toward the floor. Her face is turned toward the camera. Neither the girl's genitals nor her pubic area is visible. Similar to Image 2, the photograph advertises the modeling agency's website, vladmodels.ru.

After viewing the images contained in Prosecution Exhibit 4, the military judge reopened the providence inquiry. (JA 46). The military judge and SPC Blouin then discussed the following:

> MJ: Did you know that you had all of the images that are on Prosecution Exhibit 4 on your laptop computer?
>
> ACC: Yes, Sir.
>
> MJ: On your laptop computer?
>
> ACC: Yes, sir.
>
> MJ: Did you know what they were?
>
> ACC: Yes, Sir.
>
> MJ: What did you think they were?

ACC: Child porn.

MJ: Consistent with the definition I gave you previously?

ACC: Yes, sir.

(JA 48-9).

The military judge then addressed counsel and explained:

> [H]aving to review Prosecution Exhibit 4, I only find three images of child pornography. I find image 1229718342693.JPEG, image 1229720242042.JPEG, and image 1229721479281.JPEG meet the definition of child pornography. The balance of the images on Prosecution Exhibit 4 do not meet that definition. Given further inquiry, I do believe that the accused is guilty of the offense as charged and I stand by my findings. Although as to those three images, I think counsel would be wise to review *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), that it can be a lascivious exhibition even if the genitals and the pubic area are clothed. So I stand by my findings.

(JA 49).

The military judge did not engage in any further discussion with SPC Blouin regarding his understanding of the definition of child pornography and how it applied to the images on Prosecution Exhibit 4 in light of the fact the military judge found that nine images were not child pornography. Nor did the military judge engage in discussion with SPC Blouin regarding his reference to *Knox*.

Summary of Argument

The images admitted in Prosecution Exhibit 4 are not child pornography based on the definitions provided by statute, the military judge, and pertinent case law. Specialist Blouin admitted that the images contained in Prosecution Exhibit 4 were all child pornography. After reviewing the images, the military judge found only three images to be child pornography. However, the military judge failed to resolve SPC Blouin's misunderstanding of how the law applied to the facts in his case. Further, the military judge's reference and the Army Court's adoption of the holding in *Knox* was error as the statute at issue has dramatically changed since the *Knox* decision. The adoption of *Knox* was also erroneous because the reasoning behind the decision is questionable in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Argument

This court reviews a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The accused must admit every element of the offense to which he has pled guilty. *See* Rules for Courts-Martial [hereinafter R.C.M.] 910(e). The providence inquiry must demonstrate the accused believes he is guilty and that his understanding of the facts supports the objective conclusion he is guilty. *United States v. Care*, 40 C.M.R 247 (C.M.A. 1969). If a matter is introduced that is

inconsistent with the plea, the military judge either must resolve the inconsistency or reject the guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). Finally, the record must demonstrate the accused knew how the law applied to the facts of his case. *United States v. Schell*, 72 M.J. 339, 346 (C.A.A.F. 2013).

To be guilty of the offense charged, the accused must actually possess child pornography. Specialist Blouin was charged with possessing child pornography as defined by 18 U.S.C. § 2256(8). Thus, the images must meet the definition of sexually explicit conduct as laid out in 18 U.S.C. § 2256 (2008). *See United States v. Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012). One subset of sexually explicit conduct is a lascivious exhibition of the genitals or pubic area. 18 U.S.C. § 2256(2)(A). Congress did not define "lascivious exhibition of genitals or pubic area" in 18 U.S.C. § 2256. The threshold inquiry in lascivious exhibition cases is whether there is an exhibition of the genitals or pubic area before determining whether that exhibition is lascivious. *See Barberi*, 71 M.J. 130. In *United States v. Roderick,* this Court relied in part on the *Dost* factors[1] in determining what constitutes "lascivious

[1] The *Dost* factors refer to six non-exclusive factors established by the United States District Court for the Southern District of California, and utilized by federal circuit courts in defining

exhibition." 62 M.J. 425, 430 (C.A.A.F. 2006). The six *Dost* factors are:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 429.

As this Court observed, other federal circuit courts rely upon the *Dost* factors "with an overall consideration of the totality of the circumstances" in determining whether a particular photograph contains a "lascivious exhibition." 62 M.J. at 429-30.

A. Specialist Blouin's plea was not provident.

"lascivious conduct." *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

Specialist Blouin possessed digital images. Under the statutory definition of child pornography for digital images, to be sexually explicit conduct the lascivious exhibition of the genitals must be "graphic." The military judge expressly included this statutory definition in the providence inquiry. "Graphic" means that a "viewer can observe any part of the genitals or pubic area of any depicted person." 18 U.S.C. 2256(10).

Throughout the providence inquiry, SPC Blouin indicated that in all the images he possessed the genitals and pubic areas of the children were covered. In the images contained in Prosecution exhibit 4 a viewer cannot "observe any part of the genitals or pubic area" of any of the children depicted. Thus, SPC Blouin's descriptions as well as the photos admitted into evidence, set up a matter inconsistent with the plea that was never resolved by the military judge. Nor does the military judge's reference to *Knox* resolve the inconsistency as the holding in *Knox* was based on an earlier version of the statute which did not include a "graphic" requirement.

Further, during the providence inquiry SPC Blouin admitted that the images contained in Prosecution Exhibit 4 were child pornography. After viewing the images, the military judge reopened the providence inquiry because, after viewing the images, he found that only three of the twelve images admitted

were actually child pornography. The nine images that were not child pornography were inconsistent with SPC Blouin's plea. Specialist Blouin incorrectly believed that the nine images were child pornography, and the military judge failed to resolve this inconsistency.

Even though the military judge reopened the providence inquiry, he failed to address SPC Blouin's misunderstanding of how the law applied to the facts. In fact, the military judge merely reconfirmed that SPC Blouin believed that all the images were child pornography consistent with the definition that the military judge previously provided.

The record demonstrates that SPC Blouin did not understand the definition of child pornography as provided by the military judge. After the military judge found that only three images were child pornography, it was incumbent upon the military judge to ensure that SPC Blouin understood why the images he had already admitted were child pornography did not meet the definition. Without any further discussion with SPC Blouin regarding why the three images met the definition of child pornography and nine did not, SPC Blouin's plea was not knowing and voluntary.

The record further demonstrates that the military judge accepted SPC Blouin's plea based on an erroneous view of the law. Relying on *Knox*, the military judge believed clothing over

the genitals or pubic areas did not remove the images from the definition of child pornography. This reliance was misplaced because the current statute specifically requires that the genitals or pubic area be visible. As a result, the military judge did not review the images under the correct standard and left SPC Blouin with a false impression of the law.

B. There can be no "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(8) where the genitals and pubic area are fully covered by an article of clothing.

The military judge's reference to and the Army Court's adoption of *Knox* is erroneous in light of the current statutory definition of child pornography as well as *Ashcroft*. When *Knox* was decided, the federal statute looked remarkably different. The *Knox* statute didn't contain any provisions regarding digital images or that digital images also be "graphic." Thus, the *Knox* court's holding that covered genitals can be exhibited is irrelevant to the current statutory framework that requires a viewer to "observe any part of the genitals or pubic area."[2] Because one cannot observe something they cannot see the *Knox* holding is contrary to the statutory language.

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[2] The statute's requirement that a viewer "observe any part of the genitals or pubic area" only applies to digital images. That requirement does not apply to other types of images. Therefore, while *Knox's* holding may still apply to non-digital images, Congress intentionally placed a more exacting standard to digital images that did not exist when *Knox* was decided.

The *Knox* court's reasoning is also flawed in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254 (2002). In *Ashcroft*, the Court rejected a similar argument explaining that "*Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Ashcroft*, 535 U.S. at 250-51. The Court further rejected the justification that the virtual child pornography ban is necessary because pedophiles may use it to seduce children. *Id.* at 251. Much like virtual child pornography, depictions of minors with covered genitals not engaged in sexual activity is not the product of sexual abuse and falls outside the *Ferber* decision.

Whether a child's genitals are covered relates to the statutory threshold requiring an exhibition, not to a finding of lasciviousness. *See United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir.), *cert. denied*, 498 U.S. 1024 (1991). The inquiry of whether the child's genitals are covered should not be confused with the fourth *Dost* factor which addresses whether the child, and not the genitals, is partially clothed. The fourth factor is relevant to determine if an *exhibition* of the genitals is lascivious, not to determine the threshold question of whether there is an exhibition of the genitals. *See Barberi*, 71 M.J. at

130 (explaining when images do not contain an exhibition of genitals or pubic area, there is no need for further inquiry into the definition of lascivious or the *Dost* factors.). The fourth *Dost* factor is still relevant if the child's genitals are uncovered as a child, for example, can be fully clothed and the angle in which the photograph is taken, or an article of clothing is pushed to the side, to make the genitals or pubic area visible.

Even if this Court does not find the military judge's inclusion of the term "graphic" to be controlling, the plain meaning of "exhibition" demonstrates that the object being "exhibited" must actually be seen. "Exhibition" means an act or instance of showing. Merriam-Webster, http://merriam-webster.com/dictionary/exhibition (last visited Dec. 3, 2014). "Exhibit" means to present to view: show or display outwardly; present for inspection. Merriam-Webster, http://merriam-webster.com/dictionary/exhibit (last visited Dec. 3, 2014). Antonyms for "exhibit" are hide, cover, conceal. Roget's 21st Century Thesaurus, Third Edition, (2009).

These definitions demonstrate that the statute proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, if covered at least discernible, or displayed. Genitals which are concealed-that is, covered by an article of clothing-cannot, by definition, be exhibited. Thus, the

military judge's and the Army Court's interpretation of 18 U.S.C. § 2256 criminalizing "exhibitions" of the genitals or pubic areas even when these areas are covered by an article of clothing derogates from the plain meaning of the statute.

In interpreting a statute, the starting point is always the language of the statute itself. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014); *see also Burrage v. United States*, 134 S. Ct. 881, 887 (2014).

> The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

McPherson, 73 M.J. at 395.

The court in *Knox* reasoned that because the statute did not explicitly include a nudity requirement, the court should not read one into the statute. 32 F.3d 733, 749. The court placed the burden on Knox to demonstrate a clear contrary congressional intent to warrant importing into the statute an "unexpressed requirement of nudity". *Id.* at 747. However, the plain meaning of "exhibition of genitals" necessarily includes that the genitals be nude, uncovered, or at the least discernible. "Nude exhibition of genitals" would be redundant, thus, "nude" would be superfluous to the requirement that the genitals be exhibited.

Even though the ordinary meaning of the statutory language is clear, the *Knox* court looked to the congressional history to glean the intent of Congress. *Id.* After examining the legislative history, the court concluded that the history was "wholly silent as to whether Congress intended the statutory terms 'lascivious exhibition of the genitals or pubic area' to encompass non-nude depictions of these body parts." *Id.* at 747-48. However, the court relied on the underlying rationale for the federal child pornography laws and the importance of controlling the production and dissemination of child pornography since pedophiles often use it to seduce other children into performing sexual acts to support its conclusion that covered genitals could be exhibited and therefore proscribed. *Id.* at 749. The court reasoned 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." *Id.* at 750. The court concluded that this rationale applies equally to any lascivious exhibition whether the genitals or pubic area are clad or completely exposed. *Id.*

The *Knox* court separated "lascivious exhibition" from "genitals or pubic area". The court erred in looking at whether there is a lascivious exhibition that includes the *genital area*

and then considering "the fact that a child's *genital area* is covered [as] a factor militating against a finding of lasciviousness." *Knox*, 32 F.3d at 751. (emphasis added). The correct analysis should be whether there is an exhibition of the *genitals or pubic area*, and only if there is an exhibition of the *genitals or pubic area* should the court then determine if that exhibition is lascivious.

By focusing on lasciviousness instead of whether there is an exhibition of the genitals, the *Knox* court transformed the inquiry into a subjective one of whether the material is intended to elicit a sexual response from the viewer. The subjective inquiry which results from *Knox* leads to inconsistent findings of what constitutes child pornography and infringes on protected speech. "A conviction fails to comport with due process if the statue under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 55 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Indeed, the military judge here found that only three photos, of the twelve that were admitted into evidence, depicted a lascivious exhibition of the genitals. However, two of the photos admitted by the prosecution, which the military judge

found were not child pornography, were almost identical to the depictions that the military judge found to be child pornography as they both included the covered genital area as the focus of the photo and arguably met the same *Dost* factors as the offending photos. For example, one image is a depiction of what appears to be the same girl in images 1229718342693.jpeg and 1229720242042.jpeg dressed in the same way, bent over slightly with her buttocks facing the camera. The main difference between this photo and image 1229720242042.jpeg is the girl has a boa positioned so it is covering the anus and genitals.

Under the standard applied by the military judge, it is unclear why he did not find this photo to be child pornography but found the three offending images to be child pornography. Thus, this standard cannot provide servicemembers sufficient notice of what kind of images are constitutionally protected and which kinds represent a serious violation of federal law. If exhibition does not require that genitals be at least discernible, what kinds of minor obstructions are acceptable under the First Amendment and which are not?

Conclusion

Accordingly, SPC Blouin requests that this Honorable Court dismiss The Charge and its Specification.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Blouin*, Army Dkt. No. 20121135, USCA Dkt. No. 14-0656/AR, was electronically filed with both the Court and Government Appellate Division on December 11, 2014.

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