IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	
	Crim. App. Dkt. No. 20121135
Specialist (E-5) **Dana P. Blouin,** United States Army, Appellant	USCA Dkt. No. 14-0656/AR

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

Issue Granted

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 the Case

On October 23, 2014, this Honorable Court granted appellant's petition for review. On December 11, 2014, appellant filed his final brief with this Court. The government responded on January 12, 2015. This is Appellant's reply.

Argument

a. This Court should not expressly adopt *Knox* for the proposition that nudity is not required under 18 U.S.C. § 2256(8).

The government asks this Court to expressly adopt *Knox* for the proposition that nudity is not required under 18 U.S.C. § 2256(8), however the government ignores the changes to the statute since the *Knox* decision. The 1988 version of 18 U.S.C.

§ 2256 at issue in *Knox* is markedly different than the statute in effect today. The statute at issue in *Knox* did not address digital images nor did it contain a "graphic" requirement. In fact, only in 1996 was the statute amended to expressly include computer images.

The statute was again amended in 2003, following *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Ashcroft*, the Court struck down 18 U.S.C. § 2256(8)(B) & (D) as vague and overbroad. In recognition of that decision, Congress amended the statute by deleting subsection (8)(D) completely, and rewriting subsection (8)(B) to address the government's concerns in *Ashcroft*, while taking into account the Courts guidance. Post *Ashcroft*, 18 U.S.C. § 2256(8)(B) provides, "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 . . . ." Further, Congress added in subsection 2(B) to include a "graphic" requirement on the digital images proscribed under subsection (8)(B). "'[G]raphic', when used with respect to a 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 . . . ."* 18 U.S.C. § 2256(10).

The pre-*Ashcroft* statute banned speech that neither fell into the category of unprotected speech under *United States v. Ferber*, 458 U.S. 747 (1982) nor met the heightened standard of unprotected speech under *Miller v. California*, 413 U.S. 15 (1973). The government's argument in *Ashcroft* was premised on advancements in computer technology, and the resulting difficulty in discerning what are and are not images of actual children. *Ashcroft*, 535 U.S. at 254. To address this concern, Congress amended subsection 8(B) to encompass digital images, computer images, or computer-generated images meeting the definition of "graphic" as defined in 18 U.S.C. § 2256(10). *See* Protect Act, Pub. L. No. 108-21, sec. 501, 117 Stat. 678 (2003) (codified as a note at 18 U.S.C. 2251).

Before this Court, the government claims that "graphic" does not impose a nudity requirement, and argues "Congress would have been more explicit had it intended on proscribing a nudity requirement." (Gov't Br. 11). However, Congress did explicitly impose the "graphic" requirement, requiring that a viewer be able to observe the genitals or pubic area of persons depicted

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* Appellant does not concede that the "graphic" requirement renders the statute constitutional in absence of proof that the image depicts an actual minor or alternatively meets the definition of obscenity as explained in *Miller*.

in digital images. The government further asserts that "applying a different standard towards actual children merely because a different medium is being used is inconsistent with why federal child pornography laws were instituted." (Gov't Br. 12). The government's argument ignores that, regardless of its general policy to criminalize child pornography, Congress chose to apply different standards of proof to different mediums. Thus, this Court must give effect to the plain language of the statute as it is written.

b. The military judge provided an erroneous explanation of the law which Specialist Blouin relied on in his admissions and created a substantial inconsistency with Specialist Blouin's plea that was not resolved.

The government argues the military judge did not need to inquire further because SPC Blouin sufficiently described Image 1 and Image 3 using the *Dost* factors. (Gov't Br. 14). The government also argues: "While appellant was overbroad in his view of what constituted child pornography when describing the other images in Prosecution Exhibit 4, appellant understood what constituted child pornography as it pertained to these three images . . . ." (Gov't Br. 14). This argument flies in the face of this Court's established precedent regarding guilty pleas.

If a matter is introduced that is inconsistent the plea, the military judge must either resolve the inconsistency or

reject the guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). Further, 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). Here, the record simply does not demonstrate SPC Blouin knew how the law applied to the facts of his case.

The government introduced twelve images into evidence. Specialist Blouin, after hearing the military judge's definition for child pornography, admitted that all twelve images were child pornography. While the military judge only had SPC Blouin specifically describe two specific images during the providence inquiry, the military judge and SPC Blouin made it clear that they were discussing all the images included in Prosecution Exhibit 4 (JA 46).

The military judge initially provided SPC Blouin the correct definitions as provided by 18 U.S.C. § 2256, to include the definition for "graphic." (JA 19-22). But the military judge never elicited those facts from SPC Blouin that would demonstrate that the images were indeed "graphic." The military judge also did not apply the "graphic" requirement when assessing the sufficiency of the facts provided by SPC Blouin and the stipulation of fact.

During the trial, the military judge, on at least four occasions, made reference to the genitals or pubic area being

clothed. (JA 34, 35, 37, 49). At one point, the military judge contradicted his previously provided definition of "graphic" and stated: "And I'm not talking about unclothed. It may be clothed but is her genital area, even though clothed, visible in that photograph?" (JA 37). The military judge never asked SPC Blouin if the images met the definition of "graphic," nor did he ever discuss with SPC Blouin whether a viewer could observe any portion of the genitals or pubic area. Indeed, when SPC Blouin moved on to the second image he described during the providence inquiry, the military judge did not even ask about "genitals" but instead used broader language such as "groin area" and "genital area." (JA 36-7).

The fact that the military judge and SPC Blouin were not on the same page is amply demonstrated when SPC Blouin described the first image as the girl "bent over with her butt in the air, wearing a G-string . . . And the way that her butt was in the air, it was obvious [sic] directed to her pubic area." (JA 34). The military judge asked if he could see her pubic area and SPC Blouin said "yes." (JA 34). As noted in the first *Knox* decision, "[t]he most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." *United States v. Knox*, 977 F.2d 815, 819 (3d Cir. 1992)(citing Gray's Anatomy, 90-91 (30th ed. 1985); Dorland's Illustrated Medical

Dictionary, 1533 (27th ed. 1988)). Here, if the girl in the image was "bent over with her butt in the air" it would be impossible for her pubic area to be the focus of the photo, much less visible. The record demonstrates that both the military judge and SPC Blouin were using genitals, genital area, groin area, and pubic area interchangeably. Each word has its own distinct meaning and the record demonstrates that SPC Blouin, and perhaps even the military judge, did not understand what exhibitions 18 U.S.C. § 2256 proscribes nor how it applied to his case.

The government also argues, "the three images survive a legal sufficiency analysis." Because SPC Blouin pled guilty to possessing child pornography, legal sufficiency is an inappropriate analysis. While Image 2 and Image 3 may display the anus and a fraction of the labia majora, the military judge never discussed either with SPC Blouin and did not base his findings on them. (JA 91). Instead the military judge repeatedly focused on the clothed *genital area* as the focus of the images, and stated: "Although as to those three images, I think counsel would be wise to review *United States v. Knox*, 32 F.3d 733 (3d 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 91).

The record also demonstrates that SPC Blouin did not understand the contradicting definitions the military judge provided. Based on those definitions, SPC Blouin believed that he could "see their genitals or pubic area" in "all those other photographs." (JA 39). Specialist Blouin said this under the erroneous belief that clothed genitals and pubic areas are "visible." Specialist Blouin never indicated that he understood the difference between genitals or the pubic area. Further, once the military judge reviewed Prosecution Exhibit 4 and discovered that the bulk of the images it contained did not comport with SPC Blouin's previous admissions, the military judge was required to resolve any inconsistencies. The military judge's failure to properly explain the offense or conduct further inquiry demonstrates SPC Blouin did not understand the law or how it applied to the facts of his case.

Lastly, SPC Blouin is not asking this Court to decide that he needed to explain "each and every image" to demonstrate he understood why he was guilty. (Gov't Br. 16). Had all the images that the government claimed were child pornography actually been child pornography, and the military judge properly explained the offense, SPC Blouin's descriptions during the providence inquiry might have demonstrated his plea was knowing and voluntary. However, once the military judge discovered that the government introduced into evidence matters inconsistent

with SPC Blouin's plea, further inquiry and explanation was required.

Conclusion

WHEREFORE, SPC Blouin respectfully 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 January 22, 2015.

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