IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE ON SPECIFIED ISSUES
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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Index of Brief

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.

Table of Cases, Statutes, and Other Authorities

United States Supreme Court

United States Court of Appeals for the Armed Forces

United States Courts of Appeals

United States District Courts

Uniform Code of Military Justice

Other Statutes, Materials and Regulations

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TO THE JUDGES OF THE UNITED STATES
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Granted Issue

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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 (UCMJ). 10 U.S.C. § 866(b). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, pursuant to his plea, of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2006) [Hereinafter

UCMJ]. (JA 56). The military judge sentenced appellant to confinement for six months, reduction to E-1, and a bad-conduct discharge. (JA 49). The convening authority approved the sentence as adjudged.

On 28 May 2014, the Army Court upheld the findings and sentence, finding that there was no substantial basis in law or fact to reject appellant's plea. (JA 1). On 23 October 2014, this honorable court granted appellant's petition for review.

Statement of Facts

On or about 19 July 2011, while appellant was deployed to Afghanistan, a fellow soldier found appellant's Play Station Portable (PSP) device near his work space on Forward Operating Base Torkham. (JA 50-51). When the soldier turned on appellant's PSP device he discovered that it contained images of child pornography. (JA 51). The soldier alerted appellant's chain of command and a subsequent criminal investigation commenced. (JA 24-25).

Appellant pled guilty to one charge of possessing child pornography as defined under 18 U.S.C. § 2256(8). (JA 11, 56). The Government introduced Prosecution Exhibit 4, twelve images that were a "sample" of the images obtained from appellant.[1] (JA 4, 17). At the providence inquiry, the military judge

[1] According to the stipulation of fact, approximately 173 images were likely child pornography as defined under the Child Pornography Prevention Act (CPPA) from the over 633 images of suspected child pornography. (JA 52).

established that appellant understood the meaning and effect of his decision to enter a guilty plea. (JA 56-57). The military judge covered the elements of wrongful and knowing possession of child pornography in violation of Article 134, UCMJ. (JA 18). He also defined the elements of the definition of child pornography in its entirety as defined under 18 U.S.C. § 2256(8). (JA 19-22). Appellant acknowledged that he understood the definitions. (JA 18-23).

Appellant then admitted that the elements as described by the military judge accurately depicted his conduct for the images on Prosecution Exhibit 4. (JA 23). Appellant had downloaded the images on his laptop computer while in Afghanistan and transferred them to his PSP. (JA 25). He used Google and bit torrent to download the files, using search terms like "pre-teen, nude children, children in bathing suits." (JA 26-30). Appellant stated that he downloaded images of children between the ages of 12 and 17 that would focus on the genital area and were sexual in nature. (JA 27, 32). The appellant then told the military judge why the pictures were lascivious. (JA 34). Before commencing, the military judge redefined the word "lascivious." (JA 33). Appellant then described two of the images in Prosecution Exhibit 4, image 1229721479281.JPEG, image 1229720242042.JPEG, which are two of the images now at

issue.[2] (JA 34-38). The military judge asked additional questions, covering the factors laid out in the definition of lasciviousness. (JA 34-38). Following the providence inquiry, the military judge accepted appellant's plea of guilty. (JA 45).

Following arguments on pre-sentencing and a recess, the military judge questioned appellant further regarding the twelve images. Appellant acknowledged that the two images he described were contained in Prosecution Exhibit 4. (JA 46-47). He established that he had in fact viewed all twelve images contained in Prosecution Exhibit 4. (JA 47-48). The military judge then determined that only 3 images in Prosecution Exhibit 4 constituted child pornography:

> Counsel, having 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 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 versus Knox 32F 3d 733, 3d Circuit 1994, that it can be lascivious exhibition even if the genitals and the pubic area are clothed. So I stand by my findings.
>
> (JA 49).

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[2] Appellant did not specifically refer to the image number when describing these photographs, but it is clear by his descriptions that these are the two images that he is describing.

a. Image 1229721479281.JPEG (Image 1)[3]

The image is of a prepubescent female lying on the floor on her left side with her head resting on her hands while she looks upwards. She is wearing a floral sleeveless shirt and white bikini panties. Her legs are spread open, with both of her feet on the floor and both knees at ninety degree angles. Due to her position, her underwear is pulled to the left, "creating a shadowed area between her panties and her vulva." (JA 5). Her pubic area is not completely covered. The photograph is centered on her pubic area. The top left corner of the photo has the following website address: "magazine-fashion.com." (JA 56).

This is one of the two photographs that appellant described during his providence inquiry: "[T]he girl is laying down with her legs displayed open and her shorts are kind of pulled to the side, directing her eyes to her genital area." (JA 36). Appellant says her genital and groin area is "partly" visible. (JA 36-37). The focal point of the picture, as appellant admits, is her pubic area. (JA 36-37).

b. Image 1229720242042.JPEG (Image 2)

The image is of a prepubescent girl in white lingerie with a white g-string. She stands with her back to the photographer,

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[3] For the purposes of clarity, the Government has identified and listed the images in the same order as that of appellant's brief.

slightly bent over a chair so that her buttocks is raised and coyly looks back. This was the second image that appellant described during the providence inquiry. (JA 34). Appellant admitted that the child's vagina and buttocks are the focal point of the picture: "the way that her butt was in the air, it was obvious [sic] directed to her pubic area." (JA 34). The labia majora is partially exposed and her anus is partially visible. The bottom of the photo has an internet site displayed: www.vladmodels.ru. (JA 56).

c. Image 1229718342693.JPEG (Image 3)

The image is of the same prepubescent child as pictured in Image 2 above. She is wearing the same outfit except this time she has a white boa. She is bending over showing her rear while she is on her knees and with her left shoulder on the floor. The child is looking back at the photographer from the contorted position she has assumed. The white g-string does not completely cover her genitals; her labia majora and her anus are partially visible. She is holding the white boa with her right hand. The image suggests sexual coyness and a willingness to engage in sexual activity. The bottom of the photo has an internet site displayed: www.vladmodels.ru. (JA 56).

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Summary of Argument

This court should adopt *United States v. Knox* for the proposition that nudity or "discernibility" of the genitals or pubic area is not required to establish whether an image depicts a "lascivious exhibition." 32 F.3d 733, 746-52 (3d Cir. 1994). A review of the full context of the providence inquiry demonstrates that no substantial inconsistency with appellant's plea exists. Moreover, an examination of the entire record reveals that appellant knew the elements of the offense and admitted them freely. Even if this court does require some degree of nudity, the three images still satisfy what constitutes child pornography as defined under 18 U.S.C. § 2256(8).

Standard of Review

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 test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut,* 73 M.J. 27, 29 (C.A.A.F. 2014) (citing *United States v.*

Schell, 72 M.J. 339, 345 (C.A.A.F. 2013)). A ruling based on an erroneous view of the law constitutes an abuse of discretion. *Id.* (citing *Inabinette*, 66 M.J. at 322). Questions of law arising from a guilty plea are reviewed de novo. *Schell*, 72 M.J. at 342 (citing *Inabinette*, 66 M.J. at 322). In reviewing the adequacy of the factual basis for a plea, this court affords "significant deference." *Inabinette*, 66 M.J. at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). The court examines "the totality of the circumstances of the providence inquiry, including the stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry." *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009).

Law and Analysis

A. Child Pornography, as defined under 18 U.S.C. § 2256(8) does not require nudity.

The military judge and lower court correctly endorsed *Knox* in its applicability towards child pornography under the federal statute. (JA 5, 49). Under 18 U.S.C. § 2256(8), child pornography includes minors that are engaged in sexually explicit conduct. For the purposes of this case, sexually explicit conduct is defined under 18 U.S.C. § 2256(2)(A)(v), "lascivious exhibition of the genitals or pubic area of any

person." (JA 19-23). The military judge described the *Dost* factors when defining "lascivious." (JA 21-22, 33-34). This Court in *United States v. Roderick*, joined other federal circuits and adopted the *Dost* factors. *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); *Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006).

The *Dost* 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. *Roderick*, 62 M.J. at 429 (citing *Dost*, 636 F. Supp. at 832). This Court analyzes those six factors with an overall consideration of the totality of the circumstances, consistent with a number of federal circuits. *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).

In *Knox*, the 3rd Circuit Court of Appeals analyzed whether the appellant was guilty of possession of child pornography under the federal statute. 32 F.3d at 746-52. Appellant possessed three videos of minors in underwear, leotards, or bathing suits striking provocative poses. *Id.* at 737. The court held that nudity is not required when determining whether an image depicts a "lascivious exhibition" under the federal statute. *Id.* at 746-52.

The Government asks that this Court expressly adopt *Knox* for this proposition that nudity is not required under 18 U.S.C. § 2256(8).[4] Several other circuits have also endorsed *Knox* on the subject. *United States v. Grimes*, 244 F.3d 375, 380-82 (5th Cir. 2001); *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); *United States v. Williams*, 444 F.3d 1286, 1299 n.63 (11th Cir. 2006), rev'd on other grounds, 553 U.S. 285 (2008). No other circuit has expressly opposed the holding in *Knox* despite the changes in the statute since the *Knox* holding. As the lower court discussed, *United States v. Warner* does not impact the adoption of *Knox* because the appellant was not charged under the federal statute nor did the military judge use the federal definitions. (JA 7-8); *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013).

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[4] This Court did endorse *Knox* in *Roderick* for the holding that "lascivious exhibition" includes *Dost* plus the totality of the circumstances. *Roderick*, 62 M.J. at 429-30.

A nudity requirement should not be imposed because it is just one of the *Dost* factors. In *Dost* factor 4, one must determine whether the child is fully or partially clothed, or nude. *Roderick*, 62 M.J. at 429 (citing *Dost*, 636 F. Supp. at 832). Nudity is but one factor to weigh in determining the lasciviousness nature of the image and should not be dispositive. If there is partial nudity or even no nudity, it would stand that other *Dost* factors would have to be stronger in order to meet the necessary threshold.

The Government disagrees with appellant's assertion that for digital images that "graphic" imposes a nudity requirement. (Appellant's Br. 10).[5] The definition of graphic is "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). Appellant does not cite to any case law that finds "graphic" to impose a nudity requirement. Further, Congress would have been more explicit had it intended on proscribing a nudity requirement. *See Knox*, 32 F.3d at 744.

Appellant notes that *Knox* may still be applicable to non-digital images under the federal statute because that part of

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[5] The following argument is applicable only if the Court agrees with appellant's assertion that the definition for "sexually explicit conduct" in this case falls under 18 U.S.C. § 2256(2)(B)(iii), "graphic or simulated lascivious exhibition of the genitals or pubic are of any person." (Appellant's Br. 10).

the definition of "sexually explicit conduct" does not contain the word "graphic." (Appellant's Br. 12 n.2); *See* 18 U.S.C. § 2256(2)(A)(v). 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. As established in *United States v. Ferber*, child pornography is not protected free speech because of the harm it places on children. 458 U.S. 747, 757 (1982)("[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002)("Virtual child pornography is not 'intrinsically related' to the sexual abuse of children. . .")

B. Appellant was provident to the three images found to be child pornography regardless of whether *Knox* is adopted.

A military judge may not accept a guilty plea unless the accused is provident to the plea. Article 45(a), UCMJ. Provident means that "there is an adequate basis in law and fact to support the accused's plea." *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009). The record of trial must reflect not only that the elements of each offense charged have been explained to the accused, but also "'make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or

offenses to which he is pleading guilty.'" *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Care*, 18 C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969)); *see also* Rules for Courts-Martial 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea").

Appellate courts are highly deferential toward the trial court's fact-finding during a guilty plea providence inquiry. *Inabinette*, 66 M.J. at 322. This deference is necessary since "[b]y its nature, a guilty plea case is less likely to have developed facts." *Jordan*, 57 M.J. at 238. The facts are less developed because "they are not subject to the test of adversarial process," and the accused may make a "conscious choice . . . to limit the nature of the information that would otherwise be disclosed in an adversarial contest." *Id.* at 238-39.

A review of the entirety of the providence inquiry demonstrates that no substantial inconsistency with appellant's plea exists. Moreover, an examination of the entire record reveals that appellant knew the elements of the offense and admitted them freely as it pertained to the three images that were determined to be child pornography. The military judge established that appellant understood the meaning and effect of

his decision to enter a guilty plea. (JA 56). The military judge properly covered the elements of the offense and the entire definition of child pornography under 18 U.S.C. § 2256(8). The military judge even defined "lascivious" immediately prior to appellant describing Image 1 and Image 3. (JA 33-34). Appellant described both of these images according to the "lascivious" definition the military judge provided, which covered each of the *Dost* factors. Appellant even admitted that you could partly see the genitalia and pubic area, the focus of the images were on the genital area, that the children struck sexually suggestive, unnatural poses, and both images elicited a sexual response from appellant. (JA 38-43, 55). When the military judge reopened the inquiry prior to sentencing appellant, he did not need to inquire further because appellant had already sufficiently described Image 1 and Image 3 using the *Dost* factors. As for Image 2, appellant did not need to describe it specifically because it is similar to that of Image 3. It is of the same child in the same clothing and a similar sexually suggestive, unnatural pose. (JA 55). Image 2 is not so dissimilar from the two images that appellant describes. 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 and that

the genitalia and/or pubic area was partially exposed and that they had to meet the *Dost* factors and the elements and definitions articulated by the military judge.

Even if this Court finds the CPPA has a nudity requirement, the three images survive a legal sufficiency analysis. The clothing in each of the images is not enough to cover the pubic area and/or genitalia. In Image 2 and Image 3, the g-string does not totally cover the anus, pubic area, or labia majora. (JA 55). Because the panties in Image 1 are raised, one can see the pubic area and the shadowed area over her vulva. (JA 55). Appellant has contested on appeal that the genitalia and pubic area are not visible in any of the three images. (Appellant's Br. 4-5). This runs contrary to what appellant told the military judge and what the lower appellate court found under its broad Article 66, UCMJ, powers. (JA 4-5, 34-39).

After satisfying any nudity requirement, this court must then determine whether legally appellant has satisfied "lascivious exhibition" using *Dost* plus the totality of the circumstances. As appellant accurately describes in his providence inquiry, each of the *Dost* factors has been satisfied. The focus of each of the images is on the genitalia or pubic area. The girls are posing in a sexually provocative way in a studio setting, wearing inappropriate clothing for their age. The girls are partially clothed and the way and manner in which

they are posing suggests a willingness to engage in sexual activity. The images elicit a sexual response in the viewer. *See Dost*, 636 F. Supp. at 832 ("perhaps not the 'average viewer,' but perhaps in the pedophile viewer").

Ultimately, whether all these details constituted a "lascivious exhibition" in more than one image is now largely a question of factual sufficiency that appellant readily conceded at trial and which the Army Court answered in the affirmative under its broad Article 66, UCMJ, powers. It is for this court to decide whether appellant had to explain each and every image in order to demonstrate that he understood why he was guilty of a crime. This court should draw all the same reasonable inferences against appellant that were justifiably drawn by the military judge at trial. *See United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)).

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and uphold the findings and sentence.

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I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on the 12 day of January, 2015 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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