

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.K. CARBERRY, E.C. PRICE, B.G. FILBERT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROBERT C. PHELAN
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200900192
GENERAL COURT-MARTIAL**

Sentence Adjudged: 4 December 2008.
Military Judge: LtCol David Oliver, USMC.
Convening Authority: Commanding General, Marine Corps
Base, Camp Butler, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Maj B.C. Corcoran,
USMC (17 Jan 2009); Col S.D. Marchioro, USMC (15 Jan 2010).
For Appellant: LT Sarah Harris, JAGC, USN; LT Michael
Torrissi, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

31 August 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

This case is before us for a second time. A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification each of receipt and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for 36 months, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On initial review before this court, the appellant raised six assignments of error including: (1) the offenses of receiving and possessing child pornography were multiplicitious; (2) failure to contest the age of individuals depicted in suspected child pornography constituted ineffective assistance of counsel; (3) defense counsel's incorrect description of the appellant's convictions and failure to include character letters in the request for clemency constituted ineffective assistance of counsel; (4) failure to present matters in extenuation and mitigation during presentencing constituted ineffective assistance of counsel; (5) the appellant's sentence was unjustly severe; and, (6) substantial and material portions of the record of trial are unavailable for review.

In our initial decision, *United States v. Phelan*, No. 200900192, 2009 CCA LEXIS 454, unpublished op. (N.M.Ct.Crim.App. 17 Dec 2009), we found no merit in the appellant's second, fourth and sixth assignments of error, but concluded the appellant's first and third assignments of error warranted relief. Specifically, we concluded the separate offenses of receiving and possessing the same child pornography files were multiplicitious; we set aside the finding of guilty of Specification 2 of the Charge, possession of child pornography, and concluded that a rehearing on sentence was not required. *Phelan*, 2009 CCA LEXIS 454, at 3. We also concluded the appellant was deprived of the effective assistance of counsel "at the clemency stage," set aside the convening authority's action of 18 March 2009, and remanded the record to the Judge Advocate General of the Navy for new post-trial processing. *Id.* at 7.

On remand, a new staff judge advocate's recommendation was prepared and newly detailed defense counsel submitted a comprehensive clemency request. By action of 29 December 2009, the convening authority approved the adjudged sentence, and in an apparent act of clemency, suspended all confinement in excess of 30 months.

On 22 April 2010, appellate defense counsel informed this court that he did not intend to file any additional pleadings. Therefore the appellant's only remaining assignment of error is that his sentence was unjustly severe.

Sentence Severity

The appellant asserts that a sentence including 36 months of confinement and a dishonorable discharge are inappropriately severe given the amount of confirmed child pornography on his computer, and requests we affirm only so much of the sentence as extends to six months confinement. Appellant's Brief of 20 Jul 2009 at 18-20. The Government responds that the appellant's computer contained 17 files of child pornography, obtained through the appellant's use of child pornography specific search terms over a period exceeding two weeks, and that these files were both viewable and viewed by other Marines via a "base-wide

internet network." Government Answer of 31 Aug 2009 at 18. The Government then argues that the sentence approved by the convening authority is appropriate for this offense. We agree.

A court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy on the accused and is the prerogative of the convening authority. *Healy*, 26 M.J. at 395.

After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395; *Snelling* 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

The findings of guilty of Charge I and Specification 1 thereunder and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ. We affirm the findings of guilty of Charge I and Specification 1 thereunder and the sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court