

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

**Before  
C.L. REISMEIER, J.K. CARBERRY, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JEREMY L. SMITH  
AVIATION MAINTENANCE ADMINISTRATIONMAN SECOND CLASS (E-5),  
U.S. NAVY**

**NMCCA 201100253  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 10 February 2011.

**Military Judge:** CDR Douglas P. Barber, Jr., JAGC, USN.

**Convening Authority:** Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CDR F.D. Hutchison, JAGC, USN.

**For Appellant:** LCDR Michael R. Torrisi, JAGC, USN.

**For Appellee:** LT Benjamin J. Voce-Gardner, JAGC, USN.

**28 December 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A general court-martial composed of a military judge alone convicted the appellant, pursuant to his pleas, of two specifications each of receipt, possession, and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to 10 years confinement and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged but,

in accordance with the pretrial agreement, suspended all confinement in excess of 36 months.

The appellant raises one assignment of error: that the charges against him were unreasonably multiplied where the Government charged him with three offenses, each under two theories of liability. We find the appellant's argument to be persuasive and will take action in our decretal paragraph. We otherwise conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Facts**

The appellant installed "Limewire" on a computer, then searched for and found child pornography on the internet. He then downloaded 33 video and 16 image files onto that first computer, moved files onto a separate hard drive, and then moved the files to another computer. Ultimately, at least one video and one image from the appellant's files were distributed through Limewire.

Based on those actions, he was charged with, providently plead to, and was convicted of, three specifications alleging violations of Title 18 of the United States Code for receipt, possession, and distribution of child pornography, under clause 3 of the General Article, and three specifications alleging receipt, possession, and distribution of child pornography under clauses 1 and 2 of the General Article.

### **Analysis**

In *Quiroz*, the Court of Appeals for the Armed Forces approved what is now the well-known five-part test to determine whether findings of guilty amount to an unreasonable multiplication of charges. See *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). Here, the appellant challenged the specifications at trial, specifically asking that they be dismissed (although he also stated he was challenging the specifications "for sentencing"). The specifications were not aimed at distinctly separate criminal acts, exaggerating the appellant's criminality. While we do not find charging alternate theories of liability to be evidence of prosecutorial overreaching, and can discount any concern that the additional specifications unreasonably increased the appellant's punitive exposure when the trial judge merged them for sentencing, we are

nevertheless convinced that the additional specifications should not be affirmed. Art. 66(c), UCMJ. After reassessing the sentence, we are satisfied that the sentence adjudged and approved would be no different absent the error, particularly in light of the trial judge's treatment of the offenses as "merged" for sentencing, and the CA's express statement that he considered findings to reflect three, not six offenses. *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006).

### **Conclusion**

Accordingly, the findings as to the General Article clause 3 offenses, Specifications 1, 3 and 5 of the Charge, and the sentence as adjudged and approved by the convening authority, are affirmed. The findings as to Specifications 2, 4, and 6 are set aside and those specifications are dismissed.

For the Court

R.H. TROIDL  
Clerk of Court