

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

**Before
C.L. REISMEIER, F.D. MITCHELL, P.D. KOVAC
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ANTONY M. DREIBELBEIS
SEAMAN (E-3), U.S. NAVY**

**NMCCA 201000269
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 February 2010.
Military Judge: CAPT James Redford, JAGC, USN.
Convening Authority: Commanding Officer, Naval Hospital
Corps School, Great Lakes, IL.
For Appellant: LCDR Edward George, JAGC, USN.
For Appellee: LCDR Sergio Sarkany, JAGC, USN.

8 March 2011

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:

A military judge, sitting as a special-court martial, convicted the appellant, pursuant to his pleas, of two specifications of attempted communication of indecent language to a child under the age of 16 years, and one specification of attempted possession of child pornography in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The appellant was sentenced to six months confinement, forfeiture of \$964.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, and except for the bad-conduct discharge, ordered it executed.

The appellant advances two assignments of error. First, he alleges that the preemption doctrine has been violated because the Government charged attempted possession of child pornography as an offense under Article 134, UCMJ, instead of a violation of Article 80, UCMJ. Second, the appellant alleges that the CA's action and legal officer's recommendation fail to accurately reflect the findings entered by the military judge.

We have carefully reviewed the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and 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.

Background

In 2009, the appellant was assigned to the Naval Hospital Corps School in Great Lakes, Illinois. He utilized a computer located in the lounge of the Basic Enlisted Quarters to access an internet chat room and communicate with individuals he believed to be minors. The appellant posed as a 13-year-old female looking for other underage children. During these communications, the appellant engaged in sexually explicit conversations and asked the supposed minor subjects to send nude pictures of themselves over the internet to his personal e-mail account.

No Violation of the Preemption Doctrine

In the appellant's first assignment of error, he asserts that the Government improperly charged attempted possession of child pornography as a violation of Article 134, UCMJ, instead of an "attempt" under Article 80, UCMJ. As a result, the appellant claims that the preemption doctrine has been violated and the charge is a nullity. We disagree.

The preemption doctrine is specifically enumerated in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 60c (5)(a) and "prohibits application of Article 134 to conduct covered by Articles 80 through 132." The purpose of this doctrine is to "prevent the Government from creating new offenses in an attempt to compensate for its inability to establish an element of an enumerated offense." *United States v. Bewsey*, 54 M.J. 893, 897 (N.M.Ct.Crim.App. 2001). In *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992), the Court of Military Appeals held that in order for the preemption doctrine to apply, two questions must be answered in the affirmative:

The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of

a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which, because of their sweep, are commonly described as the general articles.

Id. at 151 (quoting *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978)).

We do not find that Congress intended to limit prosecution for attempted possession of child pornography to Article 80, UCMJ, nor does this crime contain a residuum of elements of a specific offense listed in the code. The attempted possession of child pornography is a separate and distinct federal offense assimilated from Title 18 of the United States Code. See 18 U.S.C. § 2252(a)(4)(B), (b)(1). There is no indication that Congress intended to "occupy the field" by having prosecutions of this offense limited to Article 80, UCMJ, or any other specific article of the Code.¹ *United States v. Anderson*, 68 M.J. 378, 386-87 (C.A.A.F. 2010) (stating that for preemption to apply "it must be shown that Congress intended . . . [an]other punitive article to cover a class of offenses in a complete way") (quoting *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)). In fact, no such offense is enumerated anywhere in the specific articles of the UCMJ. Moreover, the assertion that Article 80 should be used to criminalize attempted possession of child pornography is specifically rebutted by Congress' limitation of Article 80 to those "offense[es] under this chapter," which means only offenses found in 10 U.S.C. §§ 801 *et seq.* Once again, this chapter does not enumerate any offense criminalizing possession of child pornography. Accordingly, we hold that attempted possession of child pornography, as charged in this case, is not preempted by Article 80, UCMJ.²

Post-Trial Processing Errors

In his second assignment of error, the appellant contends that the CA's action and legal officer's recommendation inaccurately reflect the findings of the military judge. The appellant requests that his official records be corrected to

¹ In fact, the law seems to suggest that prosecutions predicated upon a specific federal statute assimilated under Clause 3 of Article 134 may rarely, if ever, invoke the preemption doctrine. See *Wright*, 5 M.J. at 110-11; *United States v. Norris*, 8 C.M.R. 36 (C.M.A. 1953); *but see McGuinness*, 35 M.J. at 152 (holding that "prosecution of violations of 18 U.S.C. § 793(e) under Clause 3 of Article 134 is not preempted by Article 92"). Clause 3 prosecutions may never invoke the preemption doctrine because they are predicated upon a theory of liability that results from Congress' own legislative act and not the creation of a "residuum" offense to punish conduct not otherwise criminal.

² As to the appellant's assertion that *United States v. Wood*, No. 200700576, 2008 CCA LEXIS 387, unpublished op. (N.M.Ct.Crim.App. 21 Oct 2008), "tacitly approved" charging the subject offense under Article 80, UCMJ, we find no such authority for this proposition in that unpublished opinion.

accurately reflect the findings of his courts-martial. We do not agree.

Although the military judge purported to enter a finding of "Not Guilty" to Specification 1 of the Additional Charge, he did so immediately after the trial counsel withdrew the specification from the court. Record at 76. In light of the withdrawal, the military judge's putative finding as to the specification was a legal nullity, as he could not acquit on an offense that was no longer before the court. Thus, the legal officer's recommendation and the special court-martial order correctly reflect that Specification 1 of the Additional Charge was "[w]ithdrawn with prejudice."

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court