

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

**Before
J.K. CARBERRY, L.T. BOOKER, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHARLES J. POWELL
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201000446
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 May 2010.

Military Judge: CAPT John K. Waits, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: Commander M.C.
Holifield, JAGC, USN.

For Appellant: Maj Jeffrey R. Liebenguth, USMC.

For Appellee: Capt Robert E. Eckert, Jr., USMC.

14 June 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 general court-martial convicted the appellant, consistent with his pleas, of violating the Joint Ethics Regulation, and obtaining access to and possessing child pornography, violations, respectively, of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The convening authority approved the sentence of confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge from the Naval Service.

Before us, the appellant alleges that each of the two specifications of Charge II fails to state an offense.

Alternatively, he claims that he cannot be found guilty of lesser included offenses under *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), and that his plea to Clause 1 and Clause 2 violations of Article 134 are not knowing and voluntary.

We have considered, and determined to be without merit, the appellant's latter two assignments of error. We are not entering any sort of "appellate finding" of guilt to any lesser included offense and we need not discuss further the implications of *Jones*. We find that the appellant was on notice of, instructed on, and able intelligently to discuss the prejudicial and service-discrediting aspects of his offenses. We therefore turn our attention to the appellant's first assignment of error.

Failure to State an Offense

We will set out the relevant portions of one of the specifications under Charge II to illustrate the discussion:

In that HM3 Powell, at or near Marine Corps Recruit Depot Parris Island, a place in the special maritime and territorial jurisdiction of the United States, knowingly access with intent to view images of child pornography as defined in 18 U.S.C. § 2256(8) in violation of 18 U.S.C. § 2252A(a)(5)(a), such conduct being prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

Whether a specification states an offense is a question of law that we review *de novo*. Our concerns are that the specification include, expressly or by necessary implication, all the elements of the offense, so as to give the appellant notice of what he must defend against and to give the appellant protection against a subsequent prosecution. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). The appellant's specific attack on the two specifications is that they failed to allege that he "accessed" or possessed the images of child pornography on a *specific medium*, whether it be a book, a magazine, a computer disk, or some other physical object. Appellant's Brief of 8 Oct 2010 at 7-8.

Had the specifications in issue in fact been under the federal statute, the appellant's point could be well-taken, as failure to allege a particular medium might not afford the appellant the protection against double jeopardy that a legally sufficient specification might. See *United States v. Planck*, 493 F.3d 501, 504 (5th Cir. 2007) (noting that, as the *actus reus* is possessing an image of child pornography, possessing the same image on multiple devices could legally lead to multiple convictions and punishments). At trial, counsel for the parties and the military judge spent considerable time discussing the notice aspect of the specification, prompted in part by this court's decision in *United States v. Saxman*, 69 M.J. 540

(N.M.Ct.Crim.App. 2010), a decision which discussed limitations on our ability to review a case under Article 66 when the court-martial's findings did not square with the specification before the court-martial. Notably, the defense at trial conceded that it had adequate notice. Record at 26-27.

The parties on appeal both, however, overlook the fact that the appellant was not convicted of a violation of the substantive federal law, section 2252A of title 18, United States Code, even though that section and the definitional section of the Child Pornography Prevention Act (CPPA), section 2256 of title 18, United States Code, were both mentioned in the specifications involved. His offenses did occur in an area that would give rise to court-martial jurisdiction under Clause 3 of the General Article. See 18 U.S.C. §§ 7 and 13. It might therefore have been appropriate to allege a "clause 3" violation of the General Article, in which case the specification should properly include all the elements of the federal offense. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 60c(6)(b). One of those elements apparently would be that the appellant possessed a specific medium, as electronic files do need a medium or container to be encoded. See *United States v. Thompson*, 281 F.3d 1088, 1091 (10th Cir. 2002). As a practical matter, moreover, it is necessary to allege a specific medium so that the actual images may be examined to ensure that they are "actual," not "virtual," pornography, and that they involve actual minors involved in the sexually explicit conduct. Compare *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) ("appears to be" language in CPPA unconstitutional) with *United States v. Cendejas*, 62 M.J. 334, 338 (C.A.A.F. 2006) (factfinder can determine that an actual child was used based on review of images). Cf. *Cendejas*, 62 M.J. at 338 n.5 (possession of "virtual" child pornography, while arguably constitutionally protected in civilian society, can be prosecuted under clause 1 or clause 2 of the General Article).

In this case, though, the appellant was explicitly charged with, pleaded guilty to, and was convicted of, prejudicial conduct or conduct of a nature to bring discredit upon the armed forces by gaining access to and possessing child pornography. "Accordingly, the specific elements of the crime . . . as a matter of civilian or military law are not particularly relevant." *United States v. Choate*, 32 M.J. 423, 425 (C.M.A. 1991) (citation omitted). The question, rather, is the gravamen of the conduct in light of its military context. *Id.* at 426.

Reviewing the plea colloquy and the supporting stipulation of fact, there is no question that the images that the appellant was discussing were comprised of persons under the age of 18 engaged in sexually explicit conduct. Record at 86-88, 101-03; Prosecution Exhibit 1 ¶¶ 10, 11, 13, 16. The appellant admitted to using his Government workspace computer to amass and view many of the images, and he admitted to using a personal computer in his home on a Government housing enclave to do the same. In the

former context, his activity detracted from his ability to ensure the medical readiness of the Marines entrusted to his care; in the latter, he brought the material into a community filled with service members and their families. We agree with the appellant's assessment that his activities in both locations were prejudicial to good order and discipline and were of a nature to bring discredit upon the armed forces.

Conclusion

The findings and the approved sentence are affirmed. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court