

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

**Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL D. SILVERSTEIN
ELECTRICIAN'S MATE FIREMAN (E-3), U.S. NAVY**

**NMCCA 201100407
GENERAL COURT-MARTIAL**

Sentence Adjudged: 18 May 2011.

Military Judge: CAPT David Berger, JAGC, USN.

Convening Authority: Commander, U.S Naval Forces Japan,
Yokosuka, Japan.

Staff Judge Advocate's Recommendation: CDR B. Keith, JAGC,
USN.

For Appellant: LT Daniel W. Napier, JAGC, USN; LT Toren G.
Mushovic, JAGC, USN.

For Appellee: LT Kevin Shea, JAGC, USN.

10 January 2012

OPINION OF THE COURT

**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 military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of knowingly violating a lawful order, one specification of communicating indecent language to a child under the age of sixteen, one specification of knowing receipt of child pornography, and one specification of knowing possession of child pornography, in violation of Articles 92 and

134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The military judge sentenced the appellant to confinement for fifty-four (54) months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the findings and the sentence as adjudged.

The appellant's sole assigned error is that, pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), Specification 1 of Charge II (indecent language) fails to state an offense because the specification does not allege the terminal element of Article 134. We disagree.

The appellant's case is significantly distinguishable from *Fosler* because: 1) the appellant did not challenge the adequacy of the specification at trial; 2) he pled guilty to the specification; 3) the military judge ensured the appellant understood the terminal element of the offense; and, 4) the appellant provided a factual basis to establish he was guilty of conduct prejudicial to good order and discipline, or of a nature to bring discredit upon the armed forces. Accordingly, we resolve the assigned error adverse to the appellant. See *United States v. Hackler*, ___ M.J. ___, No. 201100323 (N.M.Ct.Crim.App. 22 Dec 2011).

After careful consideration of the record, we affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court