

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

**Before  
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JUSTIN M. BROWN  
FIRE CONTROLMAN SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201300335  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 10 May 2013.

**Military Judge:** CDR Marcus Fulton, JAGC, USN.

**Convening Authority:** Commander, Navy Region Hawaii, Pearl Harbor, HI.

**Staff Judge Advocate's Recommendation:** CDR K.D. Hinson, JAGC, USN; **Addendum:** LCDR J.S. Ayeroff, JAGC, USN.

**For Appellant:** CDR Edward Hartman, JAGC, USN.

**For Appellee:** Mr. Brian Keller, Esq.

**26 November 2013**

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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 military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications each of receiving and possessing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. All six specifications were pled under clauses (1) and (2) of Article 134, UCMJ, and incorporated the definition of child pornography in 18 U.S.C.

§ 2256(8).<sup>1</sup> The military judge sentenced the appellant to confinement for 300 days, reduction to pay grade E-1, total forfeitures, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) suspended all confinement in excess of six months but otherwise approved the adjudged sentence.

Although this case was submitted without specific assignment of error, our review of the record of trial raised significant questions about the military judge's determination of the maximum authorized punishment in this case.

The maximum punishment authorized for an offense is a question of law that we review *de novo*. *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011). Pursuant to authority delegated from Congress under Article 56, UCMJ, the President has specified offense-based limits on punishment and RULE FOR COURTS-MARTIAL 1003(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) provides guidance on determining those limits. As we recently noted, this Rule "employs mutually exclusive criteria, dependent upon whether the offenses are 'listed' or 'not listed' 'in Part IV [of the Manual for Courts-Martial].'" *United States v. Booker*, 72 M.J. 787, 799 (N.M.Ct.Crim.App. 2013), *appeal denied sub nom. United States v. Schaleger*, \_\_ M.J. \_\_, 2013 CAAF LEXIS 1323 (C.A.A.F. Oct. 31, 2013) (summary disposition) (quoting R.C.M. 1003(c)(1)(A)-(B)).

For "*Offenses listed in Part IV* [of the Manual for Courts-Martial] . . . [t]he maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge." R.C.M. 1003(c)(1)(A). When offenses are not listed in Part IV of the Manual, we turn to the President's guidance in R.C.M. 1003(c)(1)(B)(i)-(ii). There we find that our inquiry is "dependent upon whether the charged offense: (1) is closely related to or necessarily included in an offense listed in Part IV of the Manual, and, if neither, then (2) whether the charged offense is punishable as authorized by the United States Code or as authorized by custom of the service." *Booker*, 72 M.J. at 802 (footnote omitted).

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<sup>1</sup> The specifications read, in pertinent part, as follows: "In that [Appellant] . . . did . . . knowingly and wrongfully [receive][possess]...child pornography as defined in 18 U.S.C. § 2256(8), which conduct was to the prejudice of good order and discipline in the armed forces, and was of a nature to bring discredit upon the Armed Forces." Charge Sheet.

Relevant to this case, the President issued Executive Order 13593 on 13 December 2011,<sup>2</sup> amending Part IV of the Manual for Courts-Martial to include Child Pornography as an enumerated Article 134 offense.<sup>3</sup> This Presidential action effectually "listed" Child Pornography as an offense in Part IV of the Manual. See *Booker*, 72 M.J. at 800-02. Under this offense, possessing and receiving child pornography each carry a maximum of 10 years confinement. The elements and legal definitions for the Article 134 offenses of wrongfully possessing and wrongfully receiving child pornography are virtually identical to those used by the military judge in advising the appellant during his providence inquiry. Record at 18-24; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 68b(1). However, the same EO also specified that "[n]othing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted." Exec. Order No. 13593 at § 2(a). The appellant's alleged offenses occurred at various intervals between December 2008 and October 2011, well before the effective date of EO 13593. Charge Sheet.

At trial, the military judge advised the appellant that the maximum sentence for the offenses to which he pleaded guilty was confinement for 90 years, forfeiture of all pay and allowances, reduction to the pay grade E-1 and a dishonorable discharge. Record at 12-13. Presumably, the military judge was relying on the maximum confinement applicable for the analogous federal offenses under 18 U.S.C. § 2252A.<sup>4</sup> However, the military judge did not articulate how he arrived at this calculation and neither the trial nor defense counsel commented on his advice to the appellant.

Before searching for analogous offenses under the United States Code, a military judge must first determine whether the offense charged is an offense listed in Part IV of the Manual and, if not, whether Part IV contains a closely related offense.

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<sup>2</sup> Amendments contained in EO 13593 took effect 30 days following its issuance.

<sup>3</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 68b.

<sup>4</sup> See RULE FOR COURTS-MARTIAL 1003(c)(1)(B)(ii), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) ("An offense not listed in Part IV [of the Manual] and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code . . . ."). The elements as instructed by the military judge and stipulated by the parties closely track 18 U.S.C. § 2252A(a)(2) for receipt, punishable by a maximum of twenty years confinement, and 2252A(a)(5) for possession, punishable by a maximum of ten years confinement.

At the time of the appellant's trial, Part IV of the Manual listed the new child pornography offense under Article 134. However, R.C.M. 1003(c)(1) does not address whether an offense listed in Part IV must exist at the time of the alleged misconduct to apply its maximum punishment. Similarly, the Rule does not address whether a "closely related" offense in Part IV must exist at the time of the alleged misconduct to apply its maximum punishment.

If the Rule only requires that the offense exist at the time of trial, either to be considered as "listed in Part IV" or as a "closely related" offense in Part IV, then the military judge erred in using the higher punishment calculus under 18 U.S.C. § 2252A. If, on the other hand, the offense must exist both at the time of the alleged misconduct and at trial, then the military judge correctly calculated maximum punishment according to the closely analogous offense under Title 18 U.S.C. § 2252A, since the appellant's misconduct occurred prior to the President's action listing the Article 134 offense in Part IV. Ultimately, however, we need not resolve this question because, even assuming error, we find that any such error was insubstantial to the appellant's decision to plead guilty.

"Our task is to look to all the circumstances of the case presented by the record . . . to determine whether the misapprehension of the maximum sentence affected the guilty plea, or whether that factor was insubstantial [to the appellant's] decision to plead [guilty]." *United States v. Hemingway*, 36 M.J. 349, 353 (C.M.A. 1993) (citation and internal quotation marks omitted). Any misunderstanding must be substantial and our analysis does not rely on any mathematical formula. *United States v. Mincey*, 42 M.J. 376, 378 (C.A.A.F. 1995).

Assuming without deciding that the military judge erred in his maximum punishment calculation, we find any error insubstantial to the appellant's decision to plead guilty. We rely on a number of factors in this regard. First, we note the overwhelming evidence of guilt reflected in the record. Next, is the fact that the appellant received an adjudged sentence far below either maximum punishment calculation under R.C.M. 1003(c)(1)(B)(i) of 60 years or (ii) of 90 years. Finally, we note that his favorable pretrial agreement limited his punitive exposure even further. Consequently, even assuming that the military judge erred, we conclude that the appellant would still have pleaded guilty even if correctly advised of the maximum confinement he faced.

For the same reasons, we similarly conclude that even assuming error by the military judge, the appellant suffered no prejudice in the assessment of his sentence. *Cf. United States v. St. Blanc*, 70 M.J. 424, 430 (C.A.A.F. 2012) (finding prejudicial error when military judge erroneously advised appellant that maximum confinement penalty was twelve years instead of correct penalty of two years and four months). We are confident that the even if the military judge calculated 60 years as the maximum confinement penalty, he would have still adjudged a sentence of at least the same severity. Therefore, we find reassessment unnecessary.

We conclude that the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. We affirm the findings and sentence as approved by the CA.

For the Court

R.H. TROIDL  
Clerk of Court