

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

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

UNITED STATES OF AMERICA

v.

**ANDREW J. DICK
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201300205
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 February 2013.

Military Judge: LtCol Eugene Robinson, Jr., USMC.

Convening Authority: Commanding General, 3d Marine Division
(-)(REIN), Okinawa, Japan.

Staff Judge Advocate's Recommendation: Maj B.C. Corcoran,
USMC.

For Appellant: Maj Babu Kaza, USMCR.

For Appellee: LT Philip Reutlinger, JAGC, USN.

21 November 2013

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, in accordance with his pleas, of one specification of receiving child pornography and one specification of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The specifications were pled under clauses 1 and 2 of Article 134, and incorporated the definition of child pornography in 18 U.S.C. § 2256. The military judge sentenced the appellant to confinement for 10 years, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. Pursuant to a

pretrial agreement, the convening authority (CA) approved the adjudged sentence and suspended all confinement in excess of 36 months.

This case was submitted without specific assignment of error. After conducting our thorough review of the record of trial and allied papers, we are convinced that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

At trial, the military judge advised the appellant that the maximum sentence for the offenses to which he pled guilty was confinement for up to 25 years, forfeiture of all pay and allowances, a fine, reduction to the pay grade E-1, and a dishonorable discharge. Record at 15. However, the military judge did not articulate how he determined the maximum confinement for these offenses; neither the trial nor the defense counsel commented on his advisement to the appellant other than to concur. *Id.*

The maximum punishment authorized for an offense is a question of law, which we review *de novo*. *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011). For limits on authorized punishments under the UCMJ, we turn to RULE FOR COURTS-MARTIAL 1003, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).¹ 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) (citation omitted). The offenses as pled here are clearly not listed in Part IV of the Manual, and thus we turn to the President's guidance in R.C.M. 1003(c)(1)(B)(i)-(ii). There we find the 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).

The President issued Executive Order (EO) 13593 on December 13, 2011,² amending Part IV of the Manual for Courts-Martial to

¹ Pursuant to authority delegated from Congress under Article 56, UCMJ, the President has specified offense-based limits on punishment in R.C.M. 1003.

² Amendments contained in EO 13593 took effect 30 days following its issuance.

include Child Pornography as an enumerated Article 134 offense.³ This Presidential action effectually "listed" Child Pornography as an offense in Part IV of the Manual. See *id.* at 800-02. Under this offense, possessing and receiving child pornography each carry a maximum of 10 years confinement. The elements and legal definitions in the Article 134 Child Pornography offenses for wrongfully possessing and wrongfully receiving child pornography are virtually identical to those the military judge advised the appellant of during his providence inquiry. Record at 22-28. Thus, the charged offenses are clearly closely related to the offenses of wrongfully possessing and wrongfully receiving child pornography as proscribed by MCM (2012 ed.), Part IV, ¶ 68b. Additionally, there is no doubt that the Article 134 offense of child pornography existed in Part IV of the Manual at all relevant stages of the appellant's trial.⁴ However, the appellant's alleged offenses occurred between April 2010 and October 2011, well before the effective date of EO 13593, which "listed" child pornography in Part IV of the Manual.

R.C.M. 1003(c)(1)(B)(i) is silent on the question of whether the "closely related" offense must be listed in Part IV of the Manual at the time of the alleged offenses and at the time of trial. If R.C.M. 1003(c)(1)(B)(i) requires both, then the maximum punishment in the present case would be determined using the analogous child pornography offenses under Title 18 U.S.C. § 2252A.⁵ But if the Rule only requires that the closely related offense be listed in Part IV of the Manual at the time of trial, then the military judge should have advised the appellant he was facing twenty years confinement for his pleas of guilty. Ultimately, however, we need not answer this question; even assuming *arguendo* that the military judge erred in his maximum punishment advice, we conclude that any such error did not materially prejudice a substantial right of the appellant. In testing for prejudice we look at the appellant's decision to plead guilty and also at the adjudged sentence.

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

⁴ Charges were preferred on 5 November 2012, referred on 1 February 2013, and the appellant was arraigned on 13 February 2013.

⁵ In *United States v. Leonard*, 64 M.J. 381, 381 (C.A.A.F. 2007) the court found the military judge properly calculated the maximum punishment for the offense of receiving child pornography charged under clauses 1 and 2, Article 134, UCMJ, by reference to the maximum punishment for a violation of 18 U.S.C. § 2252 that proscribes and criminalizes the same criminal conduct and mental state. *Id.* at 384. Under 18 U.S.C. §§ 2252A(b)(1) and (2), the maximum punishment for appellant's offenses would have included up to 30 years confinement (20 years for receiving child pornography and 10 years for possession of child pornography).

"All the circumstances presented by the record must be considered to determine whether misapprehension of the maximum imposable sentence affected the providence of guilty pleas." *United States v. Walls*, 9 M.J. 88, 91 (C.M.A. 1980) (citation omitted). In *Walls* the maximum sentence was overstated by 100%, but it was determined that the "appellant's misapprehension of the maximum imposable confinement was an insubstantial factor in his decision to plead guilty." *Id.* at 92. We make a similar finding in the present case. As the court did in *Walls*, we consider the overwhelming evidence of guilt reflected in the record⁶ and the appellant's favorable pretrial agreement, and are convinced the appellant would have pled guilty if the military judge had advised him the maximum confinement he faced was twenty years vice twenty-five years.

We similarly conclude that even assuming error by the military judge, the appellant suffered no prejudice in the assessment of his sentence. See *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). The same factors relied upon in upholding the guilty plea lead us to this conclusion. The depth and breadth of the appellant's receipt and possession of child pornography remains the same and the adjudged confinement is still significantly less than the maximum. Under these circumstances, we are convinced the military judge would have imposed the same sentence even if he had considered the maximum confinement to be twenty years.

We affirm the findings and sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court

⁶ The evidence indicated the appellant possessed 5,647 data files confirmed by the National Center for Missing and Exploited Children to contain known images of child pornography. The appellant provided a written confession to the Naval Criminal Investigative Service agent detailing his extensive involvement with child pornography which included searching for, downloading, viewing and saving child pornography.