

Wednesday, 10 April 2013

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*United States v. Rapp*

Panel Three: M.D. Modzelewski, J.R. Perlak, C.K. Joyce  
Appellate Military Judges

For Appellant: LT Jared Hernandez, JAGC, USN

For Appellee: LT Ian MacLean, JAGC, USN

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of one specification of receiving child pornography, one specification of possessing four or more images of child pornography, and one specification of attempting to receive child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. The military judge sentenced the appellant to forfeiture of all pay and allowances, a fine of \$16,000.00, reduction to pay grade E-1, 60-months confinement, and a dishonorable discharge. In a post-trial article 39(a), UCMJ session, the military judge merged specifications 1 and 2, reassessed the sentence, and reduced the sentence of confinement to 54 months. The convening authority approved the sentence as amended, suspended all confinement in excess of twelve (12) months, and, except for the punitive discharge, ordered it executed.

The issues to be argued before the Court are as follows:

- I. WHETHER THE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS IMPROPERLY ADVISED THAT THE GOVERNMENT'S EVIDENCE CONSISTED OF CHILD PORNOGRAPHY? AND WHETHER HE WOULD HAVE CONTESTED THE CHARGES, ABSENT THIS ERRONEOUS ADVICE?
- II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ACCEPTED APPELLANT'S GUILTY PLEA DESPITE A SUBSTANTIAL BASIS IN FACT AND LAW TO QUESTION APPELLANT'S GUILTY PLEA?
- III. WHETHER THE GENERAL VERDICTS OF GUILT FOR SPECIFICATION ONE AND TWO MUST BE DISMISSED BECAUSE THEY MAY HAVE RESTED ON CONSTITUTIONALLY PROTECTED CONDUCT IN THAT IMAGES ALLEGED TO BE CHILD PORNOGRAPHY, AS DEFINED BY 18 U.S.C. § 2256(8), ARE NOT CHILD PORNOGRAPHY?