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

**Before**
**R.E. VINCENT, E.C. PRICE, J.R. PERLAK**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DAVID D. KELCHNER**
**AVIATION ORDNANCEMAN AIRMAN (E-3), U.S. NAVY**

**NMCCA 200900254**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 15 January 2009.
**Military Judge:** CDR Holiday Hanna, JAGC, USN.
**Convening Authority:** Commander, Naval Air Force Atlantic, Norfolk, VA.
**Staff Judge Advocate's Recommendation:** LCDR B.T. Bowlin, JAGC, USN.
**For Appellant:** LT Michael Maffei, JAGC, USN.
**For Appellee:** LCDR C.C. Burris, JAGC, USN; Maj Elizabeth Harvey, USMC.

**15 December 2009**

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**OPINION OF THE COURT**

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**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 one specification of wrongful use of cocaine and four specifications of possessing child pornography, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The military judge sentenced the appellant to 24 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. In accordance with the pretrial

agreement, the convening authority suspended confinement in excess of 14 months for a period of 6 months.

**Background**

The appellant downloaded child pornography from the internet onto his personal laptop computer in early 2007. He later transferred the child pornography from his laptop to a portable media device called a Zune. In November 2007, the appellant misplaced his Zune, leaving it in a magazine space onboard the USS ENTERPRISE (CVN 65). The Zune was eventually found by a shipmate, who turned the device on and observed child pornography. The Sailor then delivered the Zune to the ship's security. A picture of the appellant was found on the Zune, serving to identify its owner, and the appellant was interviewed by an agent of the Naval Criminal Intelligent Service (NCIS). The appellant signed a military suspect's acknowledgement and waiver of rights and provided a signed and sworn written confession admitting to possession of child pornography. The appellant provided NCIS with written consent to search his Zune, his laptop computer, and his personal spaces. On or about 25 March 2008, the appellant wrongfully used cocaine and subsequently tested positive on a urinalysis test.

At trial, the appellant was charged with one specification of unlawful use of cocaine and four specifications of possession of child pornography. The four specifications of possession of child pornography were all charged under Article 134, UCMJ. Two of the specifications were for the child pornography contained on the appellant's Zune (Specifications 1 and 3) and the other two specifications were for the child pornography contained on the appellant's laptop (Specifications 2 and 4). For each form of media, one specification was charged under 18 U.S.C. § 2252A, as incorporated by Clause 3 of Article 134, UCMJ, while the other specification was charged under Clauses 1 and 2 of Article 134, UCMJ.

This appeal raises five assignments of error.[1] We will address them in the sequence dispositive of this appeal.

[1] I. Whether the military judge erred in not finding Specifications 1 and 3 of Charge II multiplicious for findings, as both specifications cite the same misconduct.
II. Whether the military judge erred in not finding Specifications 2 and 4 of Charge II multiplicious for findings, as both specifications cite the same misconduct.
III. Whether the military judge erred in admitting evidence at trial that was obtained as a direct result of an illegal search of appellant's personal electronic device.

## Unreasonable Multiplication of Charges

The prohibition against unreasonable multiplication of charges allows this court to address prosecutorial overreaching by imposing a standard of reasonableness. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007); *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). In addressing whether the Government has unreasonably multiplied charges, this court applies a five-part test: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)(citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)); *Paxton*, 64 M.J. at 491.

The first factor favors the Government. The appellant did not make an objection at trial. The second factor favors the appellant. For both the laptop and the portable media device, the appellant was convicted of two specifications which describe the same misconduct under two different statutes. The appellee concedes the point. Appellee’s Brief of 12 Aug 2009 at 11. The third and fourth factors also favor the appellant. The appellant was found guilty of four separate specifications involving child pornography when he should have been convicted of no more than two specifications (one specification for possession of child pornography on the Zune media device, and one specification for possession of child pornography on the laptop computer). The two additional convictions for the exact same misconduct exaggerate the appellant’s criminality and unfairly increase the appellant’s punitive exposure.

Concerning the fifth factor, trial counsel’s charging methodology does not necessarily demonstrate prosecutorial

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**Supplemental Assignments of Error**

I. Whether the Government unreasonably charged Specifications 1 and 3 of Charge II where they allege the exact same conduct, possession of a Zune media device containing child pornography.
II. Whether the Government unreasonably charged Specifications 2 and 4 of Charge II where they allege the exact same conduct, possession of a laptop computer containing child pornography.

overreaching from the outset. The Government is entitled to pursue alternative charging in anticipation of varying contingencies of proof. The various clauses of Article 134 provide alternate theories of criminal liability, but do not thereby state separate offenses. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)(citing *United States v. Sapp,* 53 M.J. 90, 92 (C.A.A.F. 2000)). Since the military judge did not compel the Government to choose between statutory theories or merge them for findings, one of the findings as to each media cannot stand.

The military judge found the appellant guilty under both theories advanced in the specifications, later ruling that he would consider them multiplicious for sentencing, but not as to the findings. Record at 243. Although the military judge's sentencing ruling mitigated any potential sentencing prejudice to the appellant arising from the Government's alternative charging methodology, the appellant's criminality was nonetheless misrepresented and exaggerated by the two additional convictions. *Pauling*, 60 M.J. at 95. Further corrective action by the military judge with respect to findings was necessary. We take appropriate action in our decretal paragraph.

**Multiplicity**

Having assessed the appellant's supplemental assignments of error and having found that the current state of the findings impermissibly exaggerates the appellant's criminality, and having taken corrective action in the decretal paragraph on that basis, we need not address appellant's first two assignments of error.

**Motion to Suppress**

After careful consideration of the third assignment of error, submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we find the matters raised by the appellant are unsubstantiated by the record and do not merit relief. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

**Conclusion**

The findings of guilty to Charge I and its specification are affirmed. The findings of guilty to Specifications 3 and 4 of Charge II and to Charge II are affirmed. The findings of guilty to Specifications 1 and 2 of Charge II are set aside. In light of the military judge's ruling on multiplicity for

sentencing, there is no change to the sentencing landscape or basis to reassess. *See United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006). The approved sentence is affirmed. We conclude that the findings and sentence, as modified herein, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court