

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**FRANKLYN B. MOLINA
INFORMATION SYSTEMS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200900408
GENERAL COURT-MARTIAL**

Sentence Adjudged: 30 April 2009.

Military Judge: CAPT Moira Modzelewski, JAGC, USN.

Convening Authority: Commander, Naval Air Force Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR Frank D. Katz,
JAGC, USN.

For Appellant: LCDR Luis Leme, JAGC, USN.

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

13 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 three specifications of possessing child pornography and two specifications of receiving of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The convening authority approved the adjudged confinement for a period of 48 months, reduction to pay grade E-1, and dishonorable discharge.

Although the case was submitted without an assignment of error, we observe that the misconduct reflected in Specifications 4 and 6, possession of child pornography and receipt of child pornography was charged as conduct prejudicial to good order and discipline and service discrediting under clauses 1 & 2 of Article 134, UCMJ. The same misconduct was charged in Specifications 3 and 5 as violations of 18 U.S.C. 2252A(a)(5) and 2252A(a)(2)(B) under clause 3 of Article 134. The military judge found the appellant guilty of the aforementioned specifications, but, pursuant to trial defense counsel's motion that Specifications were multiplicitous for sentencing purposes, she consolidated Specification 4 with Specification 3 and Specification 6 with Specification 5 for sentencing purposes.¹

In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), five factors were listed for consideration in determining whether a multiplication of charges is unreasonable. The third factor addresses the prejudice inherent in "misrepresenting or exaggerating" an appellant's criminality. Separate and distinct from this, the fourth factor addresses whether the charges and specifications "unfairly increase" the appellant's punitive exposure. *Id.* at 338-39

While the military judge's consolidation action obviated any potential sentencing prejudice to the appellant arising from the Government's alternate charging strategy, the appellant was nonetheless prejudiced by the fact that he was found guilty of five separate specifications involving child pornography when, in fact, he should have been found guilty of three specifications. Finding the appellant guilty of five specifications of criminal conduct involving possession and receipt of child pornography, vice three, exaggerates his criminality.

It is clear that both the military judge and the trial defense counsel intended to address the fact that the charges unreasonably exaggerated or misrepresented the appellant's criminality. We, therefore, decline to apply waiver in this

¹ We note that the military judge found the appellant guilty of Specification 5 by excepting the word "divers" and substituting "an" and excepting the word "occasions" and substituting the word "occasion." Despite conducting no additional inquiry regarding the number of occasions on which the appellant received child pornography, the military judge found the appellant guilty of Specification 6 without excepting or substituting any language. In light of our action in setting aside the guilty finding to Specification 6, we find that the military judge's oversight did not prejudice the appellant.

case. It also appears that the intent of the parties was for the appellant to be punished for the Article 134, clause 3 offenses. We will take appropriate action in our decretal paragraph.

The findings of guilty to Specifications 2, 3, and 5 and to the charge are affirmed. The findings of guilty to Specifications 4 and 6 of the charge are disapproved and 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 and we conclude that the modified findings and the sentence 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