

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

**Before
E.E. GEISER, R.E. BEAL, W.L. RODGERS
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES V. WHELIHAN
ELECTRONICS TECHNICIAN SEAMAN (E-3), U.S. NAVY**

**NMCCA 200900263
GENERAL COURT-MARTIAL**

Sentence Adjudged: 23 January 2009.

Military Judge: CAPT Moira Modzelewski, JAGC, USN.

Convening Authority: Commander, Submarine Group TWO, Naval Submarine Base New London, Groton, CT.

Staff Judge Advocate's Recommendation: LCDR J.L. Marsh, JAGC, USN.

For Appellant: CAPT Martin Grover, JAGC, USN.

For Appellee: LT Brian Burgtorf, JAGC, USN.

17 September 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 two specifications involving possession of child pornography and two specifications involving receipt of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence was confinement for 18 months and a bad-conduct discharge.

Although the case was submitted without assignment of error, we observe that the factual misconduct reflected in the two possession specifications was charged under one of the specifications as conduct prejudicial to good order and discipline and service discrediting under clauses 1 & 2 of Article 134, UCMJ, and then again in the other specification as a violation of 18 U.S.C. 2252A(a)(5) under clause 3 of Article 134. Such alternative charging is not, in and of itself, a problem. Charging in the alternative for contingencies of proof or other reasons is a common and accepted practice. At issue, however, are the findings.

The military judge found the appellant guilty of all 4 specifications but later, pursuant to a defense motion, consolidated Specifications 1-3 into Specification 4 for sentencing purposes. 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.

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 4 separate specifications involving child pornography when, in fact, he should have been found guilty of no more than 2 specifications. Leaving the charges and specifications "as is" tended to exaggerate the appellant's criminality.

It is clear that both the military judge and the trial defense counsel intended to address the fact that the charges unreasonably multiplied the appellant's criminality. We, therefore, decline to apply waiver in this 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 and 4 and to the Charge are affirmed. The findings of guilty to Specifications 1 and 3 of the Charge are disapproved and set-aside. The approved sentence is affirmed. We conclude that the findings and the 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