

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DAVID J. PHILLIPS
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900568
GENERAL COURT-MARTIAL**

Sentence Adjudged: 5 February 2009.

Military Judge: LtCol David Oliver, USMC.

Convening Authority: Commanding General, 3d Marine Logistics Group, Camp Foster, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol D.A. Winklosky, USMC.

For Appellant: LT Michael Torrissi, JAGC, USN.

For Appellee: Capt Robert Eckert, Jr., USMC.

28 December 2011

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, consistent with his pleas, of one specification of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The military judge also found him guilty, contrary to his pleas, of wrongfully possessing child pornography [as conduct prejudicial to good order and discipline (clause 1) and conduct of a nature to bring discredit upon the armed forces (clause 2)] in violation of

Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced him to confinement for fifteen months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

Upon initial review, we set aside the military judge's guilty findings to the Article 134 offense as to clause 1, affirmed the remaining guilty finding as to clause 2, affirmed the guilty finding to the Article 121 charge, and affirmed the sentence.¹ The appellant then appealed to the Court of Appeals for the Armed Forces (CAAF), which found that the guilty finding to the clause 2 Article 134 offense was legally sufficient. Concerned that our determination that possession of child pornography was *per se* service discrediting ran afoul of the constitutionally impermissible use of conclusive presumptions to prove an element of the offense, the CAAF remanded this case to us to make a factual sufficiency determination on the clause 2 offense under Article 66(c), UCMJ, 10 U.S.C. § 866(c).² The appellant now asserts that the evidence is factually insufficient to sustain his conviction for possession of child pornography under clause 2 of Article 134, UCMJ.

We have considered the record of trial and the submissions of the parties. We conclude that the findings and sentence are correct in law and fact and that there are no errors materially prejudicial to the substantial rights of the Appellant.³ Articles 59(a) and 66(c), UCMJ.

Factual Sufficiency

The appellant asserts two bases for factual insufficiency: (1) that the Government charged him with conduct that "was . . . service discrediting" and not "conduct of a nature to bring discredit upon the armed forces;" and (2) that no reasonable member of the public would draw a negative conclusion about the

¹ *United States v. Phillips*, 69 M.J. 642 (N.M.Ct.Crim.App. 2010).

² *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011). The CAAF held that our court "may have conclusively presumed that Appellant's conduct was of a nature to bring discredit upon the armed forces because Appellant possessed child pornography." *Id.* at 167.

³ We previously found no factual or legal error with respect to the Article 121, UCMJ charge and rejected the appellant's argument that his sentence, including the dishonorable discharge, was inappropriately severe. *United States v. Phillips*, 69 M.J. 642, 646-47 (N.M.Ct.Crim.App. 2010).

armed forces because his private criminal conduct was not exposed to public view.⁴ The Government responds that the omission of the words "of a nature" cannot constructively amend an element established by Congress, and that the evidence satisfies clause 2.⁵

We first reject the appellant's assertion that the specification, which alleged in part that his conduct "was prejudicial to good order and discipline in the armed forces and service discrediting,"⁶ required the Government to prove actual discredit because it omitted the words "of a nature." The elements of this offense, as defined by Congress, only require conduct "of a nature to bring discredit upon the armed forces". As the Government cannot modify an element established by Congress through its pleading,⁷ we therefore must only decide whether the specification, as drafted, provided the appellant with sufficient notice of the required element, and whether the evidence adduced at trial created a fatal variance from what was alleged in the charge sheet.

A specification states an offense so long as it states the elements expressly or by "necessary implication." RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). Here, this specification included not only the acts alleged to have been committed, but also that these same acts were "service discrediting." In conducting our own *de novo* review,⁸ we find that the specification as drafted sufficiently notified the appellant of the terminal element to an Article 134, UCMJ, offense.⁹ At best, the omission of the words "of a nature" is a minor drafting error, one which we find did not

⁴ Appellant's Brief of 18 Aug 2011 at 4.

⁵ Government's Brief of 17 Oct 2011 at 5-6.

⁶ Charge Sheet.

⁷ *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

⁸ *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010).

⁹ As pointed out by the Government, the appellant neither objected to the sufficiency of the specification at trial, nor moved for dismissal under R.C.M. 917 for the Government's failure to prove "actual discredit." Government's Brief at 8. Thus, we view the sufficiency of the specification with a wider lens than had it been challenged at trial. See *United States v. Watkins*, 21 M.J. 208, 209-10 (C.M.A. 1986).

prejudice the appellant. *Fosler*, 70 M.J. at 230, n. 3. Specifically, we find that the omission did not put the appellant at risk of re-prosecution, did not mislead him in preparing for trial, and did not deny him the opportunity to prepare a defense against the charge. See *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009).¹⁰

We also reject the notion that the Government, by failing to allege "of a nature," constructively amended the specification.¹¹ A constructive amendment occurs "when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *United States v. Smith*, 320 F.3d 647, 656 (6th Cir. 2003) (citing *United States v. Stirone*, 361 U.S. 212 (1960)). Simply put, it occurs when the elements proven in obtaining a conviction differ from those alleged. *United States v. McMurrin*, 70 M.J. 15, 19, n.3 (C.A.A.F. 2011).

We also disagree with the notion of any variance. A variance occurs where the evidence at trial "establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. Lubasky*, 68 M.J. 260, 264 (C.A.A.F. 2010) (citation and internal quotation marks omitted). While the distinction may be blurred,¹² a constructive amendment essentially is a discrepancy between an element charged and an element proven whereas a variance is a discrepancy between a fact alleged and a fact proven.

In either case, we find neither a constructive amendment nor a variance. There was no discrepancy between the facts alleged in the specification and the facts offered at trial. Nor is there any indication that the military judge, as the trier of fact, relied upon any element different from those contained in the specification. The omission of the words "of a

¹⁰ Although *Marshall* analyzes prejudice in terms of variance, we find its analysis to be analogous to when the specification contains a minor deficiency, but otherwise states an offense. We also note that the appellant does not allege any prejudice from this deficiency.

¹¹ Appellant's Brief at 5.

¹² See *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986) (distinction "is at best shadowy") (citation and internal quotation marks omitted).

nature" did not change the statutory elements of the offense; they remained the same. Last, we find no indication from the record that the Government attempted to offer a different theory of liability to the military judge from what was alleged in the charge sheet.

Turning now to the appellant's second argument, that the clause 2 Article 134 offense is factually insufficient because of the private nature of the appellant's conduct, we are likewise not persuaded. After weighing all the evidence and recognizing that we did not personally observe the witnesses at trial, we are nonetheless convinced beyond a reasonable doubt that the appellant's conduct was of a nature to bring discredit upon the armed forces. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The appellant executed several searches designed to find child pornography. Record at 174. He then downloaded images and videos featuring child victims engaging in sexually explicit conduct, some of which matched known child victims. *Id.* at 174-206. While the Government introduced no evidence that any member of general public knew of his conduct, it did not have to do so. *Phillips*, 70 M.J. at 166. We also note that when a special agent of the Naval Criminal Investigative Service entered the appellant's barracks room, he saw the computer was on and downloading files which were consistent with child pornography. Record at 116. The appellant made no effort to hide his conduct from public view.

Searching for and downloading child pornography, and then repeatedly viewing it in a barracks room on board a military installation is both criminal and disgraceful conduct for a corporal in the United States Marine Corps. We are convinced beyond any reasonable doubt that his conduct in this case factually satisfies the clause 2 Article 134 offense.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court