

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
COOK, TELLITOCCHI, and HAIGHT  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Sergeant JOHNATHAN W. JOHNSTON**  
**United States Army, Appellant**

ARMY 20131088

Headquarters, 7th Infantry Division  
E. Bradford Bales, Military Judge  
Lieutenant Colonel Michael S. Devine, Staff Judge Advocate

For Appellant: Major Amy E. Nieman, JA; Captain Patrick A. Crocker, JA (on brief).

For Appellee: Major A. J Courie III, JA (on brief).

24 March 2015

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SUMMARY DISPOSITION  
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TELLITOCCHI, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of sexual exploitation of a minor, wrongful distribution of child pornography, wrongful possession of child pornography (two specifications), wrongful communication of indecent language to a child under the age of 16, and wrongful possession of images of bestiality, all in violation of Article 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 934 (2006). The military judge sentenced appellant to a dishonorable discharge, confinement for six years, total forfeiture of all pay and allowances, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for fifty-four months, total forfeiture of all pay and allowances, and reduction to the grade of E-1.

This case is before us for review pursuant to Article 66, UCMJ. Appellant submitted the case on its merits.<sup>1</sup> However, one additional issue merits discussion but no relief.

## BACKGROUND

Appellant was charged with and convicted of, *inter alia*, one specification of distribution of child pornography, in violation of Article 134, UCMJ. Specification 2 of The Charge alleges:

In that [appellant], U.S. Army, did, at or near Joint Base Lewis-McChord, Washington, on divers occasions, between on or about 1 November 2011 and 5 March 2012, knowingly and wrongfully distribute child pornography, *as defined by Title 18 United States Code Section 2256(8)*, to wit: multiple digital images and one (1) digital video of a minor, *or what appears to be a minor*, engaging in sexually explicit conduct, and that such conduct was of a nature to bring discredit upon the armed forces.

(emphasis added).

During the providence inquiry, the military judge provided a definition of child pornography that included the “appears to be” language found in Specification 2. Although not raised by appellant, this specification is problematic as the “appears to be” language stands in contradiction to the definition found in 18 U.S.C. 2256(8).<sup>2</sup> In light of our superior court’s ruling in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F 2011), we will afford appropriate relief in our decretal paragraph.

## LAW AND DISCUSSION

In *Beaty*, the United States Court of Appeals for the Armed Forces [hereinafter CAAF], was faced with the same issue present in the instant case, albeit with respect to a possession of child pornography offense rather than distribution. *Id.* at 40-41. Here, as in *Beaty*, the specification alleging wrongful possession of child pornography stated the images were of “*what appears to be a minor* engaging

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<sup>1</sup> Appellant personally raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), neither of which merits discussion or relief.

<sup>2</sup> The specifications alleging possession of child pornography (Specifications 3 and 4 of The Charge) do not contain the “appears to be” language present in the distribution specification.

in sexually explicit conduct . . . .” *Id.* at 40 (emphasis added). The operative phrase in the instant case contains the same overbroad language as the one found in *Beaty*.

The CAAF ultimately affirmed *Beaty*’s conviction under Article 134, UCMJ. *Id.* at 45. In doing so, the CAAF emphasized it had “repeatedly” found possession of actual or virtual child pornography can be prosecuted under clause 1 or 2, Article 134, UCMJ. *Id.* at 41 (citations omitted). However, the CAAF also found, while applying a *de novo* review of the maximum punishment, the military judge erred as a matter of law in deciding the charged offense carried a maximum punishment of ten years.<sup>3</sup> *Id.* at 44.

The CAAF found that based on the Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), “[t]he United States Code does not criminalize possession of ‘what appears to be’ child pornography.” *Beaty*, 70 M.J. at 43. As such, the CAAF held it was error for the military judge to use the maximum punishment prescribed by 18 U.S.C. § 2252. In finding error the CAAF noted that:

[w]hen confronted with Article 134, UCMJ, offenses not specifically listed, that are not closely related to or included in a listed offense, that do not describe acts that are criminal under the United States Code, and where there is no maximum punishment ‘authorized by the custom of the service,’ they are punishable as ‘general’ or ‘simple’ disorders, with a maximum sentence of four months of confinement . . . .

*Id.* at 45.

Here, applying a *de novo* review of the maximum punishment, we find it was error for the military judge to apply the maximum punishment of twenty years confinement as set forth in 18 U.S.C. § 2252(b)(1) for distribution of images of minors. Appellant was convicted of distributing images of minors or what appeared to be minors. Since the government and the military judge broadened the scope of the offense beyond that of the civilian federal statute, the correct maximum punishment for this general Article 134, UCMJ, offense includes only four months of confinement. *Beaty*, 70 M.J. at 45.

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<sup>3</sup> In *United States v. Leonard*, 64 M.J. 382 (C.A.A.F. 2007), the CAAF “determined the military judge did not err in setting the maximum punishment for a specification and charge of possession of visual depictions of *minors* engaging in sexually explicit activity [charged under clauses 1 or 2 of Article 134, UCMJ] by reference to the maximum punishment authorized by 18 U.S.C. § 2252(a)(2), (b)(1).” *United States v. Finch*, 73 M.J. 144, 147 (C.A.A.F. 2014) (emphasis added).

## CONCLUSION

The findings of guilty are AFFIRMED.

With respect to appellant's sentence, the maximum confinement was calculated by the parties and the military judge to be seventy-two years and four months: thirty years for enticement (Specification 1); twenty years for distribution (Specification 2); ten years for each possession (Specifications 3 and 4), two years for communicating indecent language (Specification 5), and four months for the general article violation by wrongful possession of images of bestiality (Specification 6). Changing the maximum punishment for the distribution specification from twenty years to four months changes the maximum confinement appellant faced from seventy-two years and four months to fifty-two years and eight months. Nonetheless, this reduction in potential confinement does not represent a dramatic change in the overall sentencing landscape, particularly in light of appellant's adjudged sentence of six years confinement and the approved sentence of only fifty-four months of confinement.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

After reassessing the sentence and considering the entire record, we AFFIRM the approved sentence. We find this reassessed sentence purges the noted error in accordance with *Sales* and *Winckelmann* and is also appropriate under Article 66(c), UCMJ.

Senior Judge COOK and Judge HAIGHT concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.  
Clerk of Court