RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2012-01895
COUNSEL: NONE
HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His bad conduct discharge (BCD) be upgraded to an honorable discharge.

APPLICANT CONTENDS THAT:

His characterization of discharge should be upgraded based on the decision by the United States Court of Appeals for the Armed Forces in *U.S. versus* .

A copy of the applicant's complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

On 6 April 2009, the applicant, then an airman first class (E-2), was tried and convicted by general court-martial for one specification of wrongfully possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). The applicant pled guilty to the charge and specification and sentenced to a BCD, confinement for 60 days, and reduction to the grade of airman basic (E-1). On 22 May 2009, the convening authority approved the sentence as adjudged. On 19 January 2010, the Air Force Court of Criminal Appeals remanded the record of trial back to the Judge Advocate General to correct an error in the convening authority's action. On 29 January 2010, the Air Force Court of Criminal Appeals approved the sentence as adjudged. On 4 October 2010, the United States Court of Appeals for the Armed Forces denied the applicant's petition for review of the decision of the Air Force Court of Criminal Appeals, making the findings and sentence in his case final and conclusive under the UCMJ. As a result, the applicant's discharge was ordered to be executed on 3 November 2010.

The applicant was discharged effective 12 August 2011 with a BCD and a narrative reason for separation of "Court-Martial (Other)." He served four years, seven months, and five days on active duty with lost time from 6 April 2009 through 23 May 2009.

AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial. JAJM states the applicant asserts that during the court-martial hearing his military defense argued to the military judge that the maximum punishment for the offense did not include a punitive discharge. Counsel argued that because the specification, as drafted, failed to correctly assimilate the federal statute criminalizing the possession of child pornography, the maximum punishment under the statute was not available. The specification used the language "what appears to be a minor," which was the language removed from the federal statute based on the United States Supreme Court decision in *Ashcroft*. The military judge disagreed and determined the maximum punishment was a dishonorable discharge, ten years confinement, and a reduction in grade to E-1.

One month after the applicant's trial, another general court-martial was completed for the exact same offense. The accused was sentenced to a BCD, ten months confinement, and a reduction to E-1. That case was also affirmed by the Air Force Court of Criminal Appeals and was also granted review by the United States Court of Appeals for the Armed Forces. On 2 April 2011, six months after the applicant's case was final, by application of Article 76, UCMJ and Rule for Court-Martial (RCM) 1209(a)(1)(B), the United States Court of Appeals for the Armed Forces ruled that it was an error for the trial court judge to reference the maximum punishment in the federal statute and that the maximum punishment for that specification of possessing child pornography, using the language "what appears to be a minor," is actually no more than four months confinement and does not include a punitive discharge. Because the accused had already served the period of ten months confinement, the convening authority in the case approved "no punishment" and Airman was separated from active duty with an honorable discharge. He was not eligible for an administrative discharge providing a different service characterization, because his term of enlistment had already expired.

JAJMJ indicates that had the charges against the applicant been brought six months later, he would likely not have been subject to a punitive discharge based on the court's ruling in. While this argument may be true, it is irrelevant as these are not the facts of the applicant's case. Finally, it must be emphasized that the applicant does not dispute that he committed the crime of wrongfully possessing child pornography and was convicted and sentenced under the law as it existed at the time of trial.

Article 76, UCMJ (finality of proceedings, findings, and sentence), states that appellate review of records of trial provided by the UCMJ, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the UCMJ, and all dismissals and discharges carried into

execution under sentences by courts-martial following approval, review, or affirmation, as required by the UCMJ, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, only subject to action upon petition for a new trial as provided in Article 73, UCMJ, and to action by the Secretary concerned as provided in Article 74, UCMJ, and the authority of the President.

RCM 1209(a)(1)(B) states that a court-martial conviction is final when review is completed by a Court of Criminal Appeals and a petition for review is denied or otherwise rejected by the Court of Appeals for the Armed Forces. In the applicant's case the petition for review was denied; therefore, making his case final on 4 October 2010. The result in the applicant's case was determined correct under the law on that day.

JAJM states the applicant's conviction and sentence remain the legal and correct result in his case. The conviction and sentence, which includes the BCD, is a legal sentence, despite the decision in the unrelated, later case of; a decision which has no legal effect on the applicant's case. There is no legal basis with which to upgrade his punitive discharge. The fact that another individual, in another case, received a different result is of no consequence to the legal and just results in the applicant's case.

The complete JAJM evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to the applicant on 27 June 2012, for review and comment within 30 days (Exhibit D). As of this date, this office has received no response.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of an error or injustice. We took notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinion and recommendation of the Air Force office of primary responsibility and adopt its rationale as the basis for our conclusion that the

applicant has not been the victim of an error or injustice. Therefore, the applicant's request is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered AFBCMR Docket Number BC-2012-01895 in Executive Session on 12 February 2012, under the provisions of AFI 36-2603:

, Panel Chair
, Member
, Member

The following documentary evidence pertaining to AFBCMR Docket Number BC-2012-01895 was considered:

Exhibit A. DD Form 149, dated 30 Apr 12, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFLOA/JAJM, dated 12 Jun 12.
Exhibit D. Letter, SAF/MRBR, dated 27 Jun 12.

Panel Chair