

## Ex-Marine Caught Surfing Child Pornography found Not Deportable by 9th Circuit

The 9th Circuit Court of Appeals has just ruled that a conviction for violating Article 92 of the Uniform Code of Military Justice (“U.C.M.J.”) is not an aggravated felony, and therefore not a deportable offense. [Aguilar-Turcios v. Holder](#), Sept. 29, 2009.

The case involves an Ex-Marine Rigoberto Aguilar-Turcios who became a lawful permanent resident in 1996, and who joined the Marine Corp in June 2000. His conviction on under Article 92 relates to his unauthorized use of government computers for the purpose of surfing porn on the internet. On face value this seems innocent enough, but unfortunately the pornography that Mr. Aguilar was surfing involved minor children.

In September 2005, the government initiated removal proceedings against Aguilar, charging him with being subject to removal because they alleged that his conviction was an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(I).

Understandably, a person is deportable from the United States as an aggravated felon if they are convicted of an offense that involves child pornography. See 18 U.S.C. § 2252(a)(2), (a)(4).

The question that the 9th Circuit was forced to analyze was not whether Mr. Aguilar should be deported for surfing child pornography, but instead whether the minimal conduct required to substantiate a conviction under Article 92 in any way involves a depiction of a minor engaging in sexually explicit conduct. As a result, the 9th was required to ONLY look at the language contained in Article 92 to determine if Aguilar’s conviction was an aggravated felony, and not the fact that he was viewing child pornography.

In order to determine if a conviction under Article 92 constitutes an aggravated felony the 9th utilized a system of evaluation known as the categorical approach which requires an examination of the language of the underlying statute that an individual has been found guilty under. See *Taylor v. United States*, 495 U.S. 575, 600-02 (1990). Under the categorical approach the court is not permitted to consider the specific conduct that resulted in the conviction or the circumstances under which the crime was Committed.

To be convicted of violating Article 92 , an individual must have engaged in conduct that:

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties . . . .

After reviewing the plain language of Article 92 the Court determined that although a violation of section 2-301(a) may involve “pornography,” an individual may be found to be in violation of the statute without committing an offense that involves pornography, and moreover the minimal conduct contemplated under the statute to substantiate a conviction does not require the commission of an act involving a depiction of a minor engaging in sexually explicit conduct.

The Court reasoned that because a violation of Article 92 through violating section 2-301(a) does not necessarily involve a visual depiction of a minor engaging in sexually explicit conduct, Aguilar’s Article 92 conviction could not categorically be considered an aggravated felony, and therefore he is not deportable.

It appears that Mr. Aguilar owes a debt of gratitude to his lawyer David B. Landry, out of San Diego, California. Job well done Mr. Landry.