

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Private (E-2)

NATHANIEL I. GILKEY,

United States Army,

Appellant

Docket No. ARMY 20210440

Tried at Camp Humphreys, Republic of Korea and Fort Leavenworth, Kansas, on 29 October 2020, 28 December 2020, 13 and 23 January 2021, 1–4 February 2021, and 19–20 July 2021 before a general court-martial convened by Commander, 19th Expeditionary Sustainment Command, Lieutenant Colonel Christopher E. Martin and Colonel Jeffrey W. Hart, Military Judges, presiding.

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Assignment of Error I¹

**WHETHER APPELLANT’S CONVICTIONS FOR
PRODUCING AND POSSESSING A DIGITAL
IMAGE OF CHILD PORNOGRAPHY, IN**

¹ The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit, save *Grostefon* Assignment of Error X: “Whether the Statement of Trial Results contains substantial errors warranting relief.” (Appellant’s Br.) This court may and should correct the asserted clerical errors within the Statement of Trial Results pursuant to R.C.M. 1111(c)(2); Article 66(d)(2), Uniform Code of Military Justice; *United States v. Witcher*, ARMY 20210617, 2022 CCA LEXIS 503, at *1 n.2 (Army Ct. Crim. App. 23 Aug. 2022) (per curiam). Should this court consider any other *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

**SPECIFICATIONS 4 AND 5 OF CHARGE IV, IS
LEGALLY AND FACTUALLY SUFFICIENT.**

Assignment of Error II

**WHETHER SPECIFICATIONS 4 AND 5 OF
CHARGE IV ARE UNREASONABLY
MULTIPLIED.**

Assignment of Error III

**WHETHER APPELLANT IS ENTITLED TO
RELIEF FOR UNREASONABLE POST-TRIAL
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Statement of the Case

On 4 March 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of impersonating an agent of the U.S. Army Criminal Investigation Command [CID], one specification of committing a lewd act upon a child, three specifications of possessing child pornography, one specification of distributing child pornography, and one specification of producing child pornography, in violation of Articles 106, 120b, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 906, 920b, and 934. (Statement of Trial Results [STR], R. at 378). Appellant was found not guilty of one specification of distributing child pornography² and one specification of committing a lewd act upon a child. (R. at 333, 378, STR).

On 20 July 2021, the military judge sentenced appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, seven years of confinement running concurrent to lesser periods of confinement,³ and a dishonorable discharge. (R. at 533). On 13 September 2021 the convening authority took no action on the sentence and the military judge entered judgment on the same day. (Action and Judgment).

² The military judge granted defense's motion pursuant to Rule for Courts-Martial [R.C.M] 917 for Specification 2 of Charge IV. (R. at 333).

³ Appellee adopts the chart created by appellant in his brief. (Appellant's Br. 2, n.3).

Statement of the Facts⁴

Appellant had Master [REDACTED] to produce and send him child pornography.

Appellant knew Master [REDACTED] from when he was in high school and Master [REDACTED] was in the sixth or seventh grade. (R. at 113). Appellant was a member of the “senior high [school] football team” and Master [REDACTED] was on the “junior high team.” (R. at 113). The teams would practice and scrimmage together. (R. at 113). Master [REDACTED] was close with appellant’s younger brother but explained that he had a “friendly relationship” with appellant. (R. at 114). After appellant had joined the United States Army as a military police officer in 2018,⁵ he reached out to Master [REDACTED] over Snapchat and Master [REDACTED] accepted appellant’s friend request sometime between “later September [or] early October [] 2018.” (R. at 115–16, 122, 205–06). Initially, appellant and Master [REDACTED] would exchange messages with one another

⁴ The bulk of allegations against appellant consisted of possession, distribution, and production of child pornography. (Charge Sheets). Appellant was also charged with a lewd act with a minor, Master [REDACTED], impersonating an agent, and obstructing justice (appellant was found not guilty of this offense). (Charge Sheet). Appellant only challenges Specifications 4 and 5 of Charge IV for their legal and factual sufficiency and asserts that they are unreasonably multiplied in his assignments of error. Thus, appellee will only address the background and facts supporting appellant’s convictions for producing and possessing the child pornography of Master [REDACTED], the minor realized in Specifications 4 and 5 of Charge IV. (Charge Sheet, R. at 129–131).

⁵ Appellant graduated high school in 2018 and already had a “spot selected for boot camp” because he was enrolled in the delayed entry program. (R. at 503, 512).

over Snapchat about once a week and they would discuss hunting, video games, and sports. (R. at 122).

Between January and February 2019, while Master [REDACTED] was almost fifteen years old,⁶ he received a friend request on Snapchat from “Lexi Alexander” [Lexi account], who he believed was a girl he was talking to from around his hometown, but was actually a fake account created and used by appellant. (R. at 123, Pros. Ex. 13, Gilkey interview (1 of 2) at 1:07:40–1:11:00). The user of that account sent him a video of “a young girl masturbating in the mirror” but he could only see “from about her upper-lip to midways to her shin[.]” (R. at 124). After he received this video the user of this account began “trying to convince [Master [REDACTED]] to send a picture of [him]self.” (R. at 126). Master [REDACTED] agreed and sent “a close up” “picture of [his] penis” that was explicit in nature. (R. at 126, 150⁷). Master [REDACTED] immediately “felt very uncomfortable” and “blocked the account and [] went to sleep.” (R. at 127). Upon waking in the morning, Master [REDACTED] had “several

⁶ Master [REDACTED] turned fifteen years old on 3 February 2019. (R. at 123).

⁷ Contrary to appellant’s suggestion, (Appellant’s Br. 8, n. 5), this court need not look to whether trial defense counsel was deficient for asking Master [REDACTED] whether the pictures were “explicit in nature” as appellant’s conclusory statement without any analysis regarding ineffective assistance of counsel is meritless. Should this court elect to examine whether defense counsel was deficient and deem the presumption of competence overcome, the government respectfully requests to “submit a statement or affidavit from . . . defense counsel to rebut the allegations.” *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008).

messages from [appellant's] account and a couple of missed calls from him [on his Snapchat account.]" (R. at 127).

In these Snapchat messages, appellant told Master [REDACTED] that he "was in big trouble" and that "he'd be coming down . . . to arrest [him]" for what he has done. (R. at 127). Appellant told Master [REDACTED] that he must become a "confidential informant for the military" and he could get out of trouble if he "add[ed] the Lexi account back and do what they [told him] to do." (R. at 128). The next day, while at school, Master [REDACTED] sent another "close-up" picture of his penis at the request of the user of the Lexi account. (R. at 130–31). After sending four or five more photos, Master [REDACTED] again blocked the Lexi account. (R. at 131, 133). However, upon blocking the Lexi account appellant again messaged Master [REDACTED] from his account demanding he unblock the Lexi account and follow the instructions of the account holder. (R. at 133). This blocking and then unblocking of the Lexi account at the direction of appellant "happened multiple times." (R. at 133). On or about May of 2019 Master [REDACTED] received a message from appellant that "some hackers had stole [sic] the Lexi [] account, that it was a military account that they used to catch pedophiles[,]" and that he had to add the account back and send more images in order to catch this person. (R. at 134).

Through the Lexi account, appellant told Master [REDACTED] to send him videos of him masturbating—which Master [REDACTED] sent. (R. at 135). Master [REDACTED] described

sending a “[twelve]-minute video where [he] had to stick [his] fingers in his butt.” (R. at 135). Master ■ made the decision to stop interacting with the Lexi account, texted his mother about what was going on, and together they notified local law enforcement. (R. at 137).

Additional facts relevant to the assignments or error are below.

Assignment of Error I

WHETHER APPELLANT’S CONVICTIONS FOR PRODUCING AND POSSESSING A DIGITAL IMAGE OF CHILD PORNOGRAPHY, IN SPECIFICATIONS 4 AND 5 OF CHARGE IV, IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A. Legal and factual sufficiency.

The standard for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving questions of legal sufficiency, the court is “bound to

draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During its legal sufficiency review, the court considers all available facts within the record and is “not limited to the appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

Regarding factual sufficiency, the test is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this] court are themselves convinced of appellant’s guilt beyond reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In its factual sufficiency review, this court “in considering the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard witnesses.” Article 66(d)(1), UCMJ. When assessing the credibility of witness testimony, “[o]ur system of justice rests on the general assumption that the truth is not determined merely by the number of witnesses on each side of the controversy . . . [t]he touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity.” *Weiler v. United States*, 323 U.S. 606, 608 (1945).

Further, this court has stated: “we are required to make credibility determinations on appeal, but those determinations . . . recognize the trial court’s superior position in making those determinations. Our assessment of evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.” *United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at *8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.) (citing *Washington*, 57 M.J. at 399).

B. Production and possession of child pornography, Article 134, UCMJ.

A person is guilty of producing child pornography when one “knowingly and wrongfully produces child pornography[.]” *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 95.b.(4)(a). A person is guilty of possessing child pornography when one “knowingly and wrongfully possesse[s], receive[s], or view[s] child pornography[.]” *MCM*, pt. IV, ¶ 95.b.(1)(a). Further, both the production and possession of the child pornography must be “to the prejudice of good order and discipline in the armed forces,” “of a nature to bring discredit upon the armed forces,” or both. *MCM*, pt. IV, ¶ 95.b.(4)(b)&(1)(b). Child pornography is “material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaged in sexually explicit conduct.” *MCM*, pt. IV, ¶ 95.c.(4). “Sexually explicit conduct” is “actual or simulated . . . masturbation [and] lascivious exhibition of the genitals or pubic area[.]” *MCM*, pt. IV, ¶ 95.c.(10)(c)&(e) (internal quotations omitted). A

person produces child pornography when he creates or manufactures child pornography that did not previously exist. *MCM*, pt. IV, ¶ 95.c.(9). A person possesses child pornography when he exercises control over the material. *MCM*, pt. IV, ¶ 95.c.(8).

The Court of Appeals for the Armed Forces [CAAF] has adopted the federal courts' *Dost* factors for determining when visual depictions constitute a "lascivious exhibition" of the genitals. *United States v. Roderick*, 62 M.J. 425, 429–30 (C.A.A.F. 2006) (internal citations omitted). This non-exhaustive six-factor review, combined with "the totality of the circumstances," considers:

- (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- (4) whether the child is fully or partially clothed, or nude;
- (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
- (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 429 (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd*, 813 F.2d 1231 (9th Cir. 1987)). A visual depiction, however, need not involve all of these factors to be a "lascivious exhibition." *Id.* at 430.

The “objective facts surrounding the image’s creation may be considered” in this analysis. *United States v. Updegrove*, ARMY 20160166, 2017 CCA LEXIS 36, at *7 (Army Ct. Crim. App. 23 Jan. 2017) (mem. op.), pet. denied, 76 M.J. 399 (C.A.A.F. 2017). Thus, the court is “not prohibited from considering evidence outside the four corners of the images(s) in question when making a determination as to whether an image constitutes child pornography.” *United States v. Gilbert*, ARMY 20190766, 2020 CCA LEXIS 255, at *9 (Army Ct. Crim. App. 31 July 2020) (mem. op.) (relying on *Updegrove*, 2017 CCA LEXIS 36, at *7.) “The ‘circumstances’ surrounding how the image was taken and how it was possessed are part of the ‘totality of the circumstances’ that may be considered in determining whether an image constitutes child pornography.” *Updegrove*, 2017 CCA LEXIS 36, at *6 (relying on *Roderick*, 62 M.J. 425).

Argument

Appellant is not challenging the connection between the Lexi Snapchat account and his own account. (Appellant’s Br. 7–9, *see also* Pros. Ex. 13, Gilkey interview (1 of 2) at 0:49:13–1:25:0). Further, appellant appears to acknowledge the underlying facts that led to his convictions for producing and possessing *videos* of child pornography in specifications 4 and 5 of Charge IV. (*See generally*, Appellant’s Br. 4–9 addressing only the digital images). Therefore, appellee’s

argument section will address the legal and factual sufficiency of the digital images supporting these convictions.⁸

A. Appellant compelled the production of child pornography from Master [REDACTED] by telling him that he must become a “confidential informant for the military” in order to catch a pedophile.

The “objective facts surrounding the image’s creation may be considered” when determining whether a particular digital image qualifies as child pornography. *Updegrove*, 2017 CCA LEXIS 36, at *7. The photos that Master [REDACTED] describes sending to appellant must be evaluated conjunction with the surrounding circumstances compelling its creation and possession. *Roderick*, 62 M.J. at 429–30. Here, Master [REDACTED] testified that he sent a “a close up” “picture of [his] penis” in response to receiving a video of “a young girl masturbating in [a] mirror.” (R. at 126, 124). Since this photo was sent in response to a sexually explicit video and it depicted Master [REDACTED]’s penis, these surrounding circumstances dictate that the photo was “lascivious exhibition” of the youth’s genitals intended reciprocate the overt sexual nature of the young girl masturbating. *See Updegrove*, 2017 CCA LEXIS 36, at *5 (finding that statements admitted at trial are a part of the surrounding circumstances in evaluating whether a visual depiction is “lascivious”).

⁸ Appellant’s argument section under this assignment of error only addresses the production of digital images of Master [REDACTED]. (Appellant’s Br. pp. 7–9 “The government failed to prove that any image appellant *produced* was lascivious.”) (emphasis added).

Moreover, Master ■ was told by appellant that he must become a “confidential informant for the military” and continue to send photos of his penis in order to “catch pedophiles.” (R. at 128, 134). The salient objective fact in this exchange is that appellant compelled Master ■ to continue to send pictures of his penis, among other photos and videos, and that those penis photos would arouse the desires of a person who is sexually attracted to children. Thus, considering Master ■’s purpose for sending the visual depiction of his penis—to reciprocate sexually to a video of a young girl masturbating (R. at 124–26) and to attract a pedophile (R. at 134)—there is no question that the government proved beyond a reasonable doubt that the visual depictions produced by Master ■ and sent to appellant in response to appellant’s manipulation were a “lascivious exhibition” of the child’s genitals.

B. The digital images appellant produced and possessed of Master ■ meet three of the qualifying *Dost* factors for “lascivious exhibition of [a child’s] genitals.”

In addition to the circumstances surrounding the production of the visual images Master ■ was compelled to send, the photos of Master ■ genitals meet at least three of the *Dost* factors.

First, “the focal point of the visual depiction is on the child’s genitalia or pubic area[.]” *Roderick*, 62 M.J. at 429. Master ■ testified that appellant requested he “send a picture of [him]self” in response to the video of the

masturbating girl. (R. at 126). Master [REDACTED] complied and sent appellant “close up” “picture of [his] penis.” (R. at 126, 124). Master [REDACTED] testified about another photo he was compelled to send to appellant while he was at school. (R. at 129).

Appellant directed Master [REDACTED] “to go to the bathroom and send more photos of [his] penis.” (R. at 129). Master [REDACTED] then sent appellant another “close-up [photograph of his] penis.” (R. at 131). Master [REDACTED] testified that the only part of his body visible in the photograph was his penis, and thus his penis was indisputably the focal point of this picture. (R. at 131); *Roderick*, 62 M.J. at 430 (finding the first *Dost* factor where the pubic area “could be considered the focal point of the image in” some of the visual depictions admitted at trial).

The fourth *Dost* factor, the nudity of the child, was also clearly established. (R. at 126, 129, 131); *Roderick*, 62 M.J. at 430. In order for an image to depict “sexually explicit conduct” within the subcategory of “lascivious exhibition” the image must be of the child’s “genitals or pubic area,” but it does not necessarily need to be a nude image of the pubic area. *United States v. Andersen*, ARMY 20080669, 2010 CCA LEXIS 328, at *25, *27 n.10 (Army Ct. Crim. App. 10 Sept. 2010) (mem. op.), pet. denied, 69 M.J. 45 (C.A.A.F. 2010); *MCM*, pt. IV, ¶ 95.c.(10)(e). Nevertheless, in appellant’s case, the digital image that was produced of Master [REDACTED] was of his nude penis and therefore satisfies the fourth *Dost* factor. (R. at 126, 129, 131).

Finally, the sixth *Dost* factor, “whether the visual depiction is intended or designed to elicit a sexual response in the viewer,” tilts toward the digital image(s) of Master [REDACTED] qualifying as “lascivious exhibition” of his genitals. *Roderick*, 62 M.J. at 430. As discussed *infra* pp. 10–11, Master [REDACTED] sent the first “close up” “picture of [his] penis” in response to receiving a video of “a young girl masturbating.” (R. at 126, 124). The reciprocal nature of the image establishes that it was “intended or designed” to elicit a sexual response in the recipient of the photo, which was appellant masquerading as the Lexi account. *Roderick*, 62 M.J. at 430; *Updegrove*, 2017 CCA LEXIS 36, at *5. Further, other pictures Master [REDACTED] was compelled to produce for appellant, a military police officer, were pictures of his penis that Master [REDACTED] believed he was sending to “catch pedophiles” as a “confidential informant for the military.” (R. at 128, 134). These facts establish that the photos Master [REDACTED] was pressured to send were “intended” and “designed to elicit a sexual response in” pedophiles, clearly establishing the “lascivious” nature of those photos. *Roderick*, 62 M.J. at 430, n.3 (evaluating this factor from the viewpoint of what the reasonable factfinder could have concluded when considering the intent of the producer.)

Thus, directly similar to the seminal case adopting the factored approach to analyzing what images qualify as child pornography, the first, fourth and sixth *Dost* factors all point to a “lascivious exhibition” of the pubic area of Master [REDACTED].

Roderick, 62 M.J. at 430. Accordingly, the evidence is legally sufficient because, viewed in a light most favorable to the government, the evidence established the elements of the offense.⁹ *Turner*, 25 M.J. at 324. Appellant’s convictions are similarly factually sufficient as the evidence detailed above should give the members of this court the confidence to be “convinced of appellant’s guilt beyond reasonable doubt.” *Rosario*, 76 M.J. at 117.

⁹ While not raised in appellant’s brief, the government feels compelled to call to the court’s attention that there does not appear to be testimony or other evidence in the record that appellant’s actions were prejudicial to good order and discipline. There is sufficient evidence, however, to support a finding that his actions were of a nature to bring discredit upon the armed forces. *Compare United States v. Richard*, __ M.J. __, 2022 CAAF LEXIS 637, at *15 (C.A.A.F. 2022) (where the government charges an Article 134 offense that is “to the prejudice of good order and discipline in the armed forces,” the government must proffer evidence to that effect), *with United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (“[Article 134 clause 2], which requires proof of the ‘nature’ of the conduct, does not require the government to introduce testimony regarding views of ‘the public’ or any segment thereof. The responsibility for evaluation of the nature of the conduct rests with the trier of fact.”). If this court agrees, it should set aside the words “and prejudicial to good order and discipline” and affirm the remainder of the specifications. *See United States v. Lacefield*, ARMY 20120598, 2014 CCA LEXIS 84, at *8 (Army Ct. Crim. App. 19 Feb 2014) (mem. op.), pet. denied, 73 M.J. 351 (C.A.A.F. 2014) (finding that the evidence “adequately established that the conduct was service discrediting the court “dismiss[ed] the language ‘was to the prejudice of good order and discipline and’ from the remaining specification” and affirmed the Article 134 conviction.).

Assignment of Error II

WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE IV ARE UNREASONABLY MULTIPLIED.

Additional Facts

Appellant filed a motion to dismiss, *inter alia*, Specification 5 of Charge IV, asserting that it was an unreasonable multiplication of Specification 4 of Charge IV. (App. Ex. VI). The government responded in opposition to this motion. (App. Ex. VII). The military judge issued a written ruling denying appellant's motion for relief. (App. Ex. XXVI).

On 4 February 2021 appellant was found guilty of both Specifications 4 and 5 of Charge IV, among other charges and specifications. (R. at 378, STR).

Appellant requested reconsideration of his motion for the claimed unreasonable multiplication of charges after findings. (App. Ex. XXII; R. at 389). The government again responded in opposition. (App. Ex. XXXIII). The military judge reconsidered appellant's motion and denied it in whole. (App. Ex. XLVI).

For Specification 4 of Charge IV appellant received confinement for seven years and for Specification 5 of Charge IV appellant received confinement for two years. (R. at 533). All of appellant's adjudged sentences were ordered to be served concurrently. (R. at 533–34).

Standard of Review

“A military judge’s decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion.” *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)).

Law

A. Abuse of discretion.

“A military judge abuses his discretion when his findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (cleaned up). A military judge abuses his discretion when he: (1) “predicates his ruling on findings of fact that are not supported by the evidence”; (2) “uses incorrect legal principles”; (3) “applies correct legal principles to the facts in a way that is clearly unreasonable” or, (4) “fails to consider important facts.” *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (cleaned up). The abuse of discretion standard requires “more than a mere difference of opinion”; rather, the military judge’s ruling must be “arbitrary [], clearly unreasonable, or clearly erroneous.” *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (cleaned up).

B. Unreasonable multiplication of charges and the *Quiroz* factors.

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” Rule for Courts-Martial [R.C.M.] 307(c)(4). The prohibition against unreasonable multiplication of charges “addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion.” *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). In *Quiroz*, the CAAF listed five factors used to determine whether charges are unreasonably multiplied:

- (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
- (2) Is each charge and specification aimed at distinctly separate criminal acts?;
- (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
- (4) Does the number of charges and specifications *unfairly* increase the appellant's punitive exposure?; and
- (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

55 M.J. at 338–39 (internal quotations omitted). These factors are not “‘all inclusive,’ . . . [n]or is any one or more factors a prerequisite.” *Campbell*, 71 M.J. at 23 (quoting *Quiroz*, 55 M.J. at 338–39).

C. Production and possession of child pornography.

The distinguishing elements between the offenses of production of child pornography and possession of child pornography are:

(1) Production: meaning “creating or manufacturing . . . refers to making child pornography that did not previously exist. It does not include reproducing or copying.” *MCM*, pt. IV, ¶ 95.c.(9).

(2) Possession: meaning “exercising control of something. Possession may be direct physical custody . . . or it may be constructive.” *MCM*, pt. IV, ¶ 95.c.(8). “Possession must be knowing and conscious.” *Id.*

Argument

A. A review of the *Quiroz* factors does not warrant relief.

1. Did appellant object at trial?

Appellant filed two motions arguing, *inter alia*, that Specification 5 of Charge IV was an unreasonable multiplication of Specification 4 of Charge IV. (App. Ex. VI; App. Ex. XXXII). Accordingly, this factor weighs in favor of appellant.

2. Is each charge and specification aimed at distinctly separate criminal acts?

The two offenses are distinct in that appellant committed the act of producing child pornography by compelling Master [REDACTED] to create the images he sent to appellant under false and manipulative pretenses. (R. at 126, 129, 131).

Appellant committed the act of possessing those images when he received them and exercised control over them. (Pros. Ex. 13, Gilkey interview 1 of 2, 0:49:13–0:50:09). One of the most tantamount societal interests is the protection of children, which includes the criminalization of their exploitation for, among other things, sexual purposes. *See New York v. Ferber*, 458 U.S. 747, 757 (1982) (“The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance”). As asserted by the government in its response to appellant’s motion, criminalizing the act of producing child pornography is to prevent the proliferation of such material, whereas criminalizing its possession is aimed at stemming the demand for already existing child pornography. *See United States v. Taman*, No. 201900175, 2020 CCA LEXIS 442, at *10–11 (N.M. Ct. Crim. App. 11 Dec. 2020) (unpub.) (citing to *Ferber*, 458 U.S. at 109–10, to find that the government can decrease the production of child pornography by “penalizes those who possessed and view the product, thereby decreasing demand.”) (App. Ex. VII, p. 5; App. Ex. XXXIII, p. 5). Thus, the specifications are aimed at distinctly different criminal acts. Accordingly, this factor weighs in favor of the government.

3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?

This factor again weighs in favor of the government because the charges accurately capture the true extent of appellant's criminality. As stated above, criminalization of the production of child pornography is aimed at stopping the proliferation of sexual victimization of children—i.e., producing more harm. This is distinguishable from the possession of child pornography, which is aimed at stopping the spread of harm already done. Moreover, appellant's criminality is further broadened when considering the manner in which he manipulated Master [REDACTED] into sending the images and videos—by telling Master [REDACTED] that he needed to keep sending pictures of his penis and videos of him masturbating in order to catch a predator who was victimizing children, the very act he was committing. (R. at 128, 134).

4. Does the number of charges and specifications unreasonably increase appellant's punitive exposure?

Appellant asserts that he “only engaged in one course of conduct” with respect to Specifications 4 and 5 of Charge IV. (Appellant's Br. 13). However, he fails to appreciate the additional harm he inflicted by forcing a fifteen-year-old boy, a person he knew and had established a relationship with, to produce and send pornographic pictures of himself. (R. at 113–16). Further, appellant ignores the repetitive manipulation he subjected Master [REDACTED] to in demanding he unblock the

spoofed account and create more images and videos that appellant could receive and control. (R. at 133). Thus, appellant’s punitive exposure was not unreasonably increased, and this factor weighs in favor of the government.¹⁰

5. Is there evidence of prosecutorial overreaching?

Appellant readily concedes this factor while maintaining that the government desired “to maximize his punitive exposure.” (Appellant’s Br. 13).

B. The military judge could not have abused his discretion in denying appellant’s motions for unreasonable multiplication of charges because all but one *Quiroz* factors weigh in favor of the government.

Appellant argues that the military judge abused his discretion in denying his motion for unreasonable multiplication of charges because “he only spoke about the specifications in Charge IV generally[.]” (Appellant’s Br. 13). However, despite the military judge’s broad analysis regarding Charge IV, he did recognize the “distinctly separate criminal acts” and “the potential risks to victims and society at large” as it pertains to child pornography. (App. Ex. XXVI, p. 2). The military judge did not abuse his discretion because he: (1) adopted the facts asserted in appellant’s motion; (2) properly stated the law as codified in R.C.M 307(c)(4) and laid out the five *Quiroz* factors; (3) detailed his analysis of the

¹⁰ Notably, appellant received concurrent sentences for all of his convictions. (R. at 533). Thus, even if this court believed that Specification 5 of Charge IV was an unreasonable multiplication of Specification 4 of Charge IV, either as to findings or sentence, the court may dismiss the lesser offense or merge the specifications without any need for sentence reassessment.

undisputed facts to the *Quiroz* factors; and (4) did not exclude “important facts.”¹¹ *Commisso*, 76 M.J. at 321. Appellant filed a nearly identical motion in reconsideration of his claims of unreasonable multiplication of charges. (*Compare* App. Ex. XXXII with App. Ex. VI). In reconsideration of the same motion, the military judge found that appellant failed to raise a new basis or alternative argument for his request. (App. Ex. XLVI). Accordingly, appellant “failed to demonstrate, by a preponderance of the evidence, that any of the [s]pecifications of any of the [c]harges, . . . constitute an unreasonable multiplication,” (App. Ex. XLVI). Thus, the military judge did not abuse his discretion by not addressing the specific charges or specifications raised by appellant.

¹¹ To the extent that appellant’s argument that the military judge did not separately analyze Specifications 4 and 5 of Charge IV against one another (Appellant’s Br. 13–14), appellee would suggest that contributes to the fourth factor in considering whether the military judge abused his discretion. However, even if this court were to find the military judge’s ruling to be generalized in this area, it would only mean that *less* deference should be afforded than if the military judge had delineated out each specification—not that he would be entitled to no deference. *See generally*, *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (noting that a military judge’s ruling is given less deference when he fails to place the full analysis on the record).

Assignment of Error III

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY.

Additional Facts

On 20 July 2021, appellant's court martial adjourned. (R. at 534; Chronology). Appellant demanded speedy post-trial processing on 1 August 2021 and on 4 September 2021. (Memorandum from Defense Counsel, to Convening Authority, Subject: Demand for Speedy Post-Trial – United States v. PV2 Nathaniel I. Gilkey) (1 Aug. 2021) [First Demand for Speedy Post-Trial]; Memorandum from Defense Counsel, to Convening Authority, Subject: Second Demand for Speedy Post-Trial – United States v. PV2 Nathaniel I. Gilkey) (4 Sept. 2021) [Second Demand for Speedy Post Trial]). In a memorandum for record [MFR] dated 11 February 2022, the Staff Judge Advocate (SJA) for 19th Expeditionary Sustainment Command, Camp Henry, Republic of Korea [19th ESC] provided a timeline and explanation for the post-trial delay. (Memorandum from SJA for Record, Subject: Post-Trial Delay – U.S. v. PV2 Nathaniel I. Gilkey (ii) (11 Feb. 2022) [SJA MFR, Post-Trial Delay]). The greatest period of time detailed by the SJA was 85 days for the court reporter to transcribe the record of proceedings, followed by the next largest period of time, 61 days, consumed by the

military judge¹² in completing errata and authenticating the record of trial. (SJA MFR, Post-Trial Delay). On 10 February 2022, this completed record of trial was sent from Korea to the Army Court of Criminal Appeals [ACCA]. (Chronology). Appellant's case was received and docketed on 25 February 2022. (Referral and Designation of Counsel). The total number of days from adjournment to docketing was 220 days.

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(d)(1), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

A. Fifth Amendment procedural due process.

Servicemembers convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135.

¹² There were two military judges in appellant's case. (R. at 2, 39). Each had to review, provide errata, authenticate the portions of the record they presided over, and return their errata and authentication to the court reporter. (Military Judge's Errata Sheet, COL Martin (pp. 1-18 only); Military Judge's Errata Sheet, COL Hart).

Unreasonable delay in post-trial processing is presumed when “more than 150 days elapse between final adjournment and docketing with [the ACCA].” *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021).¹³ This presumption

¹³ This court should overrule *Brown*, which attempted to adapt the *Moreno* analysis to the Military Justice Act of 2016 (MJA 16) post-trial processing procedures. 81 M.J. at 509–10. *Brown* was decided on a faulty premise: rather than asking *whether Moreno* was still necessary, *Brown* incorrectly focused on *how* to apply *Moreno*. In *Moreno*, CAAF justified its judicially created rules by explaining that some action was needed to deter and remedy excessive post-trial delays. 63 M.J. at 142. Subsequently, however, Congress took *its own* legislative action with MJA 16 and provided a statutory remedy through Article 66(d)(2), UCMJ. Thus, the justification for the judicially created presumptions in *Moreno* no longer exists. *See also United States v. Anderson*, 82 M.J. 82, 88–90 (C.A.A.F. 2022) (Maggs, J., concurring) (questioning the continued viability of *Moreno* in light of MJA 16 and *United States v. Betterman*, 578 U.S. 437 (2016)). Therefore, this court, in overruling the *Brown* test, should adopt a new analysis. The appropriate test for claims of unreasonable post-trial delay is to look at the period of delay *after entry of judgment*; determine whether the “accused demonstrate[d] error or excessive delay”; and then determine whether this court should exercise its discretionary authority to grant appropriate relief. UCMJ art. 66(d)(2). For claims of delay in post-trial processing *prior to entry of judgment* under Article 60c, UCMJ, this court should find that due process is satisfied by the “adequate procedures to redress an improper deprivation of liberty” that already exist, and a CCA’s duty under Article 66(d)(1), UCMJ, is to only affirm so much of a sentence that “should be approved.” *Betterman*, 578 U.S. at 449–50 (Thomas, J., concurring); UCMJ art. 66(d)(1). Notably, this court recently held that it “lacked the authority to decide whether *Moreno* remains good law [and left] for another day a better-suited opportunity to assess *Brown*’s viability.” *United States v. Grant*, __ M.J. __, ARMY 20200645, at p.8 (Army Ct. Crim. App. 2022). Appellee avers that appellant’s case is the appropriate case for this court to overrule *Brown* as the delay in this case does not “strain [the] military justice system’s credibility.” *Id.*

triggers a four-factor analysis (*Barker* factors) that examines: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four *Barker* factors must be balanced, and “no single factor [is] required to find that post-trial delay constitutes a due process violation.” *Id.* at 136 (citing *Barker*, 407 U.S. at 533). However, the *Barker* analysis is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Military Courts of Criminal Appeals (CCAs) will further examine prejudice, one of the *Barker* factors, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant’s anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 138–39. The first sub-factor “is directly related to the success or failure of an appellant’s substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive.” *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)). Similarly, for the third sub-factor, the showing of prejudice “is directly related to whether an appellant has been successful on a

substantive issue of the appeal and whether a rehearing has been authorized.” *Id.* at 140. The second sub-factor requires an appellant to “show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Id.*

In situations where the appellant is unable to show they have suffered prejudice, “[the court] cannot find a due process violation unless the delay is so egregious as to ‘adversely affect the public’s perception of the fairness and integrity of the military justice system.’” *Brown*, 81 M.J. at 511 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125. This analysis is “separate and distinct from the consideration of prejudice as one of the four *Barker* factors.” *Id.* Under this review, the court considers “the totality of the circumstances” based on the “entire record.” *Id.* The court “will not presume prejudice from the length of the delay alone,” but instead requires “evidence of prejudice in the record.” *Id.*

B. Sentence appropriateness.

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

When there is post-trial processing delay, this court looks to the totality of the circumstances to determine what sentence should be approved. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). There is no “bright-line time limit” for post-trial processing; rather, various factors such as the length of the record, existence of post-trial processing errors, and failure to demand speedy post-trial processing. *Id.* at 681–82. Moreover, even “unacceptably slow” post-trial processing does not immediately render a sentence inappropriate. *Id.* at 683. This is a “highly case specific” review. *Simon*, 64 M.J. at 207.

Argument

Appellant's case exceeded the presumptive 150-day standard under *Brown*. 81 M.J. at 510. However, the government did not violate appellant's due process rights because there was no prejudice. Further, under the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis. Therefore, this court should affirm the findings and sentence as adjudged.

A. The first three *Barker* factors weigh in favor of appellant.

From the date the military judge adjourned appellant's court-martial to the date of docketing with this court, 220 days elapsed, exceeding the timeline provided in *Brown* by 70 days. 81 M.J. at 510; (Chronology; Referral and Designation of Counsel). Thus, the first factor weighs in favor of appellant. The government attributed some of the delay to the fact that the court-martial was tried at Fort Leavenworth, Kansas and the 19th ESC Office of the Staff Judge Advocate, Camp Henry, Korea had to coordinate to receive the recording and original pleadings before they could begin transcribing. (SJA MFR, Post-Trial Delay). A majority of the other delay was explained by understrength personnel and authentication of the record of trial. (SJA MFR, Post-Trial Delay). Despite the government's explanation of the delay, the second factor slightly weighs in appellant's favor. *Moreno*, 63 M.J. at 137. The third *Barker* factor weighs in appellant's favor since appellant twice demanded speedy post-trial processing. (First Demand for Speedy Post-Trial; Second Demand for Speedy Post-Trial).

B. The fourth *Barker* factor weighs in favor of the government.

However, appellant fails to establish prejudice. Because the substantive grounds for appellant's assignments of error are without merit, "appellant is in no worse position due to the delay." *Moreno*, 63 M.J. at 139. Further, Appellant's brief cites no particularized prejudice, or any prejudice specific to appellant

himself, while asking this court to grant relief on no other basis than the delay itself. (Appellant's Br. 16). Such a claim in the absence of prejudice is contrary to this superior court's jurisprudence and therefore his claim for relief fails.

C. The delay does not impugn the fairness or integrity of the military justice system.

Appellant has failed to show that the delay was so egregious as to “adversely affect the public's perception of the fairness and integrity of the military justice system” and overcome the absence of prejudice. *Brown*, 81 M.J. at 511 (citing *Toohey*, 63 M.J. at 362).

This court has tended to find post-trial delays between trial and convening authority action to be egregious under the *Toohey* standard when they were much greater in length than 220 days. *See Brown*, 81 M.J. at 511 (finding that 373 days between adjournment and docketing at ACCA was “not so egregious as to adversely affect the public's perception of our system's fairness and integrity”); *see also United States v. Arias*, 72 M.J. 501, 507 (Army Ct. Crim. App. 2008) (finding no public perception issue based on a post-trial processing timeline of 294 days). Appellant does not argue that a delay of 220 days is “egregious” under *Toohey*. As such, under the “difficult and sensitive balancing process,” the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

D. Appellant does not merit relief under a sentence appropriateness analysis.

Even where no due process violation occurs, this court must still determine “on the basis of the entire record” what sentence “should be approved.” Art. 66(d), UCMJ. In this case, the post-trial delay in no way affected the trial proceedings that produced appellant’s sentence. Further, appellant’s sentence is appropriate in light of his crime and the maximum allowable punishment for his conviction.

Appellant’s criminality is not limited to the child pornography involving Master ■—rather, appellant’s misconduct included various acts of: possession, production, and distribution of child pornography; indecent conduct with a minor; and impersonating an agent. (R. at 378; STR). Appellant sent direct messages to an unknown person on an online messaging application and received “several videos that [] depict children engaged in sex acts.” (R. at 230; Pros. Ex. 14 (sealed)). In a separate online messaging application appellant sent messages to an unidentified person from whom he received “over a hundred files” of “videos that appeared to be depictions of children engaged in sex acts.” (R. at 235–37, 239–40; Pros. Exs. 17 and 18 (sealed)). These videos appellant possessed were of young boys forced to preform sex acts on adult males, such as a “a teen boy approximately [twelve], [fifteen] years of age perform[ing] oral sex on an older male” and “a boy approximately [nine] to [fifteen] years-old is anally penetrated by another young child.” (R. at 335; Pros. Ex. 19 (sealed)). The viewing of these

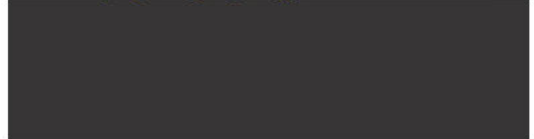
images escalated into appellant then reaching out to a young boy he knew from his hometown, just fifteen years old, and manipulating him into sending pornographic images and videos of himself. (R. at 113, 126, 130–31, 133–35). Even further aggravating appellant’s knowledge and criminality is that after he was questioned by CID and his electronic devices were seized, appellant secured another cellular phone where more images and videos of child pornography were found. (R. at 269–74; Pros. Ex. 20 (sealed)). In light of the seriousness of the offenses for which appellant was convicted, and the fact that the trial proceeding was not tainted by the post-trial delay, this court should affirm appellant’s sentence. *See Garman*, 59 M.J. at 678 (noting that this court “look[s] to the totality of the circumstances of the post-trial process” when assessing whether relief is warranted).

Conclusion

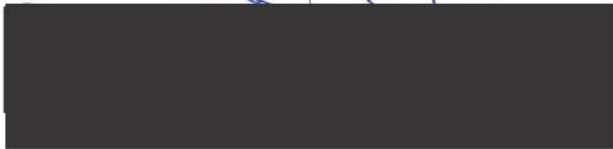
WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence as approved by the convening authority.



CPT, JA
Appellate Attorney, Government
Appellate Division



MAJ, JA
Branch Chief, Government



LTC, JA
Deputy Chief, Government
Appellate Division



COL, JA
Chief, Government Appellate
Division

Certificate of Filing and Service

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]

[REDACTED] on the 21st day of November, 2022.

[REDACTED]
Paralegal Specialist
Government Appellate Division

APPENDIX

United States v. Whitcher

United States Army Court of Criminal Appeals

August 23, 2022, Decided

ARMY 20210617

Reporter

2022 CCA LEXIS 503 *

UNITED STATES, Appellee v. Specialist ZACHARY D.
WHITCHER, United States Army, Appellant

Prior History: [*1] Headquarters, Fort Campbell.
Jacqueline Tubbs and William C. Ramsey, Military
Judges. Lieutenant Colonel Ryan W. Leary, Staff Judge
Advocate.

Counsel: For Appellant: Major Christian E. DeLuke, JA;
Captain Tumentugs D. Armstrong, JA.

For Appellee: Colonel Christopher B. Burgess, JA;
Lieutenant Colonel Jacqueline DeGaine, JA; Captain
Melissa A. Eisenberg, JA; Ms. Yasmin Musaddiq.

Judges: Before FLEMING, DENNEY,¹ and HAYES,
Appellate Military Judges.

Opinion

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.²

End of Document

¹ Judge Denney decided this case while on active duty.

² The Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect the response to block 31 as "No."

United States v. Feliciano

United States Army Court of Criminal Appeals

August 22, 2016, Decided

ARMY 20140766

Reporter

2016 CCA LEXIS 512 *

UNITED STATES, Appellee v. Private E-2 JEFFRY A. FELICIANO, JR., United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by, in part *United States v. Feliciano*, 76 M.J. 37, 2016 CAAF LEXIS 1042 (C.A.A.F., Dec. 5, 2016)

Motion denied by *United States v. Feliciano*, 76 M.J. 131, 2017 CAAF LEXIS 178 (C.A.A.F., Feb. 16, 2017)

Affirmed by [United States v. Feliciano](#), 2017 CAAF LEXIS 482 (C.A.A.F., May 17, 2017)

Prior History: [*1] Headquarters, I Corps. Andrew J. Glass, Military Judge (arraignment), Samuel A. Schubert, Military Judge (trial), Colonel Randall J. Bagwell, Staff Judge Advocate (pre-trial), Lieutenant Colonel Christopher A. Kennebeck, Acting Staff Judge Advocate (post-trial).

Counsel: For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Major Christopher D. Coleman, JA; Captain Jennifer K. Beerman, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Steve T. Nam, JA (on brief).

Judges: Before CAMPANELLA, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge CAMPANELLA and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

We discuss three issues in this appeal.¹ First, we address appellant's assigned errors that the evidence is legally and factually insufficient. After reviewing the record, we find the evidence both legally and factually sufficient. Next, we determine that appellant's two convictions for attempted sexual assault were unreasonably multiplied when there was only a single attempt. Accordingly, we conditionally dismiss one of the specifications. Finally, we discuss the military judge's instructions to the panel on sex offender registration. As we [*2] find the military judge did not commit error, we order no relief.

At a general court-martial, appellant pleaded guilty to one specification of disrespect towards a non-commissioned officer, one specification of disobeying a non-commissioned officer, two specifications of wrongfully using marijuana, and one specification of being disorderly, in violation of Articles 91, 112a, and 134, Uniform Code of Military Justice, [10 U.S.C. §§ 891, 912a, 934 \(2012\)](#) [hereinafter UCMJ]. Contrary to his pleas, an officer and enlisted panel convicted appellant of two specifications of attempted sexual assault in violation of Article 120, UCMJ. The court-martial sentenced appellant to be discharged from the Army with a bad-conduct discharge, to be confined for one year, to forfeit all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the sentence as adjudged.

BACKGROUND

On 22 January 2011, appellant, Specialist (SPC) Schwartz and Private (PV2) KF went out drinking. As the night out [*3] concluded, SPC Schwartz drove the

¹ Appellant also personally raised several issues pursuant to [United States v. Grostefon](#), 12 M.J. 431 (C.M.A. 1982). Except for appellant's claim of unreasonable multiplication of charges, the matters raised by appellant warrant neither discussion nor relief.

trio back to the barracks. En route, they were pulled over by the police. Specialist Schwartz barely passed a breathalyzer test. The officer released them after determining that SPC Schwartz was the *most* sober individual. They then drove back to the barracks, stopping to buy more alcohol. When they returned to the barracks, appellant and PV2 KF continued drinking. Eventually, all three went to bed in appellant's bed. Specialist Schwartz, however, eventually left the bed to sleep in a nearby chair. Specialist Schwartz awoke a short time later to see appellant on top of PV2 KF. Appellant was holding himself up with one hand while "starting to pull his britches down" with the other. Specialist Schwartz testified that PV2 KF's "britches" were around her knees. Later he answered the question, "where were her pants?" by saying "By her knees." He also testified that she was saying "no, no, no" and that she was in "a state of unconsciousness" and was "passed out." SPC Schwartz confronted appellant and told appellant that "what he was doing was rape" and "that if he continued along they would definitely get him for rape. . . ." Appellant responded by saying [*4] "You know what? You're right" and got off of PV2 KF.

Private KF was not called by the government. She testified briefly for the defense. Appellant did not testify.

LAW AND ANALYSIS

A. Factual and Legal Sufficiency

In accordance with *Article 66(c)*, *UCMJ*, we review issues of legal and factual sufficiency de novo. [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." [*United States v. Turner*, 25 M.J. 324, 324 \(C.M.A. 1987\)](#) (internal citations omitted); see also [*United States v. Humpherys*, 57 M.J. 83, 94 \(C.A.A.F. 2002\)](#). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." [*United States v. Barner*, 56 M.J. 131, 134 \(C.A.A.F. 2001\)](#). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." [*Turner*, 25 M.J. at 325](#).

Appellant's claim that the evidence is legally and factually insufficient boils down to questioning the credibility of SPC Schwartz. By the time of trial, SPC Schwartz had been chaptered out of the Army for using marijuana. The [*5] defense called five witnesses who said SPC Schwartz had a reputation for being untruthful. Additionally, the defense elicited from SPC Schwartz that he was a reluctant witness and that he was testifying, at least in part, in order to get the per diem accorded to travelling witnesses. The government responded that none of the reputational witnesses were aware of SPC Schwartz ever lying to them, and that he was entirely honest when directly confronted.

The following exchange between the defense counsel and SPC Schwartz demonstrates his bluntness while testifying:

Q: And you've already testified that you're not employed at all so you're not getting any money from an employer? A: No, sir.

Q: Now, you are getting per diem for participating in this trial, aren't you?

A: Yes, sir.

Q: So they're paying you a few hundred dollars to come out here and be present?

A: I guess. I haven't been told anything really about any money.

Q: And outside in this waiting room just a few minutes ago you said "I don't care about this. I'm just doing this for the money?"

A: I don't care about this. Even when [appellant and PV2 KF] were in my life, they were menial [sic] people to me.

Q: And you're just doing this for [*6] the money?

A: I'm doing this to tell the truth. Also for the money.

Q: Get a few hundred extra dollars?

A: Oh, yeah. Everybody can use some money.

A short while later, the trial counsel attempted to rehabilitate SPC Schwartz and give him an opportunity to explain why he was testifying. The trial counsel was only partially successful:

Q: Mr. Schwartz, why are you testifying today?

A: Well, I told that girl back in 2011 that I would do whatever she decided. I mean, it took quite a while for her to decide what she was going to do. And I feel that it's right to testify for her. But at the same time, I do need the money. I am having a baby and I am unemployed. So yes, I do need the money.

Certainly, appellant's view that SPC Schwartz's testimony presents clear evidence of bias is a

reasonable one. However, on the other hand, SPC Schwartz's lack of defensiveness may also be viewed as a display of unusual candor. Specialist Schwartz did not shy away from the allegation of bias.

In *United States v. Crews* we discussed the relative disadvantage of an appellate court in attempting to assess credibility from a cold transcript:

The deference given to the trial court's ability to see and hear the witnesses [*7] and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious.

[*United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *11-12 \(Army Ct. Crim. App. 29 Feb. 2016\)](#). Similarly, in [*United States v. Davis*, 75 M.J. 537, 546 \(Army Ct. Crim. App. 2015\)](#) (en banc), we noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness [*8] is at issue." At least as far back as 1990, we discussed the degree of deference given to a trial court's ability to see the witnesses. [*United States v. Johnson*, 30 M.J. 930, 934 \(A.C.M.R. 1990\)](#) (inartfully stating that we "hesitate to second-guess" a trial court's findings that depend on credibility determinations).

Put differently, we are required to make credibility determinations on appeal, but those determinations are made with the "admonition" that we recognize the trial court's superior position in making those determinations. [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#). Thus, while we give no deference to the factual sufficiency *decisions* of the trial court, *Id.*, our

assessment of the evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.

With this recognition, we assess SPC Schwartz to be credible. Accordingly we affirm the findings as factually and legally sufficient in all but one regard. As alleged, appellant was charged with, and found guilty of, attempted sexual assault by pulling down PV2 KF's pants *and underwear*. The record is devoid of any evidence, regardless of credibility, regarding whether appellant pulled down PV2 KF's underwear and that part of the specification is therefore legally insufficient. Accordingly, we will provide [*9] relief in our decretal paragraph.

B. Unreasonable Multiplication of Charges

Appellant was convicted of attempted sexual assault under the theory that PV2 KF was incapacitated and under the theory that appellant was attempting to commit a sexual assault by bodily harm. At trial, while appellant successfully objected to the two offenses as being unreasonably multiplied for sentencing, he never objected to the offenses as being unreasonably multiplied for findings. Additionally, while the two offenses appeared to have been charged in the alternative, (to address SPC Schwartz's perhaps conflicting testimony that PV2 was both unconscious and saying "no"), the government never explicitly stated so. Accordingly, this case falls outside our superior court's decision in [*United States v. Elespuru*, 73 M.J. 326, 329-30 \(C.A.A.F. 2014\)](#) (dismissing a specification where the government states it was charged in the alternative.).

Therefore, appellant has forfeited any error. Additionally, the detailed motion practice on merging the specifications for sentencing show that appellant was at the threshold—if not crossing it—of waiving the error. In short, there was no error by the military judge, plain or otherwise. Nonetheless, as an exercise of our discretionary authority [*10] under *Article 66(c)* we will notice the issue and provide relief.

We find the *Quiroz* factors weigh in favor of dismissing one specification. [*United States v. Quiroz*, 55 M.J. 334, 338 \(C.A.A.F. 2001\)](#). Specifically, we give great weight to our determination that a conviction for two specifications of attempted sexual assault unreasonably exaggerated appellant's criminality.

Accordingly, we *conditionally* dismiss Specification 1 of

Charge I, which alleged an attempted sexual assault while PV2 KF was substantially incapable of apprising the nature of the sexual act. See [United States v. Britton](#), 47 M.J. 195, 203 (C.A.A.F. 1997)(J. Effron concurring); [United States v. Hines](#), 75 MJ 734 , 2016 CCA LEXIS 439, *7-8 fn4 (Army. Ct. Crim. App. 27 Jul. 2016); [United States v. Woods](#), 21 M.J. 856, 876 (A.C.M.R. 1986). Our dismissal is conditional on Specification 2 of Charge I surviving the "final judgment" as to the legality of the proceedings. See [Article 71\(c\)\(1\)](#) (defining final judgment as to the legality of the proceedings).

C. Sentencing Instructions on Sex Offender Registration

At the presentencing proceedings, appellant introduced two unsworn statements. The first unsworn statement consisted of training certificates and family photos.² The second unsworn statement was read by appellant's counsel and consisted entirely of the following:

"I am Jeffrey A. Feliciano, Junior. I am a registered sex offender." This is the panel's findings [*11] on Charge I and that is a phrase that Private Feliciano will now say the[] rest of his life. He will not be permitted to pick [his child] up from school, or attend school sporting events. He is, for the rest of his life, a sex offender.

The military judge then gave the panel sentencing instructions. Over defense objection, the instructions included the following:

The accused's unsworn statement included the mention that the accused will have to register as a sex offender. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offenses of which the accused stands convicted. Under DOD instructions, when convicted of certain offenses, including an offense here, the accused may have to register as a sex offender with appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration [*12] is required in all 50 states; though the requirements

may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.

It is not your duty to attempt to predict sex offender registration requirements, or the consequences thereof.

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based on the offenses for which he has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future.

In short, the military judge permitted the accused in his unsworn statement to raise the issue of sex offender registration, and then instructed the panel not to consider the information when deliberating on a sentence. Given the brevity of appellant's unsworn statement, the only portion of appellant's statement that the panel was instructed to consider during deliberations was "I am Jeffrey A. Feliciano, Junior." Nonetheless, [*13] this instruction was not error and was consistent with our superior court's decision in [United States v. Talkington](#), 73 M.J. 212, 218 (C.A.A.F. 2014).

In *Talkington*, our superior court decided that sex offender registration is: 1) a collateral effect of findings not sentencing; and 2) "is a consequence . . . that is separate and distinct from the court-martial process." [Id. at 217](#) (internal citations and quotations omitted). The *Talkington* court then found no error in the military judge having told the panel that sex offender registration "should not be a part of your deliberations" [Id. at 214, 218](#).

The court in *Talkington* was fully aware of the dilemma this caused. "[T]here is a 'tension between the scope of pre-sentencing unsworn statements and the military judge's obligation to provide proper instructions.'" [Id. at 216](#) (internal citations omitted). However, the court did not address the tension because it was not raised. *Id.* This case presents two concerns about the current state of the law.

First, in cases such as this one, the net effect of the military judge's instructions is to tell the panel to ignore the accused's unsworn statement. At this stage of trial a panel will often be familiar with curative instructions and

² Government counsel did not object to the use of photos as an unsworn statement or the unsworn statements of *others* (as contained in various training certificates) being introduced as the unsworn statement of the accused.

how they come to pass (i.e. someone made a mistake). [*14] When the military judge tells the panel they should not consider the accused's statements about sex-offender registration it resembles a curative instruction. The danger is that a panel infers from the tailored instruction that the accused was trying to subvert the sentencing rules. That is, by telling the panel to ignore what the accused just stated, the panel may be left with the impression that the accused's statement was impermissible.³ Moreover, a panel at sentencing which has just rejected an accused's theory of the case may be predisposed to adopt such a viewpoint. Here, to the extent that appellant may be seen as having invited this risk, he was informed of the military judge's instructions only after he made the unsworn statement.

Second, while correct, it is unusual for a military judge to allow inadmissible information to come in front of the panel only to then tell the panel to ignore it. The alternative—prohibiting the information from coming in the first instance—would appear to be preferable.⁴ As the court discussed in *Talkington*, this is the turbulence caused from the convergence of two unrelated lines of cases. *Id. at 213, 215*. ("This Court has explained that while the right of allocution includes the right to present evidence that is not relevant as extenuation, mitigation, or rebuttal, the military judge may 'put the information in proper context by effectively advising the members to ignore it.'").

As *Talkington* acknowledges, this is a problem created entirely by case law, and is contrary to Rule for Courts-

³The panel was instructed that the accused's statements "were permissible." However, in the context of an entire trial, where matters are admitted based on rules of evidence, the members may find it perplexing that the accused is permitted to raise matters that the military judge then instructs them to disregard. And, even if the members can set aside this dissonance, they may still be left with the impression that the accused was using a technicality [*15] to get impermissible information before them. There is nothing in the trial experience that would explain to panel members why it is not error to present information that they are not supposed to consider.

⁴Consider the following: Were a military judge to prevent an accused from mentioning sex offender registration during an unsworn statement, such an action will almost certainly be harmless error. Since the panel may be instructed to ignore the information during deliberations, there cannot be prejudice from excluding in [*16] the first instance what the panel would be told to ignore in the second.

Martial [hereinafter R.C.M.] 1001(c)(2)(A), which limits the accused's unsworn statement to matters in extenuation, mitigation, or in rebuttal. See also Military Rules of Evidence [hereinafter Mil. R. Evid.] 1101 (rules of evidence applicable to sentencing); 402 (irrelevant evidence is inadmissible). It would also appear to be tautological that there is little to be gained by allowing the introduction of inadmissible information. The military judge is the presiding officer at a court-martial. R.C.M. 103(15); [Article 26, UCMJ](#). The current state of the law would appear to elevate the right of the accused to admit irrelevant information over the military judge's authority to exclude that same information under the rules. In a case where the accused is only informed of the military judge's instructions after having made the statement, this may be to the detriment of the accused.

In our view, the "tension" described in *Talkington* is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution [*17] is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic. Additionally, such an interpretation prevents the prejudice to an accused that may arise when a panel is told to give no weight to portions of an accused's unsworn statement.

Nonetheless, the resolution of this issue here is entirely determined by our superior court's decision in *Talkington*. As the military judge's actions were entirely in accord with *Talkington*, there is no error, and appellant is not entitled to any relief.

CONCLUSION

The finding of guilty of Specification 1 Charge I is *conditionally* DISMISSED. This court AFFIRMS only so much of the finding of guilty of Specification 2 of Charge I as finds that:

[appellant] did, at or near Joint Base Lewis-McChord, Washington, on or about 23 January 2011, attempt to commit the offense of aggravated sexual assault, to wit: penetrating Private (E-2) [KF]'s vulva with his penis, by causing bodily harm to her, to wit: pulling down the pants of the said Private [KF] with [*18] the specific intent to engage in a sexual act with Private [KF], and that the accused's actions would have resulted in the commission of the offense but for the intervention of

Specialist (E-4) R.S.

The remaining findings of guilty are AFFIRMED.

Applying the factors set out by our superior court in [United States v. Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#), we are confident that reassessment is appropriate. There is no change to the penalty landscape because the military judge had already merged the two specifications of Charge I for sentencing. Reassessing the sentence on the basis of the noted error, the remaining findings of guilty, and the entire record, we AFFIRM the sentence as approved by the convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored. See [UCMJ arts. 58b\(c\)](#) and [75\(a\)](#).

Senior Judge CAMPANELLA and Judge PENLAND concur.

United States v. Updegrove

United States Army Court of Criminal Appeals

January 23, 2017, Decided

ARMY 20160166

Reporter

2017 CCA LEXIS 36 *

UNITED STATES, Appellee v. Private First Class
MICHAEL A. UPDEGROVE United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Updegrove, 2017 CAAF LEXIS 581 \(C.A.A.F., June 5, 2017\)](#)

Prior History: [*1] Headquarters, 7th Infantry Division. Sean F. Mangan, Military Judge (arraignment), Kenneth W. Shahan, Military Judge (trial), Lieutenant Colonel James W. Nelson, Staff Judge Advocate.

Counsel: For Appellant: Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Timothy G. Burroughs, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Michael E. Korte, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE Appellate Military Judges. Senior Judge MULLIGAN AND Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

On appeal, appellant claims that one of the images to which he pled guilty is not child pornography. Reviewing the image, we are easily satisfied that the image constitutes child pornography as a matter of fact and law. We nonetheless briefly address how we, as an appellate court, approach the issue so that our reasoning is transparent.

BACKGROUND

[*2] At a general court-martial appellant pleaded guilty to several sexual offenses involving five different underage girls. With four children, appellant engaged in indecent communications that constituted a lewd act in violation of Article 120b, Uniform Code of Military Justice, [10 U.S.C. § 920b \(2012\)](#) [hereinafter UCMJ]. Appellant asked four girls to send him naked pictures of themselves in various states of undress and sometimes performing sexual acts. For this, appellant was charged with four specifications of possessing child pornography in violation of [Article 134, UCMJ](#).¹ Finally, appellant threatened two of the girls, in violation of [Article 134, UCMJ](#), that he would publish their nude pictures. In one case, the threat was conditioned on her sending additional pictures of her genitals. With the other, the threat was conditioned on her responding to his text messages. For this conduct, appellant was charged with two specifications of communicating a threat. The military judge sentenced appellant to a bad-conduct discharge, confinement for forty-two months, and a reduction to the grade of E-1. The convening authority approved the sentence.

LAW AND DISCUSSION

Appellant challenges the providence of his plea to Specification 5 of Charge II, which alleged he wrongfully possessed child pornography, being that of an image of OC, a minor under eighteen years of age. During the *Care*² inquiry the military judge correctly defined the elements for wrongful possession of child pornography. Appellant [*3] then admitted that the picture of OC met

¹ As part of appellant's pretrial agreement with the convening authority the specifications alleging that appellant produced and distributed child pornography were dismissed and two specifications alleging he possessed child pornography were dismissed.

² [United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 \(1969\)](#).

the military judge's definition of a lascivious exhibition of the genitals of a minor. When asked why he thought so, appellant stated "[b]ecause it has a focal point of her vagina, so it depicts the genitalia and only the vagina. It's not artistic or for scientific purposes or anything like that, sir." Appellant then further admitted that the image was intended to elicit a sexual response in the viewer, and that in his case that was the actual and intended result. The facts elicited in the *Care* inquiry were consistent with appellant's stipulation of fact.

The colloquy between appellant and the military judge adequately established his guilt to the offense. Had that been the end of it, there would be no likely issue on appeal. The government is not required to introduce evidence of appellant's guilt when an accused enters a plea of guilty. The question appellant raises, as we see it, is whether the introduction by the government of the actual photograph created a "substantial basis" to question the providence of appellant's plea. [*United States v. Inabinette*, 66 M.J. 320, 322 \(C.A.A.F. 2008\)](#). In other words, even if appellant's *Care* inquiry adequately established his guilt, if a non-pornographic photograph is introduced [*4] by the government as substantive evidence of the offense, such evidence may undermine confidence in appellant's plea.

We begin the analysis with a brief discussion on the standard of review. On appeal, appellant argues that we must review whether the image constitutes child pornography de novo. We disagree. In *United States v. Morris*, No. 15-0206, 75 M.J. 21, 2015 CAAF LEXIS 685 (July 15, 2015) (unpub.), our superior court reviewed as a question of *fact* whether the Navy-Marine Corps Court of Criminal Appeals determined an image was child pornography. In general, we review a military judge's acceptance of a guilty plea for an abuse of discretion. [*United States v. Blouin*, 74 M.J. 247, 251 \(C.A.A.F. 2015\)](#) (citation omitted). In reviewing a military judge's decision to accept a guilty plea, "we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." [*Inabinette*, 66 M.J. at 322](#). That is, appellate review of a guilty plea is often a mixed question of law and fact.

The image in question is of one victim's nude genitals. The stipulation of fact describes it as "[n]ude close up vagina of [C]." The picture is taken from below, making the genitals more clearly visible. The girl's genitals and midriff take [*5] up the entire photo and it is framed with the genitals in the center of the image. There is no

visible pubic hair. The child's mons pubis and labia are prominent and clearly visible. *Care*³

Appellant argues on appeal that we should evaluate the photo independent of appellant's statement during the *Care* inquiry and argues that the photo is not lascivious. However, this ignores the facts admitted by appellant at trial. During his *Care* inquiry, appellant admitted the genitals were the focal point of the image (a fact) and that the photo had no "artistic" or "scientific" purpose (a fact). The photo is consistent with appellant's admissions. Appellant further admitted that the image was "lascivious". While "the definition of 'lascivious' is a matter of law which we review *de novo*" the "question of whether the pictures fall within the statutory definition is a question of fact." [*United States v. Wiegand*, 812 F.2d 1239, 1244 \(9th Cir. 1987\)](#) (citation omitted). Accordingly, we see no basis to question the factual or legal basis of appellant's plea. Whether viewed as a stand-alone image, or viewed in context with appellant's admissions at trial, the image is child pornography.

In asking that we come to the opposite conclusion, appellant directs [*6] our attention to two cases. In [*United States v. Roderick*, 62 M.J. 425, 429-30 \(C.A.A.F. 2006\)](#) the Court of Appeals for the Armed Forces (CAAF) adopted the *Dost* factors. See [*United States v. Dost*, 636 F. Supp. 828, 832 \(S.D. Cal. 1986\)](#), *aff'd sub nom. Wiegand*, 812 F.2d 1239. There the CAAF adopted the approach of federal courts in

³ All parties at trial referred to the picture depicting the girl's "vagina." As appellant notes on appeal, this is technically incorrect. By definition, the vagina is "a canal in a female mammal that leads from the uterus to the external orifice of the genital canal." *Vagina*, merriam-webster.com/dictionary/vagina (last visited Jan. 6 2017). However, we commonly encounter cases, especially during the testimony of lay witnesses, where the term vagina is used to mean the female genitals. At trial, appellant used the term vagina or "vag" to indicate the genitalia of his victims. It would appear that courts too have been imprecise in their use of the term. See e.g. [*United States v. Swift*, ARMY 20100196, 2015 CCA LEXIS 581, at *2](#) (Army Ct. Crim. App. 22 Dec. 2015) (" . . . appellant rubbed his four-year-old daughter's vagina over her clothing while they were cleaning the inside of the family van."); [*United States v. Riggins*, 75 M.J. 78, 80 \(CAAF 2016\)](#) ("Appellant placed his hand on LCpl MS's vagina over her clothing"); [*United States v. Gamble*, 27 M.J. 298, 301 \(C.A.A.F. 1988\)](#) ("[Appellant] touched [the victim's] vagina on the outside of her underwear."); [*United States v. Cox*, 45 M.J. 153, 157 \(C.A.A.F. 1996\)](#) (" . . . [victim] indicated she had been spanked by her father on the buttocks and vagina.").

determining "whether a particular photograph contains a 'lascivious exhibition' by combining a review of the *Dost* factors with an overall consideration of the totality of the circumstances." [Roderick, 62 M.J. at 430](#). Included in the "totality of the circumstances" was evidence outside the four corners of the image to include appellant's admissions of downloading and possessing "numerous images of child pornography" and "morning rituals" of viewing and presumably masturbating to child pornography. *Id.* Thus, [Roderick](#) clearly stands for the proposition that the "circumstances" surrounding how the image was taken and how it was possessed are part of the "totality of the circumstances" that may be considered in determining whether an image constitutes child pornography.

Subsequently, in *United States v. Moon*, the CAAF held that an accused's subjective beliefs, however, cannot turn non-pornographic images into pornographic images. [73 M.J. 382, 389 \(C.A.A.F. 2014\)](#). By way of example, and citing to *Moon*, appellant argues that advertisements in a Sears catalog, such [*7] as those portraying children, do not become pornographic merely because an accused is sexually excited by them. See [Id. at 389](#). "When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." [United States v. Villard, 700 F. Supp. 803, 812 \(D.N.J. 1988\)](#), *aff'd*, [885 F.2d 117 \(3d Cir. 1989\)](#) (citation omitted).

Appellant argues that *Moon* effectively overruled *Roderick*. That is, appellant reads *Moon* as prohibiting the consideration of evidence outside of "the four corners of the image" when determining whether an image constitutes lasciviousness. We do not think it is necessary to read the two cases to be in conflict.

[Moon](#) prohibits subjective determinations of whether an image is child pornography thereby avoiding the hornet's nest of [First Amendment](#) problems that concerned the court in that case. However, we do not read *Moon* as prohibiting evidence of how the offense was committed (i.e. "the circumstances") when determining the totality of the circumstances. That is, *Moon* does not overrule *Roderick's* holding that the objective facts surrounding the circumstances of the image's creation may be considered.

Here, the image in question was taken [*8] by the victim at appellant's behest, and only after engaging in a series of communications. Appellant stipulated to the

following facts:

The Accused first contacted Miss [OC]. . . through Facebook. She was 16 years old and told the Accused that. Soon after initiating contact the Accused began asking for sexually suggestive pictures, which she sent. On or about 28 February 2014, the Accused asked Miss [OC] for a nude photograph. When he didn't receive a response after three hours, he threatened her as follows: "So I'm going to be a dick and start sending out ur pics. One for every hour u don't text." Miss [C] finally agreed to send fully nude, sexually explicit images of her breasts and vagina to him.

Although we would find the image to be lascivious standing alone, considering the totality of the circumstances the lasciviousness of the image is grossly apparent.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge MULLIGAN AND Judge FEBBO concur.

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United States v. Gilbert

United States Army Court of Criminal Appeals

July 31, 2020, Decided

ARMY 20190766

Reporter

2020 CCA LEXIS 255 *; 2020 WL 4458493

UNITED STATES, Appellee v. Sergeant
CHRISTOPHER S. GILBERT, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Eighth Army. Robert L. Shuck, Military Judge. Colonel Dean L. Whitford, Staff Judge Advocate.

Counsel: For Appellant: Major Benjamin A. Accinelli, JA; Captain Jason X. Hamilton, JA.

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed.

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER Appellate Military Judges. Senior Judge ALDYKIEWICZ and Judge SALUSSOLIA concur.

Opinion by: WALKER

Opinion

MEMORANDUM OPINION

WALKER, Judge:

While appellant's attempts to persuade a teenage victim to send him nude "selfies" may have constituted the offense of solicitation, they did not amount to the offense of attempt to possess child pornography.¹ For

¹ A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of one specification each of attempt to possess child pornography, sexual abuse of a child, and possession of child pornography, in violation of Articles 80, 120b, and 134, Uniform Code of Military Justice, [10 U.S.C. §§ 880, 920b, 934](#) [UCMJ]. The convening authority approved the adjudged sentence to a bad-conduct discharge, confinement for nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1. This case is now before this court pursuant to Article 66, UCMJ.

reasons discussed below, we find a substantial basis in law and fact to question the providence of appellant's plea to The Specification of Charge I. Accordingly, we set aside appellant's conviction of attempted possession of child pornography and reassess his sentence.

BACKGROUND

A. Appellant Requests Nude "Selfies" from MN

Appellant met Miss MN online playing the video game "Fortnite" on 28 May 2018. Using the voice chat feature in the game, MN told appellant she was thirteen years old and appellant told her he was twenty-two. The two traded Instagram account names and began exchanging [*2] private messages through the Instagram text messaging feature. MN would borrow her step-mother's cell phone in order to exchange messages with appellant.

In the messages, appellant engaged in inappropriate sexual conversations with MN and repeatedly asked her to send him a "selfie," including a nude "selfie" (pictures taken of oneself) through Instagram. When MN denied appellant's requests for photos, appellant sent her a digital video and photos of his penis in an attempt to persuade her to reciprocate. MN eventually said she would send appellant a picture over the weekend when her parents were gone and she was home alone, but suggested that it may not be a nude photo but rather, a photo of her breasts. When MN inquired as to why appellant would be mad if she did not send him an unclothed photo of herself, appellant replied, ". . . I mean it's only fair you like seeing me naked so I should be able to see some of you."

On 1 June 2018, MN's step-mother intercepted messages that were sexual in nature from appellant to MN. MN's father reported the messages to local law enforcement, who conducted an investigation including a download of the Instagram messages between

appellant and MN.²

B. [*3] *The Military Judge Is Not Convinced Appellant's Requests Constitute Attempts to Possess Child Pornography*

During appellant's guilty plea providency inquiry, the military judge expressed concern over whether appellant's description of his actions toward MN met the definition of attempt to possess child pornography, as charged by the government. Appellant explained, "My request to see her naked was a substantial step and a direct movement toward what I hoped would result in [MN] actually sending me, not only a nude image of herself, but an image where she was actually touching her breast or vagina."

The military judge asked appellant whether he actually asked MN to send him a picture of her touching her breasts or vagina. Appellant replied that he had not, but likely would have, had MN's parents not intervened when they did.

The military judge then defined the categories of "sexually explicit conduct" to appellant. He specifically asked appellant whether he had requested MN send him photos of herself engaged in any of the categories of sexually explicit conduct: (a) sexual intercourse or sodomy; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition [*4] of the genitals or pubic area of any person. Appellant provided that he had not specifically asked MN to send him pictures of herself engaged in any of the categories of sexually explicit conduct. Appellant explained he was initially only asking MN to send a picture of herself so he could see what she looked like, though he was "intending" for their message exchange to escalate to MN sending him an image of herself masturbating.

The military judge explained to appellant "not every picture of a nude underage person constitutes child pornography." Before taking an extended break to allow the parties to confer, the military judge concluded, "I'm not convinced based on reading the stipulation of fact that the accused was intending to possess sexually explicit photographs of [MN]. And that he was in fact only wish—desiring to possess nude selfies, and I don't

think that meets the definition of child pornography without anything else."

In an attempt to provide further context, the government entered into evidence the complete exchange of Instagram messages between appellant and MN. Appellant then explained each of the messages to the military judge and his intent behind them. Appellant admitted [*5] that his intent was to first get MN to send a selfie and then something more explicit to which he could masturbate. Finally, the military judge asked appellant, "What would've been sufficient for you to meet that requirement?" Appellant replied, "Your honor, it would be a nude image of her depicting her breasts without clothes on or her either exposing her vagina or her with her panties on, touching her vagina." The military judge asked appellant why the image he ultimately desired to receive would have been lascivious, based on the factors provided in [*United States v. Dost*, 636 F. Supp. 828, 832 \(S.D. Cal. 1986\)](#).

Appellant explained that an image such as that which he desired from MN would have been lascivious "because it would be designed to get [him] sexually excited," and would have suggested "sexual willingness to engage in sexual activity."

Before finally accepting appellant's plea, the military judge asked appellant what prevented him from actually committing the offense of possession of child pornography with regard to MN. Appellant replied that MN never sent him any images of herself and then her parents intervened.

LAW AND DISCUSSION

Asking a minor child to share naked pictures of herself and hoping the images will contain sexually explicit [*6] conduct does not satisfy the elements of the offense of attempted possession of child pornography. We conclude the military judge abused his discretion by accepting appellant's guilty plea to the offense of attempted possession of child pornography.

A. *Standard of Review*

The military judge at a guilty plea is "charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." [*United States v. Inabinette*, 66 M.J. 320, 321-322 \(C.A.A.F. 2008\)](#) (citations omitted). We review a judge's decision to accept a guilty plea for abuse of discretion. [*United*](#)

²The police department also seized appellant's phone and upon searching it, discovered the material which was the basis for the possession of child pornography specification of which appellant was convicted.

States v. Weekes, 71 M.J. 44, 46 (C.A.A.F. 2012) (citing Inabinette, 66 M.J. at 321. A military judge abuses his discretion if he accepts a guilty plea "without an adequate factual basis to support it" or if he accepts a guilty plea based upon "an erroneous view of the law." *Id.* (citation omitted).

In reviewing a military judge's decision to accept a guilty plea, "appellate courts apply a substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea?" Inabinette, 66 M.J. at 322 (internal quotations and citations omitted). "If an accused's admissions in the plea inquiry do not establish each of the elements of the charged offense, the guilty plea must be set aside." Weekes, 71 M.J. at 46 (citing United States v. Gosselin, 62 M.J. 349, 352-53) (C.A.A.F. 2006)).

B. The Definition of Child [*7] Pornography

As the military judge aptly explained to appellant, "not every picture of a nude underage person constitutes child pornography." "'Child pornography' means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of a minor engaging in sexually explicit conduct." *Manual for Courts-Martial, United States* (2016 ed.) [MCM], pt. IV, ¶ 68b.c.(1). "Sexually explicit conduct means actual or simulated: (a) sexual intercourse or sodomy . . . ; (b) bestiality; (c) masturbation; (d) sadomasochistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person." MCM, pt. IV, ¶ 68b.c.(7).

In United States v. Roderick, our superior court adopted the six "Dost factors" developed by the Southern District of California for determining when an image constitutes a "lascivious exhibition" of the genitals or pubic area. 62 M.J. 425, 430 (C.A.A.F. 2006)(citing United States v. Dost, 636 F. Supp. at 828, 832 (S.D. Cal. 1986)). The non-exclusive list of the "Dost factors" are:

- (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or [*8] pose generally associated with sexual activity;
- (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- (4) whether the child is fully or partially clothed, or nude;

(5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

(6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 429. If an image of a child does not depict the genitals or pubic area, that ends the "lascivious exhibition" analysis as such a depiction is a prerequisite to the application of the *Dost* factors. *Id.* at 430.

Since the military court system adopted the *Dost* factors, courts have analyzed material on a case-by-case basis to determine whether it meets the definition of lascivious exhibition of the genitals or pubic area. Such an analysis is a highly fact-specific determination with legal consequences. See United States v. Piolunek, 74 M.J. 107, 108 ("Whether any given image does or does not display the genitals or pubic region is a question of fact, albeit one with legal consequences.") We are not prohibited from considering evidence outside the four corners of the image(s) in question when making a determination as to whether [*9] an image constitutes child pornography. United States v. Updegrave, ARMY 20160166, 2017 CCA LEXIS 36, at *7 (23 Jan. 2017) (mem. op.) (discussing Roderick, 62 M.J. 425). The "objective facts surrounding the image's creation may be considered." *Id.*

However, in appellant's case, we have no images to analyze, and instead only the objective facts surrounding appellant's requests for a hypothetical image that was never produced, let alone possessed. There is no application of the *Dost* factors or analysis to perform. While we may consider objective facts surrounding an image's creation, we cannot wholly substitute such facts for an analysis of the material in question. It seems the military judge was satisfied that appellant's request for any selfie, with the goal of eventually convincing MN to send him an image of herself containing a lascivious exhibition of her genitals or engaging in masturbation was sufficient. We disagree and find the military judge abused his discretion in accepting appellant's plea on that basis. By appellant's own admission, MN hinted she *might* send him a photo of her breasts, which would not meet the prerequisite of genital or pubic area depiction to even begin an analysis of whether the photo would constitute child pornography. As we cannot be sure [*10] what type of image MN might have sent appellant had her parents not intervened (or if she would have sent him anything), we turn our analysis toward appellant's actions in attempting to procure photos from MN.

C. Attempt Offenses and the Substantial Step

"[A]n act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." UCMJ art. 80. The statute specifically requires that an offense of attempt must include the specific intent to commit the offense coupled with "an overt act that directly tends to accomplish the unlawful purpose." MCM, pt. IV, ¶ 4c.(1). The overt act must go beyond mere preparation, which may consist of "devising or arranging the means or measures necessary for the commission of the offense." MCM, pt. IV, ¶ 4c.(2).

In *United States v. Winckelmann*, our Superior Court drew the "elusive line separating mere preparation from a substantial step." [70 M.J. 403, 407 \(C.A.A.F. 2011\)](#) (internal quotation marks and citations omitted). The court relied on federal cases that defined a "substantial step" as "more than mere preparation but less than the last act necessary [*11] before actual commission of the crime." *United States v. Hale*, [78 M.J. 268, 272 \(C.A.A.F. 2019\)](#) (citing *Winckelmann*, [70 M.J. 403](#)). Quoting the 9th Circuit, the *Winckelmann* court stated the substantial step must "unequivocally demonstrate[e] that the crime will take place unless interrupted by independent circumstances." [70 M.J. 407](#). (quoting *United States v. Goetzke*, [494 F.3d. 1231, 1237 \(9th Cir. 2007\)](#)(citations omitted)).

In the context of attempted child enticement cases where an accused has not traveled to meet the target child victim and the interactions occurred over the internet, "courts analyze the factual sufficiency of the requisite substantial step using a case-by-case approach." *Winckelmann*, [70 M.J. at 407](#). Where an accused has not actually met the child victim or engaged in "concrete conversations" making plans to do so, courts have still found "defendants have taken a substantial step toward enticement of a minor where there is a course of more nebulous conduct, characterized as 'grooming' the victim." *Id. at 408*. We likewise consider appellant's overall grooming actions toward MN in analyzing whether his strictly online message exchanges with her amounted to an attempt to possess child pornography.

D. Hoping is Not a Substantial Step

Appellant's hope and desire that MN would eventually

send him a photo of herself that constituted child pornography, despite [*12] not having requested such a photograph, was nothing more than mere preparation. As our Superior Court recognized, "preparation consists of devising or arranging the means or measures necessary for the omission of the offense; the attempt is the direct movement toward the commission after preparations are made." *United States v. Schoof*, [37 M.J. 96, 103 \(C.M.A. 1993\)](#)(internal quotation omitted)). In the context of a guilty plea, our Superior Court further commented:

Quite simply, where an accused pleads guilty and during the providence inquiry admits that he went beyond mere preparation and points to a particular action that satisfies himself on this point, it is neither legally nor logically well-founded to say that actions that may be ambiguous on this point fall short of the line 'as a matter of law' so as to be substantially inconsistent with the guilty plea.

Schoof, [37 M.J. at 103](#). We acknowledge that we are bound to accept an appellant's guilty plea explanation of his substantial step toward the commission of his target offense. However, in this case, appellant's actions toward MN simply did not amount to more than mere preparation and hoping.

Though appellant explained his desire to escalate the message exchanges with MN, he never actually asked MN to send [*13] him an image of herself engaged in sexually explicit conduct. Appellant's honest admission at his providence inquiry that he had *hoped* MN would *eventually* send him a picture of herself masturbating or touching her breasts or vagina does not constitute a substantial step toward possession of child pornography.

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" *United States v. Hartman*, [69 M.J. 467, 468 \(C.A.A.F. 2011\)](#) (quoting *United States v. O'Connor*, [58 M.J. 450, 453 \(C.A.A.F. 2003\)](#)). The military judge's initial instinct was correct: appellant asking thirteen-year-old MN for nude "selfies" did not constitute an attempt to possess child pornography. When the military judge tried to discuss with appellant his understanding of the critical distinction between permissible and prohibited behavior, appellant's responses evidenced a belief that his conduct was prohibited because he intended to eventually persuade MN to send him photos that would sexually excite him and satisfy his masturbatory

preferences. The military judge accepted this context as a substitute for appellant taking a substantial step toward possession of material that [*14] would actually meet the definition of child pornography.

But appellant's hope that MN would eventually send him a photo of herself engaged in sexually explicit conduct (such as masturbation) did not change the nature of his actions toward MN. Appellant had inappropriate sexual conversations with MN, sexually abused her by sharing images and videos of his penis with her, and asked her to send him nude pictures of herself. He admitted that it was all preparatory work toward his ultimate goal of procuring photos that might have met the legal definition of child pornography. But he never actually asked or instructed MN to send him material that would constitute child pornography. Desiring images of MN to aid in his masturbation did not transform his preparation into a substantial step toward commission of the target offense of possession of child pornography.

In *United States v. Moon*, our Superior Court reversed a conviction of "knowingly possess[ing] multiple images of nude minors and persons appearing to be nude minors, which possession was to the prejudice of good order and discipline in the armed forces and was of a nature likely to bring discredit upon the armed forces," charged in [*15] violation of Article 134, UCMJ, but not as a possession of child pornography offense. [73 M.J. 382 \(C.A.A.F. 2014\)](#). The military judge in *Moon* attempted to have the accused explain why the images he possessed were prohibited, rather than constitutionally protected such as nude images of children in works of art. [Id. at 388-89](#). The appellant admitted he possessed the nude images of minors to satisfy his own sexual gratification and that was the reason the nude images of children, not amounting to actual child pornography, were not protected under the [First Amendment](#) and their possession was criminal. [Id. at 389](#). Reversing the conviction, the court clarified that the military judge's statement of the law was incorrect: "possession of images for one's sexual gratification does not itself remove such images from [First Amendment](#) protection. If it did, 'a sexual deviant's quirks could turn a Sears catalog into pornography.' *Id.* (quoting [United States v. Amirault](#), 173 F.3d 28, 34 (1st Cir. 1999)).

As our Superior Court did in *Moon*, we similarly conclude that notwithstanding appellant's anticipated sexual arousal to the nude "selfies" he wanted MN to send to him, the military judge misapplied the law and failed to clearly distinguish prohibited from protected conduct. The closest appellant came to possessing child

pornography of [*16] MN was hoping for it. We do not find his general request for nude "selfies" of MN to be a substantial step toward the offense of possession of child pornography, as images of nude minors are not per se child pornography. We therefore set aside appellant's conviction of attempt to possess child pornography.

E. Sentence Reassessment

Having set aside appellant's conviction of the Specification of Charge I we now reassess appellant's sentence in accordance with the principles articulated by our superior court in [United States v. Sales](#), 22 M.J. 305, 307-08 (C.M.A. 1986), and [United States v. Winkelmann](#), 73 M.J. 11, 15-16 (C.A.A.F. 2013). Setting aside appellant's conviction of attempt to possess child pornography reduces his maximum confinement exposure from thirty-five years to twenty-five years. MCM, pt. IV, ¶¶ 4.e, 45.b.e.(3)(b), 68.b.e.(1). All other remaining elements of the maximum punishment, such as reduction, forfeitures, discharge, and potential fine, remain unchanged. Appellant's adjudged sentence only included nine months of confinement and it was imposed by a military judge alone. See [United States v. Adams](#), 74 M.J. 589, 593 (Army Ct. Crim. App. 2015).

The most important consideration for us is that the gravamen of appellant's criminal conduct remains unchanged without his conviction for attempt to possess child pornography. Appellant preyed on a thirteen-year-old [*17] girl online, sexually abused her by sending her digital pictures and videos of his penis, engaged in inappropriate sexual conversations with her, and attempted to guilt her into sending nude images of herself. Though his requests for nude "selfies" did not constitute the offense of attempt to possess child pornography, they are inseparable from his sexual abuse of MN. Appellant's requests for a thirteen-year-old to send him nude photos are admissible aggravation evidence related to appellant's other convictions, and before the trier of fact notwithstanding our set aside of the attempted possession of child pornography conviction. We are confident that the remaining offenses of sexual abuse of a child and possession of child pornography would have yielded a sentence at trial at least equal to that adjudged in appellant's case. We therefore affirm appellant's sentence of a bad-conduct discharge, confinement for nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

CONCLUSION

The Specification of Charge I and Charge I are set aside and DISMISSED. The remaining findings of guilty are AFFIRMED. The sentence is AFFIRMED.

Senior Judge ALDYKIEWICZ and Judge SALUSSOLIA [*18] concur.

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United States v. Andersen

United States Army Court of Criminal Appeals

September 10, 2010, Decided

ARMY 20080669

Reporter

2010 CCA LEXIS 328 *; 2010 WL 3938363

UNITED STATES, Appellee v. Warrant Officer One
SHAWN A. ANDERSEN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Andersen, 2010 CAAF LEXIS 1035 \(C.A.A.F., Dec. 7, 2010\)](#)

Prior History: [*1] Headquarters, Fort Carson Deborah L. Boudreau, Military Judge, Colonel Michael W. Meier, Staff Judge Advocate.

Counsel: For Appellant: Colonel Mark Tellitocci, JA; Lieutenant Colonel Matthew M. Miller, JA; Major Grace M. Gallagher, JA; Lieutenant Colonel Jonathan F. Potter (on specified issues); Captain Pamela Perillo, JA (on brief and on brief on specified issues).

For Appellee: Colonel Norman F.J. Allen, III, JA; Lieutenant Colonel Martha L. Foss, JA; Major Sara M. Root, JA; Captain Sarah J. Rykowski, JA (on brief and on brief on specified issues).

Judges: Before TOZZI, HAM, ¹ and SIMS, Appellate Military Judges. Chief Judge TOZZI and Judge SIMS concur.

Opinion by: HAM

Opinion

MEMORANDUM OPINION

HAM, Judge:

This case addresses whether appellant's plea to possession of "child pornography . . . in violation of [18 U.S.C. §2252A](#)" is provident. In short, the essence of

the *Care* ² inquiry—an "inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea," in particular that the images appellant is charged with possessing depict "sexually explicit conduct"—is deficient with regard to a majority of the images [*2] charged. See Rule for Courts-Martial [hereinafter R.C.M.] 910(e). Additionally, we find evidence that patently sets up a matter inconsistent with the plea that is not addressed and thus remains unresolved, and find further that there is a substantial basis in law or fact to question the plea. Upon our review of the entire record, including those issues personally specified by appellant under [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), we set aside appellant's plea in part and we reassess his sentence.

In reaching our decision, we address two issues in detail. The first issue concerns whether the record establishes a sufficient factual predicate for appellant's plea. In our analysis of this issue, our appellate review of a guilty plea is focused on *whether the plea is provident*. We do not review the record in a guilty plea for legal or factual sufficiency, nor do we examine the evidence to determine what the government could prove if appellant contested the charges against him. In addition, in a plea to possession of child pornography that involves both charged images and uncharged images in aggravation, the record [*3] of the plea must *establish as a matter of law and fact that the charged images are of minors engaged in sexually explicit conduct*. In other words, the plea must clearly establish that the charged images actually are prohibited visual depictions of child pornography.

The second issue addresses the meaning of "sexually explicit conduct," a required element of the offense of possession of child pornography under both the federal statute and clauses 1 and 2 of [Article 134, UCMJ](#). Specifically, if the "sexually explicit conduct" at issue involves a prohibited "*lascivious exhibition*," it must be

¹Judge HAM took final action in this case prior to her permanent change of duty station.

²[United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 \(1969\)](#).

"of the genitals or pubic area of any person." Mere nudity alone will not suffice, nor will "sexually provocative poses" alone that do not include a "lascivious exhibition of the genitals or pubic area of any person."

Both issues, at least in part, revolve around the distinction between prohibited child pornography and images that are sometimes referred to as "child erotica," defined as "material that depicts 'young girls [or boys] as sexual objects or in a sexually suggestive way,' but is not 'sufficiently lascivious to meet the legal definition of sexually explicit conduct' under [18 U.S.C. § 2256](#)." [*4] *United States v. Vosburgh*, 602 F.3d 512, 520 (3d Cir. 2010) (citing *United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir.2006)) (en banc) (citing FBI affidavit describing child erotica as "images that are not themselves child pornography but still fuel . . . sexual fantasies involving children")). See also *United States v. Williams*, 592 F.3d 511, 515 (4th Cir. 2010). See generally *United States v. Garlick*, 61 M.J. 346 (C.A.A.F. 2005). Possession of mere "child erotica" does not violate federal law. While we do not decide whether possession of "child erotica" can ever violate clauses 1 and 2, [Article 134](#), UCMJ, in this case appellant was not advised that his plea encompassed possession of such materials, and therefore he cannot be found guilty of any offense relating to child erotica. "An accused must know to what offenses he is pleading guilty." See *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008).

PROCEDURAL HISTORY

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of possession of child pornography in violation of [18 U.S.C. §2252A](#), in violation of Article 134 Uniform Code of Military Justice, [10 U.S.C. §934](#) [*5] [hereinafter UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for two years, and a reprimand. The convening authority approved the adjudged sentence.

Appellant originally submitted this case alleging three assignments of error.³ This court then specified the

³ Appellant's assignments of error alleged:

I.

THE STAFF JUDGE ADVOCATE'S ADDENDUM PREJUDICED APPELLANT BY INCORRECTLY ADDRESSING DEFENSE COUNSEL'S ASSERTION OF

following issues:

I.

WHETHER A SUBSTANTIAL BASIS IN LAW OR FACT EXISTS TO QUESTION APPELLANT'S PLEA OF GUILTY TO POSSESSION OF CHILD PORNOGRAPHY WHERE THE ONLY SUPPORT THAT APPELLANT POSSESSED IMAGES DEPICTING SEXUALLY EXPLICIT CONDUCT, INCLUDING LASCIVIOUS EXHIBITIONS OF THE GENITALS OR PUBIC AREA, ARE THE IMAGES ATTACHED AS ENCLOSURES TO PROSECUTION EXHIBIT 3, THE STIPULATION OF FACT?

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO SPECIFICATION 2 OF THE CHARGE (POSSESSION OF THREE FILES OF CHILD PORNOGRAPHY), WHEN THE IMAGES AT ISSUE, ATTACHED AS ENCLOSURE 2 TO THE STIPULATION OF FACT, SET UP A MATTER INCONSISTENT WITH THE PLEA THAT THE MILITARY JUDGE DID NOT RESOLVE?

We find appellant's raised errors do not warrant discussion or relief. As noted above, we find a substantial basis in law and fact to question appellant's plea and that the military judge abused her discretion by accepting appellant's plea in part.

FACTS

Appellant pled guilty to two specifications of possession of "child pornography that [had] been transported in interstate or foreign commerce, in violation of [18 U.S.C. §2252A](#) . . . which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces."⁴ The government divided the specifications based on the different media where the images were

LEGAL ERROR.

II.

APPELLANT'S [*6] POST-TRIAL CONFINEMENT VIOLATED ARMY REGULATION 190-47.

III.

APPELLANT WAS IMPROPERLY CHARGED AND FOUND GUILTY IN THE DISJUNCTIVE.

⁴ Appellant pled not guilty to two [*7] additional violations of [Article 134, UCMJ](#), which were dismissed prior to findings.

located. More precisely, the first specification alleged that appellant knowingly possessed a "Hitachi Hard Disk Drive" containing forty-three images of "child pornography" and specifically listed ten of those images; the second specification alleged that appellant knowingly possessed a "Western Digital Disk Drive," also referred to as "the tower," containing three images of "child pornography."

The Providence Inquiry

During appellant's providence inquiry, the military judge advised appellant of the elements of the offense as follows:

One, that on or about 20 March 2007 at or near Colorado Springs, Colorado, you knowingly and wrongfully possessed material, to wit: [with regard to specification 1,] an Hitachi hard disk drive . . . that contained about 43 visual depictions; [and with regard to specification 2, a "Western Digital disk drive . . . that contained about three files with visual depictions];

Two, that such visual depictions were each of a *real minor engaged in sexually-explicit conduct* [emphasis added];

Three, that you knew that such visual depictions showed sexually-explicit conduct;

Four, that you knew that at least one of the persons engaged in the sexually-explicit conduct in each of the visual depictions was a minor;

Five, that the visual depictions had been transported in interstate or foreign commerce;

Six, that [Section 2252A of Title 18, United States Code](#), was then in effect; and

Seven, that your conduct was prejudicial to good order and discipline in the armed forces or was of a nature [*8] to bring discredit upon the armed forces.

The military judge explained that the term "sexually-explicit conduct" means

actual or simulated intercourse, including genital-to-genital, oral-to-genital, anal-to-genital, or oral-to-anal, whether between persons of the same or opposite sex. It also means bestiality [sic], masturbation, sadistic, or masochistic abuse, or *lascivious exhibition of the genitals or pubic area of any person*. (Emphasis added.)

The military judge next correctly defined the term "lascivious," in connection with an "exhibition of the genitals or pubic area of any person," as

exciting the sexual desires or marked by lust, such as when the focal point of the depiction is on the genitals or pubic area;
when the setting is sexually suggestive;
when a child is posed in a sexually [] suggestive manner or in inappropriate attire, given the child's age;
when a child is partially clothed or nude;
when the depiction suggests sexual coyness or willingness to engage in sexual activity;
when the depiction is intended to elicit a sexual response in the viewer;
when the depiction portrays the child as a sexual object;

and any captions that may appear on the depiction or materials accompanying [*9] the depiction that may have an inappropriate sexual conduct [sic].

Following the military judge's recitation of the elements, appellant had no questions, and indicated that he understood his plea of guilty "admits that these elements and the definitions taken together correctly describe" what he did.

At the time of his offenses, appellant was a United States Army Criminal Investigation Command (CID) special agent with experience investigating crimes involving child pornography. He described that he began "chatting" online with adults and then "it progressed from there . . . to basically I lost my boundaries." The military judge clarified that appellant "lost his boundaries" "in the sense that [he] started looking for child pornography on the Internet." Appellant posed as a female between the ages of 15 to 28, engaged in conversations in chat rooms and would receive "child pornography" from those with whom he was chatting.

The military judge asked appellant to "[j]ust describe for [her] in general terms what the images showed, the ones that were child pornography." Appellant responded, "*It was usually sexually [provocative poses or just nudity of prepubescent adolescents]*." (Emphasis added.) [*10] Appellant agreed that he was "absolutely convinced that each of those images was an image of child pornography." Appellant also agreed that there was no "doubt in [his] mind that these were real children." In order to illustrate this last point, the military judge discussed several images of known children that appellant agreed he possessed. As we discuss, *infra*, it

is not apparent that these images of known children are those charged in the specifications. The known images convinced appellant that he was viewing "real children." There is no description of what these images entailed; specifically, there is no description or agreement in the colloquy between the military judge and appellant that these images depicted known minors engaged in "sexually explicit conduct," or why the images depicted such activity.

Finally, the military judge engaged in a discussion with appellant about why his conduct was prejudicial to good order and discipline or of a nature to bring discredit on the armed forces, as follows:

MJ: Can you explain to me just in your own words—and if you need any help with this, I think I can suggest some words. Why is this conduct prejudicial to good order and discipline [*11] in the armed forces?

ACC: [no response]

MJ: Maybe I can help. You were a CID agent; correct?

ACC: Yes, ma'am.

MJ: *Because of this*, were you allowed to continue with your CID duties?

ACC: No, ma'am, I short-staffed the office.

MJ: Okay. So, was that harmful to CID's efforts to investigate ongoing cases?

ACC: Yes, ma'am.

MJ: And, also, if [s]oldiers of Fort Carson, junior enlisted [s]oldiers, were to find out that a CID agent was *involved in this sort of activity*, do you think that that would cause them to view CID in a less favorable light?

ACC: Yes, ma'am, I do.

MJ: All right, thank you. Now let's talk about service-discrediting conduct. Do you think that *this conduct of yours* harmed the reputation of the Army in the eyes of the public if they were to find out about this?

ACC: Yes, ma'am.

MJ: Okay. And is it all right with you that I've suggested these terms? Because I know how difficult this can be to talk about.

ACC: Yes, ma'am, it is.

MJ: All right, thank you. I believe I've covered all the elements. Do counsel for either side believe any further inquiry is required?

TC: No, Your Honor.

DC: No, ma'am.

MJ: Thank you.
(Emphasis added.)

The Stipulation of Fact and Its Enclosures

During her providence [*12] inquiry, the military judge engaged in a typical discussion with appellant concerning the stipulation of fact. She noted additionally that the stipulation included "six enclosures enclosures 1 and 2 are photographic images that are in separate envelopes." The images corresponded to the Specifications of the Charge, with enclosure 1 relating to Specification 1, and enclosure 2 relating to Specification 2 of the Charge. The military judge stated, "I don't believe [appellant had] copies of the enclosures there at counsel table, but [did appellant have] an opportunity to review these enclosures?" Appellant responded that he had. "And, in particular, the images which are . . . marked as enclosures 1 and 2, I gave these to [appellant's trial defense counsel] to show you right before we began this morning. And did you go over these with him?" Appellant responded "Yes, ma'am." There was no further discussion of enclosures 1 and 2, nor any description of the enclosures' contents. The military judge admitted the stipulation of fact into evidence without objection from the defense.

The stipulation of fact, Prosecution Exhibit 3, is a six and one-half page, single-spaced document. In addition [*13] to enclosures 1 and 2, the images on the two different computer drives, there are four additional enclosures: a twenty-seven page report from the National Center for Missing and Exploited Children (NCMEC) performed at the request of Army investigators; a six-page NCMEC report found on a CD-ROM appellant possessed; a recording of a phone interview between appellant and a civilian law enforcement agent; and a DVD of an in-person interview between appellant and the same civilian law enforcement agent.⁵

The stipulation of fact described how images of "child pornography" were traced from their origin—uploaded on a Yahoo account, through NCMEC, to an internet

⁵ The record of trial was originally missing the last enclosure, the DVD interview between appellant and a civilian law enforcement agent. In its place was an unrelated DVD. We ordered the government to produce the correct enclosure, and it is now attached to the record of trial. *United States v. Andersen*, ARMY 20080669 (Army Ct. Crim. App. 5 Jan. 2010) (order) (unpub.).

protocol address that was associated with appellant's physical address. This in turn resulted in detectives executing a search warrant at appellant's home and the seizure [*14] of the computer drives at issue plus an additional laptop computer. A civilian detective examined the seized drives and found "images of child sexual exploitation" resulting in the specifications against appellant.

Breaking these images down by drive, Specification 1 alleged that appellant possessed the "Hitachi Hard Disk Drive" "containing 43 images of child pornography" including ten images attached to the stipulation as enclosure 1. Further, Specification 2 alleged that appellant possessed the "Western Digital Disk Drive" (the tower), "containing 3 images of child pornography;" the three images were attached to the stipulation as enclosure 2. The paragraphs describing the drives continuously referred to "child pornography" but did not further describe the images.

In addition to the images included in the Specifications of the Charge against appellant, the stipulation of fact described other images found on the computer media seized at appellant's house. On the hard disc drive of "the tower," (Western Digital Disk Drive) where investigators discovered the three images charged in Specification 2, investigators also found "100 pictures of possible interest," as well as "70 pictures of [*15] interest" on the tower's "free space," and "[s]everal web pages of interest" and "one thumbnail of interest."

The stipulation of fact also described additional images found on "one of the laptops" apparently associated with the Hitachi Hard Disk Drive that contained the forty-three images charged in Specification 1. As the stipulation of fact described:

one of the laptops found 30 pictures of apparent children *posed in [a] lewd or lascivious manner, or engaged in sexual activity*. Over 30 pictures of apparent children *posing nude or partially nude* were also discovered. Over 30 thumbnails containing apparent children *engaged in sexual activity, posing in a lewd or lascivious manner, and posing nude or partially nude* were extracted from . . . the . . . Recycle Bin Additionally, over 30 pictures of apparent children *engaging in sexual activity, posing in a lewd or lascivious manner, and posing nude or partially nude* were extracted from the free space of the laptop. Three movie files containing apparent children engaging in sexual

activity were also extracted from the free space [and an] examination of [appellant's] internet activity revealed 17 pages of interest. (Emphasis [*16] added.)

We conclude this paragraph must wholly or partly describe *uncharged* images added to the stipulation in aggravation. We reach this conclusion because although the government charged appellant in Specification 1 with possessing *forty-three* images on the Hitachi Hard Disk Drive, this paragraph of the stipulation describes 120 images of "apparent children," plus three "movie files containing apparent children" and "17 web pages of interest," all found on "one of the laptops." If this description does include the images in Specification 1, there is no indication as to which of these images ended up as a charged image.

Stated simply, we cannot distinguish charged images from aggravation evidence. As we describe in more detail later in our opinion, the italicized language from the stipulation of fact quoted above does not adequately or correctly describe *prohibited* images. As a consequence, we do not know which of these images, if any, are included in appellant's plea, or if the images included in the plea actually constitute visual depictions of minors engaged in sexually explicit conduct as a matter of law. "*Pos[ing] in a lewd or lascivious manner,*" or "*posing nude or partially nude*" [*17] in and of itself does not constitute child pornography. See *Law and Discussion, infra*.

Similarly, "*engaging in sexual activity*" with no further description, does not necessarily equate to "*sexually explicit conduct*" as defined in the law. For example, "sexual activity" might include depictions of a couple, including a child, naked from the waist up kissing each other on the mouth, or of a naked child's breast, neither of which *on its own* meets the definition of prohibited "sexually explicit conduct." While we might find images including such depictions offensive, they do not meet the definition of "sexually explicit conduct" and thus do not violate the law. Accordingly, even if an accused desires to enter a plea of guilty to possessing such images, his conduct does not amount to a violation of the law and his plea is improvident.

These problems continue. The stipulation next discusses NCMEC's examination of the images found on appellant's media, including the uncharged images in aggravation. National Center for Missing and Exploited Children confirmed that one of the videos [was] from a known series with child victims. Two-hundred and seven

(207) images from a known series with a child **[*18]** victim [were] found on the tower [Western Digital Disk Drive, specification 2, which alleged appellant possessed three images]. . . and twenty-five (25) known images of child sexual abuse were identified on the laptop [Hitachi Hard Disk Drive, specification 1, which alleged appellant possessed forty-three images]" (Emphasis added.) The stipulation further described the actual victims in these known images, some of the abuse the victims suffered, the perpetrators of the offenses against those known victims, the investigations surrounding those perpetrators, and the lasting impact to the known victims.

The stipulation does not, however, correlate NCMEC's findings and the known children to the charged images in Specifications 1 and 2—we cannot tell from the description in the stipulation of fact if NCMEC's findings involve charged images, and if so, which ones.⁶ For example, the military judge addressed with appellant the paragraph in the stipulation of fact that discusses the NCMEC images. The military judge asked appellant at one point if he possessed "a video and an image" of a certain child NCMEC identified, and the appellant agreed that he did—but he is not charged with possessing **[*19]** any videos. The paragraph helped convince appellant that the video and images described were "real" children, but neither the stipulation nor appellant, nor the twenty-seven page NCMEC report, tell us *what the images depicted, whether what was depicted constituted minors engaged in sexually explicit conduct, or whether these images were charged images or uncharged aggravation*. There was no description in the stipulation of the images attached as enclosures 1 and 2 (that contain some of the charged images) or even that appellant believed or agreed they constituted sexually explicit conduct or why.

The last two and one-half single spaced pages of the stipulation describe appellant's interrogation, including his admission that he used "search strings that would bring up child pornography," and that "[h]e knew what he was doing was wrong and there was no justification for **[*20]** it." These pages also described the effects of appellant's conduct on good order and discipline and how they brought discredit to the armed forces. Finally,

the stipulation describes the findings of a "U.S. Senate Subcommittee investigating child pornography," including the "impact on the child victim who is exploited," who "may be at high risk of becoming perpetrators or abusers themselves," and who can experience "a myriad of symptoms [sic]." Evidently the investigation included a "study of children involved in sex rings," and a "significant relationship between involvement in pornography and a pattern of identification with the exploiter and deviant and symptomatic behavior," including "act[ing] out through drastic measures" such as "burning the house where the pictures are located, or . . . stealing back the record of their exploitation."

Like the failure to correlate the NCMEC findings to charged images, there is no correlation offered between the charged images and the "U.S. Senate Subcommittee" investigation so as to make this investigation relevant to appellant's court-martial. See [*United States v. Hardison*, 64 M.J. 279, 280 \(C.A.A.F. 2007\)](#) ("Admissible evidence in aggravation **[*21]** must be 'directly related' to the convicted crime."); [*United States v. Rust*, 41 M.J. 472 \(C.A.A.F. 1995\)](#).

Lastly, enclosures 1 and 2 to the stipulation of fact contain images listed in Specifications 1 and 2 of the Charge, respectively. Enclosure 1 contains ten images (of forty-three charged). The ten images all involve young girls, mostly nude, standing or sitting with their pubic areas or genitalia clearly visible. Some involve depictions of the girls spreading their legs wide with their genitals clearly exposed.

Enclosure 2 contains three images of a naked young female. One image shows her lying chest down in water with her breasts visible, but neither her genitals or pubic area are visible. The second image shows the same girl lying nude in the water chest down with her buttocks visible, but neither her genitals nor pubic area are visible. The third image shows the same girl sitting in the water facing the camera with her pubic area visible but mostly submerged in the water.

LAW AND DISCUSSION

Definition of Terms

The military judge correctly advised appellant of the definitions of terms relevant to his plea based on those contained in federal law. See [18 U.S.C. § 2256](#). She

⁶We also looked to the twenty-seven page NCMEC report, attached as an enclosure to the stipulation of fact. The parties did not stipulate how to match this information to the charged images in Specification 1 or 2, and we will not speculate how to do so. The parties did not discuss this enclosure or its contents at trial.

incorporated [*22] the definition of "child pornography" ("visual depictions' . . . of a real minor engaged in sexually explicit conduct") into her listing of the elements of the offense.⁷ She also defined "visual depiction" based on the definition in the federal statute, although she did not track it exactly. See [18 U.S.C. § 2256\(5\)](#). The judge's definition of "sexually explicit conduct," set forth earlier in the opinion, mirrors the federal statute. [18 U.S.C. § 2256\(2\)\(A\)](#).⁸

The federal statute does not define the term "lascivious" in the phrase "lascivious exhibition of the genitals or pubic area of any person." The definition the military judge used derived from [United States v. Dost](#), 636 F.Supp. 828, 832 (S.D. Cal. 1986).⁹ Our superior court has adopted the so-called "Dost factors" combined with "an overall consideration of the totality of the circumstances," to determine whether a given image constitutes a "lascivious exhibition" of the genitals or pubic area. [United States v. Roderick](#), 62 M.J. 425, 429-30 (C.A.A.F. 2006). We stress that these factors all relate to whether the image depicts a lascivious exhibition of the genitals or pubic area, the depiction

that violates the law. The *Dost* [*24] factors do not address other lascivious images lacking an exhibition of the genitals or pubic area, such as so-called "child erotica."

The Court of Appeals for the Armed Forces (C.A.A.F.) has not specifically decided whether the "totality of the circumstances" "limits the consideration of contextual evidence to the circumstances directly related to the taking of the images." [United States v. Brown](#), 579 F.3d 672, 683 (6th Cir. 2009) (adopting a "limited context" test and discussing the due process dangers inherent in too broad an inquiry). In *Roderick*, however, the C.A.A.F. did not apply a "limited context" test to determine whether the images in that case were "lascivious exhibitions." See [Roderick](#), 62 M.J. at 430.

The meaning of the statutory phrase "lascivious exhibition" in [18 U.S.C. § 2256](#) "poses a pure question of law." [United States v. Knox](#), 32 F.3d 733, 744 (3d Cir. 1994). [*25] The federal courts do not agree on the question of whether a specific image constituting a "lascivious" exhibition of the genitals or pubic area is one of law or fact, although the clear majority holds it is a question of fact. Compare [United States v. Amirault](#), 173 F.3d 28, 32 (1st Cir. 1999) (reviewing the issue as a matter of law de novo) with [United States v. Overton](#), 573 F.3d 679, 688 (9th Cir. 2009) (holding that whether images are lascivious is a question of fact reviewed for clear error) (citing [United States v. Wiegand](#), 812 F.2d 1239, 1244 (9th Cir. 1987)). If the images do not involve the genitals or pubic area, however, one does not reach the question whether the image is "lascivious," regardless of whether that secondary determination is one of fact or law. In *Roderick*, in fact, the C.A.A.F. plainly recognized that a "prerequisite for any analysis under *Dost*" is that the image depict the genitals or pubic area, and that such a depiction is "a requirement of [[18 U.S.C. § 2256\(2\)](#)]." [Roderick](#), 62 M.J. at 430.

The government also alleged that appellant's conduct violated clauses 1 and 2, Article 134, UCMJ. Our superior court has ruled that these clauses may encompass acts broader [*26] than those prohibited by federal law. [United States v. Mason](#), 60 M.J. 15, 20 (C.A.A.F. 2004) (holding that a service member may violate Article 134, UCMJ by possessing either virtual or actual child pornography). See also [United States v. Forney](#), 67 M.J. 271, 273 (C.A.A.F. 2009) (holding that receipt and possession of "images of virtual children engaged in sexually explicit conduct" may constitute conduct unbecoming an officer under [Article 133, UCMJ](#)). It is, however, still required that the visual

⁷ See [18 U.S.C. § 2256\(8\)\(A\)](#). The federal definition does not include the term "real."

⁸ Following the Supreme Court's decision in [Ashcroft v. Free Speech Coalition](#), 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), which declared a portion of the then definition of child pornography unconstitutional, Congress amended that portion of the statute. See Pub. L. 108-21, § 502(a)(1), 117 Stat. 678 (2003). The statute now includes an additional definition of child pornography that is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." [18 U.S.C. § 2256\(8\)\(B\)](#). Congress also added a second definition of "sexually explicit conduct" applicable only to this subsection [*23] that differs from the one the military judge used and is not at issue in this case. See [18 U.S.C. § 2256\(2\)\(B\)](#). See also Pub. L. 108-21 § 502(b), 117 Stat. 678 (2003). However, we point out that the second definition includes "lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited," thus permitting conviction for exhibition of breasts alone under certain circumstances not present here. [18 U.S.C. § 2256\(2\)\(B\)\(i\)](#).

⁹ The *Dost* factors are not free from controversy. See [United States v. Frabizio](#), 459 F.3d 80, 86-90 (1st Cir. 2006). "As one commentator observed, 'the *Dost* test has produced a profoundly incoherent body of case law.'" [Id.](#) at 88 (quoting A. Adler, *Inverting the First Amendment*, 149 U. Pa. L.Rev. 921, 953 (2001)).

depictions be "child pornography." That is, the visual depictions must be of minors—virtual or actual—engaged in "sexually explicit conduct." See generally [United States v. Irvin](#), 60 M.J. 23 (C.A.A.F. 2004). See also generally [United States v. Augustine](#), 53 M.J. 95 (C.A.A.F. 2000). Depictions of mere nudity, breasts, and "sexually suggestive poses" alone—what has been termed "child erotica"—plainly do not equate to "sexually explicit conduct." See [United States v. Villard](#), 885 F.2d 117, 124 (3d Cir. 1989) ("[T]he statute requires more than mere nudity, because the phrase 'exhibition of the genitals or pubic area' . . . is qualified by the word 'lascivious.'").¹⁰

We are not confronted with—and do not decide—whether images not amounting to "sexually explicit conduct" or images that depict instead what is sometimes referred to as "child erotica" violate clauses 1 or 2, Article 134, UCMJ. Service members must be on notice of what constitutes a violation of the law. In this case, by charging appellant with a violation of all three clauses of Article 134, UCMJ, the government pursued all three "theories of prosecution" available to it under Article 134, UCMJ. See [Medina](#), 66 M.J. at 26. The government utilized all three theories, however, to prosecute the same conduct, possession of "child pornography . . . in violation of [18 U.S.C. §2252A](#)." The military judge defined the conduct pursued [*28] under all three clauses as possession of visual depictions of minors engaged in "sexually explicit conduct," which she defined further as "actual or simulated intercourse . . . bestiality [sic], masturbation, sadistic [] or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person."

The military judge did not advise appellant that his plea encompassed images other than those depicting "sexually explicit conduct," nor did appellant enter a plea to such conduct. Nor was appellant advised or on notice that visual depictions that did not meet the definition of "child pornography" but might fall into the gray area of "child erotica" violated clauses 1 or 2, Article 134, UCMJ. We cannot affirm a finding of guilty to a violation

of clause 1 or 2, Article 134, UCMJ of which appellant was not on notice, in particular one that has not been recognized as a violation of clause 1 or 2, Article 134, UCMJ or defined by either this court or our superior court. See [Medina](#), 66 M.J. at 28.¹¹

Providence of Appellant's Plea

We review a military judge's acceptance of an accused's guilty plea for an abuse of discretion. [United States v. Inabinette](#), 66 M.J. 320, 322 (C.A.A.F. 2008); [United States v. Eberle](#), 44 M.J. 374, 375 (C.A.A.F. 1996). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." [Inabinette](#), 66 M.J. at 322. See also R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making sure such inquiry of the accused as shall satisfy the [*30] military judge that there is a factual basis for the plea."). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." [Medina](#), 66 M.J. at 26 (citing [Care](#), 18 C.M.A. at 538-39, 40 C.M.R. at 250-51). We will not "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." [United States v. Johnson](#), 42 M.J. 443, 445 (C.A.A.F. 1995).

Where an appellant pleads guilty, "the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." [United States v. Faircloth](#), 45 M.J. 172, 174 (C.A.A.F. 1996). See also [United States v. Barton](#), 60 M.J. 62, 64 (C.A.A.F. 2004).

Article 45(a), UCMJ, [10 U.S.C. § 845\(a\)](#), requires that the military judge set aside a guilty plea if an accused sets up a matter inconsistent with the plea,

¹⁰ While nudity alone does [*27] not suffice, there is, on the other hand, no requirement that the child be nude in order for the image to qualify as a "lascivious exhibition of the genitals or pubic area." [Knox](#), 32 F.3d at 746 ("Applying the plain meaning of the term 'lascivious exhibition' leads to the conclusion that nudity or discernability [of the genitals or pubic area] are not prerequisites for the occurrence of an exhibition within the meaning of the federal child pornography statute.").

¹¹ Further, we specifically take no position on whether prosecuting images under clauses 1 or 2 that do not constitute child pornography, i.e. "child erotica," is generally advisable. [*29] We cannot blithely dispense with the significant [First Amendment](#) and Due Process concerns that might arise. See generally [United States v. Wilcox](#), 66 M.J. 442, 451 (C.A.A.F. 2008); [United States v. O'Connor](#), 58 M.J. 450, 455 (C.A.A.F. 2003). For example, what would constitute the offense and how would a service member be on notice of what conduct is prohibited? Extreme care should be taken in any decision to charge "child erotica" in light of the potentially substantial constitutional and legal issues that could arise in such a case.

or if it appears he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect. [Rule for Courts-Martial] 910(e) . . . requires that the military judge explain the elements of the offense and ensure there is "a factual basis for [*31] the plea." Then, "*the accused must be convinced of, and be able to describe all the facts necessary to establish guilt.*" R.C.M. 910(e) Discussion. (Emphasis added.)

There is no requirement "that any witness be called or any independent evidence be produced to establish the factual predicate for the plea." The factual predicate is sufficiently established if "the factual circumstances as revealed by the accused himself objectively support that plea." [*United States v. Davenport*, 9 M.J. 364, 367 \(C.M.A. 1980\)](#).

[*Faircloth*, 45 M.J. at 174](#). "The accused must admit every element of the offense to which the accused is pleading guilty." [*United States v. Aleman*, 62 M.J. 281, 283 \(C.A.A.F. 2006\)](#). "It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." [*Barton*, 60 M.J. at 64](#) (quoting [*United States v. Jordan*, 57 M.J. 236, 238 \(C.A.A.F. 2002\)](#)).

It is worth once again returning to the seminal case in military jurisprudence concerning the requirement for a factual predicate to support the plea.

[T]he record of trial . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military [*32] trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty [citations omitted]. This requirement will not be satisfied by questions such as whether the accused realizes that a guilty plea admits "every element charged and every act or omission alleged and authorizes conviction of the offense without further proof." *Care*, 18 C.M.A. at 541, 40 C.M.R. at 253. "When considering the adequacy of the plea, this Court considers the entire record to determine whether the dictates of [*Article 45, UCMJ*](#) . . . [R.C.M.] 910, and *Care* and its progeny have been met." [*Barton*, 60 M.J. at 64](#) (citation omitted). We "examine the totality of the circumstances of the providence inquiry, including the stipulation of fact, as well as the relationship between the accused's responses to

leading questions and the full range of the accused's responses during the plea inquiry." [*United States v. Nance*, 67 M.J. 362, 366 \(C.A.A.F. 2009\)](#). See also [*United States v. Sweet*, 42 M.J. 183, 185 \(C.A.A.F. 1995\)](#).

With [*33] regard to Specification 1 of the Charge, the question is "whether the record says enough to objectively support an admission to each element of the offense." [*Barton*, 60 M.J. at 65](#). The answer is—partly and barely—"yes." Based on the totality of circumstances in the entire record, including enclosure 1 to the stipulation of fact which includes the ten images already described, we find appellant provident to those ten images. We cannot find him provident to the additional thirty-three images charged in Specification 1. Reviewing all the facts painstakingly set forth in this opinion, we do not know what those other thirty-three charged images depicted, apart from appellant's insufficient description that they involve "*usually sexually-provocative poses or just nudity of prepubescent adolescents.*" Thus we do not possess sufficient factual circumstances upon which to conclude appellant's guilty plea is provident to these thirty-three additional charged images.

We might conclude under other circumstances that the remaining thirty-three images in Specification 1 were similar to the ten we have before us, in other words that those ten images were a "representative sampling" of the forty-three [*34] total images charged in Specification 1. We cannot conclude that in this case, however, for three reasons. First, the record evinces a blatant misunderstanding of what constitutes "child pornography," specifically the requirement of a "lascivious exhibition of the genitals or pubic area," the only potential category of "sexually explicit conduct" we have before us. Second, the admissions of appellant in his *Care* inquiry are completely inadequate. Third, the stipulation of fact weaves charged and uncharged images with inadequate or absent descriptions of images into one incomprehensible morass.

Appellant's repeated agreement and admissions that he possessed "child pornography" do not suffice in this case. Preliminarily, whether an image is "child pornography" is ultimately a legal conclusion, which is not enough. [*United States v. Gosselin*, 62 M.J. 349, 353 \(C.A.A.F. 2006\)](#) ("Conclusions of law alone do not satisfy the requirements of [*Article 45, UCMJ*](#)" or R.C.M. 910(e).); [*Jordan*, 57 M.J. at 238](#) ("It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty."). It is clear to us,

more importantly, that the parties fundamentally misunderstood [*35] what is necessary for an image to qualify as "child pornography," particularly when the images can only fall into the prohibited category of a "lascivious exhibition of the genitals and pubic area of any person." Appellant's admissions that the images are "child pornography," even if adequate in other circumstances,¹² are not sufficient in this case to constitute a factual predicate for Specification 1 of the Charge.

The question with regard to Specification 2 of the Charge is different than that for Specification 1, and appellant's admissions that the images in Specification 2 constitute "child pornography" is particularly troublesome. Here we ask whether the images themselves, attached to the record in enclosure 2 to the stipulation of fact—a part of the totality of circumstances of this plea—present "a substantial basis in law and fact for questioning the guilty plea." See *Inabinette*, 66 M.J. at 322 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The answer is "yes." Two of the three images plainly do not meet the definition [*36] of "sexually explicit conduct" See *Roderick*, 62 M.J. at 430. The genitals or pubic area are not even visible, thus meaning that as a matter of law these images are not "child pornography," and appellant's admissions to the contrary are inconsequential.¹³

In the third image, the pubic area is covered partly with water; the pubic area is not the focal point; but the child is posed in the photo and it does suggest sexual coyness. Where an image is not obviously a "lascivious exhibition of the genitals or pubic area," the military judge could have resolved any inconsistency by obtaining admissions that address the image in the context of the *Dost* factors and other surrounding circumstances. At a minimum, we would expect an admission that the image constitutes a lascivious exhibition of the genitals or pubic area either from appellant, in the stipulation of fact, or preferably both. A description of the image in the plea colloquy and/or the stipulation [*37] of fact would be helpful as well.

There is no discussion of the image, nor is there any apparent understanding among any of the parties at trial (or on appeal, for that matter) that any of the images in Specification 2 of the Charge raises factual or legal issues at all.¹⁴ Perhaps if the parties had attempted at any point to describe how the images in this case actually meet the *elements* of the offense charged, they would have noticed the obvious red flags. Cf. *Villard*, 885 F.2d at 125 ("When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed . . . in a forum where pedophiles might enjoy it.") (citing *Faloon v. Hustler Magazine, Inc.*, 607 F.Supp. 1341, 1354-55 & n. 44 (N.D.Tex.1985)).

While we do "not lose sight that this is a guilty plea," and [*38] therefore "less likely to have developed facts," we also do not lose sight "that in a guilty plea case the *Care* inquiry is a substitute for a contested trial." *Barton*, 60 M.J. at 65. "As a result, [a]ppellant's desire to plead guilty should not obscure the necessity of establishing each element to each offense . . ." *Id.* at 66. We add to our superior court's admonition that the desire to include aggravation evidence in or attached to a stipulation of fact should not obscure its primary purpose: to cover the elements of the offenses and add the factual circumstances surrounding an appellant's commission of the crimes involved in the plea. Once the stipulation accomplishes its basic function, the parties can agree on relevant aggravation and mitigation/extenuation to also include in it. The parties should not address the second purpose (aggravation) before properly accomplishing the first (satisfying the elements and factual predicate for the plea).

Let us be clear: the message of this case is not to add more "stuff" as enclosures to the stipulation of fact. In fact, the images themselves are not necessarily required for us to determine the providence of the plea. See *United States v. Rominger*, ARMY 20080423, 2009 CCA LEXIS 315 (Army Ct. Crim. App. 8 Jun. 2009) [*39] (unpub.). *Care* and forty years of its progeny do not exist so that the parties in the military justice system can base a guilty plea on the government's attaching to the record the evidence it would use to prove the case if

¹² See *Mason*, 60 M.J. at 19-20 (agreement that images depicting "lascivious poses" and "child pornography" sufficient to uphold a guilty plea).

¹³ A cursory reading of the definition of "sexually explicit conduct" in 18 U.S.C. § 2256 should have put all the parties on notice that there was a problem here. It should not be an appellate court that first conducts this simple analysis.

¹⁴ Despite the clear language of 18 U.S.C. § 2256, the C.A.A.F.'s discussion of the *Dost* factors in *Roderick*, and a plethora of federal case law, the government continues to maintain in its brief to the court on the specified issues that these images in Specification 2 of the Charge meet the definition of "sexually explicit conduct" in the federal statute.

it was fully contested, or submitting evidence to demonstrate what it could prove in the absence of a plea. If that were the case, a "stipulation of fact," would be nothing but the enclosures, there would be no requirement that the military judge conduct a *Care* inquiry and personally address and question the accused, and both [Article 45, UCMJ](#) and R.C.M. 910 would be rendered null. In fact, we commend the practice of some military judges who cull the enclosures from the stipulation entirely and allow the government to seek to admit them as separate exhibits. We also commend the practice of military judges who decline to admit improper, irrelevant evidence under the guise of aggravation, regardless of whether it is included in the stipulation of fact as an enclosure or otherwise.

The message of this case, rather, is three-fold: (1) military judges must ensure to engage the accused in a complete *Care* inquiry [*40] that establishes a sufficient legal and factual basis for the offenses to which the accused has entered a guilty plea; (2) where the parties agree to enter into a stipulation of fact, the body of the stipulation of fact should, at a minimum, cover the elements of the offenses and provide the facts surrounding the offenses; and (3) finally, the parties should not confuse what might be termed "child erotica" with "visual depictions of minors engaged in sexually explicit conduct." The latter is "child pornography," the possession of which is a serious criminal offense; the former is not, and therefore cannot form the basis of a charge or conviction for possession of child pornography.

CONCLUSION

The finding of guilty of Specification 2 of the Charge is set aside and that Specification is dismissed. The court affirms only so much of the finding of Specification 1 of the Charge as finds that appellant did, at or near Colorado Springs, Colorado, on or about 20 March 2007, knowingly and wrongfully possess a Hitachi Hard Disk Drive containing ten images of child pornography that had been transported in interstate or foreign commerce, in violation of [18 U.S.C. §2252A](#), including: img.10.jpg, img.3.jpg, [*41] img.19.jpg, img.13.jpg, img.17.jpg, img.4.jpg, img.5.jpg, img.9.jpg, img.34.jpg, and img.35.jpg, which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces.

Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the

principles of [United States v. Sales, 22 M.J. 305 \(C.M.A. 1986\)](#) and [United States v. Moffeit, 63 M.J. 40 \(C.A.A.F. 2006\)](#), to include the factors Judge Baker identified in his concurring opinion, the court affirms only so much of the sentence as includes confinement for twelve months, a dishonorable discharge, and a reprimand. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision, are ordered restored. See [UCMJ arts. 58b\(c\)](#) and [75\(a\)](#).

Chief Judge TOZZI and Judge SIMS concur.

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United States v. Lacefield

United States Army Court of Criminal Appeals

February 19, 2014, Decided

ARMY 20120598

Reporter

2014 CCA LEXIS 84 *; 2014 WL 642950

UNITED STATES, Appellee v. Specialist CURTIS E. LACEFIELD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Lacefield, 2014 CAAF LEXIS 571 \(C.A.A.F., May 19, 2014\)](#)

Prior History: [*1] Headquarters, 1st Cavalry Division. Patricia H. Lewis, Military Judge. Lieutenant Colonel R. Tideman Penland, Jr., Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Imogene M. Jamison, JA; Major Jacob D. Bashore, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Robert A. Rodrigues, JA; Captain Daniel H. Karna, JA (on brief).

Judges: Before COOK, CAMPANELLA, and HAIGHT Appellate Military Judges. Senior Judge COOK and Judge HAIGHT concur.

Opinion by: CAMPANELLA

Opinion

MEMORANDUM OPINION

CAMPANELLA, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of receipt of child pornography and possession of child pornography in violation of [Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934](#) [hereinafter UCMJ].¹ The military judge sentenced appellant to a dishonorable

discharge, confinement for nine years, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for fourteen months confinement, a dishonorable discharge, and reduction to E-1.

This case is before us for review pursuant to *Article 66, UCMJ*. Appellant raises six assignments of error. Four errors warrant discussion and relief. Those errors are: (1) the offenses of receipt and possession of the same child pornography are multiplicitous; (2) these two specifications are an unreasonable multiplication of charges; (3) the government failed to prove appellant's conduct was prejudicial to good order and discipline; and (4) there is a substantial basis in law or fact to question the providence of appellant's plea. The remaining two assignments of error and those matters raised pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#) are without merit. The government concedes the discussed errors. We accept all but one of the government's concessions and provide relief in our decretal paragraph.

BACKGROUND

On or about 25 October 2010, appellant was performing Charge of Quarters (CQ) duty with Private (PV2) BW, another soldier in his unit. While on duty, appellant gave PV2 BW his external computer hard drive so that PV2 BW could watch movies while [*3] appellant left the area to check on his family. Private BW looked through the files on appellant's hard drive and came across a file folder named "My Porn." He opened the file folder and saw a file named "9yosuck." Believing it to be mislabeled, he opened the file and viewed a video of an adult male placing his penis inside the mouth of a female child estimated to be between eight and ten years old. The adult male was simultaneously rubbing the female child's vagina with his hand. In portions of the video, the female's ankles were bound to her thighs and she was blindfolded.

Private BW closed the file and opened another media

¹ A third [Article 134, UCMJ](#), specification, wrongfully and knowingly possessing five [*2] videos of animals engaged in sexual acts with people, was dismissed with prejudice pursuant to the plea agreement.

file named "Mafia Initiation." It also contained child pornography. Other file names alerted PV2 BW that there were more child pornography files in the folder. Private BW closed the pornographic files and watched a movie until appellant returned.

The next day, PV2 BW reported what he saw to his chain of command. A search of appellant's laptop computer and external hard drive revealed the presence of fifteen videos of child pornography. The search also revealed a "text file" containing a list of three video titles of what appeared to be child pornography. This [*4] text file contained no images, only titles.

As a result of this discovery, appellant was charged, *inter alia*, with one specification of possessing fifteen videos of child pornography, and one specification of receiving fifteen videos of child pornography. The specifications read as follows:

SPECIFICATION 1: In that [appellant], U.S. Army, did, between on or about 1 May 2010 and on or about 1 November 2010 at Fort Hood, Texas, a place under exclusive or concurrent federal jurisdiction, wrongfully and knowingly possess at least 15 videos of child pornography on a media storage device and laptop computer in violation of [18 United States Code section 2252A\(a\)\(5\)\(A\)](#) and which conduct, under the circumstances, was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

SPECIFICATION 2: In that [appellant], U.S. Army, did, between on or about 1 May 2010 and on or about 1 November 2010, at Fort Hood, Texas, wrongfully and knowingly receive at least 15 videos of child pornography in violation of [18 United States Code section 2252A\(a\)\(2\)\(B\)](#), which conduct, under the circumstances, was to the prejudice of good order and discipline [*5] in the armed forces and was of a nature to bring discredit upon the armed forces.

Appellant pleaded guilty consistent with a pretrial agreement, and the military judge found him guilty of these specifications. In doing so, the military judge made "special" written findings listing the child pornography videos she found the appellant guilty of "possessing pursuant to The (sic) Specification of The Charge." (emphasis added). She did not, however, make special written findings in reference to appellant *receiving* child pornography in accordance with Specification 2 of The Charge.

LAW AND DISCUSSION

Multiplicity and Unreasonable Multiplication of Charges

Appellant asserts the military judge committed plain error in failing to find Specifications 1 and 2 multiplicitous, both as drafted and as discussed during the providence inquiry. Appellant also asserts the military judge erred in failing to find Specifications 1 and 2 constituted an unreasonable multiplication of charges. Appellant argues the specifications are facially duplicative, that his conviction of both specifications constitutes plain error, and that one specification must be set aside. Based on the facts of this case, the government [*6] concedes Specifications 1 and 2 of The Charge are multiplicitous and requests that this court set aside Specification 2. We agree.

Federal law recognizes that a conviction for both receipt and possession of the same images can violate the Constitution's [Fifth Amendment Double Jeopardy Clause](#). [United States v. Dudeck](#), 657 F.3d 424, 431 (6th Cir. 2011). "If the government wishes to charge a defendant with both receipt and possession . . . based on separate conduct, it must distinctly set forth each medium forming the basis of the separate counts." [United States v. Schales](#), 546 F.3d 965, 980 (9th Cir. 2008).

In this case, the language of the two specifications of possessing and receiving child pornography indicate the offenses arose at the same time, at the same location, and involve the same number of images of child pornography. Nothing in the record sufficiently distinguishes that appellant's possession was not incidental to his receipt of the same fifteen images. While it may have been possible for the government to distinguish the specifications by demonstrating the images were different, acquired on different dates, or stored on different media devices, the government failed to do [*7] so, and the military judge failed to elicit information during the providence inquiry to support any of these propositions. As such, we find Specifications 1 and 2 of The Charge are multiplicitous. Based on the foregoing, we need not reach the issue of unreasonable multiplication of charges. In this case, one specification must be dismissed. See, e.g., [United States v. Marko](#), 60 M.J. 421 (C.A.A.F. 2004). Given the military judge's special findings only covered appellant possessing child pornography and the government's request to dismiss Specification 2, we will dismiss that specification of

receipt of child pornography.

The Conjunctive Terminal Element

Appellant asserts the military judge erred in failing to elicit a factual basis to establish appellant's conduct was both prejudicial to good order and discipline and service discrediting. The government concedes this point. We agree.

At the outset, during the providence inquiry, the military judge listed the [Article 134, UCMJ](#) elements of Specifications 1 and 2 of The Charge in the conjunctive to include both "to the prejudice of good order and discipline in the armed forces" and "of a nature to bring discredit upon the armed forces ." [*8] When she asked appellant to explain how his behavior met both standards, appellant responded "the offense was prejudicial to good order and discipline because it shifted [the] leadership's focus off of mission and made them deal with [my] issues."

Appellant's explanation refers to the command's response to his behavior rather than how the underlying misconduct created a direct effect on good order and discipline. See *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 60.c(2)(a) ("To the prejudice of good order and discipline' refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense"). Neither the stipulation of fact nor the colloquy satisfied the providency requirement for this element. See [United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 \(1969\)](#). We will, therefore, dismiss the language "was to the prejudice of good order and discipline and" from the remaining specification. Nonetheless, the stipulation of fact and the providence inquiry adequately established that the conduct was service discrediting.

Substantial Basis in Law or Fact

Appellant contends there is a substantial basis [*9] in law or fact to question appellant's plea to six of the fifteen child pornography videos, in that the military judge listed two videos in her special findings that do not exist² and listed *four* videos that are copies of portions

of four other child pornography videos to which the appellant pleaded guilty.

The government concedes that *five* of the child pornography videos listed by the military judge in her special findings are shorter versions of five other full-length child pornography videos that appellant possessed. We do not, however, accept the concession that the appellant cannot be found guilty of possessing the shorter "preview" versions of the child pornography.

Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure [*10] that a factual basis for the plea exists. [United States v. Sims, 57 M.J. 419, 421 \(C.A.A.F. 2002\)](#); [United States v. Faircloth, 45 M.J. 172, 174 \(C.A.A.F. 1996\)](#); [United States v. Davenport, 9 M.J. 364, 367 \(C.M.A. 1980\)](#). In short, "the accused must be convinced of, and able to describe all the facts necessary to establish guilt." Rule for Courts-Martial 910(e). In analogous cases, where the appellant, on appeal, attacks the factual basis for the charged elements of the offense, our superior court has declared that:

[I]n the guilty-plea context, the Government does not have to introduce evidence to prove the elements of the charged offense beyond a reasonable doubt; instead, there need only be "factual circumstances" on the record "which 'objectively' support" the guilty pleas

[United States v. James, 55 M.J. 297, 300 \(C.A.A.F. 2001\)](#) (citing [United States v. Shearer, 44 M.J. 330, 334 \(C.A.A.F. 1996\)](#)). "In determining the providence of [an] appellant's pleas, it is uncontroverted that an appellate court must consider the entire record in a case." [United States v. Johnson, 42 M.J. 443, 445 \(C.A.A.F. 1995\)](#). The standard of review is whether the record reveals a "substantial basis in [*11] law or fact" to question the plea. [United States v. Schell, 72 M.J. 339, 345 \(C.A.A.F. 2013\)](#). See also [United States v. Prater, 32 M.J. 433, 436 \(C.M.A. 1991\)](#)

Prosecution Exhibit 2, a single video disc, contains fifteen child pornography video files and one file with no video images, only text. Each of the fifteen child pornography videos has a separate video name and file size. While five of the videos are shorter versions of five

² Appellant asserts in assignment of error V that videos eleven and fifteen "do not exist." No further explanation is provided. Video eleven is a duplicative listing of the same title as video

ten. Two videos with the same name do not appear on the actual video disc. Video fifteen in the military judge's special findings is the video described in the narrative portion of the stipulation of fact, but not listed by number.

other full-length videos on the disc, none are identical to any other.

In her special written findings, the military judge listed fifteen videos that were covered in the stipulation of fact. In her findings, the military judge included a video discovered by PV2 BW and described in the stipulation of fact, but not included on the disc, Prosecution Exhibit 2. The stipulation, however, contains what appears to be a typographical error in that videos ten and eleven are given the same name. This is a single video listed twice—not two copies of the same video appearing separately on the video disc. The military judge repeated this typographical error in her special findings.

Two child pornography files are contained on the video disc but are not listed in [*12] either the stipulation of fact or in the military judge's special findings.

Having examined the providence inquiry in light of [Davenport, 9 M.J. 364](#), and [Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247](#), and after considering all of the evidence admitted at trial and the military judge's special findings, we are convinced that there is no substantial basis in law or fact to question the providence of appellant's guilty plea to possession of fourteen child pornography videos. The fourteen videos include the video discovered by PV2 BW, "9yosuck," and the remaining videos the military judge listed in her special findings, except for the video she listed twice as both video ten and eleven. We only find appellant guilty of possessing this single video once, not twice.

Despite the government's concession, we include in the fourteen videos the five "preview" videos which are shorter versions of the full-length videos contained on the video disc. We do not find the shorter videos to be duplicative of the longer videos. The "preview" versions are not identical to the extended versions—they have distinctly different file names and are different sizes. Furthermore, appellant agreed during the providence [*13] inquiry as well as in the stipulation of fact that he possessed the fourteen videos for which we are ultimately approving findings of guilty.

Two child pornography video files that are contained on the video disc are not listed in either the stipulation of fact or contained in the military judge's special findings. While the government requests this court to include these two videos in our findings, we will not do so because the military judge did not find appellant guilty of possessing these two videos in her special findings.

CONCLUSION

On consideration of the entire record and the assigned errors, the finding of guilty of Specification 2 of The Charge is set aside and that Specification is dismissed. We AFFIRM only so much of Specification 1 of The Charge as finds that the appellant did:

between on or about 1 May 2010, and on or about 1 November 2010, at Fort Hood, Texas, a place under exclusive or concurrent federal jurisdiction, wrongfully and knowingly possess at least 14 videos of child pornography on a media storage device and laptop computer in violation of [18 United States Code section 2252A\(a\)\(5\)\(A\)](#) which conduct, under the circumstances, was of a nature to bring discredit upon [*14] the armed forces.

We AFFIRM the finding of guilty to The Charge.

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 the 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 \(C.M.A. 1986\)](#).

In evaluating the [Winckelmann](#) factors, we first find no dramatic change in the penalty landscape or exposure which might cause us pause in reassessing appellant's sentence. Second, appellant pleaded guilty in a judge-alone court-martial. Third, we find the nature of the remaining offense captures the gravamen of the original specifications, and the circumstances surrounding appellant's conduct remain admissible with respect to the remaining offense, including the aggravating nature of one video depicting underage bondage and the graphic sexual nature of the others. Finally, based on our experience, we are familiar with the remaining offense so that we may reliably determine what sentence would have been imposed at trial.

Reassessing the sentence based [*15] on the noted errors, the amended finding of guilty, and the entire record including those matters presented by appellant pursuant to *Grostefer*, we AFFIRM only so much of the sentence as provides for a dishonorable discharge, confinement for thirteen months, and reduction to the grade of E-1. We find this reassessed sentence is not only purged of any error but is also appropriate. All

rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by this decision, are ordered restored. See [UCMJ arts. 58b\(c\)](#) and [75\(a\)](#).

Senior Judge COOK and Judge HAIGHT concur.

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United States v. Taman

United States Navy-Marine Corps Court of Criminal Appeals

December 11, 2020, Decided

No. 201900175

Reporter

2020 CCA LEXIS 442 *; 2020 WL 7295731

UNITED STATES, Appellee v. Vincent D. TAMAN, Jr.,
Lance Corporal (E-3), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS
BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF
PRACTICE AND PROCEDURE 30.2.

Subsequent History: Review granted by [United States v. Taman, 2021 CAAF LEXIS 115, 2021 WL 880278 \(C.A.A.F., Feb. 9, 2021\)](#)

Motion granted by [United States v. Taman, 2021 CAAF LEXIS 144, 2021 WL 906128 \(C.A.A.F., Feb. 16, 2021\)](#)

Motion granted by [United States v. Taman, 2021 CAAF LEXIS 356 \(C.A.A.F., Apr. 21, 2021\)](#)

Review denied by [United States v. Taman, 2021 CAAF LEXIS 405 \(C.A.A.F., Apr. 27, 2021\)](#)

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Mark D. Sameit. Sentence adjudged 1 February 2019 by a general court-martial convened at Marine Corps Base Camp Foster, Okinawa, Japan, consisting of officer and enlisted members. Sentence approved by the convening authority: confinement for six months and a bad-conduct discharge. [*1]¹

Counsel: For Appellant: Major Mary Claire Finnen, USMC, Lieutenant Commander Kevin R. Larson, JAGC, USN², Lieutenant Commander Hannah F. Eaves, JAGC, USN³.

For Appellee: Lieutenant Joshua C. Fiveson, JAGC,

¹ The convening authority disapproved the reprimand adjudged by the members.

² The Court granted Lieutenant Commander Larson leave to withdraw as appellate defense counsel on 6 August 2020.

³ The Court granted Lieutenant Commander Eaves leave to withdraw as appellate defense counsel on 7 October 2020.

USN, Major Kerry E. Friedewald, USMC.

Judges: Before CRISFIELD, HOLIFIELD, and LAWRENCE, Appellate Military Judges. Judge LAWRENCE delivered the opinion of the Court, in which Chief Judge Emeritus CRISFIELD and Senior Judge HOLIFIELD joined. Chief Judge Emeritus CRISFIELD and Senior Judge HOLIFIELD concur.

Opinion by: LAWRENCE

Opinion

LAWRENCE, Judge:

Appellant was convicted, contrary to his pleas, of one charge of knowingly and wrongfully receiving and viewing child pornography and another charge of soliciting and advising the production of child pornography, both in violation of [Article 134, Uniform Code of Military Justice \[UCMJ\]](#).⁴ In his sole assignment of error [AOE], [*2] Appellant avers that this Court should use its *Article 66(c)* authority to disapprove as unjust his convictions for solicitation, receiving, and viewing child pornography of Ms. Wilson,⁵ a sixteen-year-old girl, when he could have lawfully engaged in a physical sexual relationship with the same individual, raising for the first time on appeal that his constitutional rights to free speech and privacy were violated. We find no prejudicial error and affirm.

I. BACKGROUND

Appellant met Ms. Wilson when he was a high school senior platoon commander in Junior Reserve Officers' Training Corps [JROTC] and she was a freshman in his

⁴ [10 U.S.C. § 934](#).

⁵ All names in this opinion, other than those of the judges and counsel, are pseudonyms.

platoon. This shared involvement in JROTC was the extent of their in-person or online contact until two years later when he initiated contact with then-sixteen-year-old Ms. Wilson by way of a social media platform. All the offenses in question took place while Appellant was a twenty-year-old active duty Marine stationed in Okinawa, Japan.

Initially, their conversations were innocuous, but they soon turned sexual in nature. Appellant sought to explore more than mere conversation with Ms. Wilson. She testified that she resisted several of Appellant's requests for her to [*3] provide nude pictures of herself to him, but she eventually relented, supplying him a picture of her naked buttocks on another online platform thinking it would be "one and done."⁶ Because of Appellant's continuing popularity in her high school, Ms. Wilson felt she was the beneficiary of more attention and popularity due to her online relationship with Appellant being known to others. While she did not want to take and send nude pictures, she knew she risked her elevated social status amongst her high school classmates if she did not capitulate.

Appellant persisted in requesting nude pictures of sixteen-year-old Ms. Wilson. He asked for pictures of her exposed breasts. She refused, but eventually relented. Then he sought pictures of her exposed vagina. She again refused, but succumbed to his requests and sent him ten to fifteen pictures that met his request. He then requested photographs of her digitally penetrating her vagina. She provided those as well.

While the platform on which she had been sending Appellant the nude photographs quickly deletes images once viewed, Appellant asked Ms. Wilson if upon receipt he could take a screenshot to preserve these nude images of her vagina. She [*4] gave him permission, reasoning that in doing so she "hop[ed] that if he had them on his phone he would stop asking [her] for more."⁷ Due to a notification that returned to the other party, she knew that he had performed a screenshot of the nude pictures she had sent.

Next, Appellant asked that she engage in mutual masturbation with him by means of an online video telephone application. She reluctantly agreed and they did this on approximately thirty occasions. Despite being a high school student, and to accommodate his Marine

Corps working schedule in Japan, Ms. Wilson would stay up into the wee hours of the morning at her family home in the continental United States to send these online nude and explicit live-streamed videos. Appellant managed the entire production of having video sex with Ms. Wilson—from instructing her on how to masturbate to light management and camera placement in order for him "to get a better look"⁸ in viewing her naked body and sexual acts.

Ultimately, this was uncovered when Ms. Wilson's parents returned home late one night and her father, a Service Member, noticed a light from underneath her bedroom door. With her door locked—a violation of family rules—and her [*5] delay in opening the door while she got dressed from what was an in-progress explicit video call to Appellant of herself masturbating, her father demanded her cell phones. As the result of seeing their earlier social media messages of a sexual nature, Appellant's demand for nude pictures of his daughter, and a photograph of her scantily-clad buttocks and another of her naked with bare breasts, Mr. Wilson notified his command who put him in touch with military and then local civilian law enforcement.

II. DISCUSSION

A. Standard of Review

Appellant challenges his conviction as unjust, invoking this Court's statutory charge under *Article 66(c)*, *UCMJ*, that we must "affirm only such findings of guilty . . . as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." We review de novo statutory interpretations as questions of law.⁹

At the root of Appellant's claim is his assertion that *Article 134, UCMJ*, is unconstitutional as applied to the facts of his case, a matter we consider de novo through conducting a fact-specific inquiry.¹⁰ However, as neither of Appellant's as-applied constitutional challenges were

⁸ *Id.* at 405.

⁹ See *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010).

¹⁰ See *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (citing *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012)).

⁶ R. at 392-94.

⁷ *Id.* at 400.

raised during the course of his [*6] trial, we review for plain error, granting relief "only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of [an] accused."¹¹ The Court of Appeals for the Armed Forces [CAAF] has determined that [Article 134, UCMJ](#), is a facially constitutional criminal statute and, as such, to succeed in his as-applied claim, "Appellant must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's determinations that his conduct be proscribed."¹² We will first focus on each of his underlying constitutional claims.

B. Appellant's Solicitation and Advice to Produce Child Pornography and Receipt and Viewing of Child Pornography is not Protected by the [First Amendment](#)

Appellant avers that he was in a "long-distance relationship" with Ms. Wilson and the only means by which they could engage in consensual sexual acts as part of their relationship was over the internet.¹³ At issue is whether Appellant's repeated solicitation and advice to Ms. Wilson, a sixteen-year-old "minor"¹⁴ for purposes of [Article 134, UCMJ](#), our child pornography statute, seeking her production of still and video [*7] images of herself engaged in sexually explicit conduct and his receipt and viewing of those same images are constitutionally protected.

Appellant readily admits that "no court has expressly held that child pornography laws, used to prosecute people in a consensual relationship, violate the Constitution."¹⁵ This Court will not be the first. We uniformly reject Appellant's claims that the Constitution affords protection to one in Appellant's situation engaged in the production, receipt, and viewing of child pornography.

In *New York v. Ferber*,¹⁶ the United States Supreme Court considered a state statute criminalizing the pornographic display of children. The New York Court of Appeals had held the statute violated the [First Amendment](#). In the "first examination of a statute directed at and limited to depictions of sexual activity involving children,"¹⁷ the Court contrasted unprotected obscenity from protected expression: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."¹⁸ Not only was it "implicit in the history of the [First Amendment](#)" that obscenity was "utterly without [*8] redeeming social importance," but legislation from the States and Congress, and even international agreements all provided examples of its legal proscription.¹⁹

While the New York Court of Appeals applied the obscenity standard from *Miller v. California*²⁰ to delineate between protected and unprotected expression, the Supreme Court found its previous caution of the "inherent dangers of undertaking to regulate any form of expression"²¹ did not apply in the same way to *child* pornography, itself an area where the government was "entitled to greater leeway in the regulation of pornographic depictions of children."²² Specifically, the *Ferber* Court found "compelling" the government's interest in "safeguarding the physical and psychological well-being of a minor,"²³ "even when the laws have operated in the sensitive area of

¹¹ [United States v. Sweeney, 70 M.J. 296, 304 \(C.A.A.F. 2011\)](#) (citation omitted).

¹² [Goings, 72 M.J. at 205](#) (citations omitted).

¹³ Appellant's Brief at 2.

¹⁴ *Manual for Courts-Martial, United States* (2016 ed.), pt. IV, ¶ 68b.c.(4) ("Minor" means any person under the age of 18 years. ").

¹⁵ Appellant's Brief at 6.

¹⁶ [458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 \(1982\)](#).

¹⁷ [Id. at 753](#).

¹⁸ [Id. at 754](#) (quoting [Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 \(1942\)](#)) (internal quotation marks omitted).

¹⁹ [Id.](#) (citing [Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 \(1957\)](#)) (internal quotation marks omitted).

²⁰ [413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 \(1973\)](#).

²¹ [Ferber, 458 U.S. at 755](#) (quoting [Miller, 413 U.S. at 23](#)).

²² [Id. at 756](#).

²³ [Id. at 756-57](#) (quoting [Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607, 102 S. Ct. 2613, 73 L. Ed. 2d 248 \(1982\)](#)) (internal quotation marks omitted).

constitutionally protected rights."²⁴ "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."²⁵ Moreover, the Court noted that both legislatures and professional literature found that the "use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." [*9]²⁶

Although *Ferber* involved distribution that may have exacerbated the harm, the Court—even in that pre-digital era of film photography and well before internet file sharing and preservation—noted the *production* of visual materials formed a permanent record of the child involved in sex acts such that they "may haunt [the child] in future years, long after the original misdeed took place."²⁷ In fact, the Court emphasized the legislature's interest in devising laws with real vigor concerning not only the distribution of child pornography, but against those who produced the photographs and videos as these persons were already difficult to flush out. The Court concluded the *Miller* obscenity standard was insufficient to address the scourge of child pornography as it "does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."²⁸

The Court found child pornography to be "without the protection of the [First Amendment](#)."²⁹ Nonetheless, that still required the proscribed conduct to be sufficiently defined in the law. Specifically, the Court found that the

"nature of the harm to be combated requires that the state offense be limited to works [*10] that *visually* depict sexual conduct by children below a specified age."³⁰

While the Court had previously overturned a law criminalizing private possession of (adult) obscene material in *Stanley v. Georgia*,³¹ it upheld Ohio's child pornography statute in *Osborne v. Ohio*.³² The Court reiterated that its holding in *Stanley* was narrow, distinguishing it from *Osborne* where the interest of the state was far more specific: "to protect the victims of *child* pornography . . . [with] hopes to destroy a market for the exploitative use of *children*."³³

The Court agreed that the legislature had a vitally important interest in protecting child pornography subjects from suffering physiological, emotional, and mental health harm. Therefore, it was "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."³⁴ The Court found this similar to the persuasive argument in *Ferber* where

[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "It [*11] rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."³⁵

²⁴ *Id.* at 757 (citing [Prince v. Massachusetts](#), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (upholding a law not allowing a child to distribute literature on the street); [Ginsberg v. New York](#), 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (upholding law "protecting children from exposure to nonobscene literature."); [FCC v. Pacifica Foundation](#), 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) ("the Government's interest in the 'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children.")).

²⁵ *Id.* at 757.

²⁶ *Id.* at 758.

²⁷ *Id.* at 759 n. 10 (internal citation omitted).

²⁸ *Id.* at 761.

²⁹ *Id.* at 764.

³⁰ *Id.* (emphasis in original). Here the Court noted that states and the federal government then defined a "child" for child pornography purposes as one being under eighteen, seventeen, or sixteen years of age to even those who *appeared* under a specified age or who appeared as a prepubescent. See *id.* at n.17.

³¹ [394 U.S. 557](#), 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

³² [495 U.S. 103](#), 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). Despite the constitutionality of the statute, the Court reversed Osborne's conviction as the state failed to prove the lewdness element.

³³ *Id.* at 109 (emphasis added).

³⁴ *Id.* at 109-10.

³⁵ *Id.* at 110 (citing [Ferber](#), 458 U.S. at 761-62) (quoting

It also recognized that there were other factors in support of this statute:

First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.³⁶

The Court clearly recognized, as do we, that the harm imposed upon a child (or to other children) by being the subject of child pornography does not immediately vanish upon the passage of months or years to a time when that child is no longer a child.

Nor does lawful consent to sexual acts immunize an adult from criminal liability for his separate act of documenting the sex and thereby creating child [*12] pornography. In *United States v. Bach*,³⁷ the appellant argued, unsuccessfully, before the Eighth Circuit Court of Appeals that photos he took of a sixteen-year-old boy masturbating and performing oral sex on him were not criminal because the boy met the legal age of consent concerning the sexual acts. Notably, the court detailed that while the state statute defined the age of consent to sexual activity as sixteen, the federal child pornography statute³⁸ defined a minor as one under eighteen years of age. In fact, in 1984 Congress changed from sixteen to eighteen the defined age of a minor, expressly to avoid confusion regarding when a particular child appeared to have entered puberty and to better enforce the child pornography law.³⁹

Appellant argues that the landscape of free speech protections—and by extension his claims concerning

child pornography—was "fundamentally changed"⁴⁰ by the Supreme Court's decision in *United States v. Stevens*.⁴¹ In *Stevens*, the Court found the [First Amendment](#) free speech guarantees were violated by the federal statute that criminalized not the direct cruelty to animals, but the making, possessing, or sale of depictions of those despicable acts through "crush videos." "The [*13] [First Amendment](#) provides that 'Congress shall make no law . . . abridging the freedom of speech.' As a general matter, the [First Amendment](#) means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁴² But the Court recognized some distinct exceptions.

From 1791 to the present, however, the [First Amendment](#) has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to the bar—including obscenity . . . and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.⁴³

The Court noted that its earlier decision in *Ferber* made clear there were "historically unprotected categories of speech" in which "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because "the balance of competing interests is clearly struck."⁴⁴

But the Court emphasized that there was much more at stake in child pornography [*14] matters: "[t]he market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal

[Giboney v. Empire Storage & Ice. Co.](#), 336 U.S. 490, 498, 69 S. Ct. 684, 93 L. Ed. 834 (1949)).

³⁶ [Id. at 111](#) (internal citation omitted).

³⁷ [400 F.3d 622 \(8th Cir. 2005\)](#).

³⁸ [18 U.S.C. § 2256](#).

³⁹ See [Bach](#), 400 F.3d at 629 (citing H.R. Rep. No. 98-536, at 7-8 (1983), reprinted in 1994 U.S.C.C.A.N. 492, 498-99).

⁴⁰ Appellant's Brief at 14.

⁴¹ [559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 \(2010\)](#).

⁴² [Id. at 468](#) (quoting [Ashcroft v. American Civil Liberties Union](#), 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)) (internal quotation marks omitted).

⁴³ [Id. at 468-69](#) (internal citations and quotation marks omitted).

⁴⁴ [Id. at 470](#) (quoting [Ferber](#), 458 U.S. at 763-64).

throughout the Nation."⁴⁵ The Court reinforced that "*Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding."⁴⁶

Far from the "fundamental change" claimed by Appellant, *Stevens* and *Brown v. Entm't Merchs. Ass'n*,⁴⁷ decided in its next term, show a consistent approach to *First Amendment* and content restriction analysis. In *Brown*, the Court considered a *First Amendment* challenge to a California law prohibiting sales or rentals of "violent" video games to minors and special packaging to reinforce this requirement. The Court reiterated that the *general* rule was that legislatures could not "restrict expression because of its message, its ideas, its subject matter, or its content."⁴⁸ But, citing *Stevens*, it reminded that from the ratification of the *First Amendment*, content of speech has permissibly been restricted "in a few limited areas, and has never included a freedom to disregard these traditional limitations."⁴⁹ Specifically, "[t]hese [*15] limited areas . . . represent 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'"⁵⁰

The legislation failed in both *Brown* and *Stevens* because it impermissibly imposed content-based

restrictions on speech without establishing that these restrictions targeted a "well-defined and narrowly limited class[] of speech" that had been historically proscribed. The *Brown* Court noted that in *Stevens*, there was a long history against the commission of animal cruelty, but none criminalizing its visual representation and sale. So, too, in *Brown* where the Court posited that there was no long national history proscribing representations of violent behavior to minors. "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment of the American people, embodied in the *First Amendment*, that the benefits of its restrictions on the Government outweigh the costs."⁵¹

Dissenting in *Brown*, Justice Breyer believed the statute provided only a limited rather than a categorical restriction on speech and should [*16] be upheld:

No one here argues that depictions of violence, even extreme violence, *automatically* fall outside the *First Amendment's* protective scope as, for example, do obscenity and depictions of child pornography. We properly speak of *categories* of expression that lack protection when, like "child pornography," the category is broad, when it applies automatically, and when the State can prohibit everyone, including adults, from obtaining access to the material within it.⁵²

Regarding Appellant's lament that he and Ms. Wilson were merely "show[ing] each other mutual affection in one of the few ways they could"⁵³ and reiterating that "he never shared or gave the photos to anyone,"⁵⁴ we find persuasive *United States v. Hotaling*,⁵⁵ in which the Second Circuit Court of Appeals rejected the appellant's assertion that he created and maintained possession of child pornography solely to further his own sexual fantasies without display to others or distribution of the images. The court emphasized that "[t]hese are not

⁴⁵ *Id.* at 471 (quoting *Ferber*, 458 U.S. at 759) (internal quotation marks omitted).

⁴⁶ *Id.* (citing *Osborne*, 495 U.S. at 110 (noting *Ferber's* "persuasive" argument concerning the "integral part" that the advertising and sale of child pornography played in its unlawful production); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-50, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (distribution and sale "were intrinsically related to the sexual abuse of children," the speech therefore possessing "a proximate link to the crime from which it came") (internal quotation marks omitted)).

⁴⁷ 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

⁴⁸ *Id.* at 790-91 (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. at 573) (internal quotation marks omitted).

⁴⁹ *Id.* at 791 (quoting *Stevens*, 559 U.S. at 468) (internal quotation marks omitted).

⁵⁰ *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)).

⁵¹ *Id.* at 792 (quoting *Stevens*, 559 U.S. at 470) (internal quotation marks omitted).

⁵² *Id.* at 842 (Breyer, J., dissenting) (emphasis in original).

⁵³ Appellant's Brief at 10.

⁵⁴ *Id.* at 11. See also Appellant's admission that he "never shared the videos with his friends, nor did he distribute or post them online so others could see." *Id.* at 12.

⁵⁵ 634 F.3d 725 (2d Cir. 2011).

mere records of the defendant's fantasies, but child pornography that implicates actual minors and is primed for entry into the distribution chain."⁵⁶ Not only had the Supreme Court recognized in *Osborne* that [*17] an underground network had been created, but Congress in the PROTECT Act of 2003⁵⁷ found that greater protections were necessary given that the computer age had spawned new clandestine means to maintain and circulate child pornography between individual traffickers.⁵⁸

In *Doe v. Boland*,⁵⁹ the appellant—for his expert testimony as an attorney in child pornography cases—morphed pictures of actual children's faces onto the bodies of adults performing sexual acts. The Sixth Circuit Court of Appeals found that "the [First Amendment](#) offers no sanctuary" from certain forms of speech, to include child pornography.⁶⁰ The court rejected the appellant's theory that the harm in child pornography was reliant on distribution to others that was done when that child was still a minor and then only if the depicted child actually suffered psychological harm, reiterating that "[i]n today's digital world, any image is primed for entry into the distribution chain of underground child pornographers."⁶¹ Ultimately, the

court found that, even absent any display or transmission beyond the courtroom, Boland's "creation and initial publication of the images itself harmed Jane Doe and Jane Roe, and that is enough to remove [*18] Boland's actions from the protections of the [First Amendment](#)."⁶²

In *United States v. Laursen*,⁶³ the Ninth Circuit Court of Appeals affirmed the appellant's conviction on production and possession of child pornography under federal law despite the state law allowing for consensual sexual relations between the appellant and a sixteen-year-old girl. Similar to Ms. Wilson's testimony in this case,⁶⁴ the girl in *Laursen* testified that she took the "selfie" photographs with her own cell phone even though she "did not like taking pictures like that," but did so at the behest of the appellant.⁶⁵ As the court stated, "the prohibited conduct engaged in by Laursen was producing pornographic material involving [the girl], not simply engaging in a sexual relationship with her. And the Supreme Court has made it crystal clear that child pornography is not constitutionally protected."⁶⁶ Further, it is clear that "protecting children from sexual abuse and exploitation constitutes a particularly compelling interest of the government."⁶⁷

In *United States v. Rouse*,⁶⁸ the appellant was convicted under the federal child pornography statute when he recorded his sexual exploits with his sixteen-year-old partner on his cell phone [*19] and sent this video to her, and she responded to him with sexually explicit photographs she had taken of herself. Under his mistaken view of *Stevens*, Rouse asserted that absent a *separate* and *unlawful* sexual act with one under the age of consent, his sexual intercourse with a legally-consenting sixteen-year-old girl could not constitute abuse. The Eighth Circuit Court of Appeals rejected his argument, reiterating *Ferber's* conclusion that child

⁵⁶ [Id. at 730](#) (citing [Osborne](#), 495 U.S. at 110).

⁵⁷ Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003.

⁵⁸ [Hoteling](#), 634 F.3d at 730 (citing the PROTECT Act of 2003, Congressional Findings, Pub. L. No. 108-21, 117 Stat. 650). See also [United States v. Williams](#), 553 U.S. 285, 307, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet." Although the Court previously held the preceding statute to be unconstitutionally overbroad concerning the possession and distribution of material pandered as child pornography, without regard to whether it was in fact child pornography, "Congress responded with a carefully crafted attempt to eliminate the [First Amendment](#) problems we identified.")

⁵⁹ [698 F.3d 877 \(6th Cir. 2012\)](#).

⁶⁰ [Id. at 883](#) (citing [Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435; [Ferber](#), 458 U.S. at 763-64).

⁶¹ [Id. at 884](#) (quoting [Hoteling](#), 634 F.3d at 730) (citing [Osborne v. Ohio](#), 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)) (internal quotation marks omitted).

⁶² *Id.*

⁶³ [847 F.3d 1026 \(9th Cir. 2017\)](#).

⁶⁴ See R. at 392-96, 400, 402-03.

⁶⁵ [Laursen](#), 847 F.3d at 1030 (internal quotation marks omitted).

⁶⁶ [Id. at 1034](#) (citing [Ferber](#), 458 U.S. at 763).

⁶⁷ *Id.*

⁶⁸ [936 F.3d 849 \(8th Cir. 2019\)](#).

pornography is "without the protection of the [First Amendment](#)."⁶⁹

In *State v. Barr*,⁷⁰ the New Hampshire Supreme Court rejected a claim of protected freedom of speech raised by the appellant who legally engaged in a consensual sexual relationship with a sixteen-year-old girl, but was convicted of manufacturing and possessing images of child sexual abuse with that same girl. "Stevens did not disturb the Supreme Court's previous holdings that producing and possessing images of an actual child engaged in sexual activity are unprotected by the [First Amendment](#), regardless of whether the underlying sexual activity was legal."⁷¹ The court recognized that "[t]he criminal conduct underlying child pornography [was] not statutory rape, but recording a child engaged in sexual conduct."⁷² "Consenting [*20] to sexual intercourse and consenting to having that act memorialized, potentially forever, are decisions of different degrees, with corresponding consequences of different magnitudes." ⁷³

Appellant argues by way of law review articles that "sexting" is merely commonplace youthful expression between those *under eighteen* that should not be criminalized and that his and Ms. Wilson's preexisting platonic relationship within a high school JROTC program blossomed into a long-distance relationship in which their options to "show[] each other mutual affection" narrowed to this video and photographic medium.⁷⁴ We easily reject the first as it merely advocates for future legislation in the face of statutes in place that have passed constitutional muster. We also note that, unlike those sixteen and seventeen years of age, Appellant was a twenty-year-old adult throughout the entirety of his offenses and a United States Marine

subject to the UCMJ.⁷⁵ As to his second argument, we need not opine on the development of any relationship they shared. Appellant knew Ms. Wilson was a sixteen-year-old high school student living with her parents. Ms. Wilson testified and other evidence showed that Appellant [*21] persistently overcame her protestations, instructed her on lighting and camera position, and taught her how to masturbate and provide him with video and still images of her engaging in sexually explicit conduct that he received and viewed.

Under the UCMJ, Appellant could indeed legally have had sex with a consenting sixteen-year-old. However, his *separate acts* as an adult to solicit and advise in the production of and to receive and view images of sexually explicit conduct from this or any other sixteen-year-old minor constitute a criminal offense whether he was stationed in Japan, or even if he was recording the minor while directly engaged in sexual acts with her. His claims of a dating relationship and limitations on their means to share their affection outside of this video and photographic medium do not alter the criminality of his actions. In no way were his actions protected as speech or expression by the [First Amendment](#); rather, they were proscribed under [Article 134, UCMJ](#), as child pornography.

C. The [5th Amendment](#) Likewise Affords Appellant's Actions no Protection

Appellant additionally argues he enjoyed a right to privacy in the images of Ms. Wilson.⁷⁶ He points to the Supreme Court's groundbreaking [*22] ruling in *Lawrence v. Texas* ⁷⁷ where it found a Texas statute criminalizing same-sex intimate sexual conduct to be in violation of the [Due Process Clause](#). There, the Court considered the police response to a report of a weapons disturbance. That prompted police to enter Lawrence's apartment, finding him engaged in anal sex—what the Texas statute considered "deviate sexual intercourse,"

⁶⁹ *Id.* at 851 (quoting *Ferber*, 458 U.S. at 764) (internal quotation marks omitted).

⁷⁰ 172 N.H. 681, 233 A.3d 341 (N.H. 2019).

⁷¹ *Id.* at 349 (citing *Osborne*, 495 U.S. at 111; *Ferber*, 458 U.S. at 765; *Rouse*, 936 F.3d at 852).

⁷² *Id.* at 350 (citing *Stevens*, 559 U.S. at 471).

⁷³ *Id.* (citing *United States v. Fletcher*, 634 F.3d 395, 403 (7th Cir. 2011)).

⁷⁴ Appellant's Brief at 10.

⁷⁵ See *United States v. Shea*, No. ACM 39158, 2018 CCA LEXIS 160, *9 (A.F. Ct. Crim. App. Mar. 26, 2018) (unpublished) ("On appeal, Appellant [a twenty-and twenty-one-year-old E-3 at the time of his offenses] refers to commentaries on the prevalence of 'sexting' among teenagers; however, Appellant was not a fellow teenager or high school student.").

⁷⁶ See Appellant's Brief at 11.

⁷⁷ 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

even when conducted in private with a consensual, same-sex partner.

The Court sought to determine "whether the petitioners were free as *adults* to engage in the private conduct in the exercise of their liberty."⁷⁸ Concluding that the law proscribing consensual sodomy was violative of the liberty interest of Lawrence and his partner "to engage in their conduct without intervention of the government," the Court made clear that:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with [*23] full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.⁷⁹

Ultimately, the Court found the statute unconstitutional as it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁸⁰

In light of *Lawrence*, in *United States v. Marcum*,⁸¹ the CAAF was asked to consider the constitutionality of [Article 125, UCMJ](#),⁸² at that time the enumerated offense of sodomy. The CAAF noted that [Article 125](#) forbade all forms of sodomy, regardless of consent, and without regard to the location or gender of the participants. As Marcum, an E-6, was acquitted by a panel of members of *forcible* sodomy, he argued that his conviction of *consensual* sodomy with an adult, an E-4 whom he supervised and rated, violated the very liberty interest announced in *Lawrence*.

The CAAF found that "*Lawrence* requires [a] searching constitutional inquiry" that "argues for contextual, as applied analysis, rather than facial review . . . [that] is

particularly apparent in the military context."⁸³ Service Members, the CAAF reiterated, "do not leave constitutional safeguards and judicial protection behind when they enter [*24] military service."⁸⁴ Yet, by virtue of the military being a "specialized society,"⁸⁵ we must also "specifically address[] contextual factors involving military life."⁸⁶ In addressing an as-applied constitutional challenge, the CAAF crafted a three-part analysis:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?⁸⁷

Much like the CAAF, even if we assumed without deciding that the first prong was satisfied, Appellant's claim unravels on the second prong. We quickly encounter the same distinctions posed in [Lawrence](#) and reiterated in [Marcum](#)—"did the conduct involve minors? Did it involve public conduct or prostitution? Did it involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused?"⁸⁸ While the CAAF interpreted the latter disqualifying question to [*25] apply to Marcum as the supervising noncommissioned officer, here we have Ms. Wilson who—by definition of the statute—was a minor.⁸⁹ Her maturity, the quality of their relationship,

⁸³ [Marcum](#), 60 M.J. at 205.

⁸⁴ *Id.*, citing [United States v. Mitchell](#), 39 M.J. 131, 135 (C.M.A. 1994) (quoting [Weiss v. United States](#), 510 U.S. 163, 194, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) (Ginsburg, J., concurring)).

⁸⁵ *Id.* (citation omitted).

⁸⁶ *Id.* (citation omitted).

⁸⁷ [Id.](#) at 206-07.

⁸⁸ [Id.](#) at 207.

⁸⁹ See [Goings](#), 72 M.J. at 207 (citing [Lawrence](#), 539 U.S. at 578) ("*Lawrence* did not establish a presumptive constitutional protection for all offenses arising in the context of sexual activity"—in particular, pointing out that minors and those coerced were not part of their consideration in that case.); [United States v. Meakin](#), 78 M.J. 396, 403 (C.A.A.F. 2019) (quoting [Seegmiller v. LaVerkin City](#), 528 F.3d 762, 771 (10th

⁷⁸ [Id.](#) at 564 (emphasis added).

⁷⁹ [Id.](#) at 578.

⁸⁰ *Id.*

⁸¹ 60 M.J. 198 (C.A.A.F. 2004).

⁸² 10 U.S.C. § 925 (2000).

geographical hardship, or ability to separately consent to sexual acts is immaterial to the crimes for which Appellant was charged and convicted.

Several Federal, State, and Service courts of criminal appeal have rejected assertions that *Lawrence* extends privacy protection to criminal images of minors that arose from consensual sex acts.⁹⁰ We find those holdings persuasive. The same applies in our present case. An adult United States Marine, Appellant reached back from Japan via the relative stealth of the internet to a girl from his former high school with whom he had last interacted when he was a senior and she was a freshman in high school. Even were we to assume they were indeed a couple and mutually consenting to a sexual relationship, Ms. Wilson's age made her a minor with regard to the [Article 134, UCMJ](#), punitive article for child pornography. Separate from any sexual relationship itself, Appellant's actions to solicit and advise the production of child pornography and to receive and [*26] view the same were proscribed by statute and not subject to protection under *Lawrence*.

D. Article 66(c), UCMJ

Following our complete review, we find that Congress made clear both in Title 18 and in the UCMJ that it had no tolerance for the criminal exploitation of children in pornography. The courts have rejected similar

[Cir. 2008](#)) ("*Lawrence* did not purport to include any and all behavior touching on sex within its purview, and did not 'conclude that an even more general right to engage in private sexual conduct would be a fundamental right.'").

⁹⁰ See [Bach, 400 F.3d at 629](#) (The Eighth Circuit Court of Appeals rejected the appellant's liberty and privacy arguments, noting that *Lawrence* made clear that its protections were limited to consenting *adults* conducting their activities in private whereas Bach had consensual sex with a minor and the pictures he possessed and transmitted were of that minor who only relented to pose nude after refusing many of Bach's earlier requests.); [Ortiz-Graulau v. United States, 756 F.3d 12 \(1st Cir. 2014\)](#) (Rejecting the appellant's *Fifth Amendment* claim that he was immune from criminal sanction under the child pornography statute when the photographs merely documented the couple's consensual sexual relationship.); [State v. Senters, 270 Neb. 19, 699 N.W.2d 810, 816 \(Neb. 2005\)](#) ("When a law regulates sexual conduct involving a minor, *Lawrence* is inapplicable."); [Shea, 2018 CCA LEXIS 160 at *5](#) ("The right of competent, consenting adults to engage in private sexual activity recognized in *Lawrence* does not extend to protect Appellant's possession of images of 16- or 17-year-old minors engaged in sexually explicit conduct.").

arguments of adults who did or could have engaged in a physical relationship, but were held criminally liable for their acts involved with producing or receiving and viewing child pornography.

We too explicitly reject Appellant's invitation to disregard an abundantly clear law and the intent of its drafters, or to find his convictions were not just. Indeed, we side with the numerous courts which have found on similar facts that satisfaction of the age of consent for a *physical* sexual relationship does not bar the government from properly legislating against the evils of pornography, defining the victim as one below the age of majority.

The intent of Congress and the President in criminalizing pornography involving a child under the age of eighteen years is clearly expressed in [Article 134, UCMJ](#). Appellant has failed to elicit any facts [*27] that show why he, an adult Marine, should not be held criminally liable for his actions concerning sixteen-year-old Ms. Wilson.⁹¹

Appellant's argument, then, takes the form of an equitable plea or prayer for clemency that is beyond the purview of this Court.⁹²

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings and the sentence are correct in law and fact and that there is no error materially prejudicial to Appellant's substantial rights.⁹³ Accordingly, the findings and the sentence as approved by the convening authority are **AFFIRMED**.

Chief Judge Emeritus CRISFIELD and Senior Judge HOLIFIELD concur.

⁹¹ See [Goings, 72 M.J. at 205](#) (citations omitted).

⁹² See [Nerad, 69 M.J. at 140 \(C.A.A.F. 2010\)](#) (quoting [United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497, 121 S. Ct. 1711, 149 L. Ed. 2d 722 \(2001\)](#)) ("[W]hile **Article 66(c), UCMJ**, affords a [Service Criminal Court of Appeal, or CCA] broad powers, when faced with a constitutional statute a CCA 'cannot, for example, override Congress' policy decision, articulated in a statute, as to what behavior should be prohibited.'").

⁹³ UCMJ arts. 59, 66.

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