UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER W. MORRIS
United States Air Force

ACM 35192

5 February 2004

Sentence adjudged 12 April 2002 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Thomas W. Pittman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Karen L. Hecker, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel William B. Smith.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of possessing child pornography in a building leased to the United States contrary to 18 U.S.C. § 2252A(a)(5)(A), in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved was a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

The case is now before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant argues that his conviction is "void" because a portion of the federal statute defining child pornography is unconstitutional. He also contends the staff judge

advocate (SJA) committed plain error in advising the convening authority during the post-trial review of the findings and sentence. We find no error that materially prejudices the appellant's substantial rights and affirm.

I. Providence of the Plea

The appellant and his family resided in government housing on a military installation overseas. The appellant's wife informed the Air Force Office of Special Investigations (AFOSI) that she saw material on their home computer indicating the appellant visited Internet sites featuring child pornography. She consented to a search of their home computer and the accompanying storage media. The AFOSI examined the computer equipment; on one compact disc they found 102 pornographic images, including 25 images the investigators thought to be child pornography.

The appellant was charged with "knowingly possessing visual depictions of a minor engaging in sexually explicit conduct" in a building leased to the United States on divers occasions between about 1 December 1999 and 3 May 2001 contrary to 18 U.S.C. § 2252A(a)(5)(A), in violation of Article 134, UCMJ. On 12 April 2002, the appellant pled guilty pursuant to the terms of a pretrial agreement.

As part of the pretrial agreement, the appellant entered into a stipulation of fact. He admitted possessing the compact disc containing the images in question. He stipulated to the admissibility of a report by Captain (Dr.) Neil Seethaler, an Air Force pediatrician, containing sexual maturity ratings on the 31 individuals included in the 25 images in question. The stipulation further provided:

> 9. 18 USC § 2256 defines "child pornography" as "any visual depiction . . . of sexually [explicit] conduct, where . . . such visual depiction is, or appears to be, of a minor engaging [i]n sexually explicit conduct.["] A "minor" is defined as any person under the age of eighteen. "Sexually explicit conduct" is defined as "actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or the [lascivious] exhibition of the genitals or pubic area of any person." The accused admits that at least 18 out of the 25 pictures meet the definition of "child pornography" as defined by 18 USC § 2252A.
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> . . .
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> 11. The accused knew or believed that at least 18 of the images found on the one CD ROM were of individuals under 18 years of age and that such individuals were engaged in sexually explicit conduct as defined by 18 USC § 2256. That is, he admits the images involve either minors engaged in actual or simulated sexual intercourse or masturbation or lasciviously

> exhibit a person's genitals or pubic region. The accused believed that the individuals were under 18 on his own observation of their facial and physical development. That is, the accused possessed the images with the intent to appeal to his own prurient interests. The accused did not have, nor did he ever believe that he had, any legitimate law enforcement or medical purposes in possessing the images.

As required by Rule for Courts-Martial (R.C.M.) 910(e), the military judge questioned the appellant at length about his understanding of the nature of the charged offense and the factual basis for his plea. The military judge advised the appellant of the definition of child pornography contained in 18 U.S.C. § 2256(8), specifically:

> "Child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical or other means of sexually explicit conduct, where—
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> a. the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; or
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> b. **such visual depiction is of a minor engaging in sexually explicit conduct**; or
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> c. such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
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> d. such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(Emphasis added.) The military judge also defined other terms, including "sexually explicit conduct" and "lascivious exhibition." The appellant told the military judge that the elements correctly described what he did.

The military judge asked the appellant to describe what he did in his own words, and questioned the appellant to fully explore the matter.

> MJ: At this time I just want you to tell me why you are guilty of the offenses listed in the specification of the charge. Just tell me what happened.

ACC: During the charged period I downloaded pictures to my computer and saved them on a CD and that qualifies as possessing the images in question.

MJ: And do you admit that the pictures you downloaded from the computer and saved to a CD were pictures that contained images of child pornography as I defined that term to you?

ACC: Yes, Sir.

. . .

MJ: Okay. I haven't seen these images myself, but I want to make sure that you believe that the images, when you say that they contain child pornography, as I defined that to you, I want to make sure that you believe that and you, in fact, knew that they did. When I gave you the instruction for "child pornography" I told you that it involved visual depictions, computer generated for example, of sexually explicit conduct where minors were involved, where minors were engaging in sexually explicit conduct or the picture was, for example, modified to appear that an identifiable minor was engaging in sexually explicit conduct. Then I further defined "sexually explicit conduct" for you to include the different scenarios of sexual intercourse and to include a further definition of "lascivious exhibition" and you understood all those definitions. Again, is that correct?

ACC: Yes, Sir.

MJ: Okay. Is there any doubt in your mind that the minors that are contained in these images, in these pictures, were under the age of 18?

ACC: No, Sir.

MJ: Okay. There is no doubt? You knew in looking at them that they were under 18, you could tell that by looking at them?

ACC: Yes, Sir.

MJ: Okay. And just describe for me briefly what these images were?

. . .

ACC: But, I can tell you that at the time and now, that I knew and did know and still know, that the pictures were of minors.

MJ: And that they were of minors engaged in sexually explicit conduct as I defined that term?

ACC: Yes, Sir.

At the conclusion of the questioning, counsel for both sides advised the military judge that they believed no further inquiry was necessary for a provident plea.

Four days after the trial in the appellant's case, the Supreme Court released its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The Supreme Court found that some language within 18 U.S.C. § 2256 defining child pornography unconstitutionally infringed upon free speech. Specifically, the Court found that the language of § 2256(8)(B), proscribing an image or picture that "appears to be" of a minor engaging in sexually explicit conduct, and the language of § 2256(8)(D), sanctioning visual depictions that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Id.* at 256-58. Nonetheless, the Supreme Court reiterated that the government could constitutionally prohibit pornography involving actual children. *Id.* at 240. *See generally New York v. Ferber*, 458 U.S. 747 (1982); 18 U.S.C. § 2256(8)(A).

The appellant argues that his conviction for possessing child pornography is "void," following the decision of the Supreme Court in *Free Speech Coalition*. We find no merit in this argument. Had the Supreme Court struck down the statute in its entirety, we might agree. However, as discussed above, only portions of the statute were declared unconstitutional. Our task is to determine whether reliance upon unconstitutional portions of the statute rendered the appellant's guilty plea improvident.

In determining whether a guilty plea is provident, the test is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. James*, 55 M.J. 297, 298 (C.A.A.F. 2001); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996). "We will not overturn a military judge's acceptance of a guilty plea based on a 'mere possibility' of a defense." *Faircloth*, 45 M.J. at 174. This Court 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). Of course, a guilty plea does not preclude a constitutional challenge to the underlying conviction. *Menna v. New York*, 423 U.S. 61 (1975).

In order to determine whether there is a "'substantial basis' in law and fact for questioning the guilty plea," *Milton*, 46 M.J. at 318, we must decide whether the guilty plea was based, in whole or in part, upon the portions of the definition of child pornography later struck down in *Free Speech Coalition*. We first consider the definition contained in 18 U.S.C. § 2256(8)(D) concerning images that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the material was child pornography. We note this language was not included in the definition of child pornography recited in the stipulation of fact, although the military judge included it, in substantial part, in the definition given during the providence inquiry. Reviewing the factual matters discussed in support of the plea, there is no mention of the manner in which the images in question were advertised, promoted, presented or described, other than a passing reference to the names of the files and the web sites. In the stipulation of fact, the appellant specifically indicated that he thought the images were of minors because of their facial appearance and their physical development. In response to the military judge's questions, he said that he could tell they were minors from the way they looked. The appellant never indicated that he believed that this was child pornography because of advertisements or descriptions. We are convinced that the definition in 18 U.S.C. § 2256(8)(D) did not play a part in this case. *United States v. Appeldorn*, 57 M.J. 548 (A.F. Ct. Crim. App. 2002). We conclude that any error of law in providing that definition did not create a substantial basis for challenging the plea.

We next consider the definition of child pornography contained in 18 U.S.C. § 2256(8)(B), relating to an image that "appears to be" a minor engaging in sexually explicit conduct. The Supreme Court found the language of 18 U.S.C. § 2256(8)(B) overly broad because it would include "computer-generated images," "a Renaissance painting depicting a scene from classical mythology," or scenes from Hollywood movies which did not involve any children in the production process. *Free Speech Coalition*, 535 U.S. at 241. The Supreme Court also took note of the Congressional findings following 18 U.S.C. § 2251 that new technology makes it possible to create realistic images of children who do not exist. *Id.* at 240. To find the appellant's plea provident, we must be certain that the appellant did not rely upon the "appears to be" language as part of the definition of child pornography.

It is interesting to note at the outset the precise charge against the appellant. The federal statute, 18 U.S.C. § 2252A, makes it illegal to distribute, receive, or possess "child pornography." A companion statute, 18 U.S.C. § 2256(8), provides definitions of child pornography, including subsections (A) and (C) which passed constitutional muster, and subsections (B) and (D) which did not. The specification in question did not use the term "child pornography" however. Instead, the specification alleged that the appellant

possessed "visual depictions of a minor engaged in sexually explicit conduct," mirroring the language from 18 U.S.C. § 2256(8)(A). Thus the specification was narrowly focused upon a definition of child pornography ultimately approved by the Supreme Court in *Free Speech Coalition.*

Notwithstanding the specific language of the specification, the parties included the phrase "appears to be" from 18 U.S.C. § 2256(8)(B) in the stipulation of fact as part of the general definition of child pornography. In contrast, however, during the providence inquiry the military judge omitted the phrase "appears to be" from the definition of child pornography. This portion of the definition that the military judge provided to the appellant was consistent with the decision in *Free Speech Coalition.* Notwithstanding the general definition in the stipulation of fact, the substantive discussion of the specific offense did not include any reference to images that "appear to be" minors. This case is markedly different than *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), where there was an indication that the appellant's plea may have been based upon the "appears to be" language of the statute later struck down in *Free Speech Coalition*.

The images in question were not Renaissance paintings or scenes from Hollywood movies involving actresses over 18 years old. The appellant never indicated that he thought the images in question were "computer-generated" or "virtual" photographs. In sum, nothing in the providence inquiry indicates the appellant relied upon a definition of child pornography later found to be unconstitutional in *Free Speech Coalition.*

The appellant argues that the plea is improvident because the appellant never stated that the images depicted "real" or "actual" children. However, we are not convinced that employment of the adjectives "actual" or "real" in describing the minors is determinative. Indeed, 18 U.S.C. § 2256(8)(A), which passed constitutional scrutiny under *Free Speech Coalition*, does not use either word to modify the term "minor." Normal usage and common-sense suggest that describing a person as a minor or a child indicates the subject is a real person, unless there is some limiting language such as "appears to be," "virtual," or "computer-generated." *See James*, 55 M.J. at 300-01 (the appellant's admissions that the images "depicted young females under the age of eighteen" and "minors" reasonably suggested depiction of actual minors). Where, as here, in the context of a guilty plea, the appellant indicated that the images were of minors and that minors are children under the age of 18, we find a sufficient basis to conclude that the appellant believed they were images of real children and that his plea was provident. To do otherwise would require speculation on our part, and we will not "speculate post-trial as to the existence of facts which might invalidate" a guilty plea. *Johnson*, 42 M.J. at 445.

"Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense." Article 59(b), UCMJ, 10 U.S.C. § 859(b). Considering our disposition above,

however, it is not necessary to consider whether the evidence was sufficient to support a conviction for the attempted possession of child pornography under 18 U.S.C. § 2252A(b)(2), or a general disorder under Article 134, UCMJ.

II. Post-trial Processing Error

The appellant contends that three errors in the staff judge advocate's recommendation (SJAR) prejudiced his right to a proper post-trial review by the convening authority. The appellant argues that this error requires a rehearing on the sentence, or a 60-day reduction in his sentence to confinement. We do not agree.

An assistant staff judge advocate prepared the SJAR in accordance with the format set out in Air Force Instruction 51-201, *Administration of Military Justice*, Figure 9.4 (2 Nov 1999). The acting SJA signed it. The defense counsel received a copy of the SJAR. In her reply, the defense counsel raised no claim of error. The convening authority reviewed the SJAR and the defense clemency submissions before taking action on the sentence. There is no indication that the convening authority reviewed the record of trial.

The appellant now points out three errors in the SJAR. Recognizing that the defense counsel did not make a timely objection, the appellant argues that these constituted "plain error" requiring relief.

Article 60(d), UCMJ, 10 U.S.C. § 860(d), requires the convening authority to consider the written recommendation of the SJA before acting on a general court-martial case. The formal recommendation to the convening authority must contain "such matters as the President shall prescribe by regulation." The President promulgated R.C.M. 1106, setting out the required content of the recommendation. These include the findings and sentence adjudged, any recommendation for clemency made by the sentencing authority, a summary of the accused's service record, the nature and duration of any pretrial confinement, the impact of any pretrial agreement, and a specific recommendation concerning action on the sentence. R.C.M. 1106(d)(3). The SJA is not required to discuss the evidence, but may do so if deemed appropriate. R.C.M. 1106(d)(5). Erroneous advice by the staff judge advocate can be a basis for setting aside the post-trial processing. *United States v. Welker*, 44 M.J. 85, 88 (C.A.A.F. 1996); *United States v. Craig*, 28 M.J. 321, 324 (C.M.A. 1989); *United States v. Hill*, 27 M.J. 293, 296-97 (C.M.A. 1988).

The recommendation must be served upon the defense, who may submit comments, corrections, or rebuttal. R.C.M. 1106(f)(6) provides, "Failure of counsel for the accused to comment on any matter in the recommendation . . . in a timely manner shall waive later claim of error . . . in the absence of plain error." *See United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003). "Plain error" is error that is plain or obvious, and materially prejudices the appellant's substantial rights. *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

This Court reviews records of trial de novo to determine whether the post-trial processing was properly completed. In reviewing claims of inaccurate or erroneous SJARs, this Court has held that, "there must not only be error, there must also be prejudice to the rights of the accused." *United States v. Blodgett*, 20 M.J. 756,758 (A.F.C.M.R. 1985).

> Whether or not an appellant was prejudiced by a mistake in the SJAR generally requires a court to consider whether the convening authority plausibly might have taken more favorable action had he or she been provided accurate or more complete information. *United States v. Johnson*, 26 M.J. 686, 689 (A.C.M.R. 1988), *aff'd*, 28 M.J. 452 (C.M.A. 1989).

United States v. Alis, 47 M.J. 817, 827 (A.F. Ct. Crim. App. 1998). Our superior court also holds:

> If the Court of Military Review is convinced that, under the particular circumstances, a properly prepared recommendation would have no effect on the convening authority's exercise of his discretion—the burden in this regard being on the Government—remand to the convening authority is unnecessary.

Hill, 27 M.J. at 296. *See also United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999); *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994).

We will consider each of the asserted errors in turn. The second paragraph of the SJAR said:

> 2. The primary evidence against the accused consisted of his admissions associated with his guilty plea, a stipulation of fact and two prosecution exhibits, one of which contains 25 photographs depicting child pornography. There is no corrective action required in regard to the findings of guilty. I am satisfied that the evidence upon which the conviction is based is legally sufficient.

In fact, the government initially offered 25 images as the child pornography in question, and they were admitted without objection. Subsequently, the military judge received a copy of the report of the expert pediatrician offering his opinion of the age of the individuals based upon their physical development. The expert was unwilling to offer an opinion with regard to several images, usually because he concluded partial images provided an insufficient basis upon which to make the assessment. The military judge then modified his earlier ruling and admitted only 15 of the original 25 images. Trial counsel urged reconsideration, noting that two of the partial images not admitted

(Prosecution Exhibits 5-5 and 5-14) were of the same child whose image was admitted as Prosecution Exhibit 5-10. The military judge declined to revise his ruling.

We find that the SJA's representation that the prosecution exhibit contained 25 photographs depicting child pornography was error. We also find that the error was obvious; the record of trial clearly reflects the number of images admitted as part of the prosecution exhibit.

We do not find that this error materially prejudiced the appellant's substantial rights, however. The difference between possessing 15 images and 25 images has no legal effect. Most importantly, there is no indication that the convening authority actually saw the images in question, thus the prejudicial effect is reduced to the abstract report of a quantity. We are convinced that, if the error had been corrected or the accurate information had been provided, it would have had no effect on the convening authority's exercise of his discretion in approving the findings or sentence.

The second asserted error concerns the stipulation of fact attached to the SJAR. The appellant was charged with possessing the child pornography on divers occasions between about 1 December 1999 and 3 May 2001. The stipulation of fact originally prepared, signed by the parties, and offered into evidence reflected the same dates. During the military judge's inquiry into the stipulation of fact, the appellant took issue with the dates, indicating that he thought he had destroyed the images by 1 March 2001. The parties then amended the stipulation to reflect the earlier date. The military judge found the appellant guilty of the timeframe charged, however, because the period he admitted knowingly possessing the images fell within the charged period. The SJAR included a copy of the signed stipulation of fact, but it did not reflect the change made at trial.

The appellant contends that it was error to advise the convening authority that the appellant possessed the images for the greater time period. However, even if this was error, it was clearly harmless. The difference between possessing the images for 16 months as compared to 14 months is insubstantial. We are convinced that if the accurate information had been provided, it is not plausible that the convening authority might have taken more favorable action.

The third alleged error also arises from the stipulation of fact. The original version included the following sentence: "That is, the accused possessed the images solely with the intent to appeal to his own prurient interests." During the military judge's inquiry, the appellant expressed reservations about this language. The parties eventually resolved it by deleting the word "solely" from the stipulation of fact in the record. However, a copy of the original, unchanged version was attached to the SJAR and provided to the convening authority. The appellant contends this was plain error.

Even if this was error, we find it would have no effect on the convening authority's exercise of his discretion. If the correct version had been provided to the convening authority, he would have read that, "the accused possessed the images with the intent to appeal to his own prurient interests." The corrected version would not create a significantly different impression upon the mind of a reader. Even considering the combined impact of these three errors, we find it is not reasonably plausible that the convening authority would have taken more favorable action in this case.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator