

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**J.D. HARTY**

**R.G. KELLY**

**W.M. FREDERICK**

**UNITED STATES**

**v.**

**Kenneth R. FRANK  
Aviation Electronics Technician First Class (E-6), U. S. Navy**

NMCCA 200600894

Decided 9 January 2007

Sentence adjudged 19 July 2005. Military Judge: R.G. Johnson. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel  
JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and 18 U.S.C. § 2252A. The appellant was sentenced to confinement for two years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. In an act of clemency, the convening authority (CA) approved only so much of the adjudged sentence that provided for confinement for two years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

We have considered the record of trial, the appellant's sole assignment of error claiming that his guilty plea was improvident because his possession of child pornography occurred outside the United States, and the Government's answer. We find partial merit in the appellant's assignment of error and will take corrective action in our decretal paragraph. See Arts. 59(a) and 66(c), UCMJ.

## Improvident Plea

The appellant's conduct was charged as a violation of Article 134, UCMJ. "Conduct is punishable under Article 134 if it 'prejudices good order and discipline in the armed forces' (clause 1), if it is 'of a nature to bring discredit upon the armed forces' (clause 2), or if it is a crime or offense not capital (clause 3)." *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005)(quoting *United States v. O'Connor*, 58 M.J. 450, 452 (C.A.A.F. 2003)). As was the case in both *O'Connor* and *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004), the appellant's conduct was specifically charged as a "clause 3" offense, with the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A (2000)(CPPA), serving as the "crime or offense not capital."

The appellant's conviction is based on his plea of guilty to violating the CPPA by possessing child pornography in Sicily, Italy, that had been transported in interstate or foreign commerce, including by computer. See 18 U.S.C. § 2252A(a)(5)(B). For us to set aside the appellant's finding of guilty based upon his guilty plea, the record of trial must show a substantial basis in law and fact for questioning that guilty plea. *O'Connor*, 58 M.J. at 453 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). We must decide whether our superior court's decision in *Martinelli* creates a substantial basis in law and fact for questioning the appellant's plea. Because the appellant's possession of child pornography occurred outside the United States, we conclude that it does, and find his guilty plea improvident. See *Martinelli*, 62 M.J. at 62.

Our determination that the appellant's plea is improvident as to a violation of the CPPA does not end our inquiry. Our superior court has recognized that an improvident plea to a CPPA-based clause 3 offense under Article 134, UCMJ, may be upheld as a provident plea to a lesser included offense under clauses 1 and 2 of that same Article. See, e.g., *United States v. Hays*, 62 M.J. 158, 167 (C.A.A.F. 2005); *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000); *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). We must determine whether the record supports our affirming a lesser included offense.

"For a guilty plea to be provident, the accused must be convinced of, and be able to describe, all of the facts necessary to establish guilt." *O'Connor*, 58 M.J. at 453 (citing RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion). "In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Id.* (quoting *Jordan*, 57 M.J. at 238)(quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). The accused must demonstrate that he clearly understands the nature of the prohibited conduct. *Hays*, 62 M.J.

at 167 (quoting *United States v. Reeves*, 62 M.J. 88, 95 (C.A.A.F. 2005)).

Here, as in *Sapp* and *Augustine*, the guilty plea was entered to a violation of Article 134, clause 3, based on possession of child pornography in violation of the CPPA. There, the guilty pleas were found to be improvident as to the clause 3 offenses in light of certain requirements under the CPPA that were not established. In those cases, however, our superior court concluded that the guilty pleas were provident as to the lesser included offense of engaging in "conduct of a nature to bring discredit upon the armed forces" under clause 2 and upheld the convictions under Article 134, in part, because both appellant's admitted during the providence inquiry that their behavior was service discrediting. See *Sapp*, 53 M.J. at 91 (accused admitted during providence inquiry that possession of images constituted service discrediting conduct); *Augustine*, 53 M.J. at 96 (accused admitted during providence inquiry that his conduct "was of a nature to bring discredit upon the armed forces"). The question before this court is whether that same conclusion can be reached here. For the reasons outlined below, we conclude that it can.

Here, the plea inquiry includes a dialogue between the military judge and the appellant concerning whether the appellant's actions were prejudicial to good order and discipline and whether those same acts were also service discrediting. Without hesitation, the appellant admitted that his conduct was both prejudicial to good order and discipline and service discrediting. Record at 52-53. His answers and statements concerning prejudice to good order and discipline and service discrediting conduct were not primarily the result of the military judge's "use of conclusions and leading questions that merely extract from an accused 'yes' and 'no responses . . . ." *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004)(citing *Jordan*, 57 M.J. at 238; *United States v. Sweet*, 42 M.J. 183, 185 (C.M.A. 1995)). Rather, the appellant spoke freely and clearly so that a factual basis is clearly established in the record. *Id.* (citing *United States v. Holt*, 27 M.J. 57, 58 (C.M.A. 1988)). His answers and statements demonstrate that he clearly understood the nature of the prohibited conduct. See *Hays*, 62 M.J. at 167. The record shows that the appellant was convinced of the facts predicate to a conviction under both clause 1 and 2 of Article 134, UCMJ, and that there was a sufficient factual basis for guilty pleas to the lesser included offense under the sole specification of the Charge. See R.C.M. 910(e).

Under these circumstances, we conclude that this record reflects an appropriate discussion of the character of the conduct at issue as both prejudicial to good order and discipline and service discrediting, and demonstrates that the accused clearly understood the nature of the prohibited conduct as being a violation of both clause 1 and 2 of Article 134, UCMJ. Accordingly, we will take corrective action in our decretal paragraph by excepting all language from the specification

referencing the CPPA. Our action does not alter the essential nature of the offense, and there is no prejudice as to the sentence. Sentence reassessment, therefore, is not required. See *Hays*, 62 M.J. at 168-69 (citing *Augustine*, 53 M.J. at 96; *Mason*, 60 M.J. at 20 (affirming the sentence)).

### **Conclusion**

The sole specification under the Charge is amended to read as follows:

In that Aviation Electronics Technician First Class Petty Officer Kenneth R. Frank, U.S. Navy, Center for Naval Aviation Technical Training Unit, Keesler Air Force Base, Gulfport, Mississippi, on active duty, did, at or near Motta, Sicily, Italy, on or about June 2002, knowingly possess a computer with a hard drive and compact discs containing images of child pornography that had been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, conduct that was prejudicial to good order and discipline and service discrediting.

The findings, as amended, and the sentence as approved below are affirmed. We direct that the supplemental court-martial order reflect this court's action.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court