UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN M. RAPP
SEAMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 201200303
GENERAL COURT-MARTIAL

Sentence Adjudged: 23 April 2012.
Military Judge: LtCol Charles Hale, USMC.
Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.
Staff Judge Advocate's Recommendation: LCDR Jeremy Brooks, JAGC, USN.
For Appellant: LT Jared Hernandez, JAGC, USN.
For Appellee: LT Ian MacLean, JAGC, USN.

30 April 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

JOYCE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of one specification of receiving child pornography, one specification of possessing four or more images of child pornography, and one specification of attempting to receive child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge initially sentenced the appellant to five years of confinement, forfeiture of all pay

and allowances, reduction to pay grade E-1, a fine of $16,000.00, and a dishonorable discharge. In a post-trial Article 39(a), UCMJ, session, the military judge merged Specifications 1 and 2 for sentencing, reassessed the sentence, and reduced the sentence of confinement to 54 months. The convening authority approved the sentence as amended, suspended all confinement in excess of 12 months in accordance with the terms of a pretrial agreement and, except for the punitive discharge, ordered it executed.

The appellant now avers four assignments of error: (1) that he was denied his Sixth Amendment right to effective assistance of counsel when he was improperly advised that the Government's evidence constituted child pornography and, absent this erroneous advice, he would have contested the charges; (2) that the military judge abused his discretion when he accepted the guilty pleas despite a substantial basis in fact and law to question the pleas; (3) that the general verdicts of guilt for Specifications 1 and 2 must be dismissed because the images fail to meet the statutory definition of child pornography; and (4) that a fine of $16,000.00 is inappropriately severe. We find merit in the appellant's second assignment of error, and therefore set aside the findings and the sentence in our decretal paragraph.[1] Arts. 59(a) and 66(c), UCMJ.

Background

The appellant's roommate reported to his chain of command what he believed to be child pornography on the appellant's personal computer. Prosecution Exhibit 4 at 1. With command authorization, the Naval Criminal Investigation Service (NCIS) seized the appellant's computer and discovered 28 images[2] of suspected child pornography. PE 3. As a result of the evidence seized, the appellant was charged with receiving (Specification 1), possessing (Specification 2), and attempting to receive (Specification 3) child pornography. The appellant waived his right to a hearing under Article 32, UCMJ, and entered into a pretrial agreement.

[1] The first and fourth assignments of error are mooted by our resolution of the second assignment of error. The third assignment of error is relevant to our analysis of the second assignment of error and therefore is addressed further in this opinion.

[2] Of these 28 images, 16 form the basis for Specifications 1 (receipt of child pornography) and 2 (possession of four or more images of child pornography). There is no information in the record as to what the remaining 12 images contain.

During his providence inquiry, and in his stipulation of fact (Prosecution Exhibit 1), the appellant admitted that while he was assigned to the Transient Personnel Unit, Great Lakes, Illinois, from August to October 2010, he conducted approximately 150 Google searches using the search terms "underage nude females" or "preteen underwear models" while logged into his computer under username "jRAPP218." PE 1 at 1; Record at 33.[3]

The appellant's stipulation of fact identifies a list of 16 filenames, which purportedly correspond to 16 images found in a CD identified as Prosecution Exhibit 5. The filenames were assigned during the forensic analysis, and are not in any way descriptive of the images, but are instead simply numerical identifiers.[4] PE 1 at 2-3; Record at 48. The appellant did not view the .jpg images after his computer was confiscated and stated to the military judge that he did not recognize the filenames. Record at 51, 53. To better "articulate the filenames," the military judge requested a list of the "actual filenames." Record at 50-51. In response, the Government offered Appellate Exhibit V. However, Appellate Exhibit V is as uninformative as the filenames in the stipulation of fact, and

[3] The appellant admitted to the military judge that when the photos came up on the website, he would download them to a temporary folder because he intended to keep them. Record at 34. He further stated that he would "right click and click 'Save As,' [to] save them to [his] hard drive." *Id.* at 36. Now, in an affidavit addressing the appeal before this court, the appellant states that, in his initial statement to NCIS, he used these search terms to find websites depicting 18-year-old girls made to look younger. Appellant's Affidavit of 6 Sep 2012 at 1.

[4] The 16 images were listed in the stipulation of fact with no photos or other accompanying documentation as follows:

RAPP images to NCMEC/NEMEC/00162653.jpg
RAPP images to NCMEC/Unknown/00138331.jpg
RAPP images to NCMEC/Unknown/00104810.jpg
RAPP images to NCMEC/Unknown/00106537.jpg
RAPP images to NCMEC/Unknown/00112611.jpg
RAPP images to NCMEC/Unknown/00112785.jpg
RAPP images to NCMEC/Unknown/00121676.jpg
RAPP images to NCMEC/Unknown/00138954.jpg
RAPP images to NCMEC/Unknown/00141582.jpg
RAPP images to NCMEC/Unknown/00141977.jpg
RAPP images to NCMEC/Unknown/00142702.jpg
RAPP images to NCMEC/Unknown/00157533.jpg
RAPP images to NCMEC/Unknown/00194708.jpg
RAPP images to NCMEC/Unknown/00194712.jpg
RAPP images to NCMEC/Unknown/00256873.jpg
RAPP images to NCMEC/Unknown/00259205.jpg

the appellant did not recognize those filenames either.[5] *See id.* at 50-53. When asked by the military judge if he was satisfied that the filenames listed in Appellate Exhibit V and the stipulation of fact were the same, the appellant responded, "After conferring with my counsel, yes, sir." *Id.* at 56.

During the providence inquiry, the military judge informed the appellant and counsel that he would not view the actual 16 images until the presentencing phase. *Id.* at 37, 94-95. The military judge established with counsel and the appellant, during the providence inquiry, that the 16 images were the only images that formed the basis for Specification 1 (receipt) and Specification 2 (possession). *Id.* at 33-34, 39, 45. Throughout the providence inquiry, the military judge queried the appellant's understanding of the terms "child pornography," "sexually explicit conduct," and "lascivious exhibition." However, the appellant failed to describe any of the 16 images on Prosecution Exhibit 5 either during his providence inquiry or in his stipulation of fact.[6]

After the military judge announced findings and during the presentencing phase, the Government offered the 16 images in Prosecution Exhibit 5. *Id.* at 97-99. After evidence was presented by both parties, the military judge viewed Prosecution Exhibit 5 for the first time during his deliberations on sentence. *Id.* at 127. When he re-opened court to announce his sentence, the military judge made no reference to the images.

Additional facts are developed below as necessary.

Child Pornography Defined

The Government charged that the appellant knowingly received, possessed, and attempted to receive child pornography in violation of Article 134, UCMJ, clauses (1) and (2). Although it was not required to do so under clauses (1) and (2),

[5] For example, four of the filenames listed in Appellate Exhibit V read exactly the same: "Tag136_ItemA_HD_001\E\System Volume Information\{45b4279b-d8e6-11df-8847-00a0d5ffff85}{3808876b-c176-4e48-b7ae-04046e6cc752}," and are supposed to correspond with the .jpg filenames ending in 954, 582, 977, and 702 in the stipulation of fact and footnote above.

[6] After conferring with his trial defense counsel, the appellant told the military judge that he recalled an image depicting vaginal intercourse, which may have been a failed attempt by the trial defense counsel in describing one of the images among the 16 in Prosecution Exhibit 5 (identified as 00256873.jpg). Record at 42.

the Government chose to allege child pornography as defined by 18 U.S.C. § 2256(8), the Child Pornography Prevention Act (CPPA). *See United States v. Barberi*, 71 M.J. 127, 129-30 (C.A.A.F. 2012) (holding that once the military judge elects to use the statutory definition of child pornography, the evidence must meet that definition). As part of the providence inquiry, the military judge informed the appellant, using the CPPA's definition, that "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 (A) the production of such visual depiction involves the use of a minor engaging in *sexually explicit conduct*; ... or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in *sexually explicit conduct*.

18 U.S.C. § 2256(8) (emphasis added); *see* Record at 29-30. The military judge also used the CPPA's definition of "sexually explicit conduct":

> actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v)*lascivious exhibition of the genitals or pubic area of any person* . . . .

18 U.S.C § 2256(2)(A) (emphasis added); *see* Record at 29.

In explaining what constitutes a "lascivious exhibition," the military judge listed the six *Dost*[7] factors relied on in *United States v. Roderick,* 62 M.J. 425, 429-30 (C.A.A.F. 2006),[8] and added additional factors, such as "whether the depiction

[7] *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom*. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

[8] The *Dost* factors are: (1) whether the focal point of the depiction is on the genitals or pubic area; (2) whether the setting is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) whether the child is fully or partially clothed or nude; (5) whether the depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the depiction is intended to elicit a sexual response in the viewer.

portrays a child as a sexual object, and any captions that may appear or depiction materials accompanying the depiction, or audio." Record at 31. He concluded by saying, "A visual depiction, however, need not involve all of these factors to be a lascivious exhibition." *Id.* In applying *Dost*, however, we note that "this list is not exhaustive as other factors may be relevant in particular cases. . . [t]he analysis is qualitative and no single factor is dispositive." *United States v. Knox,* 32 F.3d 733, 746 (3d Cir. 1994) (citations omitted); *see also United States v. Steen*, 634 F.3d 822 (5th Cir. 2011). The "factors are generally relevant and provide some guidance . . . ." *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999). However, "the *Dost* factors 'are neither comprehensive nor necessarily applicable in every situation' and that '[t]he inquiry will always be case-specific.'" *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009) (quoting *United States v. Frabizio*, 459 F.3d 80, 87 (1st Cir. 2006)).

Because the appellant described only one sexual act, and only one image included in Prosecution Exhibit 5 depicts a sexual act, the application of "lascivious exhibition" is pivotal to this case. "[I]n order for the images to constitute child pornography they must contain an exhibition of the genitals or pubic area and that exhibition must be lascivious." *Barberi*, 71 M.J. at 130; *see also Roderick*, 62 M.J. at 430 (finding that while a child may be fully or partially nude in a picture, "a requirement of [18 U.S.C.] § 2256(2) and prerequisite to any analysis under *Dost*" is that the photo must depict the genitals or pubic area.). Without an exhibition of the genitals or pubic area, the images would not fall within the definition of sexually explicit conduct and therefore would not constitute child pornography as defined by the CPPA and as instructed by the military judge in this case.

Federal courts follow and adopt the definition of "lascivious exhibition" from *Knox*, 32 F.3d at 745, where it defined "lascivious" and "exhibit" and concluded that the ordinary meaning of the phrase "lascivious exhibition" means "a depiction which displays or brings forth to view *in order to attract notice to the genitals or pubic area of children*, in order to excite lustfulness or sexual stimulation in the viewer." (Emphasis added); s*ee also United States v. Grimes*, 244 F.3d 375, 381 (5th Cir. 2001); *Brown*, 579 F.3d at 681; *United States v. Clark*, 468 Fed. Appx. 102, 103-04 (3rd Cir. 2011); and *Steen*, 634 F.3d at 828. "[L]ascivious is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of

himself or like minded pedophiles." *United States v. Larkin*, 629 F.3d 177, 184 (3d Cir. 2010) (quoting *Weigand*, 812 F.2d at 1244), *cert. denied*, 132 S. Ct. 313 (2011). "[T]he focus must be on the *intended* effect, rather than the *actual* effect, on the viewer." *Id.*; *see also Dost*, 636 F.Supp. at 832 (having as its sixth factor "whether the visual depiction is *intended* or *designed* to elicit a sexual response in the viewer," (emphasis added)). "Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo." *Id.* (citation omitted). "'[W]e must . . . look at the photograph, rather than the viewer,' because if 'we were to conclude that the photographs were lascivious merely because [the viewer] found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand – a legal analysis of the sufficiency of the evidence is lasciviousness." *Brown*, 579 F.3d at 682-83 (quoting *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989)).

Providence of Plea

The appellant claims the military judge erred by accepting his guilty plea to receiving child pornography (Specification 1) and possessing "four or more images" of child pornography (Specification 2), because some of the 16 images on Prosecution Exhibit 5, were not child pornography, as defined in 18 U.S.C. § 2256(8). We agree.

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008). We will not disturb a guilty plea unless the record of trial shows a substantial basis in law or fact for questioning the guilty plea. *Id.* To prevent the acceptance of improvident pleas, the Court of Appeals for the Armed Forces has long placed a duty on the military judge to establish, on the record, the factual bases that establish that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969) (citation omitted); *see also* Art. 45, UCMJ. The appellant must admit every element of the offense to which he pleads guilty. *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006); *see also* RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). If the military judge fails to establish that there is an adequate basis in law and fact to support the appellant's plea during the *Care* inquiry, the plea will be improvident. *Inabinette*, 66 M.J. at 322; *see also* R.C.M. 910(e). However, there is no requirement that any witness be called or any independent

evidence be produced to establish the factual predicate for the plea. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

In considering the adequacy of guilty pleas, we consider the entire record, including the stipulation of fact and the full range of the appellant's responses during the plea inquiry to determine whether the requirements of Article 45, UCMJ, R.C.M. 910, and *Care* have been met. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002); *see also United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009) (examining the "totality of the circumstances"); *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995).

In order for the military judge to find the appellant guilty of receipt and possession of child pornography, the appellant must have admitted facts to establish each of the elements of each of the offenses charged.[9] At issue is whether the military judge elicited enough information from the appellant to establish that the appellant received and possessed child pornography that met the statutory definition. We find that the appellant's pleas were not provident.

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[9] The military judge provided the following elements for receipt of child pornography:

> 1. that the appellant wrongfully received child pornography, as defined by 18 U.S.C. 2256(8);
> 2. that such visual depiction was produced by use of a minor engaging in sexually explicit conduct;
> 3. that such visual depiction was a minor engaged in sexually explicit conduct;
> 4. that at the time, the appellant knew the material he received contained such visual depiction;
> 5. that the acts were wrongful; and
> 6. that under the circumstances the appellant's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Record at 24. The military judge then provided the following elements for possession of "four or more" images of child pornography:

> 1. that the appellant knowingly
> possessed four or more images of child pornography as defined by 18 U.S.C. 2256(8);
> 2. that he knew the images depicted child pornography;
> 3. that the possession was wrongful;
> 4. that 18 USC 2256(8) was in existence at the time; and
> 5. that the possession was prejudicial to good order and discipline and of a nature to bring discredit to the armed forces.

Id. at 25.

When determining the appellant's guilty pleas with regard to these 16 images and the definitions cited above, the military judge conducted the following colloquy with the appellant:

MJ: And – well, what does "child pornography" mean to you?
ACC: Well, naked underage girls with prepubescent features.

MJ: Okay, What—what is "pre—prepubescent females" mean to you?
ACC: Underdeveloped—underdeveloped breast area and vagina area.

MJ: And what do you mean by "undeveloped vagina area?"
ACC: No pubic hair.

MJ: Okay. How about their hips?
ACC: Narrow.

MJ: Okay. I take it when I view these images in sentencing that will become apparent to me as well – --
ACC: Yes, sir.

MJ: Okay. Now, why aren't these –why are they "sexually explicit," as I defined it for you?
ACC: They are in sexually explicit positions, some of them. Some of them are nude or partially nude.

MJ: What's wrong with being nude? What—what is being demonstrated in these photos?
ACC: Their openness to sexual contact or willingness.

Record at 37-38.

MJ: Now, did the production of such visual depiction involve the use of a minor engaging in sexually explicit conduct . . . or was a visual depiction created, adapted or modified to appear that an identifiable minor is engaging in such explic— sexually explicit conduct?
ACC: Yes, sir.

MJ: And why do you believe this?
ACC: Because of the way--the way that they looked in my

search terms, sir.

Id. at 40-41.

MJ: And how did you know the depictions were of a minor engaging in sexually explicit conduct?
ACC: Because the – they're under 18 and they had the – [Confers with defense counsel]—search terms.

MJ: Search terms and the physical characteristics?
ACC: Yes, sir.

Id. at 63.

MJ: So why—on these other 15 images, what about them falls into that "promiscuous" or "lascivious" definition, what makes them "child pornography" then?
ACC: Their body poses, and their expressions on their faces, their willingness.

Id. at 44.

The majority of the appellant's responses to the military judge did nothing more than describe the characteristics of young girls, under the age of 18, who were nude or partially nude: "naked underage girls with prepubescent features," "narrow" hips, "small breasts," and "undeveloped vagina area." *Id.* at 37, 40-41. When the military judge asked the appellant if there were any "sexual acts depicted in any of the photos that [he] could recall," the appellant responded, after conferring with his trial defense counsel, that there was an image depicting vaginal intercourse, *id*. at 42; no such image is described in the stipulation of fact or portrayed in Prosecution Exhibit 5. Further, the appellant did not remember any other sex acts. *Id.* at 44. When the appellant was asked about sexually explicit conduct and lascivious exhibition, his responses were vague: "[t]heir body poses, and their expressions on their faces, their willingness;" "[j]ust open legs, doing splits." *Id.* at 38, 41, 44.

Throughout the providence inquiry, the military judge was on notice that the appellant did not view the 16 images in Prosecution Exhibit 5 during preparation for his guilty plea and that he could not remember images he saw from his searches because the time of trial was 18 months removed from the date of

the events at issue.[10] The military judge appropriately pressed the appellant for more details and more information, but received nothing more descriptive. In response to several open-ended questions posed by the military judge, the appellant admitted the images were "child pornography," contained "sexually explicit conduct" and were "promiscuous" and "lascivious," but such responses by the appellant were mere legal conclusions. The appellant's vague, generalized, and often unresponsive answers should have alerted the military judge to the fact that the appellant was not describing with sufficient detail images that meet the statutory definition of child pornography. Moreover, the appellant's search terms of "underage nude females" and "preteen underwear models," neither of which indicates child pornography *per se*, should also have alerted the military judge that he needed to ensure that he and the appellant were discussing images that actually constitute child pornography within the meaning of 18 U.S.C. § 2256(8).

The military judge has a duty to engage with the appellant in a complete *Care* inquiry to establish a sufficient factual basis for the offenses to which the appellant has entered a plea of guilty. Here, the military judge was required to ensure compliance with the legal statutory definition of child pornography. "[M]ere conclusions of law recited by the accused . . . are insufficient to establish a factual basis for a guilty plea." *United v. Jackson*, 61 M.J. 731, 734 (N.M.Ct.Crim.App. 2005) (citing *United States v. Terry*, 45 C.M.R. 216, 217 (C.M.A. 1972)). As part of establishing the facts to a child pornography charge such as this, the appellant must describe images that contained minors engaged in "sexually explicit conduct," in this case the relevant conduct being the "lascivious exhibition of the genitals and pubic area of any person." An insufficient inquiry took place, and the appellant did not satisfy the elements of each and every offense. We now consider whether the stipulation of fact provides an adequate basis in law and fact to support the appellant's pleas.

Stipulation of Fact

"Although the decision to stipulate should ordinarily be left to the parties, the military judge should not accept a stipulation if there is any doubt of the accused's or any other

[10] The appellant's computer was seized in November 2010, charges preferred in December 2011 (14 months later), and the date of trial was 23 April 2012. PE 3; Charge Sheet.

party's understanding of the nature and effect of the stipulation. The military judge should also refuse to accept a stipulation which is unclear or ambiguous." R.C.M. 811(b), Discussion. The stipulation of fact in this case adds little to the providence inquiry described earlier. First, it does not outline the elements of each of the three specifications and it is unclear and ambiguous as to whether it addresses Specification 3 (attempt to receive child pornography) at all. Second, it fails to establish a factual basis to conclude that the images involved in this case meet the statutory definition of child pornography. Last, most importantly, it does not describe the 16 images listed in the pretrial agreement and contained in Prosecution Exhibit 5. There are no enclosures accompanying the stipulation of fact.

While it is not required that the elements of an offense be set out separately from the supporting evidence in a stipulation of fact, it is a best practice. Such a format is extremely helpful to the military judge during the providence inquiry, assists an accused in understanding the charges he faces, clears up inconsistencies between the understandings of the parties, and aids appellate review.

While the parties agreed, during the providence inquiry, that the receipt (Specification 1) and possession of "four or more images" (Specification 2) refer only to the 16 images found in Prosecution Exhibit 5 and identified by filenames in the stipulation of fact, there are no descriptions of these images to support the legal conclusion that these images are child pornography. Further, there is no discussion of the *Dost* factors as related to these images.

Finally, the details provided for specific pictures in the stipulation of fact describe images not found in Prosecution Exhibit 5. Even though images matching these descriptions are not contained in Prosecution Exhibit 5,[11] the military judge did not attempt to resolve the ambiguity or at least narrow the description of the 16 images to at least four images as required by Specification 2.

While the appellant avers the military judge abused his discretion with regard to Specifications 1 and 2, the same issue applies to Specification 3 (attempt to receive child pornography). During the providence inquiry, the appellant repeatedly told the military judge, "I tried to get child pornography" and "I was attempting to receive child

[11] Additionally compounding these issues, the military judge failed to elicit any description of images during his inquiry regarding Specification 3.

pornography." Record at 71, 73. Again, these statements are nothing more than legal conclusions, and are compromised by the appellant's apparent misunderstanding of what constitutes child pornography. Further, the stipulation of fact is silent as to Specification 3. The military judge was required to inquire further than he did into the specification of attempted receipt of child pornography before accepting the plea.

While the appellant pled guilty to all three specifications of the charge, it is unclear from the record if any of the parties understood and appreciated what facts were needed to satisfy the statutory definition of child pornography. The military judge had an obligation to ensure the appellant was convinced of, and was able to describe, all the facts necessary to establish guilt. R.C.M. 910(e).

For the reasons stated above regarding both the providence inquiry and the stipulation of fact, we find that the military judge abused his discretion in accepting the pleas of guilty, in that he did not elicit enough information from the appellant to establish that there is an adequate basis in law and fact to support the appellant's plea to receiving, possessing and attempting to receive child pornography per the statutory definition.

Matters Inconsistent with the Plea

If the parties and the military judge were not alerted to the ambiguity and vagueness of the appellant's answers during the providence inquiry, the admission of Prosecution Exhibit 5 during the Government's case in aggravation should have raised the proverbial "red flag" and called into question the adequacy of the providence inquiry. If an accused sets up a "matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect," the military judge must set aside the guilty plea. Art. 45(a), UCMJ.[12]

Here, not all 16 images contained in Prosecution Exhibit 5 satisfy the statutory definition of child pornography. Six of

[12] During the trial, the military judge informed the appellant that a stipulation of fact "is an agreement among the [parties] that the contents of the stipulation are true and, if entered into evidence, will become facts that cannot be contradicted by either party in the case." Record at 21. He further informed the appellant, "If this stipulation should be contradicted after I've accepted your guilty pleas, I'll have to reopen my inquiry into the factual basis for your pleas." *Id.* at 22 (emphasis added).

the images[13] contained in Prosecution Exhibit 5 do not depict sexually explicit conduct, and, in fact do not depict any genitals or pubic areas, much less a "lascivious exhibition." We, therefore, conclude that these images are constitutionally protected. *Roderick,* 62 M.J. 430 (finding that a depiction of the genitals or pubic area is a prerequisite for an analysis under 18 U.S.C. § 2256(2) and *Dost*). Other images[14] appear to be child erotica[15] rather than child pornography. Because child erotica does not meet the definition of child pornography under 18 U.S.C. § 2256(8) as charged in this case, and because the appellant was not advised that his plea may encompass possession of such materials, he cannot be found guilty for possession, receipt, or attempted receipt of such images. *See United States v. Andersen*, 2010 CCA LEXIS 328 (Army Ct.Crim.App. 10 Sep 2010) (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)). Lastly, the intent of the photographers of some of the images[16] is unclear and it cannot be assumed that the images were intended to be viewed by pedophiles or the like. In a case such as this one, with constitutional implications, "the record must conspicuously reflect that the accused 'clearly understood the nature of the prohibited conduct'" as being a violation of the statutory definition of child pornography. *United States v. Martinelli*, 62 M.J. 52, 67 (C.A.A.F. 2005). This did not happen.

During his review of Prosecution Exhibit 5 while the court was closed for deliberations, the military judge should have recognized that the images did not clearly meet the statutory definition and did not correspond to the appellant's responses during the providence inquiry. In light of his review of the images, the military judge, at a minimum, was required to reopen the providence inquiry. He failed to do so. Instead, the

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[13] We identify these images as: 00162653.jpg; 00104810.jpg; 00106537.jpg; 00112611.jpg; 00112785.jpg; and 00121676.jpg. PE 5.

[14] We identify these images as: 00138331.jpg; 00194708.jpg; and 00194712.jpg. PE. 5.

[15] "Child erotica" has been defined by Federal courts 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." *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 child erotica as "images that are not themselves child pornography but still fuel . . . sexual fantasies involving children"). *See also Andersen*, 2010 CCA LEXIS 328 *2-4.

[16] We identify these images as: 00259205.jpg; 00142702.jpg; 00138954.jpg; 00141582.jpg; and 00141977.jpg.

military judge emerged from deliberations to impose a sentence of five years confinement, total forfeitures, reduction to E-1, a dishonorable discharge, and a $16,000.00 fine. The amount of the fine would seem to indicate that the military judge punished the appellant based on all 16 images from Prosecution Exhibit 5.

"'[I]f a factfinder is presented with alternative theories of guilt and one or more of those theories is later found to be unconstitutional, any resulting conviction must be set aside when it is unclear which theory the factfinder relied on in reaching a decision.'" *Barberi*, 71 M.J. at 131 (quoting *United States v. Cendejas*, 62 M.J. 334, 339 (C.A.A.F. 2006)). We decline to guess which of the images from Prosecution Exhibit 5 were the ones that the appellant was seeking to describe in his providence inquiry: there appears to be little, if any, correlation between his vague answers and the 16 images. *See Cendejas*, 62 M.J. at 339. We find that the military judge abused his discretion in accepting the appellant's pleas without an inadequate factual predicate and in failing to reopen the providence inquiry after viewing the 16 images on Prosecution Exhibit 5.[17]

Conclusion

The findings and sentence are set aside, and a rehearing is authorized. Arts. 59(a) and 66(c), UCMJ.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court

[17] Based on our action, we do not address whether the appellant's counsel was ineffective in failing to properly advise the appellant as to whether the images found on his computer were child pornography within the meaning of the statute. Given the constitutional implications, the critical inquiry here is whether the record reflects an appropriate discussion between the military judge and the appellant to establish factual circumstances that objectively support the plea. *Aleman*, 62 M.J. at 283; *see also* R.C.M. 910(e). That did not happen here.