No. __-____

In the
Supreme Court of the United States

LAURENCE H. FINCH, Technical Sergeant,
United States Air Force,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner was sentenced to seven years in confinement when the maximum he should have faced was only eight months.

The question presented, then, is whether a divided Court of Appeals for the Armed Forces erred when it affirmed Petitioner's sentence in violation of *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) and *Alleyne v. United States*, 133 S. Ct. 2151 (2013)?

TABLE OF CONTENTS

LIST OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Technical Sergeant Laurence H. Finch, United States Air Force, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces, *United States v. Finch*, 73 M.J. 144 (C.A.A.F. 2014) is reproduced as Appendix A. The order granting Petitioner's request for review by the Court of Appeals for the Armed Forces, *United States v. Finch*, 72 M.J. 384 (C.A.A.F. 2013), is reproduced as Appendix B. The Certificate for Review filed by the Judge Advocate General of the United States Air Force is reproduced as Appendix C. The unpublished decision of the United States Air Force Court of Criminal Appeals, *United States v. Finch*, ACM 38081 (Misc. Dkt. No. 2012-13), 2013 WL 376065 (A.F. Ct. Crim. App. Jan. 25, 2013) is reproduced as Appendix D.

JURISDICTION

On 6 March 2014, the Court of Appeals for the Armed Forces affirmed the decision of the United States Air Force Court of Criminal

Appeals in *United States v. Finch*. Jurisdiction in this Court is based on 28 U.S.C. § 1259(3).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: No person shall be . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . ." U.S. CONST. amend. VI.

INTRODUCTION

When the military charges an accused with a crime not directly listed in Part IV of the Manual for Courts-Martial (MCM), [containing the punitive offenses outlined in the Uniform Code of Military Justice (UCMJ)], the maximum punishment for the crime is determined by first looking to an analogous crime elsewhere in the UCMJ. *See* Rule for Courts-Martial (RCM) 1003(c)(1)(B), MANUAL

FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). When there exists no analogous charge in the UCMJ, the military judge may then look to federal law for a directly analogous statute. If found, the judge may use the penalty set forth in that federal statute. *Id.* If no analogous statute exists in federal law and there exists no punishment prescribed by a custom of the service, the maximum sentence available is that of a "disorder," which includes a maximum of four months of confinement per offense. *See United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011); s*ee also United States v. Finch*, 73 M.J. 144, 147 (C.A.A.F. 2014).[1]

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[1] As succinctly noted by the Court of Appeals for the Armed Forces,

> this case presents a situation where the offenses at issue were neither listed in Part IV nor included in or closely related to any offense listed in the *MCM*. In such a case, R.C.M. 1003(c)(1)(B)(ii), provides that "[a]n offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States code, or as authorized by the custom of service." Neither Finch nor the government argue that a custom of the service establishes the maximum sentence in this case.
>
> The question, therefore, is whether the offenses in this case are analogous to 18 U.S.C. § 2252A(a)(2) and (5), punishable by sentences of twenty years and ten years respectively, or whether they are simple disorders punishable

In the present case, the Petitioner was charged with one specification of receiving and possessing "visual depictions of minors engaging in sexually explicit conduct," and one specification of distributing "visual depictions of minors engaging in sexually explicit conduct." There existed no analogous Article in the UCMJ at the time of the Petitioner's offenses. Because there was no analogous statute, the military judge looked to federal law for the proper maximum sentence.

Without discussing or mentioning any specific provision of federal code, the military judge determined that the Petitioner faced a 30 year maximum sentence based on his offenses. Neither trial counsel nor trial defense counsel objected to this determination. The Air Force Court of Criminal Appeals and Court of Appeals for the Armed Forces reasoned that the military judge's determination was based on a finding that 18 U.S.C. § 2252A(a)(2) [distribution of child pornography], and 18 U.S.C. § 2252A(a)(5) [possession of child pornography] were sufficiently analogous and utilized the relevant sentences set forth in 18

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by four months of confinement. *Beaty,* 70 M.J. at 45.

Finch, 73 M.J. at 144.

U.S.C. § 2252A(b)(1) [20 years] and (2) [10 years].

Petitioner pled guilty to the charges. At no point during the plea inquiry was it determined whether the images were of actual or virtual children. Instead, the military judge advised Petitioner that it didn't matter whether the children were "actual or virtual." Specifically, the judge instructed Petitioner:

> There is no requirement that the images in this case include actual images of minors; That is, the wrongful and knowing receipt and possession of visual depictions containing sexually explicit images of persons indistinguishable from minor children, whether actual or virtual, when determined to be service-discrediting conduct and conduct prejudicial to good order and discipline, is an offense under Article 134, UCMJ.

Typically, images of "virtual" children are protected by the First Amendment. U.S. CONST. amend I; *see Ashcroft v. Free Speech Coal.*, 535 U.S. at 251 (quoting *United States v. Ferber*, 458 U.S. 747, 764-65 (1982) ("the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of

live performances, retains First Amendment protection")).

However, due to the unique circumstances of the military and the allowances of the UCMJ, otherwise constitutionally-protected images may be criminalized in the armed forces. *Beaty*, 70 M.J. at 41. Though a violation of the Code, the maximum punishment for crimes involving such otherwise constitutionally-protected "virtual" images is limited to that of a general "disorder" under the UCMJ. *Id*. at 45.

Judge Margaret Ryan, Court of Appeals for the Armed Forces, recognized this in her dissent in the present case:

> While the definition of child pornography in 18 U.S.C. § 2256(8) "does not distinguish between minors and actual minors," *United States v. Finch,* 73 M.J. 144, 148 (C.A.A.F.2014), the clear import of Supreme Court precedent is that statutes under the United States Code may constitutionally criminalize only child pornography that either involves actual children or is obscene. *See generally Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 251, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

Finch, 73 M.J. at 150 n.2 (Ryan, J., dissenting) (3-2 decision) (internal quotations omitted).

Accordingly, when the divided (3-2) Court of Appeals for the Armed Forces held that 18 U.S.C. § 2252A(a)(2) and 18 U.S.C. § 2252A(a)(5) were directly analogous, they erred. The federal statutes were modified by the directly applicable Supreme Court case law to prohibit solely images of *actual* children, while the military prohibition on images is not so limited. Because the Court of Appeals for the Armed Forces did not consider this modification of federal law by *Ashcroft*, the Court of Appeals for the Armed Forces improperly held the statues analogous, allowing for a 30 year maximum confinement instead of only four months per specification.[2]

In so holding, the Court sidestepped the constitutional requirement of *Alleyne v. United*

[2] Pursuant to Rule for Courts-Martial 1003(d)(3), "[i]f an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances." Accordingly, because Petitioner would have faced a punitive discharge even if sentenced in accordance with *Alleyne* and *Beaty*, this brief only discusses the increase in confinement from eight months to seven years.

States, 133 S. Ct. 2151, 2160 (2013). Specifically, *Alleyne* requires that any "'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id*. (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)). Additionally, the facts "must be submitted to the jury." *Id*. at 2161. Once submitted to the jury, those facts must be found to be true beyond a reasonable doubt. *Id*. at 2163.

As noted above, no facts were submitted during the findings of guilt which indicated whether the images in this case were virtual or actual. As such, the elements that increased the penalty were never proven as required for Petitioner to receive the increased punishment. *See Alleyne*, 133 S. Ct. at 2160.

STATEMENT OF THE CASE

Petitioner was charged with two violations of Article 134, UCMJ. The first alleged that he "knowingly and wrongfully receive[d] and possess[ed] visual depictions of a minor engaged in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces." Charge, Specification 1. The second alleged that he "knowingly and wrongfully distribute[d] visual depictions of a

minor engaged in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces."[3] Charge, Specification 2.

Petitioner pleaded guilty to the Charge and both of its Specifications. The military judge advised Petitioner that whether the images at issue were of actual children was irrelevant. The military judge explained:

> There is no requirement that the images in this case include actual

[3] The two charges alleged that Petitioner:

> [D]id, within the continental United States, on divers occasions between on or about 1 July 2006 and on or about 18 December 2008, knowingly and wrongfully receive and possess visual depictions of a minor engaging in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces;
>
> and
>
> [D]id, within the continental United States, on divers occasions between on or about 1 July 2006 and on or about 18 December 2008, knowingly and wrongfully receive and possess visual depictions of a minor engaging in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

> images of minors; That is, the wrongful and knowing receipt and possession of visual depictions containing sexually explicit images of persons indistinguishable from minor children, whether actual or virtual, when determined to be service-discrediting conduct and conduct prejudicial to good order and discipline, is an offense under Article 134, UCMJ.

During the providence inquiry into Specification 1, the military judge asked, "The depictions at issue in this case – did they show someone appearing to be under the age of 18?" Petitioner answered, "Yes, sir." The military judge inquired, "Why did you believe they were individuals under the age of 18? What about them made you believe that?" Petitioner replied, "Sir, they appeared – their bodies were not developed." The military judge also established that file names or descriptions associated with the images included words suggesting the content "was potentially child pornography." Petitioner also stated that his conduct charged by Specification 1 was both service discrediting and prejudicial to good order and discipline.

During the providence inquiry into Specification 2, the military judge advised Petitioner that the definition of "minor" was

the same as that previously provided. The inquiry into Specification 2 included this colloquy:

> MJ: Once again, the depictions – did they show someone appearing to be under the age of 18?
>
> ACC: Yes, sir.
>
> MJ: Are these the same images that were received or possessed by you that we discussed in Specification 1?
>
> ACC: Yes, sir.
>
> MJ: Once again, can you explain why you believe that they showed someone appearing to be under the age of 18?
>
> ACC: Sir, the females were not developed in their breast and pubic areas. The males were not developed in muscle structure or in their pubic areas.
>
> MJ: And, as before, were some of the files[’] names, ones that suggested that they were of minors?

ACC: Yes, sir.

As he had regarding Specification 1, Petitioner stated that his conduct charged by Specification 2 was both service discrediting and prejudicial to good order and discipline.

The military judge found Petitioner guilty in accordance with his pleas.

The parties and the military judge agreed that the maximum authorized sentence was confinement for 30 years, reduction to the grade of E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The punishment landscape under 18 U.S.C. §2252A(b)(1)-(2) was not discussed, neither specifically nor generally.

The military judge sentenced Petitioner to confinement for seven years, reduction to E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

The Air Force Court of Criminal Appeals heard the case and affirmed the findings and sentence on 25 January 2013. Appendix D. The Court of Appeals for the Armed Forces granted review (Appendix B) and docketed a certified issue filed by the Air Force (Appendix

C). On 6 March 2014, the Court of Appeals for the Armed Forces affirmed the ruling of the Air Force Court of Criminal Appeals. Appendix A.

REASONS FOR GRANTING THE WRIT

Petitioner was sentenced to seven years of confinement. The maximum he should have faced was eight months. This sentence was ultimately upheld by a divided Court of Appeals for the Armed Forces, when the majority did not consider this Court's precedent in *Ashcroft* and *Alleyne*. Accordingly, the writ should issue and this Court should correct the injustice in this case.

The majority of a divided Court of Appeals for the Armed Forces did not include *Ashcroft* or *Alleyne* in its analysis, leading to an erroneous result.

The crux of the issue in the present case is whether the offenses for which Petitioner was found guilty are directly analogous to 18 U.S.C. § 2252A(a)(2) and (5). In a 3-2 decision, the Court of Appeals for the Armed Forces held that it is.

However, in coming to its decision, it appears the majority did not consider how U.S.C. § 2252A(a)(2) and (5) have been

modified by *Ashcroft*. As noted in the dissent by the Honorable Margaret Ryan, Court of Appeals for the Armed Forces, "the United States Code may constitutionally criminalize only child pornography that either involves actual children or is obscene." *Finch*, 73 M.J. at 150 n.2; *see also Ashcroft*, 535 U.S. at 251.

That issue was not considered by the majority when it determined the federal statute was essentially the same as the charged offense. Put simply, because the federal code cannot charge someone with the possession or distribution of virtual child pornography while the military can, the crimes are not directly analogous. Because there exists no statute in federal law analogous to the offenses for which Petitioner was found guilty (*see Ashcroft*), the maximum confinement Petitioner should have faced was four months for each specification, or eight months total. *See Beaty*, 70 M.J. at 45.

Further, even assuming the statutes were analogous, in order to punish the Petitioner under the higher federal maximums, his guilt to possession of *actual* images would have to be proven beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2160. That did not occur. Instead, Petitioner was only found guilty of possession and distribution of images that had no requirement (or proof) that they "include

actual images of minors," as articulated by the military judge.[4]

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] The Petitioner acknowledges that under *Beaty*, 70 M.J. at 45, his convictions do constitute legally sufficient disorder crimes under Article 134, UCMJ and were subject to the four months' confinement per specification.

APPENDICES

APPENDIX A

U.S. Court of Appeals for the Armed Forces.

UNITED STATES, Appellee/Cross–Appellant
v.
Laurence H. FINCH, Technical Sergeant, U.S. Air Force, Appellant/Cross–Appellee.

73 M.J. 144

Nos. 13–0353, 13–5007.
Crim.App. No. 38081 (Misc. Dkt. No. 2012–13).
Argued Oct. 9, 2013.
Decided March 6, 2014.

***145** ERDMANN, J., delivered the opinion of the court, in which BAKER, C.J., and STUCKY, J., joined. RYAN, J., filed a separate dissenting opinion. EFFRON, S.J., filed a separate dissenting opinion in which RYAN, J., joined. For Appellant/Cross–Appellee: *Captain Michael A. Schrama* (argued); *Major Matthew T. King* and *Dwight H. Sullivan* (on brief).

For Appellee/Cross–Appellant: *Major Brian C. Mason* (argued); *Colonel Don M. Christensen, Lieutenant Colonel C. Taylor Smith,* and *Gerald R. Bruce* (on brief).

Judge ERDMANN delivered the opinion of the court.

Technical Sergeant (E–6) Laurence H. Finch pleaded guilty at a general court-martial to one specification of receiving and possessing child pornography and one specification of distributing child pornography, both in violation of Article 134(1) and (2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2006). The military judge found Finch guilty in accordance with his pleas and sentenced him to confinement for seven years, reduction to E–1, and a dishonorable discharge. The convening authority approved the adjudged sentence. The United States Air Force Court of Criminal Appeals (CCA) affirmed the findings and sentence. *United States v. Finch,* No. ACM 38081 (Misc. Dkt. No. 2012–13), 2013 CCA LEXIS 33, at *11, 2013 WL 376065, at *4 (A.F.Ct.Crim.App. Jan. 25, 2013).

We granted review in this case to determine whether the military judge erred when he determined the maximum sentence to confinement was thirty years. [FN1] Following the court's grant of review, the Air Force Judge Advocate General (TJAG) certified an issue which questioned the providence of Finch's guilty plea.[FN2]

FN1. We granted review of the following issue:

Where the Article 134 child pornography specifications of which Appellant was convicted did not allege that the images depicted actual minors and where the military judge advised Appellant during the providence inquiry that "There is no requirement that the images in this case include actual images of minors," is the maximum authorized confinement for each specification limited to four months?

United States v. Finch, 72 M.J. 384 (C.A.A.F.2013) (order granting review).

FN2. TJAG certified the following issue:

If the court finds that the specifications sufficiently alleged that the visual depictions were of actual minors but that the military judge's definitions were inconsistent with the alleged specifications, what is the appropriate remedy, if any, to be given?

United States v. Finch, 72 M.J. 402 (C.A.A.F.2013) (docketing notice).

We hold, consistent with *United States v. Leonard,* 64 M.J. 381 (C.A.A.F.2007), that the military judge did not err in determining the maximum sentence to confinement. In addition, based upon our review of the record, there is no substantial basis in law or fact to question Finch's pleas of guilty to the offenses. *See United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F.2008). We therefore affirm the decision of the CCA.

***146** *Factual Background*

The specifications in this case alleged that Finch knowingly and wrongfully received, possessed (Specification 1), and distributed (Specification 2) "visual depictions of a minor engaging in sexually explicit conduct." FN3 When the military judge asked trial counsel for his calculation of the maximum sentence, trial counsel responded "30 years confinement; total forfeitures of all pay and allowances; reduction to E–1; and a dishonorable discharge." The military judge then asked trial defense counsel if he agreed and he responded "Yes, Your Honor." Consistent with the agreement of both counsel, the military judge then advised Finch of the agreed maximum possible sentence. There is no indication in the record as to what the parties relied upon to determine the maximum possible sentence to confinement. However, the CCA noted that the

analogous federal offenses provide for a maximum punishment of thirty years for the two specifications.[FN4] *Finch,* 2013 CCA LEXIS 33, at *4, 2013 WL 376065, at *2.

FN3. Specification 1 of the charge alleged that Finch:

[D]id, within the continental United States, on divers occasions between on or about 1 July 2006 and on or about 18 December 2008, knowingly and wrongfully receive and possess visual depictions of a minor engaging in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Specification 2 of the charge alleged that Finch:

[Did], both within and outside the continental United States, on divers occasions between on or about 1 July 2006 and on or about 18 December 2008, knowingly and wrongfully distribute visual depictions of a minor engaging in sexually explicit conduct, which conduct was, under the circumstances, prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

FN4. 18 U.S.C. § 2252A(b)(1) sets out the maximum imprisonment for violation of 18 U.S.C. § 2252A(a)(2) (distribution) at twenty years. 18 U.S.C. § 2252A(b)(2) sets the maximum imprisonment for a violation of 18 U.S.C. § 2252A(a)(5) (possession) at ten years. Violation of these two federal statutes results in a maximum sentence to confinement of thirty years.

During the subsequent providence inquiry, the military judge initially advised Finch of the elements of the Specification 1 and went on to provide definitions of "divers," "wrongful," "knowingly," "possess," and "receive." At that point the military judge stated:

> There is no requirement that the images in this case include actual images of minors; That is, the wrongful and knowing receipt and possession of visual depictions containing sexually explicit images of persons indistinguishable from minor children, whether actual or virtual, when determined to be service-discrediting conduct and conduct prejudicial to good order and discipline, is an offense under Article 134.

Following that statement, the military judge resumed his definitions of relevant terms, which included the term "minor." The military judge defined "minor" as "any person under the age of 18 years," which is the definition found in 18 U.S.C. § 2256(1). Following an extensive providence inquiry, the military judge accepted Finch's pleas.

In his appeal to the Air Force Court of Criminal Appeals, Finch argued that the

military judge calculated the incorrect maximum sentence to confinement and that the Staff Judge Advocate (SJA) misadvised the convening authority on clemency matters. *Finch,* 2013 CCA LEXIS 33, at *1, 2013 WL 376065, at *1. The CCA affirmed the findings and sentence, holding that the offenses charged were analogous to the "offenses of knowing receipt and possession as well as knowing distribution of child pornography, under 18 U.S.C. § 2252A(a)(2), (5), for purposes of determining the maximum punishment." *Id.* at *4, 2013 WL 376065, at *2. The CCA found no error in the recommendation of the SJA in regard to the clemency matters and went on to hold that there was "no substantial basis to question appellant's guilty plea." *Id.* at *8–*10, 2013 WL 376065, at *3–*4.

Discussion

The Granted Issue

The granted issue asks whether the military judge erred in calculating the maximum***147** punishment to confinement. Finch argues that the specifications did not allege, nor did the providence inquiry establish, that the depicted images were actual minors. Since the specifications did not allege any offense punishable under Title 18, United States Code, Finch argues that the

maximum period of confinement for each of the two Article 134 specifications was four months, citing *United States v. Beaty,* 70 M.J. 39 (C.A.A.F.2011). In addition to questioning the maximum sentence calculation, Finch also argues that his plea was not provident to an offense involving images of actual minors as the military judge specifically advised him that "[t]here is no requirement that the images in the case include actual images of minors." Finch's arguments as to the providence of the plea will be discussed under the certified issue, which also raises the providence issue.

The government responds that the military judge's calculation of the maximum sentence was correct as the specifications in this case are substantially the same as the specifications in *Leonard,* which this court recognized as being directly analogous to Title 18 offenses.

Where an offense is listed in Part IV of the *Manual for Courts–Martial, United States* (*MCM*), the maximum punishment is set forth therein. *Beaty,* 70 M.J. at 42 (citing R.C.M. 1003(c)(1)(A)(i)). Neither the receipt and possession specification nor the distribution of child pornography specification (involving either an actual minor or what appears to be a minor) was a listed offense at the time of Finch's court-martial. For offenses not listed in Part IV, the maximum punishment depends on whether the offense is included in or closely

related to a listed offense in the *MCM.* R.C.M. 1003(c)(1)(B); *Leonard,* 64 M.J. at 383; *Beaty,* 70 M.J. at 42 n. 7. In this case, neither the receipt and possession of child pornography nor the distribution of child pornography specifications were included in, or closely related to, a listed offense. *Leonard,* 64 M.J. at 383; *Beaty,* 70 M.J. at 42.

Therefore this case presents a situation where the offenses at issue were neither listed in Part IV nor included in or closely related to any offense listed in the *MCM.* In such a case, R.C.M. 1003(c)(1)(B)(ii), provides that "[a]n offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of service." Neither Finch nor the government argue that a custom of the service establishes the maximum sentence in this case. The question, therefore, is whether the offenses in this case are analogous to 18 U.S.C. § 2252A(a)(2) and (5), punishable by sentences of twenty years and ten years respectively, or whether they are simple disorders punishable by four months of confinement. *Beaty,* 70 M.J. at 45. That determination is dependent on whether the specifications alleged offenses involving both actual and virtual images of minors or just images of actual minors. The CCA upheld the military judge's thirty-year maximum sentence calculation with reference to 18 U.S.C. § 2252A(a)(2) and (5), which are

restricted to actual minors. *Finch,* 2013 CCA LEXIS 33, at *4, 2013 WL 376065, at *2.

In *Leonard,* 64 M.J. at 382, 384, we determined that the military judge did not err in setting the maximum punishment for a specification and charge of possession of visual depictions of minors engaging in sexually explicit activity by reference to the maximum punishment authorized by 18 U.S.C. § 2252(a)(2), (b)(1). We explained:

> We have looked before at the maximum sentence for offenses charged under clauses 1 or 2 of Article 134, UCMJ, that include the conduct and mens rea proscribed by directly analogous federal criminal statutes. In doing so, we focused on whether the offense as charged is "essentially the same," as that proscribed by the federal statute. *United States v. Jackson,* 17 C.M.A. 580, 583, 38 C.M.R. 378, 381 (1968); *see also United States v. Williams,* 17 M.J. 207, 216–17 (C.M.A.1984) (upholding sentence for kidnapping under clauses 1 or 2 by referencing the maximum sentence for a violation of the federal kidnapping statute). *The military judge did not err by referencing a directly analogous federal statute to identify the maximum punishment*****148*** *in this case, when every element of the federal crime, except the jurisdictional element, was included in the specification.*

Id. at 384 (emphasis added)

As in *Leonard,* here all elements of the federal crimes, except the jurisdictional element, were included in the specifications. Appellant was charged with receipt, possession, and distribution of "visual depictions of a minor engaged in sexually explicit conduct." We agree with the CCA's determination that the analogous federal provisions are 18 U.S.C. § 2252A(a)(2), which criminalizes receipt and distribution of child pornography, and § 2252A(a)(5), which criminalizes possession.[FN5]

The term "child pornography" is defined in § 2256(8)(B) to include "any visual depiction ... of a minor engaging in sexually explicit conduct." These sections are directly analogous to the specifications in this case. The definition

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FN5. Appellant's citation to 18 U.S.C. § 2252A(a)(3)(B) is inapposite, as that section targets the advertisement, promotion, presentation, distribution, or solicitation of material in a manner that reflects the belief, or intends to cause another to believe, that the material is either obscenity (of "a minor") or child pornography (of an "actual minor"). This is not analogous to the receipt, possession, and distribution offenses for which Appellant was charged, which make no distinction between obscenity of "a minor" and child pornography of "an actual minor."

does not distinguish between minors and actual minors. Neither do the sections of the statute directly criminalizing receipt and distribution and possession of child pornography. Accordingly, we hold that the CCA did not err in holding that the maximum possible sentence was based on the analogous portions of 18 U.S.C. § 2252A, which address essentially the same offenses as charged in Finch's case, and affirm that portion of the CCA's decision.

The Certified Issue

The issue certified by TJAG asks the court to provide the "appropriate remedy" if the specifications sufficiently alleged that the visual depictions were of actual minors, but the military judge's definitions were inconsistent with the alleged specifications. Essentially, TJAG seeks review of the providence of Finch's guilty plea. As noted, Finch argues that his plea to the specifications which involved images of actual minors was not provident as the military judge specifically advised him that the images could be either actual or virtual. The government acknowledges that advisement but argues that the singular reference in context of the entire providence inquiry is insufficient to render the plea improvident.

"During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." *Inabinette,* 66 M.J. at 321–22. "A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *Id.* at 322 (citations and internal quotation marks omitted). In order to ensure a provident plea, the military judge must "accurately inform Appellant of the nature of his offense and elicit from him a factual basis to support his plea." *United States v. Negron,* 60 M.J. 136, 141 (C.A.A.F.2004). "An essential aspect of informing Appellant of the nature of the offense is a correct definition of legal concepts. The judge's failure to do so may render the plea improvident." *Id.* However, "an error in advising an accused does not always render a guilty plea improvident. Where the record contains factual circumstances that objectively support the guilty plea to a more narrowly construed statute or legal principle, the guilty plea may be accepted." *Id.* (citations and internal quotation marks omitted). "To prevail, Appellant has the burden to demonstrate a substantial basis in law and fact for questioning the plea." *Id.* (citation and internal quotation marks omitted). The "mere possibility" of a conflict between the accused's plea and statements or other evidence in the

record is not a sufficient basis to overturn the trial results. *United States v. Garcia,* 44 M.J. 496, 498 (C.A.A.F.1996) (citation and internal quotation marks omitted).

Finch's argument centers on the military judge's statement that the images could display either actual or virtual minors. Finch argues that this inconsistent statement caused confusion and, as a result, he could ***149** not be sure whether he was pleading to offenses involving actual minors with a maximum sentence of thirty years or offenses involving virtual minors with a maximum sentence of eight months. An initial difficulty with this argument is that Finch's trial defense counsel explicitly agreed with the government's calculation of a maximum sentence to confinement of thirty years, a statute limited to actual minors. We note that six months prior to Finch's court-martial, this court held that possession of virtual child pornography charged under Article 134, clauses 1 and 2, was punishable as a simple disorder with a maximum punishment of four months of confinement. *See Beaty,* 70 M.J. at 45. In light of the holding in *Beaty,* the providence inquiry reflects that the parties proceeded with the understanding that the specifications involved actual minors with the corresponding thirty-year maximum sentence despite the military judge's inconsistent reference to virtual minors. At no point during the providence

inquiry or sentencing portion of the trial was there any expression of surprise or confusion as to the maximum sentence.

A further review of the providence inquiry record supports this conclusion. Following the military judge's inconsistent statement, he defined the term "minor" as used in the specification as a "person under the age of 18 years." That definition is identical to the definition of "minor" as the term is used in 18 U.S.C. § 2252A(a)(2) and (5), which are limited to actual minors. *See* 18 U.S.C. § 2256(1).[FN6] In discussing "sexually explicit conduct" the military judge informed Finch of the factors to consider in determining whether the depictions included "lascivious exhibition of the genitals or pubic area of any *person*." (Emphasis added.) When the military judge asked Finch why he believed the "individuals" depicted were under the age of eighteen, Finch responded, "Sir, they appeared—their bodies were not developed." Further, Finch responded "yes" when the military judge asked him if he understood the elements and definitions described and "yes" when asked "do you believe and admit that the elements and definitions taken together correctly describe what you did?"

FN6. The plain meaning of the term "person" references an actual person rather than a virtual person. *See United States v. Schell,* 72 M.J. 339, 343 (C.A.A.F.2013)

("Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result.") (citation and internal quotation marks omitted).

Finch told the military judge that he "knowingly received and possessed visual depictions of minors engaging in sexually explicit conduct." He said that he "saw that images of minors engaged in sexually explicit conduct were downloaded and I knowingly kept them on my computer."

Finch admitted that the descriptions or file names contained words like "underage," "minor," or "child." He answered "yes" to similar questions relating to the second specification alleging distribution of those images.

Our review of the record of the providence inquiry reflects that, despite the single inconsistent reference to images of virtual minors, the parties proceeded as though the allegations involved actual persons and the military judge elicited adequate information from Finch to support the plea. Consequently, Finch has failed to establish that a substantial basis in law or fact exists to reject his plea. *See, e.g., Garcia,* 44 M.J. at 499.

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

RYAN, Judge (dissenting):

I concur with Senior Judge Effron's dissent. I write separately to point out the additional, constitutional infirmity with the Charge and specifications in this case raised by the vast disparity between the maximum sentences authorized for actual and virtual child pornography offenses at the time of Appellant's court-martial.

I am well familiar with the holdings in both *United States v. Leonard,* 64 M.J. 381, 384 (C.A.A.F.2007), and *United States v. Beaty,* 70 M.J. 39, 41 (C.A.A.F.2011). *Leonard* still accurately stands for the general proposition that where a specification adequately alleges ***150** the same conduct and mens rea as a directly analogous federal statute, except for the jurisdictional element, the offense may be punished as authorized by the United States Code. 64 M.J. at 384; Rule for Courts–Martial (R.C.M.) 1003(c)(1)(B)(ii). The opinion also concluded that a particular specification merely alleging "minors" was adequate to use the maximum punishment from the United States Code, which was fifteen years at the relevant time. *Leonard,* 64 M.J. at 382, 384.

Leonard came after the Court's decision in

United States v. Mason, which clarified that virtual child pornography, in addition to actual child pornography, could be prosecuted under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2000). 60 M.J. 15, 19–20 (C.A.A.F.2004). However, *Leonard* predated *Beaty*'s conclusion that a child pornography offense that did *not* depict actual children could not be punished by reference to the United States Code, since there was no analogous federal crime. 70 M.J. at 44 ("An offense comprised of acts that cannot be criminally charged under the United States Code at all is neither 'directly analogous' nor 'essentially the same' as one that can be."). In such cases, the maximum authorized punishment is four months of confinement and forfeiture of two-thirds pay per month for four months. *Id.* at 45; *see also Manual for Courts–Martial, United States* Maximum Punishment Chart app. 12 at A12–6 (2012 ed.) (*MCM*); *see generally* R.C.M. 1003(c). The sentence disparity between the two offenses was not evident until it was raised and decided in *Beaty*. [FN1] If the offenses in this case had been charged under clause 3 of Article 134, UCMJ, and referenced 18 U.S.C. § 2252A (2006), there would not be a problem with the specifications in this case. Under that statute "minor" has only one meaning; "minor" is defined as "any *person* under the age of eighteen years," 18 U.S.C. § 2256(1) (2006) (emphasis added), and it is

FN1. Moreover, in *Leonard,* the accused admitted during the providence inquiry that the depictions were of actual minors. 64 M.J. at 382.

clear that the "person" must be a real person under person under the United States Code.[FN2]

FN2. While the definition of child pornography in 18 U.S.C. § 2256(8) "does not distinguish between minors and actual minors," *United States v. Finch,* 73 M.J. 144, 148 (C.A.A.F.2014), the clear import of Supreme Court precedent is that statutes under the United States Code may constitutionally criminalize only child pornography that either involves actual children or is obscene. *See generally Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 251, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (explaining that "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment," and creating a clear distinction between the treatment of actual and virtual child pornography). Consequently, the United States Code only criminalizes depictions that are either of actual minors, *see, e.g.,* 18 U.S.C. §§ 2252(a)(2), 2252A(a)(2), or obscene, *see, e.g.,* 18 U.S.C. § 1466A(a). While the definition of "child pornography" also includes a visual depiction 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), it is clear that the United States Code does not attempt to criminalize non-obscene depictions of virtual minors because 18 U.S.C. § 2252A(c) provides an affirmative defense that the depictions were of actual, adult persons or that no actual minor was used in the production of the depictions. Our precedent involving offenses charged as violations of clauses 1 or 2 of Article 134, UCMJ, imposes no such limits. It is this fact, combined

with the sentence disparity, which causes the constitutional problem discussed *infra*.

But the Government charged the offense as a violation of clauses 1 and 2, Article 134, UCMJ, which permitted, even prior to the recent *MCM* amendments, prosecution of real, virtual, or what appears to be child pornography. *See Beaty,* 70 M.J. at 41; *see also Finch,* 73 M.J. at 153 (Effron, S.J., with whom Ryan, J., joined, dissenting) (discussing the recent *MCM* amendments). If, of course, the depictions were of actual minors, there are directly analogous federal statutes, which authorize sentences well in excess of four months [FN3] for the distribution and receipt***151** [FN4] specifications.

FN3. While the parties agreed at the court-martial that the maximum punishment for the two specifications was thirty years, they appear to have relied on the maximum punishment discussed in *Leonard,* 64 M.J. at 384, rather than the amended statutes. *See* 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1) (amended 2003).

FN4. The majority ultimately treats Specification 1 as a possession offense, directly analogous to 18 U.S.C. § 2252A(a)(5), *Finch,* 73 M.J. at 147–48, despite noting the additional "receive" language in the specification. Whether the specification is best characterized as a possession offense, with a maximum sentence of ten years of confinement, or a receipt offense, with a maximum sentence of twenty years of confinement,

however, is largely unimportant here because the maximum sentence for either offense is far in excess of four months.

See, e.g., 18 U.S.C. § 2252A(b)(1); *see also Leonard,* 64 M.J. at 384. But if the depictions were of virtual child pornography, or what appeared to be minors, the sentencing exposure for each specification was only four months. *Beaty,* 70 M.J. at 44–45.

This distinction raises the constitutional problem presented by the specifications and adjudged sentence but avoided by the majority. "[A]ny facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime." *Alleyne v. United States,* ——U.S. ——, 133 S.Ct. 2151, 2160, 186 L.Ed.2d 314 (2013) (citation and internal quotation marks omitted). Consequently, given the widely disparate sentences occasioned by the status of the depictions, when charged as a violation of clause 1 or 2, Article 134, UCMJ, the fact that the depictions were of *actual* minors "necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne,* 133 S.Ct. at 2162.

Even in the guilty plea context, where an accused waives his right to trial by members, *United States v. Hansen,* 59 M.J. 410, 411 (C.A.A.F.2004), such elements must be included in the specification and shown to be understood by the accused as elements of the

offense to which he is pleading guilty. *United States v. Care,* 18 C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969); *see generally United States v. Ballan,* 71 M.J. 28 (C.A.A.F.2012).

One simply cannot rely on *Leonard* without considering the import of *Beaty* for this particular set of offenses. The issue here is not answered solely by reference to the language of the specification without consideration of the effects of our child pornography jurisprudence, particularly in light of the elements as defined during the providence inquiry. *Leonard* neither addresses nor purports to approach the legal landscape presented in this case, which is the result of permitting offenses under Article 134, UCMJ, that are not offenses under the United States Code, and of resort to "general guidance in the *Manual for Courts–Martial* in order to ascertain the maximum punishments available under military law for different forms of child pornography offenses." *Finch,* 73 M.J. at 152–53 (Effron, S.J., with whom Ryan, J., joined, dissenting); *see also* R.C.M. 1003(c)(1)(B).

No one questions that the "actual" status of the minors in the visual depictions at issue significantly increases the range of penalties to which Appellant was exposed, because such acts may be prosecuted under the United States Code, over the penalties allowed if the depictions were of "virtual" child pornography

or what appeared to be minors, which generally may not be prosecuted under the United States Code. *See Finch,* 73 M.J. at 147. Given these circumstances, we are simply not free to either disagree with or ignore the Supreme Court's directive as to how such facts must be treated. *See, e.g., Alleyne,* 133 S.Ct. at 2160, 2162.

Consequently, absent an allegation that the depictions were of "actual" minors, under the law at the time of his conduct Appellant could not be subject to the sentencing maximum for that offense. *Id.* Moreover, the military judge not only failed to render the error harmless by both explaining that the status of the minors was relevant to the offense and eliciting the Appellant's admission that the pornography was of actual minors, *see Ballan,* 71 M.J. at 35, he compounded the problem by telling Appellant that they did not have to be actual minors.[FN5]

I respectfully dissent.

FN5. This fact raises serious questions as to the basis for the majority's conclusion that all parties involved were aware of *Beaty, see Finch,* 73 M.J. at 148–49, since *Beaty*'s holding on the maximum sentence for virtual child pornography was contrary to the agreed upon sentence for the elements of the specifications as described by the military judge during the providence inquiry.

***152** EFFRON, Senior Judge, with whom RYAN, Judge, joins (dissenting):

The military judge in the present case erroneously informed Appellant that it made no difference whether the child pornography images at issue depicted actual or virtual children. In providing this erroneous information to Appellant, the military judge overlooked a critical difference in the penalty landscape at the time of Appellant's trial. At that time, the two offenses at issue carried a combined authorized punishment of thirty years of confinement for the distribution and possession of images involving actual children. *United States v. Finch,* 73 M.J. 144, 146 n. 4 (C.A.A.F.2014). By contrast, if the depictions consisted of virtual images, the combined authorized punishment at the time of Appellant's trial was only eight months of confinement. *Id.* at 147–48. The majority concludes that the erroneous statement by the military judge—equating actual and virtual images—constituted an insubstantial error under the circumstances of this case. For the reasons set forth below, I respectfully dissent.

The evolving treatment of actual and virtual images under military law

The federal criminal code treats child

pornography offenses as serious crimes, punishable by lengthy periods of confinement. *See* 18 U.S.C. § 2252A (2012). Although the Uniform Code of Military Justice (UCMJ) does not contain an article that expressly addresses child pornography, such offenses are prosecuted in courts-martial under Article 134, UCMJ, 10 U.S.C. § 934 (2012), which prohibits conduct that is prejudicial to good order and discipline, conduct that is service discrediting, and conduct that violates federal criminal statutes.

In *United States v. James,* 55 M.J. 297 (C.A.A.F.2001), we upheld a court-martial conviction under a federal child pornography statute that prohibited the possession of child pornography regardless of whether the pornography depicted actual children or computer-generated images of "virtual" children. Our decision was consistent with the views expressed by a majority of other federal courts of appeals that had considered the issue at that time. *See id.* at 299–300. Subsequently, however, the Supreme Court held that the restrictions on pornographic materials involving actual children could not be applied to computer-generated simulations or images under the First Amendment. *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 249–56, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

In *United States v. O'Connor,* 58 M.J. 450, 454–55 (C.A.A.F.2003), we recognized that the

Supreme Court's decision established binding precedent with respect to application of the federal criminal statute, but we left open the possibility that child pornography offenses involving virtual images could be prosecuted under other provisions of military law. In *United States v. Mason,* 60 M.J. 15, 20 (C.A.A.F.2004), we held that under military law, the receipt or possession of virtual child pornography, as well as actual child pornography, could constitute conduct prejudicial to good order and discipline or service discrediting conduct under the first and second clauses of Article 134, UCMJ, depending on the facts of the case.

The evolving contours of the penalty landscape

During the eight-year period that followed our 2004 decision in *Mason,* including the period of time covered by the trial in the present appeal, the President did not exercise the authority provided by Article 56, UCMJ, 10 U.S.C. § 856 (2012), to establish maximum punishments for specific forms of child pornography offenses. In the absence of express attention under Article 56, UCMJ, military judges and the appellate courts were required to apply general guidance in the *Manual for Courts–Martial* in order to ascertain the maximum punishments available under military law for different forms of child pornography offenses. *See* Rule for Courts–Martial (R.C.M.) 1003(c)(1)(B);

United States v. Leonard, 64 M.J. 381, 383–84 (C.A.A.F.2007) (concluding that R.C.M. 1003(c)(1)(B)(ii) authorized confinement for up to fifteen years in a case involving receipt of actual child pornography); *Finch,* 73 M.J. at 146 n. 4 (noting the current authority for confinement of up to twenty years for distribution of actual images and confinement of ***153** up to ten years for receipt of actual images); *United States v. Beaty,* 70 M.J. 39, 44–45 (C.A.A.F.2011) (concluding that the rule authorized a maximum punishment of four months of confinement and associated penalties in a case involving virtual child pornography).

Subsequent to Appellant's trial—and subsequent to *Mason, Leonard,* and *Beaty*—the *Manual for Courts–Martial* was amended to address expressly actual images and virtual images (i.e., images of "what appear[ ] to be minors," *Beaty,* 70 M.J. at 40, 43). *See Manual for Courts–Martial, United States* Analysis of the Punitive Articles app. 23 at A23–22 (2012 ed.) (*MCM*). Under the amended version of the *Manual,* which is now in effect, actual and virtual images are treated as the same for punishment purposes. *MCM* pt. IV, para. 68b.c.(1). Offenses such as possessing, receiving, and viewing child pornography are subject to a maximum of ten years of confinement per offense, regardless of whether the images are of actual children or images of virtual children. *Id.* at para. 68b.e.(1). Periods

of greater confinement are authorized for offenses involving aggravating circumstances: fifteen years for possession with intent to distribute, twenty years for distribution; and thirty years for production. *Id.* at paras. 68b.e.(2)–(4). The new rules, which equate actual and virtual child pornography, reflect the reality of modern imaging technology. Persons with only modest skills can produce virtual images that, from the perspective of the viewer, are infused with such vitality that they "appear to be" real.

But Appellant was not tried under the new rules. At the time he was tried, the offenses involving actual and virtual images were not equated. Instead, the penalty landscape presented vast differences in authorized punishments on the two specifications involving child pornography offenses. At the time of Appellant's trial, the two offenses at issue carried an authorized punishment of thirty years of confinement for the distribution and possession of actual images, but only eight months of confinement for images involving virtual depictions.

Consideration of the relationship between actual and virtual images during Appellant's trial

Given the vast disparity in the consequences associated with the offenses under the law in effect at that time, it was

incumbent upon the military judge to engage in a plea colloquy that accurately informed Appellant of the nature of the offenses and the penalty landscape. *See* R.C.M. 910(c)(1). In this case, the military judge erroneously told Appellant that it would make no difference whether the images were actual or virtual. *Finch,* 73 M.J. at 146. In so doing, he left Appellant with the misleading impression that there was no legal difference between actual and virtual images when, in fact, the difference was dramatic. At no point did the military judge provide any information to Appellant to rectify this error.

An error by the military judge in misadvising an accused on matters affecting the maximum sentence does not necessarily amount to the type of substantial misunderstanding that will invalidate a plea. *See, e.g., United States v. Walker,* 34 M.J. 264, 266 (C.M.A.1992). The analysis is contextual. *Id.*

The majority concludes that there was no substantial misunderstanding, viewing the record as demonstrating a context in which all present understood that the case involved images of actual children. In support of this proposition, the majority cites defense counsel's agreement with the military judge that the maximum punishment was thirty years. *Finch,* 73 M.J. at 148–49. Defense counsel, however, did not object to or correct

the military judge and did not offer any views as to the considerable differences between actual and virtual images. To the extent that the exchange between the defense counsel and the military judge proves anything, it merely demonstrates that the defense counsel and the military judge shared the same misunderstanding of the relationship between actual and virtual images—a matter involving a vast difference in the penalty landscape and that was never explained on the record to Appellant.

The majority also cites the use of phrases in the plea colloquy such as "person," "child," ***154** "underage," "individuals ... [whose] bodies were not developed," and "minors engaging in sexually explicit conduct" as demonstrating an understanding by the military judge and Appellant that the colloquy involved actual rather than virtual images. *Id.* at 149. The military judge's own words refute the majority's theory. He expressly used the words "persons" in describing virtual pornography when he erroneously equated actual and virtual images by referring to "visual depictions containing sexually explicit images of *persons* indistinguishable from minor children, whether actual or virtual." *Id.* at 146 (emphasis added).

In that context, where the military judge expressly advised Appellant that virtual images constituted depictions of "persons

indistinguishable from minor children," nothing in Appellant's use of similar words would provide a basis for concluding that Appellant was referring only to actual children. *Id.* Given the graphic reality that can be achieved in the production of virtual images, the fact that participants in a plea colloquy used such language does not demonstrate that they were referring to actual or virtual images.

The current *Manual for Courts–Martial* repeatedly uses similar words to describe both actual and virtual images. *See, e.g., MCM* pt. IV, para. 68b.c.(1) (defining child pornography as the "visual depiction of a minor engaging in sexually explicit conduct"); *id.* at para. 68b.c.(4) (defining a minor as a "person under the age of 18 years"); *id.* at para. 68b.c. (7) (defining various forms of sexually explicit conduct as occurring "between persons of the same or opposite sex" or involving "lascivious exhibition of the genitals or pubic area of any person").

The amended *Manual* does not govern the case before us, but the use of such language in the current *Manual* to describe both actual and virtual images—like the use of such words by the military judge at trial—refutes the majority's view that the plain meaning of such words refers only to actual images. The *Manual,* in its routine use of words like "individuals" and "persons" to describe both

actual and virtual images of sexual conduct, demonstrates that the plain meaning of these words can encompass both. The use of these words during the plea colloquy does not demonstrate either an express or implicit understanding by the military judge or Appellant that the images at issue in the present case only involved images of actual children.

The defective plea inquiry in this case involves a set of circumstances that would not affect a plea under current law. The plea inquiry in this case, however, demonstrates a substantial and uncorrected error by the military judge with respect to the law at the time of Appellant's trial, rendering the plea improvident. Under these circumstances, the Court should set aside the findings and sentence, and remand the case for a rehearing.

U.S. Armed Forces,2014.
U.S. v. Finch
73 M.J. 144

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Daily Journal

Thursday, May 16, 2013, 13–165

ORDERS GRANTING PETITION FOR REVIEW

72 M.J. 385

No. 13–0353/AF. U.S. v. Laurence H. Finch. CCA 38081.

Review granted on the following issue:

WHERE THE ARTICLE 134 CHILD PORNOGRAPHY SPECIFICATIONS OF WHICH APPELLANT WAS CONVICTED DID NOT ALLEGE THAT THE IMAGES DEPICTED ACTUAL MINORS AND WHERE THE MILITARY JUDGE ADVISED APPELLANT DURING THE PROVIDENCE INQUIRY THAT "THERE IS NO REQUIREMENT THAT THE IMAGES IN THIS CASE INCLUDE ACTUAL IMAGES OF MINORS," IS THE MAXIMUM AUTHORIZED CONFINEMENT FOR EACH SPECIFICATION LIMITED TO FOUR MONTHS?

Briefs will be filed under Rule 25.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Daily Journal

Monday, June 17, 2013

CERTIFICATE FOR REVIEW FILED
72 M.J. 402, 13-185

No. 13-5007/AF. U.S. v. Laurence H. FINCH. CCA 38081. Notice is hereby given that a certificate for review of the decision of the United States Air Force Court of Criminal Appeals was filed under Rule 22 this date on the following issue:

IF THE COURT FINDS THAT THE SPECIFICATIONS SUFFICIENTLY ALLEGED THAT THE VISUAL DEPICTIONS WERE OF ACTUAL MINORS BUT THAT THE MILITARY JUDGE'S DEFINITIONS WERE INCONSISTENT WITH THE ALLEGED SPECIFICATIONS, WHAT IS THE APPROPRIATE REMEDY, IF ANY, TO BE GIVEN?

APPENDIX D

U.S. Air Force Court of Criminal Appeals

UNITED STATES
v.
Technical Sergeant Laurence H. FINCH, United States Air Force.

ACM 38081, Misc. Dkt.2012–13

Sentence Adjudged 9 Nov. 2011

2013 WL 376065 (A.F. Ct. Crim. App)

GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 7 years, and reduction to E–1.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire (argued); Major Daniel E. Schoeni; and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Captain Brian C. Mason (argued); Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before GREGORY, HARNEY, and CHERRY,

Appellate Military Judges.

PER CURIAM.

***1** A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of possession and distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court adjudged a dishonorable discharge, confinement for seven years, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. The appellant assigns as error that the military judge applied the wrong maximum punishment and that the staff judge advocate misadvised the convening authority on consideration of clemency matters.

The Maximum Punishment

An offense not specifically listed in, included within, or closely related to an offense listed in the *Manual for Courts–Martial* (hereinafter *Manual*) is punishable as authorized by the United States Code (hereinafter the Code). Rule for Courts–Martial (R.C.M.) 1003(c)(1)(B)(ii). Because the charged child pornography offenses were not specifically listed in the *Manual* at the time of trial, the parties agreed that the maximum punishment included confinement for 30 years based on the analogous offenses under 18 U.S.C. § 2252A.

The appellant concedes that this maximum would be correct if the individuals in the images were actual minors, but he argues (1) that the specifications did not allege that the images involved "actual" minors and (2) that the plea inquiry failed to establish that the images were of actual minors.

The specifications allege that the appellant possessed and distributed images of a minor: Specification 1 alleges that the appellant knowingly received and possessed "visual depictions of *a minor* engaging in sexually explicit conduct" and Specification 2 alleges that he knowingly distributed "visual depictions of *a minor* engaging in sexually explicit conduct." (Emphasis added.). In *United States v. Beaty,* 70 M.J. 39, 42 (C.A.A.F.2011), our superior court held that a specification which alleged possession of images of "*what appears to be* a minor engaging in sexually explicit activity" was insufficient to invoke the Code's maximum for possession of child pornography, but found no abuse of discretion in using the higher maximum of the analogous Code offense for a specification alleging "possession of visual depictions *of minors* engaging in sexually explicit activity." *Id.* at 42–43 (emphasis added).

In a supplemental brief, the appellant argues that the term "minor," as used in the specifications, is insufficient to invoke the

punishment under 18 U.S.C. § 2252A because the statute distinguishes minors and actual minors. He cites 18 U.S.C. § 2252A(a)(3)(B), which subjects to criminal liability anyone who "advertises, promotes, presents, distributes, or solicits" material that is "an obscene visual depiction *of a minor* engaging in sexually explicit conduct" or "a visual depiction *of an actual minor* engaging in sexually explicit conduct." (Emphasis added.). Based on this provision, he argues that the specification should have alleged—and the military judge should have confirmed—that the images involved "actual minors" rather than just "minors."

***2** But the appellant's crimes are not analogous to this subsection; rather, the appellant's crimes are analogous to other subsections which criminalize the possession and distribution of "child pornography." *See* 18 U.S.C. § 2252A(a)(2), (5). The term "child pornography" includes any visual depiction of sexually explicit conduct where (1) the "visual depiction involves the use of *a minor* engaging in sexually explicit conduct," or (2) the visual depiction 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)(A), (B) (emphasis added). Therefore, the specifications at issue here are sufficient to allege the analogous offenses of

knowing receipt and possession as well as knowing distribution of child pornography, under 18 U.S.C. § 2252A(a)(2), (5), for purposes of determining the maximum punishment.

The appellant next argues that, despite the language of the specifications, the military judge conducted a plea inquiry for images that only "appeared to be" minors. We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *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) (citation omitted). "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 United States v. Prater,* 32 M.J. 433, 436 (C.M.A.1991) (A plea of guilty should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea.). "An accused must know to what offenses he is pleading guilty," *United States v. Medina,* 66 M.J. 21, 28 (C.A.A.F.2008), and a military judge's failure to explain the elements of the charged offense is error. *United States v. Care,* 40 C.M.R. 247, 253 (C.M.A.1969). Accordingly, "a

military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton,* 60 M.J. 62, 64 (C.A.A.F.2004) (citing *United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A.F.1996)).

In complex offenses, failure to explain the elements will generally result in reversal. *See United States v. Pretlow,* 13 M.J. 85, 88–89 (C.M.A.1982). However, a guilty plea is not automatically improvident and "may meet required standards if on the basis of the whole record the showing is clear that the plea was truly voluntary, even if the trial judge has not personally addressed the accused and determined that the defendant possesses an understanding of the law in relation to the facts." *Care,* 40 C.M.R. at 251. *See also United States v. Jones,* 34 M.J. 270, 272 (C.M.A.1992) (finding a plea was not improvident despite the military judge's failure to read the elements). In such cases, a separate detailing of each element of the offense is not required to establish the providence of the guilty plea if the record otherwise establishes that the appellant understood the elements of the offense. *See United States v. Kilgore,* 44 C.M.R. 89, 90–91 (C.M .A.1971) (finding the elements sufficiently "explained" throughout the military judge's dialogue with the appellant); *United States v.. Nystrom,* 39 M.J. 698, 701 (N.M.C.M.R.1993).

***3** Here, the military judge accepted the appellant's pleas of guilty to one specification of knowingly receiving and possessing "visual depictions of a minor engaging in sexually explicit conduct" and one specification of knowingly distributing "visual depictions of a minor engaging in sexually explicit conduct." He defined minor as "any *person* under the age of 18 years." (Emphasis added.). In his explanation of the elements of the possession offense, the military judge initially stated that the specification did not require "that the images in this case include actual images of minors" but later stated that the offense required knowing receipt of "sexually explicit images of a minor." After acknowledging his understanding of the elements, the appellant stated that he knowingly received and possessed "visual depictions of minors engaging in sexually explicit conduct."

During the ensuing colloquy with the appellant the military judge specifically asked about the age of the persons in the images:

MJ: The depictions at issue in this case—did they show someone appearing to be under the age of 18?

ACC: Yes, sir.

MJ: Why did you believe they were individuals

under the age of 18? What about them made you believe that?

ACC: Sir, they appeared—their bodies were not developed.

At the conclusion of the inquiry, the military judge asked the appellant if he believed and admitted that he knowingly received and possessed "*visual depictions of a minor* engaging in sexually explicit conduct." (Emphasis added.). The appellant replied that he did. The military judge conducted a similar inquiry on the distribution specification and clarified with the appellant that the images were the same as those they had just discussed regarding specification one. In consideration of the entire inquiry, we find no substantial basis to question the appellant's guilty plea to knowing receipt and possession as well as knowing distribution of child pornography, as defined by 18 U.S.C. § 2256(8) and punishable as prescribed by 18 U.S.C. § 2252A. Although the military judge initially used the phrase "appearing to be" in regard to the images, the inquiry as a whole shows that both he and the appellant understood that the appellant was pleading guilty as charged to images involving a minor rather than images of only what appeared to be a minor.

The Recommendation of the Staff Judge Advocate

In an addendum to his recommendation, the staff judge advocate (SJA) responded to various matters submitted by the defense in clemency, to include the appellant's "multitude of medical issues" and lack of medical care while in initial confinement at Fort Leavenworth. The SJA stated that the appellant or his counsel should notify prison officials concerning any medical care issues and advised the convening authority that "[t]he issue of healthcare is not a basis for clemency." The appellant argues that this statement misled the convening authority concerning the scope of his clemency powers and requests that the record be returned to the convening authority for a new recommendation and action.

***4** We review post-trial processing issues de novo. *United States v. Kho,* 54 M.J. 63, 65 (C.A.A.F.2000). In post-trial matters, "there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.' " *United States v. Wheelus,* 49 M.J. 283, 289 (C.A.A.F.1998) (quoting *United States v. Chatman,* 46 M.J. 321, 323–24 (C.A.A.F.1997)). This low threshold of possible prejudice from an erroneous post-trial recommendation "reflects the convening

authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the [clemency decision]." *United States v. Scalo,* 60 M.J. 435, 437 (C.A.A.F.2005).

We find nothing that would prohibit a convening authority from granting clemency on the basis of medical issues. "The convening authority may for any or no reason disapprove a legal sentence in whole or in part." R.C.M. 1107(d). The SJA's statement that healthcare is not a basis for clemency is simply wrong. The appellant argues that, if not for the erroneous advice, the convening authority "might" have reduced his confinement. We find this insufficient to make a colorable showing of possible prejudice. Despite the erroneous advice, the convening authority states that he considered the matters submitted by the appellant before taking action. Viewed in the context of the appellant's crimes and the convening authority's express statement that he considered the matters submitted by the appellant, we see no colorable showing of possible prejudice from the single erroneous statement in the addendum.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the

appellant occurred.[FN1] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F.2000). Accordingly, the approved findings and sentence are

FN1. The appellant petitioned this Court to order his release from confinement during the pendency of the appeal on the basis that he was unlawfully confined under an erroneous maximum punishment. For the reasons set forth herein regarding the maximum punishment for the appellant's offenses, the petition is **DENIED.**

AFFIRMED.

A.F.Ct.Crim.App.,2013.
U.S. v. Finch
Not Reported in M.J., 2013 WL 376065 (A.F.Ct.Crim.App.)

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