25 November 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. 37785
Airman First Class (E-3) KOREY J. TALKINGTON, USAF *Appellant.*	)	USCA Dkt. No. 13-0601/AF

BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE MEMBERS THAT CONSIDERATION OF SEX OFFENDER REGISTRATION IS "NOT A MATTER BEFORE THEM" AND "FRAUGHT WITH PROBLEMS."

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ. This Honorable Court has jurisdiction to review AFCCA's decision under Article 67, UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

The facts necessary to the disposition of the issues are set forth in the argument below.

SUMMARY OF ARGUMENT

The military judge did not abuse his discretion when he instructed the members that consideration of sex offender

registration is "not a matter before them" and "fraught with problems." First, United States v. Riley, 72 M.J. 115, 112 (C.A.A.F. 2013), held "that in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea," and is inapplicable to this case because the requirements of sex offender registration, unlike the loss of retirement benefits, vary from state to state and are speculative. More importantly, sex offender registration is not a mitigating factor or a consequence of the sentence adjudged. Finally, even if the military judge abused his discretion, the error did not have a substantial influence on the sentence.

ARGUMENT

THE MILITARY JUDGE DID NOT ERR BY INSTRUCTING THE MEMBERS THAT CONSIDERATION OF SEX OFFENDER REGISTRATION IS "NOT A MATTER BEFORE THEM" AND "FRAUGHT WITH PROBLEMS."

Standard of Review

A military judge has substantial discretionary authority in determining what instructions are ultimately provided to the members. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993) (citing United States v. Smith, 34 M.J. 200 (C.M.A. 1992)). This Court reviews a military judge's sentencing instructions for an abuse of discretion when objected to by trial defense counsel. United States v. Barrier, 61 M.J.

482, 485 (C.A.A.F. 2005); United States v. Boyd, 55 M.J. 217, 220 (C.A.A.F. 2001). The challenged action "must be 'arbitray, fanciful, clearly unreasonable' or 'clearly erroneous.'" United States v. McElhaney, 54 M.J. 120, 132 (C.A.A.F. 2000) (quoting United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997)). A failure to properly instruct is tested for whether it had substantial influence on the sentence. Boyd, 55 M.J. at 221.

Law and Analysis

"The general rule concerning collateral consequences of a sentence is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'" United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988) (quoting United States v. Quesinberry, 31 C.M.R. 195, 198 (C.M.A. 1962)). Ordinarily, instructions of collateral consequences should be avoided. United States v. Hall, 46 M.J. 145, 146 (C.A.A.F. 1997) (citing Griffin, 25 M.J. 423; United States v. McElroy, 40 M.J. 368, 371-72 (C.M.A. 1994)).

Prior to sentencing instructions, trial counsel requested a tailored instruction regarding sex offender registration, prompted by express references in Appellant's unsworn statement. (JA at 66.) After trial counsel proposed the instruction, defense counsel objected to the instruction in its entirety. (JA

at 40.) In the alternative, trial defense counsel asked that only a portion of the instruction requested by trial counsel be given. (Id.) After discussion of the government's proposed instruction regarding sex offender registration and trial defense counsel's objections to the proposed instruction, the military judge overruled trial defense counsel's objections. (JA at 40-42.)

After the discussion on the government's proposed instruction, the members returned and the military judge began providing sentencing instructions to them. (JA at 42-43.) During his sentencing instructions, the military judge instructed the members

> The accused's unsworn statement included the accused's personal belief that he would be administratively discharged if he did not receive a punitive discharge and his belief that he would be required to register as a sex offender. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense of which the accused stands convicted. However, as a general evidentiary matter, evidence regarding possible registration as a sex offender or the potential of an administrative discharge, and the consequences thereof, would be characterized as a collateral consequences, and thus inadmissible outside of the context of an unsworn statement. This is so because your duty in sentencing is to adjudge an appropriate sentence for this accused, under these facts, in accordance with my instructions. Possible collateral consequences of the sentence, beyond those upon which you are instructed, should not be a part of your deliberations other than as I have earlier discussed. As to sex offender registration requirements, they may differ between

> jurisdictions such that registration requirements and the consequences thereof, are not necessarily predictable with any degree of accuracy. Even if such requirements were predictable, whether or not the accused will be or should be registered as a sex offender and whether he will be or should be administratively discharged is not a matter before you. Rather, determining an appropriate sentence for this accused, in accordance with my instructions, is your charge. In short, use of this limited information is fraught with problems. Therefore, after due consideration of the unsworn statement and my prior instructions the nature of the unsworn statement, the consideration and weight you give the reference is up to you in your sound discretion. Your duty is to adjudge an appropriate sentence for this accused in accordance with these instructions.[1]

(JA at 49-50.)

Appellant claims United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013), "should be extended to make clear that sex offender registration is a direct consequence of the conviction, which the members should consider in sentencing." (App. Br. at 5.) However, Appellant gives no explanation of, or argument why, Riley somehow demands such a change in the law concerning sex offender registration consideration in sentencing.

Riley involved a judge alone guilty plea, with a pretrial agreement. The accused, who had tried to steal a baby from a hospital, pleaded guilty to kidnapping a minor, which would have resulted in sex offender registration. However, the accused was never told by either her defense counsel or the military judge

[1] The language in the instruction provided by the military judge differed significantly from the language in the instruction proposed by the government.

that her plea would result in registration as a sex offender. She complained on appeal she would never have entered into the plea agreement, or pleaded guilty at all to the charge, had she known it would result in sex offender registration. This Court examined the specific dangers of military members not being appropriately informed of the sex offender registration consequences of their pleas. This Court discussed how defense counsel did not follow the specific rule announced in United States v. Miller, 63 M.J. 452 (C.A.A.F. 2006), stating "the importance of this rule springs from the unique circumstances of the military justice system" in how service members are "more often than not" court-martialed outside their state of domicile and without the assistance of counsel from that state. Riley, 72 M.J. at 121. This Court analogized the situation to not being informed of deportation as a consequence of a plea. Id. at 120-21. Finally, the Court discussed how they had recently found it was ineffective assistance of counsel when defense counsel failed to respond to a client's question about sex offender registration consequences of his plea, "where, had the request been investigated and answered, even counsel acknowledge[d] that his advice would have been different." Id. at 121. (internal quotations and citations omitted.) Taking all of that into account, this Court held "that **in the context of a guilty plea inquiry**, sex offender registration consequences can no longer be

deemed a collateral consequence **of the plea**." Riley, 72 M.J. at 121 (emphasis added).

Riley has no relation to the case at bar and is inapposite to the issue presented.[2] Appellant's argument improperly merges the concepts of collateral consequences to a plea and collateral issues to a sentence. This case is much more analogous to that presented to the Air Force Court of Criminal Appeals in United States v. Datavs, 70 M.J. 595 (A.F. Ct. Crim. App. 2001)[3]. In Datavs, the military judge granted a government motion in limine, prohibiting the defense from discussing the impact of sex offender registration in sentencing argument. Id. at 603. In holding the military judge did not abuse his discretion, the Air Force Court of Criminal Appeals held

> While our superior court has to some degree relaxed the general rule to permit discussion of collateral impact in cases involving retirement benefits, to date the court has not made such a policy change with respect to sex offender registration, and we decline to do so today. Retirement benefits are defined and quantifiable and can be explained to the sentencing authority with specific accuracy. The requirements for registering as a sex offender on the other hand are not nearly as precise. Each state has different

[2] Neither this Court nor any service Court of Criminal Appeals has followed Appellant's strained logic in applying Riley. *See* United States v. Martin, ACM 38222 (A.F. Ct. Crim. App. 30 September 2013) (unpub. op.) (Appendix) (Military judge did not abuse his discretion in refusing to provide the defense-requested sex offender registration instruction); United States v. Lindsey, ACM 37894 (A.F. Ct. Crim. App. 18 June 2013) (unpub. op.) (Appendix) (Military judge did not abuse her discretion in instructing members that they could not consider sex offender registration consequences when deciding what sentence was appropriate for the appellant and by prohibiting trial defense counsel from referencing sex offender registration in his argument).

[3] The Court of Appeals for the Armed Forces granted review and affirmed on separate issues. *See* United States v. Datavs, 71 M.J. 420 (C.A.A.F. 2012).

> rules as to when registration is required and how compliance is monitored and measured. Given these differences, the military judge did not abuse his discretion by finding there was insufficient information for the members to make an informed decision on the issue. While the effects of registration may be difficult for the appellant, the military judge did not abuse his discretion by precluding trial defense counsel from discussing the matter during argument.

Id. at 604 (internal citations omitted).

What the Air Force Court of Criminal Appeals recognized in Datavs that Appellant ignores, is that there is significant difference between retirement benefits and sex offender registration, both in form and function. First, retirement benefits are defined and quantifiable with specific accuracy. Id. No matter what state or country an accused resides in, the effect of a punitive discharge on his/her retirement benefits is going to be the same. Conversely, sex offender registration laws are governed by the various states. Each state has different rules as to when registration is required, how compliance is monitored and measured, and how violations are addressed.[4] Which laws will govern and how stringent the requirements will be is dependent on the affirmative decision by an accused concerning where he/she will live, and assumes the accused will actually take the affirmative action to register, if required. In short, sex offender registration, and the

[4] A cursory review of the laws of the various states show significant differences from one state to the next.

requirements thereof, are speculative at best and thus "fraught with problems."

Appellant's attempted analogy between sex offender registration and retirement benefits fails on a much more fundamental level. Appellant argues "[i]f members are required to be notified **of the effect their adjudged sentence will have on an accused's eligibility for military retirement benefits**, it stands to reason that members should be made aware of the effect of sex offender registration, especially in light of the severity of such a penalty." (App. Br. at 6.) (emphasis added) It is the cause and effect relationship that makes these two distinct concepts, retirement benefits and sex offender registration, so very different. The loss of retirement benefits is effectuated by the members adjudging a punitive discharge. Because the effect (loss of retirement benefits) is a result of the members adjudging a punitive discharge (the cause) it makes logical sense that military judges are "required to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it." Boyd, 55 M.J. at 221. The possibility of sex offender registration, on the other hand, is not an effect of the adjudged sentence. Instead, it is a consequence of the conviction itself, regardless of what sentence is adjudged. That is why Riley held "**in the context of**

a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea." Riley, 72 M.J. at 121. This language is used in the context of whether the accused understood the meaning and effect of his/her guilty plea, as required by Article 45(a), UCMJ. The language of Riley does not transform sex offender registration into a matter in extenuation that would bring it outside of the parameters set forth in United States v. McNutt, 62 M.J. 16, 19 (C.A.A.F. 2005)(error by the military judge when considering the Army's "good-time" credit policy when he assessed the accused's sentence, as sentence determinations should be based on the evidence before the factfinder) and United States v. Duncan, 53 M.J. 494 (C.A.A.F. 2000)(military judge properly instructed on requirement of accused to participate in a rehabilitation program as a collateral consequence when information was requested by members and reasonably related to the consideration of the nature of appellant's offenses).

Even if this Court somehow concludes that the military judge abused his discretion, the error did not have a substantial influence on the sentence. There is no evidence members sentenced Appellant to a longer period of confinement or a punitive discharge than they otherwise would have. Beyond rank speculation, Appellant is able to provide no argument aside from a blanket statement that "the military judge's erroneous

instructions had a substantial influence on Appellant's sentence." (App. Br. at 8.) Appellant's egregious crimes are an affront to basic humanity. He victimized CLG, a dependent of a military member and someone who called Appellant a friend, with the specific intent to commit the offense of aggravated sexual assault. In addition, the evidence concerning sex offender registration was before the members, on three separate occasions. First, trial defense counsel was permitted, over government objection, to ask Appellant's mother "[y]ou know your son might have to register as a sex offender..." (JA at 30-32.) Second, Appellant told the members, in his unsworn statement, "I will have to register as a sex offender for life...and I'm not sure what sort of work I will be able to find with those obstacles." (JA at 64.) Finally, and most importantly, trial defense counsel, in sentencing argument, argued to the members, without objection:

> He told you about that sex offender registration and I don't want there to be any confusion about what the judge instructed you. You may consider what he told you and what he believes. He believes that he will have to register as a sex offender for the rest of his life. Think about how that impacts him and how that must make him feel and the hurdles that he will have to overcome. That's not your fault. It's something that he will have to deal with.

(JA at 59.) The maximum sentence for his crimes included a possible 47 years of confinement and a dishonorable discharge, and trial counsel argued for 3 years of confinement and a

dishonorable discharge. (JA at 51.) The members sentenced Appellant to only 8 months of confinement and a bad conduct discharge. (JA at 17.) There is absolutely no reason to believe this richly deserved sentence was affected by anything besides the Appellant's own depraved crimes and the evidence presented at trial.

The military judge's instruction in no way constituted an abuse of discretion, either before United States v. Riley, or now. Appellant's attempt to dramatically expand the holding of Riley is without merit, and his sentence should stand.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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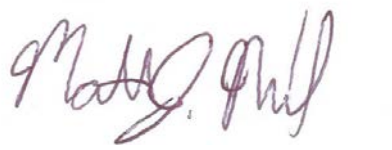
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Air Force Appellate Defense Division on 25 November 2013.



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APPENDIX

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER J. MARTIN
United States Air Force

ACM 38222

30 September 2013

Sentence adjudged 22 August 2012 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Christopher A. Santoro.

Approved Sentence: Dishonorable discharge and confinement for 15 months.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire, and Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Gerald R. Bruce, Esquire; and Major Tyson D. Kindness.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

At a general court-martial the appellant was convicted, consistent with his pleas, of attempted forcible sodomy, willful disobedience of a superior commissioned officer, wrongful use of oxycodone, and assault consummated by a battery, in violation of Articles 80, 90, 112a and 128, UCMJ, 10 U.S.C. §§ 880, 890, 912a, 928. A panel of officer and enlisted members adjudged a sentence of a dishonorable discharge,

confinement for 24 months, and forfeiture of all pay and allowances.[1] The convening authority approved only so much of the sentence that called for 15 months of confinement and a dishonorable discharge. The convening authority also waived automatic forfeitures for six months for the benefit of the appellant's daughter.

On appeal, the appellant asserts that the military judge abused his discretion by refusing to give a defense-requested instruction in sentencing on sex offender registration. We have reviewed the record of trial, the assignment of error, and the government's answer thereto. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

Prior to the sentencing proceedings, the appellant requested that the military judge provide a tailored sentencing instruction. The subject of the requested instruction was sex offender registration as a result of the appellant's conviction of attempted forcible sodomy. The military judge refused to provide the requested instruction, explaining that sex offender registration was a collateral matter and not the proper subject of a sentencing instruction. The military judge also stated that the proposed instruction provided by the appellant failed to cite any legal authority upon which it was based.

Sex Offender Registration Instruction

Counsel is entitled to request specific instructions from the military judge, but the judge has substantial discretionary power in deciding which instructions are ultimately provided to the members. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992)); Rules for Courts-Martial 920(c) Discussion. Thus, the military judge's denial of a requested instruction is reviewed for abuse of discretion. *Damatta-Olivera*, 37 M.J. at 478 (citing *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980)); *United States v. Rasnick*, 58 M.J. 9, 10 (C.A.A.F. 2003). To determine whether error exists when a military judge fails to give a requested instruction, we apply a three-pronged test and determine whether: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main [instruction]'; and (3) 'it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation.'" *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003) (citing *United States v. Zamberlan*, 45 M.J. 491, 492-93 (C.A.A.F. 1997) (quoting *United States v. Eby*, 44 M.J. 425, 428 (C.A.A.F. 1996))); *See also Damatta-Olivera*, 37 M.J. at 478. For error to exist, all three prongs of the *Miller* test must be satisfied. *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012).

[1] We note that the Court-Martial Order (CMO) incorrectly states that the appellant's sentence was adjudged by a military judge. Promulgation of a corrected CMO, properly reflecting that the sentence was imposed by officer and enlisted members, is hereby ordered.

"The general rule concerning collateral consequences of a sentence is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'" *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (quoting *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A 1962)) (alteration in original). Ordinarily, instructions on collateral consequences should be avoided. *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997) (citing *Griffin*, 25 M.J 423; *United States v. McElroy*, 40 M.J. 368, 371–72 (C.M.A. 1994)).

The appellant argues that sex offender registration is a proper matter in mitigation and therefore the military judge abused his discretion by refusing to provide the members with the instruction on sex offender registration, in light of our superior court's decision in *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013). In *Riley*, the accused was not advised by her trial defense counsel that pleading guilty to kidnapping of a child subjected her to registration as a "sex offender" pursuant to federal law. Our superior court held that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea." *Id.* at 121. That language, however, is used in the context of whether the accused understood the "meaning and effect" of her guilty plea, as required by Article 45(a), UCMJ, 10 U.S.C. § 845(a), which includes the consequence of sex offender registration. With that context, we do not find this language transforms sex offender registration into a matter in extenuation that would bring it outside of the parameters set forth in *United States v. McNutt*, 62 M.J. 16, 19 (C.A.A.F. 2005) (Error by the military judge when considering the Army's "good-time" credit policy when he assessed the accused's sentence, as sentence determinations should be based on the evidence before the factfinder) and *United States v. Duncan*, 53 M.J. 494 (C.A.A.F. 2000) (Military judge properly instructed on requirement of accused to participate in a rehabilitation program as a collateral consequence when information was requested by members and reasonably related to the consideration of the nature of the appellant's offenses).

Given that, we find the military judge did not abuse his discretion in refusing to provide the defense-requested sex offender registration instruction because sex offender registration is not a matter in mitigation for purposes of sentencing proceedings. *See United States v. Lindsey*, ACM 37894 (A.F. Ct. Crim. App. 18 June 2013) (unpub. op.) (Military judge did not abuse her discretion in instructing members that they could not consider sex offender registration consequences when deciding what sentence was appropriate for the appellant and by prohibiting trial defense counsel from referencing sex offender registration in his argument); *United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011) (No abuse of discretion where a military judge precluded the trial defense counsel from discussing sex offender registration during his sentencing argument).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT F. LINDSEY
United States Air Force

ACM 37894

18 June 2013

Sentence adjudged 07 January 2011 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Terry A. O'Brien.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the appellant: Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Jason S. Osborne; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

At a general court-martial, the appellant was convicted, consistent with his pleas, of wrongfully possessing one or more visual depictions of minors engaged in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Officer members adjudged a sentence of a bad-conduct discharge, confinement for 3 years, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends the military judge erred in admitting a Senate report as sentencing evidence through judicial notice and by denying the defense request to refer to the burden of sexual offender registration during sentencing. Although not raised by the appellant, we also evaluated whether the appellant's guilty plea was provident and whether the military judge applied the correct maximum punishment. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

In his guilty plea inquiry, the appellant stated that on 14 November 2009, he was in possession of 10 video files containing visual depictions of minors engaging in sexually explicit conduct. He was using a peer-to-peer file sharing program to search for adult pornography, using search terms that he could not recall by the time of his court-martial. This program allows a user to link to and then search the computers of other users ("peers") for content those peers have agreed to share. When the user types a search term into the program, it provides a list of file names containing that term.

In order to download the files, the user has to select the file and take an affirmative step to start the download. After a list of file names appeared on his computer, the appellant clicked on them and initiated their download, while "definitely knowing" by the file name that the files likely contained videos of children engaging in sexual activity. After the files downloaded, the appellant viewed several of them, seeing individuals under the age of 18 engaging in sodomy and sexual intercourse together and with adults. A later forensic analysis of the appellant's hard drive verified that fact.

According to a statement he gave under rights advisement to agents with the Air Force Office of Special Investigations (AFOSI), the appellant downloaded approximately 4-5 child pornography videos every 1-2 months and he had done this approximately 10 times. He told the agents he did this for sexual gratification and, after downloading the files, he would move them to a separate folder so others could not download them from him, and then he would delete the files after several days.

Guilty Plea

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)).

Here, the military judge accepted the appellant's pleas of guilty to knowingly possessing "one or more visual depictions of minors engaging in sexually explicit conduct." In doing so, she defined minor as "any *person* under the age of 18 years." (Emphasis added.). In her explanation of the elements of the possession offense, the military judge stated that the Specification did not require "that the images include images of actual minors" as "possession of . . . sexually explicit images of persons indistinguishable from minor children, whether actual or virtual . . . is an offense" under the UCMJ.[1]

She also instructed him that the offense required knowing possession of depictions "of minors engaged in sexually explicit conduct." After acknowledging his understanding of the elements, the appellant admitted that he possessed "videos of minors engaging in sexual activity," that he "perceived the images to be of minors under the age of 18," and that "they looked like actual people and . . . not like cartoons," thus he was "sure they were real physical human beings." After he told the military judge that no one had ever provided him with proof that the minors were, in fact, actual people, he agreed that the images he possessed "appeared to be minors engaging in sexually explicit conduct." He also admitted he had no authority to possess images of minors or "what appear[ed] to be minors" engaging in this conduct. In the context of discussing the terminal element for Article 134, UCMJ, the appellant agreed with the military judge that "[e]ven if the images were not [of] actual minors, . . . [his] possession of virtual or computer morphed images that were indistinguishable from real minors w[as] also to the prejudice of good order and discipline and the type of conduct which is service discrediting." At the conclusion of the inquiry, the military judge asked the appellant if he believed and admitted that he wrongfully and knowingly possessed one or more "*visual depictions of minors* engaging in sexually explicit conduct." (Emphasis added.). The appellant replied that he did.

Given the totality of the guilty plea inquiry, we find the appellant's plea to possession of "visual depictions of minors engaging in sexually explicit conduct" to be

[1] As charged, this crime is analogous to a federal code subsection which criminalizes the possession of "child pornography." *See* 18 U.S.C. § 2252A(a)(2), (5). There, 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).

provident. Although the military judge and the appellant used the phrase "appears to be" at several times during the guilty plea inquiry, the inquiry as a whole shows that the appellant understood he was pleading guilty to possessing sexually explicit images of minors or images indistinguishable from minor children.[2]

As the charged offense was not specifically listed in the *Manual for Courts-Martial, United States* (*Manual*), at the time of trial, the parties agreed that the maximum punishment included confinement for 10 years, apparently using the punishment authorized for possession of child pornography under 18 U.S.C. § 2252A(a)(5). *See* Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii) (an offense not specifically listed, included within, or closely related to an offense listed in the *Manual* is punishable as authorized by the United States Code). We find this to be the correct maximum punishment for this offense. *Slagle*, slip op. at 2; *United States v. Finch*, ACM 38081 (A.F. Ct. Crim. App. 25 January 2013), *petition granted*, No. 13-0353/AF (C.A.A.F. 16 May 2013).

Senate Report

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the prosecution moved the military judge to take judicial notice of a four-page document entitled, "Senate Report 104-358 – Child Pornography Prevention Act of 1995," contending this report constituted "legislative facts" which can be judicially noticed as "domestic law" pursuant to Mil. R. Evid. 201A(a). The trial defense counsel, stating he had read this Court's decision in *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), objected on relevancy grounds, arguing it was not directly related to the charged offense of possession, and that it would be unduly prejudicial in a members case.

The military judge found portions of the Government's proposed exhibit to be admissible through judicial notice of legislative facts. She also found it relevant and proper aggravation evidence under *Anderson* and *United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985), and that its probative value was not substantially outweighed by the danger of unfair prejudice or confusion of the issues, citing Mil. R. Evid. 403. She also noted that she would limit the panel's consideration to the portions that specifically address the impact of child pornography on the children in the pictures.

In the sentencing phase, the court-martial panel was informed by the military judge that she had taken judicial notice of certain portions of a Senate report. This document included statements that (a) the use of children in the production of pornographic images can cause them to suffer current and future physical and psychological harm, (b) the images create a permanent record of their abuse and invade their privacy in years to come, (c) child pornography is often used as part of a method to

[2] Having reviewed the videos ourselves, we are also convinced these images are of minors engaging in sexually explicit conduct.

seduce other children to engage in sexual activity, and (d) technology can be used to alter innocent images of children to create visual depictions of them engaging in sexual activity.

The military judge instructed the panel that she had taken judicial notice of this Senate report and it "contains findings that Congress determined supported passage of the [Child Pornography Prevention Act of 1995]," and the panel is "now permitted to recognize and consider these facts without further proof as evidence of why Congress passed the act. It should be considered . . . as evidence with all other evidence in the case." She also told them the Government is allowed to present information about the consequences and repercussions of the appellant's offense so they can discern a proper sentence, including evidence about the impact on the victims involved in the child pornography, so long as such evidence is directly related to or results from his offense. The panel was therefore instructed, "you are permitted to consider the impact the child pornography possession has on the individual victims contained in the child pornography as discussed in the Senate report but you may not consider the impact on society as a whole." Lastly, she told them they may but are not required to accept as conclusive any matter she judicially noticed.

In his unsworn statement, the appellant apologized to the members and said he now recognized his actions brought further harm to the children in the videos and continued their pain. In his sentencing argument, the trial counsel referenced the Senate report's statements about these images being a permanent record of the abuse that will haunt the children for years to come.

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). We test the admission of evidence by the military judge based on the law at the time of appeal. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011); *see also United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be plain at the time of appellate consideration") (quotation marks and citations omitted)). In a recent decision, this Court held this document to be inappropriate for judicial notice under the Military Rules of Evidence. *United States v. Lutes*, 72 M.J. 530 (A.F. Ct. Crim. App. 2013).

Thus, admitting this document though judicial notice was error and an abuse of discretion. However, we must also test for prejudice. That is, "[w]e test the erroneous admission . . . of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citation omitted). Here, we find the erroneous admission of the document did not have a substantial influence on the adjudged sentence

in the present case, and thus there was no material prejudice to the appellant's substantial rights.

The trial counsel only briefly referenced the Senate report in his sentencing argument. The report did not materially add to the counsel's argument nor make points not readily understood by a court-martial panel, and we find the appellant was not prejudiced by its errant admission. Given this and the images the appellant possessed, we are confident the erroneous admission of this document did not substantially influence the panel's judgment on the appellant's sentence. Furthermore, having considered the character of this offender, the nature and seriousness of his offenses, and the entire record of trial, we find his sentence appropriate. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Sex Offender Registration

Prior to trial, the prosecution filed a motion to preclude the trial defense counsel from referencing sex offender registration during the sentencing case, arguing it was "unclear" whether the appellant would have to register in his ultimate state of residence and that registration is a collateral consequence of his conviction and not something the panel members should consider. Furthermore, if the appellant referenced sex offender registration in his unsworn statement, the prosecution asked for an instruction pursuant to *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998), to limit the panel's ability to consider that information. The defense disagreed, noting that registration was an absolute certainty and, at a minimum, the defense should be able to reference it during the appellant's unsworn, citing to *United States v. Macias*, 53 M.J. 728, 732 (Army Ct. Crim. App. 1999).

The military judge held sex offender registration is a likely collateral consequence here, based on the appellant's conviction for possession of child pornography. Relying on *United States v. Briggs*, 69 M.J. 648 (A.F. Ct. Crim. App. 2010), the military judge ruled that any defense counsel argument about sex offender registration would be improper. She also ruled that the accused could reference it in his unsworn, but that she would provide a limiting instruction to the members.

In his unsworn statement, the appellant told the panel about his trial defense counsel's advice that most, if not all, states will require him to register as a sex offender and that he still decided to plead guilty. He also said he was worried about the burden that registration may place on him in the years ahead and that he hoped they would consider it in coming to his sentence. Following that unsworn statement, the military judge instructed the panel:

> In his unsworn statement, the accused indicated he may be required to register as a sex offender due to this conviction. Sex offender registration requirements vary

> between states based on the nature of the conviction. Sex offender registration is a collateral consequence resulting from the accused's actions that led to his conviction. The registration requirement that any state imposes on a person convicted of certain crimes is a consequence that is separate and distinct from the court-martial process. You, of course, should not and cannot rely on whether he may or may not have to register as a sex offender when determining what is an appropriate punishment for this accused for the offense of which he stands convicted.

"We review a military judge's decision to give a sentencing instruction for an abuse of discretion" and she "has considerable discretion in tailoring instructions to the evidence and law." *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002) (citing *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997)). The abuse of discretion standard is strict and involves "more than a mere difference of opinion." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). "The challenged action must be 'arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous.'" *Id.* (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

"[C]ourts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'" *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (alteration in original) (citation omitted). The accused's right to allocution through an unsworn statement "is broad, and largely unfettered, but it is not without limits." *United States v. Barrier*, 61 M.J. 482, 486 (C.A.A.F. 2005). If an accused's unsworn statement includes information about collateral matters that are beyond the scope of R.C.M. 1001 because it is not relevant to mitigation, extenuation, or rebuttal, the military judge can properly advise panel members that the proffered information is irrelevant. *Id.*; *see also United States v. McNutt*, 62 M.J. 16, 19-20 (C.A.A.F. 2005) (even when it may be appropriate for a military judge to instruct the panel on collateral matters, the panel must be told they cannot consider these matters in deciding on an appropriate sentence); *United States v. Duncan*, 53 M.J. 494, 499-500 (C.A.A.F. 2000).

The appellant argues that sex offender registration is a proper matter in mitigation and therefore the military judge abused her discretion by telling the members they could not consider this information when fashioning an appropriate punishment, especially in light of our superior court's decision in *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013). In *Riley*, the accused was not advised by her trial defense counsel that pleading guilty to kidnapping of a child subjected her to registration as a "sex offender" pursuant to federal law and our superior court held that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea." *Id.* at 121. That language, however, is used in the context of whether the

accused understood the "meaning and effect" of her guilty plea, as required by Article 45(a), UCMJ, 10 U.S.C. § 8 45(a), which includes the consequence of sex offender registration. With that context, we do not find this language transforms sex offender registration into a matter in extenuation that would bring it outside of the parameters set forth in *McNutt* and *Duncan*.

Given that, we find the military judge did not abuse her discretion in telling the panel they cannot consider sex offender registration consequences when deciding what sentence is appropriate for the appellant and by prohibiting trial defense counsel from referencing sex offender registration in his argument.[3] *See United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011) (no abuse of discretion where a military judge precluded the trial defense counsel from discussing sex offender registration during his sentencing argument); *Barrier*, 61 M.J. at 486.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] We note, however, that the military judge's instruction to the panel made the likelihood of this consequence appear less certain than it actually is under federal law. As a military member convicted of an Article 134, UCMJ, 10 U.S.C. § 934, offense covering "pornography involving a minor," the appellant is an offender who must "register, and keep the registration current, in each jurisdiction where [he] resides, . . . is an employee, [or] . . . is a student" and appear in person periodically to "allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered." 42 U.S.C. §§ 16911(1), (5)(A)(iv) and 16913(a)-(c), 16916 (2006); Department of Defense Instruction (DoDI) 1325.7, Enclosure 27 (17 July 2001), *cancelled and reissued by* DoDI 1325.07, Enclosure 2, App 4 (11 March 2013) ; *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012); *Carr v. United States*, 130 S. Ct. 2229, 2241-42 (2010). If he fails to register as statutorily required, he faces federal prosecution with a penalty that includes ten years imprisonment and a fine of up to $250,000. 18 U.S.C. § 2250(a); *Reynolds*, 132 S. Ct. at 978; *Carr*, 130 S. Ct. at 2238, 2240. We also note that the paperwork provided to the appellant by the defense counsel regarding sex offender registration cites to the Wetterling Act, 42 U.S.C. §§ 14071-073, which was repealed effective 27 July 2009, following passage of the Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16901-991.

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).