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*41 OMITTING CHILD PORNOGRAPHY FROM GUILTY PLEAS

The Military Justice Act of 2016 (MJA-16) made significant changes to the Uniform Code of Military Justice (UCMJ) and the practice of military justice. As attorneys and legal professionals continue to adjust their practice in a post-MJA-16 world, many unnecessary litigation habits continue to persist. This article analyzes one such persistent habit: trial counsel continue to attach evidence of child pornography to guilty plea records as a matter of course rather than necessity. Practitioners should stop the unnecessary inclusion of child pornography evidence in guilty pleas because it is not required by case law, it produces a more complicated record to transport, and it negatively impacts both the child(ren) depicted and fellow military justice practitioners.

To better understand and challenge this practice, this article provides an overview of current case law on the issue, examines some of the concerns with attaching child pornography evidence to the record, and suggests practical application tips to clean up the record while still ensuring the findings and sentence are affirmed on appeal. While practitioners are certainly permitted to introduce evidence to support a guilty plea,[1] practical and policy reasons strongly support only doing so when necessary.

Case Law Overview

Court of Appeals for the Armed Forces

The Court of Appeals for the Armed Forces (CAAF) has repeatedly held there is no requirement that any witness be called or any independent evidence be produced to establish the factual predicate for a guilty plea.[2] Rather, the "factual predicate is sufficiently established if 'the factual circumstances as revealed by the accused himself objectively support that plea ....'"[3]

This is equally true in child pornography cases. In *United States v. James*, a guilty plea for possessing and transporting child pornography in interstate commerce, the appellant argued "no definite proof exists in his case that the pictures at issue showed actual minors."[4] The CAAF affirmed his convictions relying upon the appellant's providence inquiry and the photographs attached to the record.[5] However, the court also held that "in the guilty-plea context, the Government does not have to introduce evidence to prove the elements of the charged offense beyond a reasonable doubt; instead, there need only be 'factual circumstances' on the record 'which "objectively" support' the guilty pleas ...."[6] Following in line with CAAF, no service court of criminal appeals has required extrinsic evidence be introduced in a guilty plea.

*42 *Courts of Criminal Appeals*

Army Court of Criminal Appeals

The Army Court of Criminal Appeals (ACCA) leads the service courts of criminal appeals in taking the strongest stance, repeatedly "remind[ing] counsel that admission of child pornography into the record during a guilty plea is not necessary."[7]

In *United States v. Guy*, the court explained the practical and policy implications as to why child pornography does not need to be attached to the record in a guilty plea.[8] The court explained that attaching evidence does not necessarily make a plea factually provident where it would otherwise not.[9] Moreover, adding evidence can undermine the conviction on appeal by creating a substantial factual basis for a court to set aside the plea.[10] That being said, the court found the most compelling reason to stop the practice is the effect it can have on victims: "child pornography involves real people who are done no great service when images of their rape as a child are needlessly included in a record for strangers to review."[11] Despite the ACCA's clarity that such evidence is not required--or wanted--by the court, practitioners continue to attach the evidence to guilty plea records.[12]

Air Force Court of Criminal Appeals

Similar to the Army, the Air Force Court of Criminal Appeals (AFCCA) also finds that including child pornography in the record is not necessary in a guilty plea.[13] In *United States v. Monarch*, the appellant pleaded guilty, amongst other charges, to indecent acts and possession of child pornography.[14] The AFCCA addressed the issue of counsel including evidence of child pornography as aggravating evidence in sentencing at a guilty plea. The court "call[ed] upon trial counsel and staff judge advocates to weigh the probative value of [illicit photograph] exhibits against the privacy interests of the victims when deciding to seek the admission of the exhibits [in a guilty plea]."[15]

The court recommended that, instead of introducing the contraband in the record, counsel write a stipulation of fact where the "words could express the nature of the images without further intruding into the privacy rights of the victims."[16] Holding the inadvertent omission of images of child pornography in the record for review on appeal insubstantial, the court went on to "question the need to attach contraband images in a case with a pretrial agreement which requires a stipulation of fact."[17] Drawing upon examples of wrongful use guilty pleas, the court explained "[a] plea to the possession of contraband does not require the contraband to be attached in order to be provident ...."[18]

Navy and Marine Corps Court of Criminal Appeals

While the Navy and Marine Corps Court of Criminal Appeals (NMCCA) has not been as direct in discussing this subject as its sister courts, it has implicitly approved of omitting child pornography evidence at guilty pleas. In a series of merit submissions involving guilty pleas with child pornography specifications where the child pornography was not introduced into the record, the court issued summary dispositions affirming the findings and sentence.[19]

In *United States v. Santarini*, the appellant pleaded guilty to possessing child pornography but argued that the military judge failed to establish "whether children were actually used to produce the explicit images."[20] The Government was unable to produce the compact disc (CD) that contained the child pornography.[21] Nevertheless, the court affirmed the convictions and held the absence of child pornography in the record is not fatal where the military judge:

> (1) considers an adequate descriptive stipulation of fact supporting each charge; and/or (2) elicits from the accused during the providence inquiry a sufficient verbal description of the child pornography supporting each charge ...; and (3) the stipulation of fact and/or providence inquiry make clear that the images in question do depict images of *actual* identifiable minors engaging in sexually explicit conduct, as opposed to virtual or morphed images.[22]

While not as direct as the ACCA or AFCCA on the issue, the NMCCA lays out a road map for a provident guilty plea that omits child pornography evidence.

Case law makes clear that nothing requires the Government to submit photographic evidence to establish the factual predicate for a guilty plea. The inclusion of child pornography in the record of guilty pleas is seldom necessary for or helpful to appellate review when a legally-sound providence inquiry and detailed stipulation of fact establish the necessary facts.

Handling the Record

The additional difficulty in transporting records containing child pornography and the inherent risk of inadvertent disclosure of the evidence support removing the evidence from the record in guilty pleas. Typically, the child pornography images or videos are reduced to password-protected CDs or DVDs, sealed by the military judge, and transported as sealed material.[23] Federal law requires child pornography to "remain in the care, custody, and control of either the Government or the court."[24] This limits the methods of transporting records to military couriers or by the United States Postal Service (USPS).[25] In light of these procedural safeguards, the record can be sent from the field to the appellate courts either 1) as a complete record using USPS or military courier; or, 2) if permitted by the service court, as two shipments--with the sealed material transported via authorized government carrier and the remainder of the unsealed record transported via normal delivery methods.[26]

Despite these procedural safeguards, human error in handling records persists. ***43** While transporting records from trial to appellate courts, instances where the Government mishandled, lost, or caused individuals to unnecessarily view images of child pornography are documented.[27] Each time the evidence is transported, it represents another instance for possible human error or inadvertent disclosures. Removing the evidence from the record eliminates the risk of inadvertent disclosure and complications associated with transporting child pornography.

The Impact of Child Pornography on Victims and Military Justice Practitioners

Victims of child pornography can suffer in ways distinct and more prolonged than victims of other types of sexual abuse. Victims suffer from the initial sexual abuse inflicted when the child pornography was produced; they then also suffer with the unique knowledge that there is a permanent record of their sexual abuse. When these images migrate to the internet, the re-victimization of the children depicted continues in perpetuity.[28]

In the legal system, introduction of child pornography in the record represents another loss of control by the victim as the number of persons viewing the image(s) expands.[29] Both the victim, as well as the individuals required to review the disturbing images of child sexual exploitation, are negatively impacted. For example, there is the risk of secondary traumatic stress, also known as vicarious trauma, which "generically describes the manner in which a person can be traumatized simply from hearing or being exposed to someone else's trauma or implementations that caused it."[30] Practitioners that have to review the evidence as part of their professional duties are susceptible to suffering from secondary traumatic stress.[31] The symptoms of such stress may manifest in sleep disturbance and nightmares; PTSD symptoms, such as intrusive thoughts and memories; emotional distress; irritability; angry outbursts; inability to focus; and negative thinking.[32]

The re-victimization of the children and serious negative consequences to fellow military justice practitioners lends support to finding methods that avoid unnecessarily putting the evidence in the guilty plea record.[33] As discussed later, when weighing the "necessity" of the child pornography evidence, practitioners can reconcile the desire for a provident plea and sufficient aggravating evidence by ensuring there is a robust providence inquiry and detailed stipulation of fact.

Practical Application

Practitioners should consider the following trial junctures when omitting child pornography evidence from the guilty plea record. While fairly straightforward, a defect in the charge sheet, plea agreement, or plea inquiry can have detrimental consequences for the Government, the accused, and the victim on appeal.

Charging Decision

The charging decision may be the most important decision a trial counsel makes in a case. This is especially so in cases involving child pornography where cases frequently result in a guilty plea. The work upfront of using specificity instead of generalities on a charge sheet can be especially helpful for information flow to the factfinder or for review on appeal.[34]

For example, in the case of wrongful possession of child pornography, the specification could include a description of the device where the contraband was found and a sampling of file names that contain the most aggravating images or videos.[35] With the file names included in the specification, a description of the general nature of the image or video would be appropriate and relevant in a stipulation of fact and during the providence inquiry. Any loss of aggravating evidence by not including the contraband in the record can be made up in part by including a robust word picture of the child pornography in a stipulation of fact and providence inquiry--made possible by a more detailed charge sheet.

Drafting the Plea Agreement

At a minimum, a well-drafted plea agreement includes 1) an unconditional guilty plea; 2) a "waive all waivable motions" provision; and 3) a written stipulation of fact. To address concerns about the loss of aggravating evidence, the convening authority may negotiate a minimum punishment--including a minimum period of confinement.[36] The provisions of the plea agreement and the stipulation of fact will be critical to help the military judge accept a knowing and voluntary plea, ensuring the conviction survives appeal.

Conditional guilty pleas should be avoided whenever possible. An unconditional guilty plea waives all non-jurisdictional defects at earlier stages of the proceedings.[37]

A "waive all waivable motions" provision in a plea agreement precludes an appellant from raising waivable issues on appeal.[38] Except where explicitly prohibited, an accused may knowingly and voluntarily waive any non-constitutional right in a plea agreement.[39] While an unconditional guilty plea waives appellate review of all non-jurisdictional defects, an explicit waiver provision is a much stronger tool to argue waiver on appeal. If there are known issues or motions litigated at trial, an inquiry by the military judge with the accused on their knowing and voluntary waiver of each issue or motion will generally waive the issue on appeal. The general "waive all waivable motions" provision combined with a specific inquiry into the waiver on the record will help ensure any non-jurisdictional defect in the accused's case is waived.

A detailed stipulation of fact is an invaluable aide in a guilty plea during the providence inquiry and on appeal in assessing the providence of the plea. A stipulation of fact should include, at a minimum, a breakdown and discussion of every element of every specification to which the accused ***44** pleads guilty. This will help satisfy the *Care* inquiry.[40] Depending on the case-- and the wording of the charge sheet--a stipulation of fact may also include: 1) the total number of images and videos; 2) the total length of the videos; 3) the total number of victims; 4) whether the images and videos were synced across multiple devices or uploaded to the internet/online cloud; 5) whether the accused was viewing, sharing, or storing the images; and 6) a general description of the images and videos.[41]

An accused does not have the right to personally review the child pornography that forms the basis of the charge against him to prepare for a guilty plea.[42] However, the trial defense counsel should be afforded ample opportunity to review the evidence in order to help advise and prepare their client.[43] By reviewing the evidence, counsel can ensure the alleged child pornography is in fact child pornography, and the review can assist in drafting a detailed stipulation of fact and help prepare the accused for the providence inquiry.

As a general rule, novel plea agreement provisions should be avoided whenever possible as they receive heightened scrutiny at trial and on appeal. Each service's trial counsel assistance program normally has model plea agreement templates for counsel to utilize. These templates have been reviewed by many legal eyes, and the risk for error when using one of these templates is far less than when drafting a novel provision.[44]

Protect the Record

At a guilty plea, the military judge is responsible for *inter alia*, ensuring the accused's plea is made voluntarily and knowingly and that there is an adequate basis in law and fact to support the plea.[45] During the guilty plea, the military judge should: 1) conduct a thorough providence inquiry of every element of each offense, 2) ensure the providence inquiry is reopened for additional examination if any facts are presented that raise the possibility of a defense or a matter inconsistent with the pleas, and 3) inquire whether the trial defense counsel had the opportunity to review the child pornography in question.

Conducting a Thorough Providence Inquiry

A thorough providence inquiry requires preparation with an accused. The military judge is responsible for ensuring the accused admits to every element of each offense in the accused's own words, not mere legal conclusions.[46] It is not uncommon for an accused to struggle to describe in detail the images of child pornography--sometimes because of the sheer number of images discovered or, perhaps, because the ***45** accused is ashamed of the offensive nature of the material. Regardless, the trial defense counsel should prepare the accused accordingly to ensure there is no preventable failure to get through a providence inquiry. Trial defense counsel can help prepare their client by running through practice providence inquiries with the accused with another member of the defense team playing the role of the military judge conducting the *Care* inquiry.

Resolving Inconsistencies and Addressing Possible Defenses

If an accused makes an irregular pleading, sets up a matter inconsistent with their pleas, or enters pleas of guilty improvidently, Article 45(a), UCMJ, requires the military judge to reject their pleas of guilty.[47] A matter may be inconsistent with a plea of guilty if it raises the possibility of a defense.[48] Where any facts during a providence inquiry or pre-sentencing present the possibility of a defense or a matter inconsistent with the pleas, counsel should request the military judge reopen providency to inquire further. While the military judge bears ultimate responsibility for accepting a guilty plea, the trial counsel and trial defense counsel are active participants in ensuring a successful guilty plea and should flag potential issues for the military judge.[49] Failure to do so risks having a finding of guilt overturned on appeal.

Opportunity for Defense Counsel to Review the Evidence

While not required, a record is more insulated from attack on appeal if the military judge inquires as to whether the trial defense counsel had the opportunity to review the relevant child pornography in the Government's possession. This ensures a member of the defense team was provided the opportunity to verify the Government's evidence before the accused enters pleas. As discussed below, this inquiry will help protect the record from claims of ineffective assistance of counsel on appeal.

Surviving Appeal

On appeal, the appellate courts review the entire record of cases before it. If child pornography evidence was admitted at trial, the court will review the evidence and make its own determination about whether the images are legally sufficient. If the evidence of child pornography conflicts with the guilty plea, it provides the court with a substantial basis in fact to question the plea, set aside the conviction, and authorize a rehearing.[50]

Alternatively, if photographic evidence of child pornography is omitted, appellate courts will still consider the “full context” of the plea inquiry, including the stipulation of fact.[51] Appellate courts review challenges to guilty pleas in terms of providence of the plea, not sufficiency of the evidence.[52] An accused's unconditional plea of guilty waives any objection relating to factual issues of guilt.[53] When an appellant alleges factual insufficiency of a guilty plea, courts analyze the question presented in terms of providence of an appellant's plea, not sufficiency of the evidence.[54] So long as there is a provident plea inquiry, the actual evidence of child pornography is irrelevant.

If an issue arises on appeal from a guilty plea where the child pornography has been omitted from the record, appellate courts have tools at their disposal to resolve the issue. Hypothetically, an appellate court could find an issue has been raised in a case where child pornography was omitted from the record that cannot be fully resolved by the material in the record. In *United*

States v. Jessie, the court reiterated the general rule that the courts of criminal appeals "may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c), UCMJ."[55] However, CAAF discussed three categories of precedent that allow for supplementing the record--the second category of cases dealt with issues raised by materials in the record, but not fully resolvable by those materials.[56] In the hypothetical mentioned above, the court could order a *DuBay* hearing to help resolve the issue raised by materials in the record,[57] which may include producing and considering the previously omitted child pornography.[58]

The most likely error to be alleged on appeal in a guilty plea involving child pornography is ineffective assistance of counsel. For example, an appellant may claim ineffective assistance of counsel where the trial defense counsel never reviewed the child pornography and an appellant is adamant the material was not actually child pornography. If this were the case, depending on the circumstances presented in the record and as hypothesized above, the court of criminal appeals may order production of the material to review on appeal as a matter not resolvable by the current record.[59] In order to avoid litigation on this issue, this emphasizes the need to get on the record that trial defense counsel had ample opportunity to review the evidence against the accused.

Conclusion

The reasons for counsel wanting to admit evidence of child pornography in the record at guilty pleas is varied. Yet, for practical and policy reasons, counsel generally do not need to include the evidence in the record. Practically, case law does not require the evidence for a provident guilty plea nor on appeal to affirm the findings or sentence. The record also becomes more cumbersome in its limited transportation methods. From a policy perspective, introducing the evidence re-victimizes the children depicted in the images and can cause vicarious trauma to the counsel and staff that review the evidence.

Mindful prosecution throughout a case--especially at major junctures and with an eye toward appeal--will help ensure ***46** the findings and sentence are affirmed on appeal. Standard practice for guilty pleas should include a robust providence inquiry, a detailed stipulation of fact, and ample opportunity for trial defense counsel to review the evidence. With few exceptions, practitioners should omit evidence of child pornography in guilty pleas.

Footnotes

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1 *See* Manual for Courts-Martial, United States, R.C.M. 910(a)(1)(D) discussion ("A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation.") [hereinafter MCM]. *See also id.* R.C.M. 1001(b)(4).

2 *See, e.g.*, United States v. Ferguson, 68 M.J. 431, 434 (C.A.A.F. 2010) (holding that, unless the appellant pleaded guilty to conduct that was not criminal, the court should only review to ensure that the appellant did not set up matter inconsistent with his plea); United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996); United States v. Davenport, 9 M.J. 364, 366 (C.M.A. 1980).

3 *Faircloth*, 45 M.J. at 174 (quoting *Davenport*, 9 M.J. at 367).

4 United States v. James, 55 M.J. 297, 300 (C.A.A.F. 2001).

5 *Id.* at 301.

6 *Id.* at 300.

7 United States v. Britt, ARMY 20190290, 2020 CCA LEXIS 127, at *5 n.3 (A. Ct. Crim. App. Apr. 17, 2020). *See, e.g.*, United States v. Guy, ARMY 20180292, 2019 CCA LEXIS 129, at *1 (A. Ct. Crim. App. Mar. 21, 2019) (per curiam); United States v. Simon, ARMY 20160312, 2017 CCA LEXIS 405, at *6-8 (A. Ct. Crim. App. June 16, 2017) (summary disposition), *petition denied*, USCA Dkt. No. 17-0472/AR (C.A.A.F. July 28, 2017); United States v. Rominger, 2009 CCA LEXIS 315, at *4-5 (A. Ct. Crim. App. June 8, 2009).

8 *Guy*, 2019 CCA LEXIS 129, at *1.

9 In *Guy*, the Army Court of Criminal Appeals stressed that "if the accused fails to properly admit that he is guilty of possessing child pornography, the inclusion in the record of a government exhibit which is child pornography will not necessarily save the plea." *Id.* at *3.

10 "[When] the government introduces a picture in sentencing that on appeal a court concludes is *not* child pornography, the government can create a substantial factual basis for [a court] to set aside the plea .... Such a scenario represents a bipartite failure by the government (in charging a non-offense in the first instance) and the defense (in advising the accused to plead guilty)." *Id.* at *3 n.3 (citation omitted).

11 *Id.* at *4.

12 *Britt*, 2020 CCA LEXIS 127, at *5 n.3.

13 *See, e.g.*, United States v. Monarch, ACM 38585, 2015 CCA LEXIS 428, at *18 & *18 n.5 (A.F. Ct. Crim. App. Oct. 14, 2015).

14 *Id.* at *2.

15 *Id.* at *13.

16 *Id.* at *13-14.

17 *Id.* at *18 & *18 n.5.

18 *Id.* at *18 n.5.

19 *See, e.g.*, United States v. McTigue, No. 202100052, 2021 CCA LEXIS 316 (N-M. Ct. Crim. App. June 29, 2021) (per curiam); United States v. Mestuzzi, No. 202000004, 2021 CCA LEXIS 189 (N-M. Ct. Crim. App. Apr. 21, 2021) (per curiam); United States v. Kuhns, No. 202000203 (N-M. Ct. Crim. App. Feb. 19, 2021) (per curiam).

20 United States v. Santarini, No. 200201454, 2004 CCA LEXIS 103, at *9-10 (N-M. Ct. Crim. App. Apr. 30, 2004).

21 *Id.* at *14.

22 *Id.* at *14-15, *24 (citing United States v. Washburne, No. 200300123, 59 M.J. 866, 871 (N-M. Ct. Crim. App. Apr. 9, 2004), *rev'd on other grounds*, 60 M.J. 396 (C.A.A.F. 2004) (affirming conviction where the United States

intentionally did not introduce child pornography images at a guilty plea)). *See also* United States v. Henthorn, 58 M.J. 556, 559-60 (N-M. Ct. Crim. App. Jan. 23, 2003) (finding omission of child pornography photographs attached to stipulation of fact as part of a guilty plea but not included in the record did not result in prejudice where the guilty plea is not questioned and the general nature of the photographs is described in the record); United States v. Payne, 2012 CCA LEXIS 898, at *2-4 (A.F. Ct. Crim. App. Dec. 19, 2012) (finding omission of child pornography to stipulation of fact as part of the guilty plea but not included in the record as insubstantial because the appellant specifically described the types of child pornography he viewed, agreed that the disc attached to the stipulation of fact contained the images he viewed, and the contents of the disc are described in the stipulation).

23 *See* U.S. Dep't of Navy, JAGINST 5800.7G, Manual of the Judge Advocate General (JAGMAN) ch.1, sec. 0157(h) (2022) [hereinafter JAGMAN].

24 18 U.S.C. § 3509(m)(1). 18 U.S.C. § 3509(m)(1) (Adam Walsh Child Protection and Safety Act of 2006), applies to courts-martial because the purpose of the law is consistent with protecting the victims involved in child pornography courts-martial; and, there is no potentially contradictory military purpose. While CAAF has never specifically addressed whether 18 U.S.C. § 3509(m) applies to courts-martial, the CCAs have directly and implicitly touched on § 3509(m)'s applicability to courts-martial. *See* United States v. Guy, ARMY 20180292, 2019 CCA LEXIS 129, at *4-5 (A. Ct. Crim. App. Mar. 21, 2019) (applying 18 U.S.C. § 3509(m)(1) to military courts transporting records on appeal); United States v. Lambert, 2014 CCA LEXIS 101, at *11-12 (A.F. Ct. Crim. App. Feb. 24, 2014) (finding unconditional guilty plea waived appellant's assignment of error alleging violation of § 3509(m)); United States v. Jones, No. 200602320, 2009 CCA LEXIS 356, at *13 n.3 (N-M. Ct. Crim. App. Oct. 27, 2009) (referencing § 3509(m) as applying to child pornography discovery). *See also* U.S. Dep't of Navy, JAGINST 5800.7G, Manual of the Judge Advocate General (JAGMAN) ch. 1, sec. 0155(h)(1) (15 Jan. 2021) (making clear counsel shall apply the protections and procedural safeguards outlined in § 3509(m)).

25 *See* U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 744 (2004) (establishing the U.S. Postal Service as part of the executive branch).

26 While this may not be an additional burden for some trial offices, there are many trial offices that normally utilize commercial carriers, like FedEx, to transport records to appellate offices.

27 *See, e.g.*, United States v. Donoho, No. ACM 39242, 2018 CCA LEXIS 545, at *8 n.7 (A.F. Ct. Crim. App. Nov. 19, 2018) ("[W]e are greatly troubled at the Government's mishandling of child pornography. The images of [the victim] were not just omitted from the record; they were lost."); United States v. Monarch, ACM 38585, 2015 CCA LEXIS 428, at *14-15 (A.F. Ct. Crim. App. Oct. 14, 2015) (describing the government's inability to produce on appeal the certified child pornography evidence that was attached to the stipulation of fact at trial); United States v. Santarini, No. 200201454, 2004 CCA LEXIS 103, at *15 (N-M. Ct. Crim. App. Apr. 30, 2004) (expressing "displeasure" over the government's handling of child pornography where the government was unable to produce the child pornography introduced at trial, the military judge reviewed child pornography that was not used during the guilty plea, and the original evidence was destroyed).

28 *Child Pornography*, U.S. Dep't of Just., www.justice.gov/criminal-ceos/child-pornography (May 28, 2020).

29 MCM, *supra* note 1, R.C.M. 1113(b) outlines the individuals that may be authorized to review sealed material pre-referral, post-referral, and reviewing and appellate authorities and counsel. Even assuming there is no inadvertent disclosures during processing or transportation of the record, at a minimum, the military judge, appellate counsel, and appellate judges will also review the evidence.

30 Evan R. Seamone, *Sex Crimes Litigation as Hazardous Duty: Practical Tools for Trauma-Exposed Prosecutors,*

Defense Counsel, and Paralegals, 11 Ohio St. J. Crim. L. 487, 493 (2014).

31 This risk is significant. Research shows lawyers, especially those working with victims and criminal defendants, are more likely to be affected by secondary traumatic stress than therapists and social workers. Kiley Tilby & James Holbrook, *Secondary Traumatic Stress Among Lawyers and Judges*, 32 Utah Bar J. 20, 21 (2019).

32 *Id.* at 22.

33 Seamone, *supra* note 30, at 493, 536-40 (describing how secondary traumatic stress, especially when stemming from viewing child pornography, can negatively impact military attorneys personally and professionally).

34 Specificity in the charge sheet is best achieved after an investigation is complete. Drafting specific charges in an ongoing investigation can potentially lead to later-discovered evidence not being relevant to the specific charges or admissible.

35 This can be done even where the images at issue are not especially aggravating. The images can be omitted by having a general description of the image in the charge sheet and later detailed in the stipulation of fact.

36 MCM, *supra* note 1, R.C.M. 705(d)(1)(B).

37 *See id.* R.C.M. 910(j); United States v. Bradley, 68 M.J. 279, 281 (C.A.A.F. 2010).

38 *See* United States v. Nye, No. 201600362, 2018 CCA LEXIS 13, at *4 (N-M. Ct. Crim. App. Nov. 18, 2018) (citing United States v. Murphy, No. 201000262, 2010 CCA LEXIS 774, at *3-4 (N-M. Ct. Crim. App. Nov. 23, 2010)).

39 *See* United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009).

40 United States v. Care, 40 C.M.R. 247, 253 (1969).

41 In the absence of visual images this information can help the military judge better understand the aggravating aspects of the case.

42 In *United States v. Jones*, 69 M.J. 294, 295 (C.A.A.F. 2011), the appellant challenged the providency of his plea because the military judge refused to allow him the opportunity to review the evidence before he pleaded guilty. *Id.* at 295-96. The Court of Appeals for the Armed Forces affirmed the appellant's conviction, holding the military judge's ruling did not violate the appellant's Sixth Amendment right since he "did not seek to review the evidence to prepare a defense ...." *Id.* at 296.

43 *See* 18 U.S.C. § 3509(m)(2)(A)-(B) (requiring the Government make evidence of child pornography "reasonably available to the defendant" which means the Government provides "ample opportunity for inspection, viewing, and examination at a Government facility ....").

44 If counsel want to include a novel provision in a plea agreement, they are encouraged to reach out to their respective service trial counsel assistance program or appellate government counsel office early to receive advice on enforceability of the provision.

45 *See* United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008). *See generally* MCM, *supra* note 1, R.C.M. 910.

46 *See* United States v. Price, 76 M.J. 136, 138 (C.A.A.F. 2017).

47 UCMJ art. 45(a) (2016). *See also* United States v. Zachary, 63 M.J. 438, 444 (C.A.A.F. 2006) (quoting United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996)); United States v. Shaw, 64 M.J. 460, 462 (C.A.A.F. 2007).

48 United States v. Hayes, 70 M.J. 454, 458 (C.A.A.F. 2012). *See also* United States v. Goodman, 70 M.J. 396, 399-400 (C.A.A.F. 2011) (requiring a mistake of fact defense to be "reasonably raised" before it can create an inconsistency in a guilty plea).

49 United States v. Partin, 7 M.J. 409 (C.M.A. 1979) (military judge must police terms of pretrial agreements). *See generally* MCM, *supra* note 1, R.C.M. 910(f).

50 United States v. Riley, 72 M.J. 115, 122 (C.A.A.F. 2013) ("The remedy for finding a plea improvident is to set aside the finding based on the improvident plea and authorize a rehearing."). *But see* United States v. Atchak, 75 M.J. 193, 196 (C.A.A.F. 2016) (ordering a rehearing is matter of discretion). *See, e.g.*, United States v. Rapp, No. 201200303, 2013 CCA LEXIS 355, at *24 (N-M. Ct. Crim. App. Apr. 30, 2013) (overturning appellant's conviction after the appellate court concluded certain purported images of child pornography did not meet the definition of child pornography).

51 *Goodman*, 70 M.J. at 399 (citation omitted).

52 *See* United States v. Ferguson, 68 M.J. 431, 434 (C.A.A.F. 2010); United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996); United States v. Davenport, 9 M.J. 364, 366 (C.M.A. 1980).

53 United States v. Smith, 60 M.J. 985, 986 (N-M. Ct. Crim. App. Dec. 17, 2004). Moreover, for all offenses committed after 5 January 2021, appellants are no longer guaranteed a factual sufficiency review. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-3613 (2021). Courts of criminal appeals will only conduct a factual sufficiency review upon the appellant making a "specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B)(i). If such a showing is made, then the court may review the evidence and give relief if "clearly convinced that the finding of guilty was against the weight of the evidence ...." *Id.* art. 66(d) (1)(B)(iii). The shift from a beyond a reasonable doubt standard to a clear and convincing standard reduces the likelihood an appellant might receive appellate relief under a factual insufficiency claim.

54 *Smith*, 60 M.J. at 986 (citing *Faircloth*, 45 M.J. at 174); *accord* United States v. Forbes, 77 M.J. 765, 768 n.3 (N-M. Ct. Crim. App. 2018); United States v. Salguero, No. ACM 38767, 2016 CCA LEXIS 5, at *4-5 n.3 (A.F. Ct. Crim App. Jan. 16, 2016).

55 United States v. Jessie, 79 M.J. 437, 441 (C.A.A.F. 2020) (citation omitted).

56 *Id.* at 445.

57 A *Dubay* hearing occurs when a military court of appeals sends a case back to a trial-level judge for a specific fact-finding hearing on a matter that is being considered on appeal. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

58 *See* UCMJ art. 66(f)(3) (2021); *Jessie*, 79 M.J. at 442. *See also* United States v. Parker, 36 M.J. 269, 271-72 (C.A.A.F. 1993) (listing examples of issues *DuBay* hearings have been ordered to resolve).

59 The author is not aware of any service court ordering production of child pornography evidence not introduced at trial. However, under *Jessie*, it seems like it would theoretically be possible depending on the issue the court sought to resolve.

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