20 March 2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DIETRICH A. SMITH,
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 26-XXXX/AF

Crim. App. Dkt. No. ACM 40437

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Index of Brief

Table of Authorities

Statutes

Supreme Court Cases

CAAF and CMA Cases

Service Courts of Criminal Appeals Cases

Other Authorities

Error Assigned for Review

I.

DURING THE PROVIDENCE INQUIRY, THE MILITARY TRIAL JUDGE FAILED TO ASK APPELLANT ANY QUESTIONS SPECIFIC TO THE TERMINAL ELEMENT OF THE ARTICLE 134 OFFENSE FOR WHICH HE WAS PLEADING. ADDITIONALLY, THE STIPULATION OF FACT CONTAINED ONLY A CONCLUSION SPECIFIC TO THE TERMINAL ELEMENT. DID THESE FAILINGS RENDER APPELLANT'S PLEA TO THE CHARGE AND SPECIFICATION IMPROVIDENT?

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ABUSED ITS DISCRETION BY ANALYZING THE PROVIDENCY OF APPELLANT'S PLEA USING AN ERRONEOUS "LIGHT MOST FAVORABLE TO THE GOVERNMENT" STANDARD OF LAW.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Summary of Proceedings

On July 11-12 and December 15, 2022, a military trial judge sitting as a general court-martial at Minot Air Force Base, North Dakota, convicted Appellant,

consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Tr. 306; Entry of Judgment (EOJ), Feb. 23, 2023. The military trial judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for fourteen months, and dishonorable discharge. Tr. 337; EOJ. The convening authority took no action on the findings or sentence.[1] Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, Feb. 6, 2023.

The AFCCA denied relief and affirmed the findings and sentence on January 5, 2026. *United States v. Smith*, No. ACM 40437 (f rev), 2026 CCA LEXIS 1(A.F. Ct. Crim. App. Jan 5, 2026) (Appendix).

Statement of Facts

During Appellant's providence inquiry, the military trial judge went over the stipulation of fact with Appellant. Tr. 250-57. The only reference to the terminal element of Article 134, UCMJ, in the stipulation of fact consisted of a single sentence that Appellant's "possession of child pornography was of a nature to bring discredit upon the armed forces because such a crime would harm and lower the reputation of the service in public esteem." Pros. Ex. 1 at 4. Although the military

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *Contrast* CADA, *with* Tr. 337. This error was likely predicated by an error in the Statement of Trial Results, which listed "adjudged forfeitures" as part of the sentence when the court adjudged no forfeitures. The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." EOJ at 3.

trial judge engaged in a providence inquiry with Appellant after this and both defined and explained that the terminal element was a necessary element of the offense, he did not ask Appellant any questions specific to this terminal element of Article 134, UCMJ. *See* Tr. 258-83. Nor did Appellant volunteer any statements specific to the element. *Id*. Despite this, the military trial judge found Appellant's plea to the Article 134 offense to be provident. Tr. at 306.

The military trial judge then sentenced Appellant to, *inter alia*, fourteen months of confinement. Tr. 337.

On appeal, the AFCCA viewed the facts of Appellant's case in the light most favorable to the Government, denied any relief, and affirmed the findings and sentence. Appendix at 6, 13.

Reasons to Grant Review

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE AFCCA DECIDED A QUESTION OF LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENT. NAMELY, THE AFCCA FOUND A SUFFICIENT FACTUAL PREDICATE EXISTED FOR APPELLANT'S TERMINAL ELEMENT EVEN THOUGH THE MILITARY TRIAL JUDGE FAILED TO ASK APPELLANT ANY QUESTIONS SPECIFIC TO THE ELEMENT AND THE STIPULATION OF FACT ONLY CONTAINED A CONCLUSORY STATEMENT SPECIFIC TO THE ELEMENT.

Standard of Review

A military trial judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014).

Law and Analysis

During Appellant's providence inquiry, the military trial judge completely failed to ask Appellant any questions specific to the terminal element of the Article 134 offense alleged against him. Additionally, the stipulation of fact contains a mere conclusory statement specific to the terminal element. Because of this the facts and circumstances do not objectively support the terminal element of his offense. This inadequacy resulted in an improvident plea, which must be set aside.

When this Court reviews the AFCCA's holding on the ruling of a trial court, this Court typically pierces through the "intermediate level and examine[s] the military trial judge's ruling, then decide[s] whether the Court of Criminal Appeals was right or wrong." *United States v. Hernandez*, 81 M.J. 432, 437 (C.A.A.F. 2021) (citations omitted).

"During a guilty plea inquiry the military trial 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. Thus the military trial judge must establish during a providence inquiry that the accused understands two general areas; first the judge must establish that the accused understands and can recite the factual history of the offense, and, second, judge must establish that the accused understands how the law relates to those facts. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United Sates v. Care*, 18 C.M.A. 535, 538-39 (1969)). That understanding must be elicited in the form of "*actual facts* from an accused and not merely legal conclusions." *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021) (emphasis in original) (quoting *United States v. Price*, 76 MJ 136, 138 (C.A.A.F. 2017)). A sufficient factual basis for a plea, in turn, requires *a sufficient factual basis for each element* of the offense for which the accused is pleading guilty. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citation omitted). In the context of an Article 134, UCMJ, offense, "[i]t is well established that the terminal element of

the general article is an essential element of the offense." *United States v. Richard*, 82 M.J. 473, 476 (C.A.A.F. 2022) (internal quotation marks and citation omitted).

In the context of a guilty plea, specifically with regard to the terminal element, "the record must conspicuously reflect that the accused 'clearly understood the nature of the prohibited conduct' as being in violation of clause 1 and clause 2, Article 134[.]" *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008) (citing *United States v. Martinelli*, 62 M.J. 52, 67 (C.A.A.F. 2005). An accused's mere understanding that "service discrediting" is an element of his offense is–by itself–insufficient to establish proof of the terminal element; to be sufficient "[t]he plea colloquy between the military trial judge and [the accused has to] demonstrate[] that he 'clearly understood the nature of the prohibited conduct' in terms of that conduct being service-discrediting[.]" *Id*. (citing *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004). In other words, it is not sufficient that an accused only understands his underlying misconduct, he must also understand how that misconduct meets the terminal element.

If an accused's guilty plea is not voluntary and knowing, "it has been obtained in violation of due process and is therefore void." *Care*, 40 C.M.R. at 251. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *United States v. Byunggu Kim*, 83 M.J. 235, 238

(C.A.A.F. 2023) (alteration in original) (quoting *Care*, 40 C.M.R. at 251). Additionally, "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea." *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)).

A military trial judge's failure to obtain an adequate factual basis for a guilty plea constitutes an abuse of discretion. *Inabinette*, 66 MJ at 322. However, military trial judges are afforded significant deference on this point and are granted substantial leeway in conducting providence inquiries. *Moratalla*, 82 M.J. at 4. In determining whether a military trial judge abused his or her discretion, an appellate court applies the "substantial basis" test. *Inabinette*, 66 M.J. at 322. Specifically, the court asks "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." *Id*.

A. The military trial judge abused his discretion by accepting Appellant's guilty plea when the record failed to establish an adequate factual basis for the terminal element.

An Article 134, UCMJ, offense generally "has two elements: (1) a predicate act or failure to act, and (2) a terminal element." *United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013) (citing *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008)). For an offense charged under Article 134, an act or omission that is used to prove up the first element *standing on its own*—no matter how distasteful, or vulgar,

or offensive, or deplorable—is not criminal under the UCMJ; the criminality of that act comes from proof of the terminal element. *See United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000) (overruled on other grounds) (stating the terminal elements of Article 134 are "alternative ways of proving the criminal nature of the charged misconduct."); *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) ("Whether any given conduct violates clause 1 or 2 is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action."); *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011) ("An accused cannot be convicted under Article 134 if the trier of fact determines only that the accused committed [the underlying misconduct]; the trier of fact must also determine beyond a reasonable doubt that the terminal element has been satisfied.").

This leads to a necessary corollary rule; alleged underlying misconduct cannot be per se violative of the terminal elements of Article 134, UCMJ. *See Richard*, 82 M.J. at 478 ("The Government acknowledges that this Court has held that no misconduct can be considered per se prejudicial to good order and discipline[.]"). Indeed, the notion that proof of the act or omission referenced in the first element of an Article 134 offense somehow additionally proves the terminal element as well would result in the collapse of Article 134 into an unconstitutional single-element offense whereby any act or omission is an offense under the UCMJ

regardless of the proof of any terminal element.

1. The military trial judge failed to discuss the terminal element with Appellant.

The military trial judge in this case failed to ask Appellant any questions specific to the terminal element of the offense alleged against him. *See* Tr. 258-83. The military trial judge asked about how Appellant found the images (Tr. at 267), the search terms he used (Tr. at 268), and the names of the websites where he found the images (*id*.), but he did not ask Appellant any questions specific to Appellant's understanding of how or why his conduct was discrediting to the service. *See* Tr. 258-83. The military trial judge's subsequent acceptance of Appellant's guilty plea, after such an omission by the military trial judge, is, therefore, an abuse of discretion.

In *United States v. Jordan*, this Court held that the military trial judge's failure to establish the appellant's understanding of how the terminal element was met—beyond bare "yes, sir" responses to the military trial judge's questions—resulted in a "substantial basis in law and fact for questioning the guilty plea." 57 M.J. 236, 238-40 (C.A.A.F. 2002). Because of this, the appellant's finding of guilty was set aside. *Id*. at 240. Unlike the military trial judge in *Jordan*, in the instant case the military trial judge did not even ask Appellant if he agreed that his conduct was service discrediting; the judge simply stated that service discrediting was an element, then moved past the element without discussing it with Appellant at all.

Like the insufficiency of *Jordan*'s conclusory statements, Appellant's complete lack of statements regarding the terminal element is insufficient.

In another case, a similar situation occurred. *United States v. O'Connor,* 58 M.J. 450 (C.A.A.F. 2003). The appellant on *O'Connor* pled guilty to two specifications of receiving and possessing child pornography in violation of Article 134, UCMJ. *Id*. at 451. Although originally charged as an Article 134 "clause 3" violation of 18 U.S.C. § 2251, when the Supreme Court of the United States invalidated a portion of that law in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court analyzed whether the appellant's plea could be provident as a service discrediting "clause 2" lesser-included-offense, and found that it could not. *Id*. at 454. This Court held, "Although Appellant stipulated to the service-discrediting character of his conduct in the present case there was no discussion of that element by either Appellant or the military trial judge during his plea inquiry." *Id*. This Court then reiterated, "there was no specific discussion with Appellant concerning the service-discrediting character of his conduct, much less any constitutional implications his conduct may or may not have had." *Id*. at 455. This Court then held, "In the absence of any conscious discussion regarding those issues, the record here does not demonstrate that Appellant 'clearly understood the nature of the prohibited conduct.' Accordingly, we cannot view Appellant's plea as provident to the lesser-included offense of service-discrediting conduct under clause

2 of Article 134." *Id*. (quoting *Sapp*, 53 M.J. at 92).

Like *O'Connor*, there was no discussion regarding the service discrediting element of Appellant's Article 134 offense. Because of that, the record fails to demonstrate that Appellant clearly understood the nature of the prohibited conduct as it applies to the terminal element. Therefore, Appellant's plea is improvident and the military trial judge abused his discretion in accepting the plea.

2. The AFCCA's justifications to find Appellant's plea provident compounded the error.

In addition to the military trial judge's error in accepting Appellant's improvident plea with no discussion of the terminal element, the AFFCA compounded that error by essentially holding that Appellant's underlying conduct was per se service discrediting, despite this Court making it clear that no conduct can be considered per se violative of the terminal elements of Article 134.

To find that the military trial judge's omission did not affect the providency of Appellant's plea, the AFCCA pointed to the following three justifications. Appendix at 9-10. Each justification is contrary to this Court's precedent.

i. Legally incorrect justification one: A conclusory "Yes, Sir" is insufficient.

First, the AFCCA said, "The military judge asked Appellant if he understood the definition of service discrediting conduct, to which Appellant responded, 'Yes, sir.'" *Id*. at 9. For at least two reasons, this is insufficient to establish that Appellant

understood how conduct met the terminal element.

Initially, this is insufficient because – when put in context – this one "yes, sir" does nothing to reflect upon Appellant's understanding at all. "Yes sir" was in response to a single definition in a sea of other legal definitions to which the military trial judge also elicited "yes-sirs" from Appellant, including the definitions for "Child Pornography Involving Actual Minor," "Child Pornography Involving What Appears to be a Minor," "obscene," "minor," "child," "sexually explicit conduct," "lascivious," "visual depiction," "possessing," "wrongful," and "knowingly." *See* Tr. at 260-65. Cherry-picking one small moment in time from the rote agreement to the definitions on a list of other legal phrases has no value; at least no value when determining whether Appellant understood the implications of the terminal element and whether it existed in his case.

Further, this Court has long held that "simply respond[ing] 'Yes, sir' to the several questions put to [an appellant] as to [the terminal element]" are nothing more than "legal conclusions with which appellant was asked to agree without any admissions from him to support them." *Jordan*, 57 M.J. at 239. Legal conclusions "are insufficient to provide a factual basis for a guilty plea." *Id*. (citing *Outhier*, 45 M.J. at 331).

ii. Legally incorrect justification two: The underlying conduct necessarily implying the terminal element is insufficient.

Next the AFCCA pointed out that, "Appellant proceeded to provide a

thorough description of the images he possessed[.]" Appendix at 9. After pointing this out, the AFCCA said, "These facts do not merely support the first element of the charged offense [. . .] These facts also support the second element of the charged offense[.]" *Id.* at 10.

The effect is that the AFCCA held that no discussion of the terminal element was necessary between the military trial judge and Appellant because the underlying misconduct itself established the terminal element; which is to say, the underlying misconduct – in the AFCCA's view – is per se service discrediting. This view by the AFCCA flatly contradicts the precedent established by this Court.

For example, in *United States v. Phillips*, the appellant was convicted of a "clause 2," Article 134, UCMJ, possession of "actual" child pornography. 70 M.J. 161, 164 (CAAF 2011). The CCA reviewed the sufficiency of the evidence against the appellant and held that the underlying misconduct (i.e., the possession of child pornography itself) was "per se service discrediting . . . especially under the facts and circumstances of this case." *Id*. at 164. This Court reversed the decision and remanded it to the CCA for a clarification of what was meant by "per se." *Id*. But in doing so, this Court cautioned that the terminal element "cannot be conclusively presumed from any particular course of action." *Id*. at 165.

And yet, that is exactly the course the AFCCA took in the instant case. The court cited to Appellant's admission that he possessed images in an application and

was caught by law enforcement as proof that that very possession was service discrediting. Such circular reasoning swallows the rule this Court has held in cases like *Phillips*. It would allow CCA's to circumvent this Court's rule by merely saying "the possession of child pornography is service discrediting in this case" rather than saying "the possession of child pornography is per se service discrediting." The fact that a CCA does not say misconduct is "per se" while still treating the misconduct as "per se" is an illusory distinction. Although not binding, the Army Court of Criminal Appeals (ACCA) summed up what the AFCCA's failing was here in *United States v. Knight*. 2015 CCA LEXIS 255, *4-5 (A. Ct. Crim. App. June 17, 2015). The ACCA pointed out,

> It may be tempting to simply acknowledge that crimes such as the possession of child pornography are intuitively, inherently, or per se prejudicial to good order and discipline or service discrediting. However, it is well established that the terminal element "cannot be conclusively presumed from any particular course of action," even deplorable behavior such as that charged and admitted to here.

Id. (citing *Phillips*, 70 MJ at 165).

This Court made a similar statement, though in the context of the sufficiency of an Article 134 specification that failed to allege the terminal element. *See United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). In *Ballan*, the appellant pled guilty, *inter alia*, to an Article 134, UCMJ, specification that failed to allege a terminal element. *Id*. at 31. In the analysis this Court said, "whether specifications for charged violations of Article 134, UCMJ, may be upheld in the guilty plea context

where the terminal element is not alleged cannot be answered by determining that the act that an accused 'did or failed to do'. . . is inherently, impliedly, or as a matter of common sense, prejudicial to good order and discipline or service discrediting." *Id*. at 33. This Court noted that the terminal element "is an actual and distinct element," and "like any element of any criminal offense, must be separately charged *and proven*." *Id*. (emphasis added). Thus, presumably, if the allegation of the underlying conduct in the first element of an Article 134 offense does not imply the existence of the terminal element, then proof of the underlying conduct would not imply proof of the terminal element either.

Additionally, though in a contested case, a similar point was made by this Court in *United States v. Fosler*. 70 M.J. 225 (C.A.A.F. 2011). In *Fosler*, this Court stated, "An accused cannot be convicted under Article 134 if the trier of fact determines only that the accused committed [the underlying Article 134 act]; the trier of fact must also determine beyond a reasonable doubt that the terminal element has been satisfied." *Id*. at 230. This is because, as this Court explained, the underlying act, "standing alone, does not constitute an offense under Article 134, the mere allegation that an accused has engaged in [the underlying] conduct cannot imply the terminal element." *Id*. Although *Fosler* was specifically talking about contested cases, the principle rings no less true in a guilty plea case. The underlying conduct in an Article 134, UCMJ, case is only half of an offense, and half of an

Article 134, UCMJ, offense is no offense at all regardless of the deplorable nature of that conduct. In other words, proof (by admission or otherwise) of the underlying act is not legally sufficient to prove an Article 134 offense without proof of the terminal element as well.

iii. Legally incorrect justification three: A conclusory statement in a stipulation of fact is insufficient.

Lastly, the AFCCA stated that Appellant "then again admitted in paragraph 18 of the stipulation [of fact] that his 'possession of child pornography was of a nature to bring discredit upon the armed forces because such a crime would harm and lower the reputation of the service in public esteem.'" Appendix at 10. However, this Court has already addressed how conclusory statements in a stipulation of fact are insufficient to establish the providency of a plea.

This Court examined that situation in *United States v. Sims*. 57 M.J. 419 (C.A.A.F. 2002). The appellant in *Sims* was initially charged with, among other offenses, an Article 134, UCMJ, indecent conduct offense by touching the breasts of another soldier while they were alone in an unlocked barracks room. *Id*. at 420. The appellant entered into a stipulation of fact that purported to establish that the appellant's conduct was "indecent" because "there was a substantial risk that his activity could be discovered at any given time if someone had walked in on them," thus making his conduct open and notorious. *Id*. The CAAF held the stipulation of fact to be inadequate to establish a factual predicate for the element of "indecent

act" because its conclusory statement was insufficient. *Id*. at 422. Specifically, the CAAF said:

> We have noted appellant's stipulation that "there was a substantial risk that his activity could be discovered[.]" In our view, appellant's conclusory stipulation . . . is inadequate to establish a factual predicate for "open and notorious" sexual conduct. . . . Accordingly, there is a substantial basis for rejecting the plea as improvident, because appellant's responses and the stipulation of fact state only the conclusion that it was reasonably likely under these circumstances that appellant's act of touching [the soldier's breasts] would have been seen by others, but they do not provide the factual basis for that conclusion.

Id. (citations omitted).

Sims is on point for the instant case. In *Sims* the stipulation was attempting to establish an element by making a conclusory statement of how that element was established. Specifically, the stipulation attempted to establish "indecent act" by making a conclusory statement that the act was open and notorious because someone could have walked in on the act. *Id*. at 420. Like the stipulation in *Sims*, Appellant's stipulation attempts to establish the terminal element by making a conclusory statement that conduct "would harm and lower the reputation of the service in public esteem." Appendix at 10. Just like how the conclusory statement in the *Sims* stipulation was simply "inadequate to establish a factual predicate," the conclusory statement in the instant case is inadequate for the same reason. *Sims*, 57 M.J. at 422.

A similar result was reached in the above-discussed case, *United States v.*

O'Connor. 58 M.J. at 455. In *O'Connor*, this Court analyzed whether the appellant's improvident plea to a "clause 3" Article 134 offense could nevertheless be provident under "clause 2." *Id.* at 454. In making the determination that it was not provident, this Court pointed out that, although the appellant entered into a stipulation of fact "to the service-discrediting character of his conduct in the present case there was no discussion of that element by either Appellant or the military trial judge during his plea inquiry." *Id*. Thus, legal conclusions about a terminal element in a stipulation of fact are insufficient to establish the providency of a plea.

The military trial judge in the instant case failed to discuss the terminal element with Appellant; the AFCCA's three justifications for overlooking this failure and finding an adequate factual support anyway fail individually and collectively. Appellant's plea is improvident.

B. Material prejudice to the substantial rights of Appellant

"Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military trial judge's error in accepting the plea 'materially prejudice[d] the substantial rights of the accused.'" *Moratalla*, 82 M.J. at 4 (citing Article 45(c), UCMJ, 10 U.S.C. § 845(c)).

A military trial judge's erroneous acceptance of a guilty plea and the resulting erroneous finding of guilty for an act that does not constitute an offense itself materially prejudices an appellant's substantial rights. *See, e.g.*, *United States v.*

McCullough, No. ARMY 20220376, 2024 CCA LEXIS 198, at *4 (A. Ct. Crim. App. Apr. 30, 2024); *see also United States v. Kibler*, 84 M.J. 603, 608 (A. Ct. Crim. App. 2024) (finding material prejudice to an appellant's substantial rights resulting from military trial judge's erroneous acceptance of a guilty plea "because appellant now stands improperly convicted of suffocating his spouse, and the sentence to confinement for that offense resulted in an additional 108 days of confinement"). In the instant case, the military trial judge's improper acceptance of an improvident plea resulted in Appellant's *only* criminal conviction, the deprivation of his liberty for fourteen months, and the lifelong stigma of a dishonorable discharge.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant review of this issue.

II.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE AFCCA DECIDED A QUESTION OF LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT WHEN IT REVIEWED THE PROVIDENCY OF APPELLANT'S GUILTY PLEA IN A "LIGHT MOST FAVORABLE TO THE GOVERNMENT."

Standard of Review

Questions of law are reviewed de novo. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997). Application of the law to the facts of a case is a mixed question. *See United States v. Durbin*, 68 M.J. 271, 273 (C.A.A.F. 2010). While the lower court's legal conclusions are reviewed de novo, the court's factual findings are

afforded more deference and will not be reversed unless the findings are clearly erroneous. *Id*. Findings of fact are clearly erroneous if those findings are "based on 'an erroneous view of the law.'" *Taylor*, 47 M.J. at 325.

Law and Analysis

In reviewing Appellant's Assignment of Error regarding the providence of his guilty plea, the AFCCA stated that the following standard governed its review:

> "[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be viewed in the light most favorable to the [G]overnment." *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994) (citation omitted).

Appendix at *6.

It then applied that standard when it found that the facts developed by the military trial judge were sufficient to establish the providence of Appellant's plea *Id*. at 6-13.

The AFCCA erred by employing a "light most favorable to the Government" standard because it is predicated on a weak legal bases, is inconsistent with this Court's precedent, and has been abandoned by every court other than the AFCCA.

It is clear from the Court's decisions that the correct standard of review for the providence of a guilty plea affords no deference to the government. *See United States v. Saul*, __ M.J. __, 2025 CAAF LEXIS 578, at *6 (C.A.A.F. July 21, 2025); *United States v. Navarro Aguirre*, 2025 CAAF LEXIS 614, at *20 (C.A.A.F. July 25, 2025) (both citing *Inabinette*, 66 M.J. at 322). Rather, the question on appeal is

whether there is a substantial basis in law or fact for questioning the guilty plea. *Inabinette*, 66 M.J. at 322. There is no "thumb on the scale" in favor of the government. As such, the AFCCA's use of this incorrect standard was error. *See United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) ("Further, it is error for a lower court to use an incorrect standard.")

The AFCCA's erroneous view appears to be rooted in a concurrence from a long-cast aside decision. In the instant case, the AFCCA cites to a published 1994 decision from the Air Force Court of Military Review: *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994). Appendix at 4. *Arnold*, in turn, is missing the full citation (at least in the Lexis database used by the Air Force) for where it gets its authority for the proposition; only a partial cite of "(C.M.A. 1989)" appears in the case.[2] But other cases discussed below reveal the source is a concurrence with no authority cited as a lawful foundation for its rule. Specifically, in *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989) (Cox, J., concurring), the concurrence postulated that, "where a guilty plea is first attacked on appeal, we must construe the evidence in a light most favorable to the Government."

Aside from the problem with citing to a concurrence as binding authority, *Md. v. Wilson*, 519 U.S. 408, 412-13 (1997), the AFCCA's continued embrace of the

[2] It is unclear if this relates to the AFCCA's parenthetical following the citation to *Arnold* that the authority upon which that case relied was omitted.

Hubbard concurrence is out of step with the law going back to at least 2010. Consistent with that, the Army has employed the *Hubbard* concurrence only once since then, seemingly missing that it was from a concurrence. *United States v. Rogers*, 2019 CCA LEXIS 507, at *6 (A. Ct. Crim. App. Dec. 12, 2019). Likewise, the Navy-Marine Corps Court of Criminal Appeals has not turned to the *Hubbard* concurrence at all since last referencing it in *United States v. Shuman*, 2010 CCA LEXIS 501, at *3 (N-M. Ct. Crim. App. Oct. 19, 2010).

The disappearance of reliance on the *Hubbard* concurrence since 2010—apart from the AFCCA—is significant and consistent with this Court's treatment of that case. In 2010, this Court put an end to *Hubbard* and the line of cases addressing the closely related offense doctrine of which it was a part because they were "based on neither the text of the UCMJ, nor the *MCM*."*United States v. Morton*, 69 M.J. 12, 15-16 (C.A.A.F. 2010).

Yet despite its weak foundation, the AFCCA repeatedly turns to *Hubbard* post-*Morton*, either through citing directly to the *Hubbard* concurrence itself or through its own published decision in *Arnold* that relies on the *Hubbard* concurrence. *See, e.g.*, *United States v.* Lawrence, 2021 CCA LEXIS 459, at *19 (A.F. Ct. Crim. App. Sep. 14, 2021) (citing *Hubbard*. 28 M.J. at 209 (Cox, J., concurring)); *United States v. Navarro Aguirre*, 2024 CCA LEXIS 103, at *18 (A.F. Ct. Crim. App. Mar. 11, 2024), *rev'd on other grounds*, 2025 CAAF LEXIS 614; *United States v. Sanger*,

2025 CCA LEXIS 370, at *41 (A.F. Ct. Crim. App. Aug. 7, 2025) (citing *Arnold*, 40 M.J. at 745); *United States v. Keilberg*, 2025 CCA LEXIS 481, at *13 (A.F. Ct. Crim. App. Oct. 22, 2025) (citing *Arnold*, 40 M.J. at 745). That includes at least one case where this Court has reversed the AFCCA to find a guilty plea improvident. *United States v. Saul*, 2023 CCA LEXIS 546, at *4 (A.F. Ct. Crim. App. Dec. 29, 2023), *rev'd*, 2025 CAAF LEXIS 578. This court should grant review because the AFCCA should no longer persist as an outlier amongst the services and should apply the same standard of review for guilty pleas mandated by this Court and applied uniformly by the other services. *See* C.A.A.F. R. 21(b)(5)(B), 21(b)(5)(F).

Because the AFCCA applied the wrong law, it abused its discretion. That made a difference in this close case, as discussed under Issue I above, the providence inquiry was lacked the necessary facts to establish the terminal element. This was error, and the appropriate remedy when a CCA uses an incorrect standard is to set aside the opinion and remand the case to ensure that the lower court's erroneous view of the law did not prejudice the appellant. *United States v. McAlhaney*, 83 M.J. 164, 168 (C.A.A.F. 2023).

Wherefore, Appellant respectfully requests this Honorable Court grant review of this issue.

Respectfully submitted,

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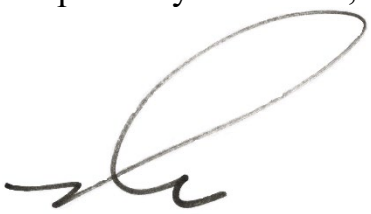
Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on 20 March 2026.

Respectfully submitted,



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Certificate of Compliance

This brief complies with the type-volume limitation of Rules 21(b) and 21(6) of no more than 9,000 words because it contains approximately 5,574 words.

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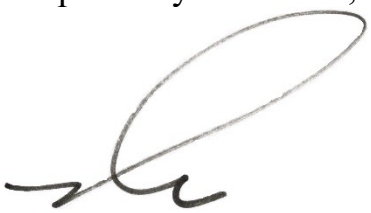
Respectfully submitted,



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Appendix

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40437 (f rev)

UNITED STATES
Appellee

v.

Dietrich A. SMITH
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 5 January 2026

Military Judge: Charles G. Warren.

Sentence: Sentence adjudged 15 December 2022 by GCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 23 February 2023: Dishonorable discharge, confinement for 14 months, reduction to E-1, and a reprimand.

For Appellant: Lieutenant Colonel Kasey W. Hawkins, USAF; Lieutenant Colonel Luke D. Wilson, USAF; Major Frederick J. Johnson, USAF.

For Appellee: Lieutenant Colonel Pete Ferrell, USAF; Lieutenant Colonel Jenny Liabenow, USAF; Lieutenant Colonel Meredith L. Steer, USAF; Major Vanessa Bairos, USAF; Major Regina Henenlotter, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before GRUEN, PERCLE, and MORGAN, *Appellate Military Judges*.

Senior Judge GRUEN delivered the opinion of the court, in which Judge PERCLE and Judge MORGAN joined.

GRUEN, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of wrongful possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 14 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or the sentence.[2]

Appellant raises two issues on appeal, which we have rephrased: (1) whether the military judge failed to elicit a factual basis for the specification rendering Appellant's plea improvident; and (2) whether the military judge committed plain error by admitting and considering improper evidence in aggravation under Rule for Courts-Martial (R.C.M.) 1001(b)(4). After carefully considering both issues, we find Appellant is not entitled to relief.

I. BACKGROUND

The Charge and its Specification alleged that Appellant, between on or about 1 January 2017 and on or about 5 May 2020, knowingly and wrongfully possessed child pornography, in violation of Article 134, UCMJ. This specification alleged possession of "photographs, videos, and digital images of a minor, or what appeared to be a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces." An Additional Charge and its Specification alleged that Appellant, between on or about 1 January 2017 and on or about 5 May 2020, knowingly possessed obscene visual depictions of a minor engaging in sexually explicit conduct, also in violation of Article 134, UCMJ. This additional specification alleged the knowing possession of "obscene visual depictions of minors engaging in sexually explicit conduct, and such visual depictions were transported in interstate or foreign commerce by means of the [I]nternet, in violation of 18 U.S.C. § 1466A, an offense not capital."

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[1] All references in this opinion to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The convening authority decision on action memorandum (CADAM) stated the convening authority suspended the adjudged forfeitures, but Appellant's sentence did not include adjudged forfeitures. This error was likely predicated by an error in the Statement of Trial Results, which erroneously listed "adjudged forfeitures" as part of the sentence. The military judge exercised his authority under R.C.M. 1104(b)(2)(B)(ii) to correct the CADAM and declared the provision suspending adjudged forfeitures a "legal nullity." Appellant claims no prejudice from this irregularity, and we find none.

Appellant entered into a plea agreement with the convening authority, wherein Appellant agreed to plead guilty to the Charge and its Specification, in exchange for the withdrawal and dismissal of the Additional Charge and its Specification, which upon the military judge's acceptance of Appellant's plea, but prior to the military judge's announcement of findings, would be withdrawn and dismissed with prejudice. The plea agreement also required the military judge, upon acceptance of Appellant's guilty plea, to enter a sentence that included no less than 10 months of confinement, but no more than 15 months of confinement, and a dishonorable discharge.

A. Providency of Plea – Terminal Element

During the plea inquiry, the military judge discussed the elements of the sole offense with Appellant, to include advising him on the terminal element, stating in pertinent part:

> "[S]ervice discrediting conduct" is defined as conduct which tends to harm the reputation of the service or lower it in public esteem. I also advise you as a matter of law that service discrediting doesn't mean that any particular member of the public now finds the Air Force to be in lower esteem, but an objective member of the public fully informed of all of the circumstances—that it would tend to lower the esteem of the Armed Forces in their perspective.

The military judge then asked Appellant if he understood this definition, to which Appellant responded, "Yes, sir." The military judge then asked Appellant to explain in his own words why he believed he was guilty of the offense.

Appellant proceeded to provide a thorough description of the images he possessed, to include having in his possession at the time law enforcement knocked on his door in the spring of 2020, 13 pornographic images and one video of minors; that he knew the images contained children performing sexual acts, which he described in vulgar detail; the manner in which he possessed the images in that he possessed these images in a "photo vault" on his cell phone in a folder labeled with a skull and crossbones; and that he password-protected and encrypted the images because he "knew that the contents of it were bad," meaning they were "immoral and unlawful."

Appellant, now on appeal, claims in his first issue that "the military judge wholly failed to elicit any facts from Appellant regarding the terminal element of the offense during the providency inquiry."

B. Stipulation of Fact

As part of the plea agreement, Appellant agreed to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the offense to which he agreed to plead guilty. Appellant agreed that the facts in the stipulation of fact "are true and admissible for all purposes in [his case], to include matters in aggravation." The stipulation of fact consists of 21 numbered paragraphs and seven attachments, totaling 39 pages of agreed upon facts. Appellant specifically stipulated "to the foundation, authentication, and admissibility of the attachments to [the] stipulation."

Attachment 7 to the stipulation of fact is a disc containing 13 images and one video, all contraband images of child pornography forming the basis of Appellant's offense to which he pleaded guilty. In paragraph 12 of the stipulation, Appellant agreed and admitted that he did knowingly and wrongfully possess child pornography as charged and "that said conduct was of a nature to bring discredit upon the armed forces." He agreed that the files on his cell phone and contained in Attachment 7 met the definition of child pornography; that he knowingly possessed the images and knew it was wrongful; that the contraband images were intended to elicit a sexual response in the viewer; that he had no legal or other justification for possessing the images; that he could have avoided such conduct if he had wanted to; and that both civilian and military law enforcement were involved in the investigation into his possession of suspected child pornography. In paragraph 18 of the stipulation Appellant admits that his "possession of child pornography was of a nature to bring discredit upon the armed forces because such a crime would harm and lower the reputation of the service in public esteem."

Attachment 4 to the stipulation of fact is a disc containing three images, one Graphics Interchange Format (GIF), and one video of "age indeterminate" persons involved in pornographic conduct. The military judge stated he would use the images in Attachment 4 as aggravation evidence when determining Appellant's sentence. This attachment forms the basis of Appellant's second issue on appeal.

With respect to Attachment 4 to the stipulation, the military judge stated:

> So to be clear here, . . . looking at Attachment 4, these other images that the [G]overnment ultimately didn't charge you with and you didn't plead guilty to, they're used as aggravation evidence to place into context the images that you did plead guilty to. . . . So I'll use [Attachment 4] to do things, like, look at, "Well, these are other images that were -- with data at a particular time. Did that inform your intent in what you were

> looking at?" And, you know, how, you know, the types of material that you were generally interested in.

The military judge further advised Appellant that he "cannot be punished additionally for the aggravating circumstances." He informed Appellant that he would be "punished solely for the conduct of which [he was] convicted" and made clear he would only consider the information in Attachment 4 to the stipulation to "contextualize the images to which [Appellant] pled guilty." The military judge then asked Appellant if he understood what he just said, to which Appellant replied, "Yes, Your Honor." The military judge then asked trial defense counsel if there was any objection to the military judge considering Attachment 4 as aggravation evidence, in the way the military judge proposed, to which trial defense counsel responded, after conferring with Appellant, "No, Your Honor."

Before the military judge announced Appellant's sentence, he provided the following statement to Appellant:

> [T]his [c]ourt carefully reviewed all of the evidence that you submitted here at sentencing for extenuation and mitigation. In particular, Doctor [SM's] Memorandum concerning his evaluation of you and your childhood traumas dealing with family, turmoil, child sex abuse, exposure to pornography at a young age. I also reviewed the character letters submitted by family members, friends, co-workers, and your written unsworn statement. The marching orders of R.C.M. 1002(f) is essentially to temper justice with mercy. For punishment that's sufficient but not greater than necessary to protect good order and discipline, safeguard society, ensure your rehabilitation . . . as punishment.

The military judge went on to say that he was convinced of Appellant's remorse and recognized that he had begun to take accountability with his voluntary plea of guilty, which the military judge said he took into account as "a potential matter in mitigation" when determining Appellant's sentence. There was no mention by the military judge of any matters in aggravation that he considered when determining the final appropriate sentence for Appellant.

II. DISCUSSION

A. Law

1. Providency of Plea and Stipulation of Fact

This court reviews "questions of law arising from the guilty plea de novo." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). However, we

review a military judge's decision to accept an accused's guilty plea for an abuse of discretion. *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013) (quoting *Inabinette*, 66 M.J. at 322). In determining whether a military judge abused his discretion in accepting a guilty plea as provident, "an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

"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." *United States v. Forbes*, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). "A plea is provident so long as [the a]ppellant was 'convinced of, and [was] able to describe, all of the facts necessary to establish [his] guilt.'" *United States v. Murphy*, 74 M.J. 302, 308 (C.A.A.F. 2015) (second and third alterations in original) (quoting *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)). The military judge may consider both the stipulation of fact and the inquiry with the appellant when determining if the guilty plea is provident. *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (citation omitted). However, Article 45(a), UCMJ, requires military judges to reject a plea of guilty "if it appears that [an accused] has entered the plea of guilty improvidently." 10 U.S.C. § 845(a).

"[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be viewed in the light most favorable to the [G]overnment." *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994) (citation omitted). Reviewing courts "must accept all of the facts in the parties' stipulation as true." *United States v. Castro*, 81 M.J. 209, 211 (C.A.A.F. 2021) (citation omitted). This is so because "[u]nless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto." *Id.* (quoting R.C.M. 811(e)).

An appellant bears the "burden to demonstrate a substantial basis in law and fact for questioning the plea." *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014) (quoting *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)). When entering a guilty plea, the accused should understand the law in relation to the facts. *United States v. Care*, 40 C.M.R. 247, 251 (C.M.A. 1969). "This court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient." *Id.* (internal quotation marks and citation omitted).

The elements of the offense to which Appellant pleaded guilty are: (1) that Appellant knowingly and wrongfully possessed child pornography; and (2) that under the circumstances, the conduct of Appellant was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States*

(2019 ed.) (*MCM*), pt. IV, ¶ 95.b.(1). "Child pornography" is defined as "material that contains either 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." *MCM*, pt. IV, ¶ 95.c.(4).

To prove the terminal element "of a nature to bring discredit upon the armed forces," the Government must prove that the conduct "has a tendency to bring the service into disrepute or [ ] tends to lower it in public esteem." *United States v. Heppermann*, 82 M.J. 794, 799 (A.F. Ct. Crim. App. 2022) (omission in original) (citing *MCM*, pt. IV, ¶ 91.c.(3)). "In the past [our superior court has] repeatedly held that the terminal element of an Article 134, UCMJ, offense is not inherently included within other elements and is instead a separate and distinct element that the [G]overnment must prove." *United States v. Coleman*, 79 M.J. 100, 103–04 (C.A.A.F. 2019) (citation omitted).

"Whether any given conduct [is service discrediting] is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action." *Heppermann*, 82 M.J. at 801 (alteration in original) (citing *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011)). "The degree to which others became aware of the accused's conduct may bear upon whether the conduct is service discrediting, but actual public knowledge is not a prerequisite." *Id.* (alterations, internal quotation marks, and citations omitted). The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable doubt that the accused's conduct would tend to bring the service into disrepute if it were known. *Id.* at 801–02 (citations omitted).

2. Admissibility of Evidence in Aggravation

a. Admissibility of Evidence

We review a military judge's ruling on the admissibility of evidence for "an abuse of discretion." *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000). Relevant evidence is generally admissible. Mil. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. Evidence, that may otherwise be inadmissible under the Military Rules of Evidence, "may sometimes be admitted at trial through a stipulation, if the parties expressly agree, if there is no overreaching on the part of the Government in obtaining the agreement, and if the military judge finds no reason to reject the stipulation 'in the interest of justice.'" *United States v. Clark*, 53 M.J. 280, 281–82 (C.A.A.F. 2000) (citation omitted).

R.C.M. 1001(b)(4), *Evidence in aggravation*, states

> Trial counsel may present evidence as to any aggravating circumstance directly relating to . . . the offenses of which the accused has been found guilty. . . . In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived . . . sex (including pregnancy), gender (including gender identity), disability, or sexual orientation of any person.

In sentencing an accused, "the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration . . . the nature and circumstances of the offense and the history and characteristics of the accused . . . ." R.C.M. 1002(f). "Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001, and . . . [a]ny evidence admitted by the military judge during the findings proceeding," may be considered. R.C.M. 1002(g)(1)–(2).

b. Waiver

"We review whether an appellant has waived an issue, a question of law, de novo." *United States v. Givens*, 82 M.J. 211, 215 (C.A.A.F. 2022) (citation omitted). The voluntariness of a waiver is also reviewed de novo; voluntariness "is measured by reference to the surrounding circumstances." *United States v. Hasan*, 84 M.J. 181, 198 (C.A.A.F. 2024) (citation omitted). "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). However, "for waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege." *United States v. Suarez*, __ M.J. __, No. 25-0004, 2025 CAAF LEXIS 651, at *13 (C.A.A.F. 5 Aug. 2025) (citing *United States v. Smith*, 85 M.J. 283, 287 (C.A.A.F. 2024) (quoting *United States v. Sweeney*, 70 M.J. 296, 303–04 (C.A.A.F. 2011)). "When . . . an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). "An effective waiver leaves no error to correct on appeal." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020).

"Waiver can occur either by operation of law," such as an unconditional guilty plea, "or by the 'intentional relinquishment or abandonment of a known right.'" *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (quoting *Sweeney*, 70 M.J. at 303) (citing *United States v. Hardy*, 77 M.J. 438, 441–42 (C.A.A.F. 2018)). The Supreme Court has held that waiver need not be expressed; an implied waiver can be established through a "course of conduct indicating

waiver." *Berghuis v. Thompkins*, 560 U. S. 370, 383–84 (2010) (quoting *North Carolina v. Butler*, 441 U. S. 369, 373 (1979)).

B. Analysis

1. Providency of Plea – Terminal Element

The issue at bar is whether the military judge abused his discretion when he accepted Appellant's pleas to wrongful possession of child pornography as provident and convicted him accordingly. The question as to whether Appellant did in fact wrongfully and knowingly possess child pornography, for which he was found guilty pursuant to his guilty plea, is not in issue here. Rather, Appellant contends that "the military judge wholly failed to elicit any facts from Appellant regarding the terminal element of the offense during the providency inquiry," and therefore, Appellant believes his plea is improvident and must be set aside. We do not agree that the military judge "wholly failed to elicit any facts" regarding the terminal element and find the facts elicited from Appellant on this element were sufficient to support his conviction for this offense.

There are two elements which must be factually satisfied in order for Appellant's conviction for wrongful possession of child pornography pursuant to Article 134, UCMJ, to stand. As stated, Appellant does not challenge that he pleaded sufficiently to the first element—that he knowingly and wrongfully possessed child pornography. Appellant takes umbrage with the military judge's finding that his plea was provident because Appellant now claims that the second element was not satisfied by his dialogue with the military judge during his plea inquiry—the requirement to show that under the circumstances, the conduct of Appellant was of a nature to bring discredit upon the armed forces. *See MCM*, pt. IV, ¶ 95.b.(1). In this connection, we note the several ways in which the military judge did his due diligence in eliciting facts to support this element.

First, during the plea inquiry, the military judge thoroughly discussed the elements of the offense with Appellant, to include advising him on the terminal element as provided in section I.A of this opinion, *supra*. The military judge asked Appellant if he understood the definition of service discrediting conduct, to which Appellant responded, "Yes, sir."

More importantly, the very next thing the military judge did was ask Appellant to explain in his own words why he believed he was guilty of the offense—effectively to provide the military judge with facts to support both elements of the offense. As noted *supra* and worth repeating, Appellant proceeded to provide a thorough description of the images he possessed—to include having in his possession at the time law enforcement knocked on his door in the spring of 2020, 13 pornographic images and one video of minors;

that he knew the images contained children performing sexual acts, which he described in vulgar detail; the manner in which he possessed the images in that he possessed them in a "photo vault" on his cell phone in a folder labeled with a skull and cross-bones; and that he password-protected and encrypted the images because he "knew that the contents of it were bad" meaning they were "immoral and unlawful." These facts do not merely support the first element of the charged offense, that he knowingly and wrongfully possessed child pornography. These facts also support the second element of the charged offense in that the vulgar description of the images he possessed, the fact that he, as a military member, secreted these images away in a "photo vault" because they were "immoral and unlawful" knowing the images were "bad," show that Appellant was testifying that under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. He knew what he was doing was "bad" and he did not want anyone knowing that he, a member of the armed forces, was indulging in viewing this obscene and vulgar material.

Moreover, as part of his plea agreement, Appellant agreed to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the offense to which he agreed to plead guilty. When discussing his criminal conduct with the military judge during the plea inquiry, Appellant did not "set[ ] up [any] matter[s] inconsistent with the plea" at any time during the proceeding. *Garcia*, 44 M.J. at 498 (quoting Article 45(a), UCMJ). Conversely, Appellant agreed that everything in the stipulation was true and correct to the best of his knowledge and belief, to include acknowledging "that said conduct was of a nature to bring discredit upon the armed forces." He agreed that the files on his cell phone and contained in Attachment 7 to the stipulation of fact met the definition of child pornography; that he knowingly possessed the images even knowing it was wrongful; that the contraband images were intended to elicit a sexual response in the viewer; that he had no legal or other justification for possessing the images; that he could have avoided such conduct if he had wanted to; and that both civilian and military law enforcement were involved in the investigation into his possession of suspected child pornography. He then again admitted in paragraph 18 of the stipulation that his "possession of child pornography was of a nature to bring discredit upon the armed forces because such a crime would harm and lower the reputation of the service in public esteem." Clearly the reason such a crime would harm and lower the reputation of the service in public esteem is directly connected to the facts he provided describing his indulgence in viewing vulgar images of child pornography.

"A plea is provident so long as [the a]ppellant was convinced of, and was able to describe, all of the facts necessary to establish his guilt." *Murphy*, 74 M.J. at 308 (alterations in original, internal quotation marks, and citation omitted). Viewing the entire record, we are convinced that Appellant was able

to describe all the facts necessary to establish his guilt and that when he entered his guilty plea, he understood the law in relation to the facts. *Care*, 40 C.M.R. at 251. "This court must find a substantial conflict between the plea and [Appellant's] statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient." *Id.* (internal quotation marks and citation omitted). Appellant bears the "burden to demonstrate a substantial basis in law and fact for questioning the plea." *Finch*, 73 M.J. at 148 (quoting *Negron*, 60 M.J. at 141). After a thorough and careful review of the record of trial, we find there is no substantial conflict between the plea and Appellant's statements or other evidence in the record and that Appellant has not met his burden to demonstrate a substantial basis in law and fact for questioning his plea. We therefore find his plea was provident and the military judge did not abuse his discretion in accepting Appellant's pleas and finding him guilty pursuant thereto.

2. Admissibility of Evidence in Aggravation

a. Admissibility

Appellant's main complaint regarding the military judge's admission of Attachment 4 to the stipulation of fact is that he abused his discretion when he admitted it and used it as matters in aggravation to determine Appellant's sentence. We do not agree. We concur with the Government that "the age difficult images [contained in Attachment 4] further demonstrated Appellant's interest and intent to [locate] images of young females engaged in sexually explicit conduct," and were thus relevant and admissible. Further, we note that "[e]vidence that otherwise would be inadmissible under the Military Rules of Evidence may sometimes be admitted at trial through a stipulation," so long as the parties expressly agree, there is no overreaching on the part of the Government in obtaining the agreement, and the military judge finds no reason to reject the stipulation "in the interest of justice." *Clark*, 53 M.J. at 281–82. We find the parties expressly agreed "to the foundation, authentication, and admissibility of the attachments to [the] stipulation," and "agree[d] to the use of [the] attachments for all purposes, including matters in aggravation . . . ." We find no overreaching on the part of the Government and the military judge did not reject the stipulation "in the interest of justice" during Appellant's court-martial. Therefore, the images contained in Attachment 4 to the stipulation of fact were admissible.

We find no error in the military judge's purported use of the images in Attachment 4 of the stipulation of fact. Aside from the military judge stating the general proposition that "they're [the images] used as aggravation evidence to place into context the images that you did plead guilty to," we are unable to find evidence to support Appellant's contention that the military judge did in

fact use the images in Attachment 4 as matters in aggravation. Before the military judge announced Appellant's sentence, he stated the following:

> This court carefully reviewed all of the evidence that you submitted here at sentencing for *extenuation and mitigation*. In particular, Doctor [SM's] Memorandum concerning his evaluation of you and your childhood traumas dealing with family, turmoil, child sex abuse, exposure to pornography at a young age. I also reviewed the character letters submitted by family members, friends, co-workers, and your written unsworn statement. The marching orders of R.C.M. 1002(f) is essentially to temper justice with mercy. For punishment that's sufficient but not greater than necessary to protect good order and discipline, safeguard society, ensure your rehabilitation.

(Emphasis added).

The military judge went on to say he was convinced of Appellant's remorse and recognized that he had begun to take accountability with his voluntary plea of guilty, which the military judge said he took into account as "a potential matter in mitigation" when determining Appellant's sentence. There was no mention by the military judge of any matters in aggravation that he considered when determining the final appropriate sentence for Appellant. The military judge specifically advised Appellant that he "cannot be punished additionally for the aggravating circumstances," referring to the images contained in Attachment 4 to the stipulation of fact. The military judge further informed Appellant that he would be "punished solely for the conduct of which [he was] convicted." Appellant has failed to meet his burden to demonstrate error—our observation is that there is no evidence to support the military judge committed error, let alone plain error. Further, based on the language agreed upon in the stipulation of fact, we find Appellant waived this issue for appellate purposes.

b. Waiver

Assuming the military judge did consider Attachment 4 as aggravation evidence, not only do we find it was an appropriate use, but we find Appellant waived any potential issue related to such consideration. When addressing Attachment 4 to the stipulation of fact the military judge informed Appellant and his counsel that he was going to use Attachment 4 "as aggravation evidence to place into context the images that [Appellant] did plead guilty to . . . ." He further stated that "these are other images that were with data at a particular time" and "inform intent in what [Appellant was] looking at," and "how . . . the types of material that [Appellant was] generally interested in." After such advice, the military judge asked Appellant if he understood what he

just said, to which Appellant replied, "Yes, Your Honor." The military judge then asked trial defense counsel if there was any objection to the military judge considering the evidence found in Attachment 4 to the stipulation of fact, in the way the military judge proposed, to which trial defense counsel responded, after conferring with Appellant, "No, Your Honor."

We find not only did the military judge not abuse his discretion in admitting and using the images in Attachment 4 to the stipulation of fact as he proposed, but Appellant also waived any issues with respect to this matter.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 59(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court