

# Omitting Child Pornography from Guilty Pleas

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Disclaimer: The views presented are those of the speaker and do not necessarily represent the views of the DoD or its components.

# The Issue

- The problem – introducing evidence of child pornography to the record is
  - Harmful to all the practitioners required to review the material in the review chain,
  - Harmful to victims, and
  - Complicates handling and transporting the record.
- So why does evidence of child pornography continue to be introduced in guilty dives?

# Case Law

# CAAF – Evidence at Guilty Plea

- There is no requirement that any witness be called or any independent evidence be produced to establish the factual predicate for a guilty plea. *See, e.g.*, 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).
- At a guilty plea, the Gov't 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 ...'' United States v. James, 55 M.J. 297, 300 (C.A.A.F. 2001).

# Service Appellate Courts

Court	Position on CP at Guilty Plea	Case Law
Army CCA	Has repeatedly “remind[ed] counsel that admission of child pornography into the record during a guilty plea is not necessary.”	United States v. Britt, ARMY 20190290, 2020 CCA LEXIS 127, at *5 n.3 (A. Ct. Crim. App. Apr. 17, 2020). <i>See, e.g.</i> , 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), <i>petition denied</i> , 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).
Air Force CCA	CP in the record is not necessary in a guilty plea, recommends using a stipulation of fact.	<i>See, e.g.</i> , United States v. Monarch, ACM 38585, 2015 CCA LEXIS 428, at *18 & *18 n.5 (A.F. Ct. Crim. App. Oct. 14, 2015).
Navy and Marine Corps CCA	Has affirmed guilty pleas without evidence of CP in cases where the military judge 1) considers a descriptive stip of fact; and/or 2) elicits sufficient providence inquiry, and 3) stip of fact/providence inquiry make clear images depict actual identifiable minors engaging in sexually explicit conduct	United States v. Santarini, No. 200201454, 2004 CCA LEXIS 103, at *14–15, *24 (N-M. Ct. Crim. App. Apr. 30, 2004). <i>See, e.g.</i> , 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).

# Practical Application

# Charging Decision

- Specificity > Generalities
- Ex. A sampling of file names that contain the most aggravating images or videos
- Specificity in the charge sheet is best achieved after an investigation is complete.



# Drafting the Plea Agreement

## **Well-drafted Plea Agreements Include:**

- An unconditional guilty plea
- A “waive all waivable motions” provision
- A written stipulation of fact

## **Optional:**

- A minimum period of confinement

## **Detailed Stipulation of Fact May Include:**

- Total # of images and videos
- Total length of videos
- Total # of victims
- Location of videos (synced across multiple devices/uploaded to the internet)
- Whether the accused was viewing, sharing, and/or storing the images
- General description of the images/videos

# Protect the Record

- Conduct a Thorough Providence Inquiry
  - While the MJ bears ultimate responsibility for accepting a guilty plea, the trial and defense counsel are active participants in ensuring a successful guilty plea.
- Resolve Inconsistencies and Address Possible Defenses
- Opportunity for Defense Counsel to Review the Evidence



Questions?