IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **E.E. GEISER** **J.F. FELTHAM**

UNITED STATES

v.

JOHN A. HALSEMA
CAPTAIN (O-6), U. S. Navy

NMCCA 200001337 Decided 30 November 2006

Sentence adjudged 16 August 1999. Military Judge: P. McLaughlin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commandant, Naval District Washington, Washington, DC.

Capt R.R. SANCHEZ, USMC, Appellate Defense Counsel
Maj C ZELNIS, USMC, Appellate Defense Counsel
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of attempted communication of indecent language to a child under the age of 16; two specifications of violating a lawful general regulation, by using government communication systems and equipment to communicate indecent language, and by using government communication systems and equipment to receive and view child pornography; one specification of communicating indecent language; two specifications of distributing child pornography; and one specification of possession of child pornography, in violation of Articles 80, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, and 934. The appellant was sentenced to confinement for eight months, a letter of reprimand, and dismissal from the naval service. The convening authority approved the adjudged sentence, but suspended that part of the sentence extending to dismissal and to confinement in excess of five months for a period of one year

from the date of sentencing, in accordance with a pretrial agreement.

The appellant now claims the findings of guilty should be set aside because he lacked mental responsibility for his actions; that his pleas to Specifications 2, 3 and 4 of Charge III, which allege violations of 18 U.S.C. § 2252A, were improvident because they failed to establish a factual basis that the images he possessed were of actual minors; and that his guilty plea to knowing possession of images of child pornography was improvident, as he informed the military judge that he had no recollection of possessing the images.

In his reply to the Government's Answer, the appellant claims the Government's response to his first assigned error, which alleges lack of mental responsibility for his actions, is rendered moot by our superior court's holding in *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). He asks us to reject the Government's Answer, and set aside the findings and the sentence. The appellant also alleges that the providence inquiry into his pleas of guilty to possession and distribution of child pornography, which were charged under Clause 3 of Article 134, UCMJ, was insufficient for him to be found guilty of a lesser included offense under Clause 1 or Clause 2 of Article 134. More recently, the appellant filed a motion for summary disposition, reiterating his argument that *Harris* requires us to set aside the findings and the sentence.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, the appellant's reply to the Government's response, and the pleadings related to the appellant's motion for summary disposition. We conclude that the findings must be modified and the sentence reassessed. Following our corrective action, we conclude that the findings and sentence are correct in law and fact and that no error remains that is materially prejudicial to the substantial rights of the appellant. *See* Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant pled guilty to offenses that took place in 1997. On 4 August 1998, a forensic psychiatrist at the National Naval Medical Center, Department of Psychiatry, Bethesda, Maryland, prepared a preliminary report of inquiry into the appellant's mental state for the convening authority. The forensic psychiatrist, LCDR Kevin D. Moore, MC, USN, concluded that the appellant had a severe mental disease or defect at the time of the alleged criminal conduct and, as a result of such mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his conduct. Appellate Exhibit XVI at 12. LCDR Moore also concluded that the appellant had sufficient mental capacity to understand the nature of the proceedings against him and to cooperate in his own defense. *Id*.

The charges were preferred on 21 August 1998. On 15 October 1998, LCDR Moore prepared a mental health evaluation of the appellant for the convening authority. In it, he indicated he was "gravely concerned that court proceedings will likely exacerbate [the appellant's] mental condition and substantially increase his risk of suicide." Appellate Exhibit XVI at 14. LCDR Moore asked the convening authority to suspend the then-pending Article 32, UCMJ, pretrial investigation into the matters set forth in the charges. *Id*.

On 16 November 1998, in accordance with RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), and on order of the convening authority, a board consisting of three forensic psychiatrists stationed at Walter Reed Army Medical Center, Washington, DC, convened to inquire into the appellant's mental competency and mental responsibility. On 1 December 1998, the board concluded that the appellant had a severe mental disease or defect at the time of the alleged criminal conduct. Appellate Exhibit IV at 5-6.[1] Contrary to LCDR Moore's earlier finding, the board concluded that at the time of the alleged criminal conduct the appellant was able to appreciate the nature and quality or wrongfulness of his conduct. *Id*. It also concluded that he had sufficient capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense. *Id*.

Thereafter, an Article 32, UCMJ, investigation into the charges and specifications was conducted on 12 February 1999. The Article 32, UCMJ, Investigating Officer noted that the appellant raised issues during the investigation concerning his mental competency and mental responsibility, and recommended that they be addressed at trial.

On 25 February 1999, the convening authority referred the charges for trial. At trial, the appellant filed a motion in accordance with R.C.M. 706, asking the military judge to order an inquiry to determine whether he lacked the capacity to stand trial. Appellate Exhibit IV; Record at 43 – 54. The motion alleged that a "recent psychiatric admission to Walter Reed Army Medical Center" indicated the appellant's mental condition had worsened since the R.C.M. 706 Board issued its report. Appellate Exhibit IV.

The appellant also filed a motion under R.C.M. 906(b)(3), asking the military judge to "correct the defects of the Article 32 investigation by ordering a new Article 32 investigation." Appellate Exhibit VI. The motion alleged that the appellant was mentally incompetent at the time of the Article 32 investigation because he suffered from severe hypothyroidism, and further

[1] The specific diagnosis was: Mood Disorder due to a General Medical Condition (Hypothyroidism), with depressive features. Appellate Exhibit IV at 5-6. The appellant was also found to be suffering from stresses related to his involvement in classified military operations. *Id*.

alleged that the Article 32, UCMJ, Investigating Officer proceeded with the investigation over the appellant's objection. *Id*. Both of these motions were supported by attached medical documentation, as well as expert medical and psychiatric testimony.

On 12 August 1999, while awaiting the military judge's ruling on his motions, the appellant entered into a pretrial agreement with the convening authority. Paragraph 11 of the pretrial agreement reads as follows:

> I understand that by pleading guilty, I waive my right to appeal the Military Judge's denial of my motion to compel the government to assign an individual military counsel, my motion for a continuance, my motion to set aside or reopen the Article 32, my motion for a new inquiry into my capacity to stand trial, and my motion that I was not competent to stand trial.

Appellate Exhibit XXXII.

Without waiting for the military judge to rule on his motions, the appellant then pleaded guilty, by exceptions and substitutions, to all the charges and specifications. His pleas were supported, in part, by a stipulation of fact. The stipulation consisted of seven pages of text and Appendices 1 (138 pages of transcribed written communications, sent via computer, between the appellant and a female known as "Jane Lea"), 2 (five pages of visual images depicting minors engaged in actual or simulated sexually explicit conduct), 3 (36 pages of transcribed written communications, sent via a Government-owned computer, between the appellant and a female known as "Stacie 619"), 4 (a 26-page transcript of an audio tape of telephone conversations of the appellant recorded on 17 October 1997), 5 (three pages of visual images depicting minors engaged in actual or simulated sexually explicit conduct), 6 (one page of transcribed written communications, sent via a Government-owned computer, between the appellant and an individual known as "Salty 2222"), and 7 (24 pages of visual images depicting minors engaged in actual or simulated sexually explicit conduct).[2] Prosecution Exhibit 1 at 1-7.

The final two sentences of the stipulation of fact read as follows: "The accused's actions were, at all times, voluntary and knowing on his part. At all time [sic], the accused had the ability to appreciate the nature and quality of his conduct and

[2] "Jane Lea" and "Stacie 619" were pseudonyms used by two undercover television news reporters posing as females under the age of 16. "Salty 2222" was the pseudonym of an individual, not further identified, to whom the appellant communicated, via computer, written descriptions of his sexual preferences and prior encounters with children.

had the ability to appreciate the wrongfulness of his conduct." Prosecution Exhibit 1 at 7.

Citing *United States v. Sweet*, 42 M.J. 183 (C.A.A.F. 1995), the military judge, relying heavily on the stipulation of fact, conducted a brief providence inquiry. The inquiry consisted primarily of explanations of the elements of the offenses to which the appellant pleaded guilty, definitions of terms that were pertinent to the charges, and questions that elicited "yes" and "no" responses to inquiries as to whether those elements correctly described what the appellant did. Although we do not find the providence inquiry in this case deficient, we note that our superior court "[has] repeatedly advised against and cautioned judges regarding the use of conclusions and leading questions that merely extract from an accused 'yes' and 'no' responses during the providency [sic] inquiry." *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F 2004)(citing *United States v. Jordan*, 57 M.J. 236, 2381 (C.A.A.F. 2002); *Sweet*, 42 M.J. at 185; and *United States v. Lee*, 16 M.J. 278, 282 (C.M.A. 1983)). "[I]t is especially important that the accused speak freely so that a factual basis will be clearly established in the record." *United States v. Holt,* 27 M.J. 57, 58 (C.M.A. 1988). In the instant case, a providence inquiry that included a thorough discussion of those matters addressed in the stipulation of fact would have been preferable to the one that was actually conducted.

After questioning the appellant about his pleas of guilty, the military judge inquired as to his mental status:

MJ: Okay, Captain Halsema, do you have any questions about the meaning and effect of your pleas of guilty?
ACC: No, Sir.

MJ: Do you still wish to plead guilty?
ACC: Yes, sir.

MJ: Okay. Earlier on in the case we had some discussion regarding your health and your mental condition. How are you feeling today as far as your alertness and understanding of the proceedings, and what we're doing here and the importance of it all?
ACC: I'm on a lot of medication, but I understand what's going on.

MJ: Pardon me?
ACC: I'm on a great deal of medication, but I understand what's going on.

MJ: Okay, and you feel capable of proceeding and well served by your counsel, Mr. Sheldon?
ACC: Yes, sir.

MJ: Is there any doubt in your mind whether we should proceed or not?

ACC: No, sir.

MJ: What medications are you on?
ACC: Several psychotropic drugs, and several drugs to correct my thyroid deficiency.

MJ: Psychotropic drugs are—they don't interfere with your focus, do they?
ACC: Umm—

MJ: Do they keep you in a calm state?
ACC: Yes, sir. Essentially they're designed to stop hallucinations and they do, and they're designed to control my—they're designed to help keep me out of a suicidal state and to control my hallucinations.

MJ: So then you're feeling well-grounded here in reality and understanding the proceedings, is that right?
ACC: Yes, sir.

MJ: Mr. Sheldon, are you satisfied that the Captain is----
CC: Yes, your honor.

MJ: ----I guess, I'm----
CC: Competent.

MJ: Well, competent, that's a deep word, but is capable of assisting you and participating in the proceedings?
CC: Yes, your honor.

Record at 261-63.

On 20 October 2003, over four years after his court-martial adjourned, the appellant asked this court to order an inquiry into his mental responsibility, in accordance with R.C.M. 706, and to order a stay in the proceedings pending its outcome. He argued that there were matters pertaining to his mental responsibility and mental competence that had "only come to light subsequent to Appellant's court-martial that mandate a new R.C.M. 706 proceeding before the Court can consider the merits of Appellant's case." Appellant's Motion of 20 Oct 2003 at 4-5.

The new information pertaining to the appellant's mental status was a report prepared by Michael Dineen, CAPT, MC, USN, on 26 September 2003. *See* Appellant's Motion to Attach of 20 Oct 2003. Dr. Dineen, a Navy Psychiatrist, was the appellant's attending psychiatrist for approximately three years. During this period, he reported that the appellant was able to recall and describe events in his life that were not available at the time of the trial due to the appellant's earlier inability to recall and/or describe them. *Id*. Although not a forensic psychiatrist, Dr. Dineen concluded that the appellant suffered from a severe mental disease or defect at the time of the alleged criminal conduct and, as a result of such severe mental disease

or defect, was unable to appreciate the wrongfulness of his conduct. *Id*. He also concluded that, "During the trial, Mr. Halsema was not able to effectively assist his lawyers in his defense because he could not convey critical information regarding his history of sexual abuse and the real reason why he had been using the internet to communicate with people who abused children." *Id*. Dr. Dineen opined that the first R.C.M. 706 board "would have reached an entirely different conclusion if the examiners had had access to the information contained in [his] report." *Id*.

On 11 December 2003, in response to the appellant's 20 October 2003 motion pursuant to R.C.M. 706, his motion to stay proceedings, and his motion to attach Dr. Dineen's report to the record, this court ordered an inquiry into the appellant's mental capacity in accordance with R.C.M. 706. Accordingly, on 17 June 2004, an inquiry was conducted into his competence and criminal responsibility at the National Naval Medical Center, Bethesda, Maryland. The inquiry was conducted by a two-member board consisting of Thomas Grieger, CAPT, MC, USN, a forensic psychiatrist, and Lesley Ross, LT, MC, USNR, a psychiatry resident. This second R.C.M. 706 board, like the first, concluded that at the time of the alleged criminal conduct, the appellant had a severe mental disease or defect. It made the following Axis I diagnosis: Major Depressive Disorder, Severe, Recurrent, with Mood Congruent Psychotic Features Delirium secondary to Hypothyroidism Post Traumatic Stress Disorder, Chronic. The Axis III diagnosis was Profound Hypothyroidism, Untreated; the Axis IV diagnosis was Occupational Stress, Severe.

Unlike the first R.C.M. 706 board, the second board concluded that, at the time of the alleged criminal conduct, and as a result of a severe mental disease or defect, the appellant was unable to appreciate the nature and quality or wrongfulness of his conduct. Contrary to Dr. Dineen's earlier opinion, however, the board concluded that at the time of his trial the appellant was able to understand the nature of the proceedings against him and to cooperate intelligently in the defense of his case.

Lack of Mental Responsibility

Lack of mental responsibility is "an affirmative defense in a trial by court-martial [if], at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." Art. 50a, UCMJ. If the mental responsibility of an accused is an issue, it must be addressed by an inquiry, conducted by a board of mental health experts, into the mental condition of the accused. R.C.M. 706(a).

In a trial by court-martial, the accused is always presumed to have been mentally responsible and bears the burden of proving

"by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense." R.C.M. 916(k)(3)(A). This presumption continues throughout the trial, unless the accused establishes otherwise. *Id*.

If a potential defense of lack of mental responsibility is raised in a case in which the accused pleads guilty, the military judge must resolve the issue by inquiring whether the accused still wishes to plead quilty, though aware of a possible affirmative defense based on a mental disease or defect. *See Harris*, 61 M.J. at 398. Our superior court has held that "it is consistent with the direction of Article 45(a), UCMJ, 10 U.S.C. § 845(a), that military judges be vigilant in rejecting 'irregular,' 'inconsistent,' improvident or unintelligent guilty pleas. [It has] held that this responsibility includes the duty to explain to a military accused possible defenses that might be raised as a result of his guilty-plea responses." *United States v. Smith*, 44 M.J. 387, 392 (C.A.A.F. 1996)(citing *United States v. Smauley*, 42 M.J. 449, 450 (C.A.A.F. 1995); *United States v. Clark*, 28 M.J. 401, 405 (C.M.A. 1989); and *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984)).

With regard to his claim that the findings of guilty should be set aside because he lacked mental responsibility for his actions, the appellant argues that the facts of his case "are almost identical to *Harris*," and that *Harris* requires us to "reject the Government's Answer and set aside the findings and sentence." Appellant's Reply of 2 Nov 2005 at 2-3; Appellant's Motion for Summary Disposition of 25 Aug 2006. We disagree.

In *Harris*, a one-member R.C.M. 706 board concluded, before trial, that the accused did not suffer from any mental disease or defect and that he was mentally responsible for his behavior at the time of his alleged criminal conduct. *Harris*, 61 M.J. at 393. Subsequently, however, both the military judge and a post-trial R.C.M. 706 board concluded that at the time of the offenses, the accused suffered from a severe mental disease, specifically, bipolar disorder. *Id*. at 393. Nonetheless, the military judge did not inquire into the potential impact of this mental disease on the accused's pleas of guilty. *Id*. at 398. On those facts, our superior court found the guilty pleas improvident and set them aside, noting that:

> We do not see how an accused can make an informed plea without knowledge that he suffered from a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary Care inquiry into an accused's pleas without exploring the impact of any mental health issues on those pleas. Thus, we conclude that there is a substantial basis in law and fact to question Appellant's pleas of guilty.

Harris, 61 M.J. at 398.

The instant case is distinguishable from *Harris*. Here, the appellant first raised the issues of his mental responsibility and competency at the time of the Article 32, UCMJ, investigation, and extensively litigated them during the motions phase of his court-martial. At the time of the trial, he and his counsel were in possession of two reports concerning his mental status. The first of these, Dr. Moore's preliminary inquiry, found that the appellant had a severe mental disease or defect at the time of the offenses and, as a result, was unable to appreciate the nature and quality or wrongfulness of his conduct. The second report, that of the initial R.C.M. 706 board, concluded that the appellant suffered from a severe mental disease or defect at the time of the offenses, but was mentally responsible for his actions at that time and competent to stand trial.

Despite the possible affirmative defenses suggested by these reports, and the extensive litigation of his motions pertaining to his mental status, the appellant elected to enter into a pretrial agreement and unconditionally plead guilty to the charges and specifications. In the pretrial agreement, and during the providence inquiry, he affirmatively waived the mental health motions he had earlier raised and litigated. In the stipulation of fact that supported his pleas, he stipulated that his criminal actions were voluntary and knowing, and that he had the ability to appreciate the nature and quality, and wrongfulness, of his conduct.

It is abundantly clear from the record that, unlike the situation in *Harris*, the appellant and his counsel were well aware that the appellant suffered from a severe mental disease or defect at the time of the offenses. Though aware of a potential defense based upon lack of mental responsibility--a defense clearly suggested by one of the two reports on his mental health then in his possession, and raised in defense motions that were heavily litigated at trial--the appellant chose to plead guilty.

Once he did, the military judge, unlike the military judge in *Harris*, explored the potential impact of the appellant's mental health issues on his pleas of guilty. He asked the appellant if he understood that, by pleading guilty, he would be waiving some of the motions he had raised, to which the appellant answered in the affirmative. Record at 236. In addition, he asked the appellant and his civilian counsel if they believed the appellant understood the nature and significance of the trial proceedings, to which the appellant and his counsel both answered in the affirmative. Record at 261-63. Finally, the military judge asked the appellant's civilian counsel if he believed the appellant was capable of assisting him and participating in the proceedings, to which the counsel answered in the affirmative. *Id*.

Thus, the instant case is distinguishable from *Harris*, as the record before us contains ample discussion of the appellant's mental health issues such that we find that he entered informed

pleas of guilty with full knowledge that he suffered from a severe mental disease or defect at the time of the offenses, and with full knowledge of the existence of a possible affirmative defense based upon lack of mental responsibility and/or mental competency. Furthermore, and unlike the military judge in *Harris*, the military judge in this case explored the impact of the appellant's mental health issues on his pleas of guilty.

Having looked at the trial as a whole, we find that the military judge properly inquired into the impact of mental health issues on the appellant's pleas of guilty. We find that the appellant made informed pleas of guilty with full knowledge that he suffered from a severe mental disease or defect at the time of the offenses, and that he and his counsel had full knowledge of the existence of the possible defenses of lack of mental responsibility and/or lack of mental competence. We further find that the appellant and his counsel were fully aware that, at the time he pleaded guilty, the appellant was waiving the motions he had previously raised, including those pertaining to possible affirmative defenses based upon lack of mental responsibility and lack of mental competence.

Although, like other affirmative defenses, the defense of lack of mental responsibility is subject to the rule of waiver (*see* R.C.M. 905(e); *see also United States v. Lewis*, 34 M.J. 745, 750 (N.M.C.M.R. 1991)), our superior court has ruled that service courts may inquire into an appellant's mental responsibility at the time of the offenses, even though no mental responsibility defense was raised at trial. *United States v. Massey*, 27 M.J. 371, 374 (C.M.A. 1989); *United States v. Thomas*, 32 C.M.R. 163, 169 (C.M.A. 1962). On the other hand, "[i]ssues concerning an accused's mental capacity to stand trial or to conduct or cooperate intelligently in appellate proceedings are not waived." *Lewis*, 34 M.J. at 751.

In the instant case, although the appellant, by his pleas, intended to affirmatively forfeit the issues of his mental responsibility for the offenses and his capacity to stand trial, we do not regard his actions in this regard as waiving our responsibility to inquire inquiry into those issues. Rather, we considered his willingness to waive each of these issues as two of the factors we weigh in applying our superior court's holding in *Harris* to the facts of his case. Applying *Harris*, we find that there is no substantial basis in law and fact to question the appellant's pleas of guilty because of lack of mental responsibility or competence.

Child Pornography

In his second assignment of error, the appellant claims his pleas to Specifications 2, 3, and 4 of Charge III, which allege violations of 18 U.S.C. § 2252A, were improvident because they

failed to establish a factual basis that the images the appellant possessed were of actual minors. We agree.[3]

The appellant was convicted of separate specifications of distribution and possession of child pornography, in violation of Article 134, UCMJ, and 18 U.S.C. §2252A. He was also convicted of violating a lawful general regulation, to wit: Paragraph 2-301 of the Joint Ethics Regulation, Department of Defense Regulation 5500.7-R, dated 30 August 1993, as amended on 25 March 1996, by using Government communication systems and equipment to receive and view child pornography, a non-official, unauthorized use, in violation of Article 92, UCMJ.

The appellant's conduct in possessing and distributing child pornography was charged in the manner of Clause 3 offenses under Article 134, UCMJ, with the "crimes and offenses not capital" being violations of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §2252A. As charged, the criminal nature of the appellant's conduct derived from his violation of this federal criminal statute proscribing the possession and distribution of child pornography. *See United States v. O'Connor*, 58 M.J. 450, 452 (C.A.A.F. 2003). With regard to these offenses, as well as the Article 92, UCMJ, offense of using government communication systems and equipment to receive and view child pornography, the military judge defined the term "child pornography" to the appellant by using portions of the statutory definition that were later struck down by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

We note, however, that insofar as the Clause 3, Article 134, UCMJ, offenses are concerned, *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004), allows us to affirm a lesser-included offense under Clauses 1 or 2 of Article 134, UCMJ, if the record demonstrates that the appellant "'clearly understood the nature of the prohibited conduct' in terms of that conduct being service-discrediting and prejudicial to good order and discipline." *Mason*, 60 M.J. at 19 (quoting *O'Connor*, 58 M.J. at 455).

[3] We are aware that our superior court has held that, under appropriate circumstances, we can "make a determination as to whether actual children were used to produce the images based upon a review of the images alone." *United States v. Cendejas*, 62 M.J. 334, 338 (C.A.A.F. 2006). However, it has also held that our factfinding authority "does not extend to making a 'finding of fact' of that nature in the context of a guilty plea, where no aspect of either the plea colloquy or the stipulation of fact is directed toward the character of the images as depicting 'real' or 'virtual' minors." *United States v. Carlson*, 59 M.J. 475, 476 (C.A.A.F. 2004)(summary disposition). In the instant case, neither the plea colloquy, nor the stipulation of fact, addresses whether the images the appellant possessed and distributed depict real (i.e., actual) or virtual minors. Although we are confident, from our review of them, that the images depict real children, *Carlson* precludes our using our factfinding authority under Article 66(c), UCMJ, to make such a determination.

In the instant case, the providence inquiry and the appellant's stipulation of fact focused on whether or not his conduct violated 18 U.S.C. §2252A, not on whether, under the circumstances, it was of a nature to bring discredit upon the armed forces or prejudicial to good order and discipline in the armed forces. The military judge did not address the service-discrediting nature of the appellant's conduct, or its prejudicial impact on good order and discipline; neither did the stipulation of fact that supported the appellant's guilty pleas. Accordingly, we cannot view the appellant's pleas to Specifications 2, 3, and 4 of Charge III as provident to the lesser included offenses of conduct prejudicial to good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, under Clause 1 or Clause 2 of Article 134, UCMJ, and cannot affirm findings of guilty to lesser included offenses for any of these specifications. We will take appropriate action in our decretal paragraph.

Using Government Communication Systems and Equipment to Receive and View Child Pornography

The appellant does not contest the providence of his pleas of guilty to Specification 2 of Charge II, which alleged a violation of a lawful general regulation by using Government communication systems and equipment to receive and view child pornography, in violation of Article 92, UCMJ. Nonetheless, the military judge's use of the definition of the term "child pornography" struck down by *Ashcroft* requires us to disapprove this finding of guilty as well.[4] We may, however, affirm a finding of guilty to the lesser included offense of attempting to violate a lawful general regulation, to wit: Paragraph 2-301 of the Joint Ethics Regulation, Department of Defense Regulation 5500.7-R, dated 30 August 1993, as amended on 25 March 1996, by using Government communication systems and equipment to attempt to receive and view child pornography, a non-official, unauthorized use, in violation of Article 80, UCMJ.

Conclusion

The findings of guilty of Specifications 2, 3, and 4 of Charge III are set aside. In view of this action, we find it unnecessary to address the appellant's third assignment of error, claiming his guilty pleas to knowing possession of images of child pornography were improvident because he informed the military judge that he had no recollection of possessing the images.

[4] Although confident that the images the appellant received and viewed depict real children, we cannot affirm a finding of guilty to this offense by exercising our factfinding authority to make such a determination. *Carlson*, 59 M.J. at 476.

With regard to the findings of guilty of Specification 2 of Charge II, we affirm a finding of guilty to the following lesser included violation of Article 80, UCMJ:

> In that Captain John A. Halsema, U.S. Navy, Chief of Naval Operations (N84), temporarily assigned to Commandant, Naval District Washington, Washington, D.C., on active duty, did, on divers occasions from June 1997 through October 1997, attempt to violate a lawful general regulation, to wit: Paragraph 2-301 of the Joint Ethics Regulation, Department of Defense Regulation 5500.7-R, dated 30 August 1993, as amended on 25 March 1996, by using federal government communication systems and equipment to attempt to receive and view child pornography, a non-official, unauthorized use.

We affirm the remaining findings of guilty, as approved by the convening authority.

As a result of our action on the findings, we will reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). In light of our setting aside the findings with regard to the specifications of possession and distribution of child pornography, and our affirming a lesser included offense of the specification of violating a lawful general regulation by using government communications systems and equipment to view child pornography, we find that the sentence received by the appellant would have been lighter had he not been convicted of these offenses as they were originally charged. In reassessing the sentence, we have carefully considered the record of trial, the appellant's statements during the providence inquiry, and those portions of the stipulation of fact and its appendices that pertain to the remaining findings of guilty. We also carefully considered all evidence presented in aggravation, as well as extenuation and mitigation, of the offenses of which the appellant now stands guilty. Accordingly, we affirm only so much of the sentence as extends to confinement for five months, a letter of reprimand, and dismissal from the naval service, concluding beyond a reasonable doubt that no less of a sentence would have been imposed at the trial level if the errors had not occurred.

The Article 32, UCMJ, Investigating Officer and the military judge failed to order that images of child pornography received into evidence be properly sealed in the record of trial. *See* R.C.M. 1103A. Therefore, we order that the exhibits in the

Article 32, UCMJ, investigation, and Appendices 2, 5, and 7 of Prosecution Exhibit 1, be sealed, and labeled so as to prevent their dissemination, as they contain images of minors engaged in actual or simulated sexually explicit conduct.

Chief Judge ROLPH and Senior Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court