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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Don SANTARINI
Missile Technician First Class (E-6), U.S. Navy

NMCCA 200201454 Decided 30 April 2004

Sentence adjudged 1 November 2001. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge, sitting alone. Pursuant to his pleas, the appellant was convicted of: (1) violating the Department of Defense Joint Ethics Regulation by wrongfully using a United States Government computer to download and store sexually explicit images; (2) knowingly possessing a computer hard drive that contained images of child pornography in a building owned by, leased to, or otherwise used by or under the control of the United States Government; and, (3) knowingly possessing a computer hard drive and computer disks that contained images of child pornography that had been transported in interstate commerce, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934, and 18 U.S.C. § 2252A.

The appellant was sentenced to confinement for a period of 18 months and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority deferred execution of the automatic forfeiture of the appellant’s pay. In his action, pursuant to the pretrial agreement, the convening authority waived the automatic forfeiture of pay for a period of 6 months.

After carefully considering the record of trial, the appellant's two assignments of error, and the Government's response, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The charges relate to the appellant's January 2001 misconduct in violation of Department of Defense Directive 5500.7-R (Joint Ethics Regulation), ¶ 2-301 (Ch.2, 25 Mar 1996), and 18 U.S.C. § 2252A at the Strategic Weapons Facility Pacific, Bangor, Washington, and at the appellant's home in Bremerton, Washington. The Joint Ethics Regulation prohibits, in part, "put[ting] Federal Government communications systems to uses that would reflect adversely on DoD or the DoD Component (such as uses involving pornography[.])." DoD 5500.7-R, ¶ 2-301a(2)(d). The possession of images of child pornography by any person is prohibited by 18 U.S.C. § 2252A(a)(5), if, either:

> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), [he] knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or (B) [he] knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including computer[.]

18 U.S.C. § 2252A(a)(5) (1998).

On 16 April 2002, after the appellant's trial and just one day before the convening authority acted, the Supreme Court decided *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), striking down portions of 18 U.S.C. § 2256 (1996)(current version at 18 U.S.C. § 2256 (2004)), thereby restricting the definition of child pornography applicable to 18 U.S.C. § 2252A.

In *Free Speech Coalition*, the Supreme Court addressed a challenge to two of the four sections of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251, *et seq*., defining child pornography. *Free Speech Coalition*, 535 U.S. at 241. The petitioners in *Free Speech Coalition* challenged language defining child pornography as images in which: (1) the

visual depiction "is, *or appears to be*, of a minor engaged in sexually explicit conduct"; or, (2) the image is "advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression*" that it depicts "a minor engaging in sexually explicit conduct." *Id.* at 241-42 (emphasis added); *see also* 18 U.S.C. § 2256(8)(B) and (D). Finding these provisions prohibited a "substantial amount of lawful speech," the Supreme Court deemed the challenged language overbroad and unconstitutional. *Free Speech Coalition*, 535 U.S. at 256. The Supreme Court's ruling left intact two definitions of child pornography, including the definition in the provision targeting images where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A).

Insufficient Providence Inquiry

In the appellant's first assignment of error, he asserts that where he pled guilty pursuant to an unconstitutional definition of "child pornography" (18 U.S.C. § 2256(8)(b)) in the CPPA, his pleas to Specifications 1 and 2 of the original Charge were improvident in light of the Supreme Court's decision in *Free Speech Coalition*. The appellant suggests that this court should dismiss both Specifications 1 and 2 of the original Charge, and remand his case for a new sentencing hearing. We disagree.

For a military judge to accept an accused's guilty plea, his inquiry must both indicate that the accused himself believes he is guilty and indicate that the factual circumstances, as revealed by the accused, objectively support his plea. *United States v. Higgins,* 40 M.J. 67, 68 (C.M.A. 1994)(quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); *see also* Art. 45(a), UCMJ. This inquiry must elicit sufficient facts to satisfy every element of the offense in question. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. R.C.M. 910 requires the military judge to inform the accused of, and determine that the accused understands the nature of, the offense to which the guilty plea is offered. A military judge, however, is not required "to embark on a mindless fishing expedition to ferret out or negate all possible defenses or potential inconsistencies." *United States v. Jackson*, 23 M.J. 650, 652 (N.M.C.M.R. 1986), *rev. denied*, 24 M.J. 405 (C.M.A. 1987). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)(quoting *Davenport*, 9 M.J. at 367).

A judge's acceptance of a guilty plea will not be set aside absent an abuse of discretion. *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996). However, a guilty plea does not preclude a constitutional challenge to the underlying conviction. *See Menna v. New York*, 423 U.S. 61, 62 (1975). To prevail here, the appellant must demonstrate "a 'substantial basis' in law and

fact for questioning the guilty plea." *Eberle*, 44 M.J. at 375 (quoting *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991)). The appellant must "overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson,* 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

"For simple military offenses whose elements are commonly known and understood by servicemembers, an explanation of the elements of the offense is not required to establish the providence of a guilty plea if the record otherwise makes clear that the accused understood those elements." *United States v. Nystrom*, 39 M.J. 698, 701 (N.M.C.M.R. 1993)(citing *United States v. Kilgore*, 44 C.M.R. 89 (C.M.A. 1971)). For more complex offenses, failure to explain the elements may result in reversal if the accused was unaware of the elements required to prove his guilt. *Nystrom*, 39 M.J. at 701-02 (citing *United States v. Pretlow*, 13 M.J. 85 (C.M.A. 1982)).

It is this court's opinion that, as in 18 U.S.C. § 2252, the various subsections of 18 U.S.C. § 2252A, also "[s]et out the numerous prohibitions designed to prevent child pornography, to forbid every act by which child pornography could adversely affect the United States, and to extend the prohibitions to the maximum extent of Congress' legislative authority under the Commerce Clause." *See United States v. Leco*, 59 M.J. 705, 707-08 (N.M.Ct.Crim.App. 2003).

We now consider whether the providence inquiry was sufficient to support the appellant's pleas to possessing child pornography on both his U.S. Government computer and on his personal computer. As noted above, the appellant pled guilty to Specifications 1 and 2 of the original Charge, which alleged violations of 18 U.S.C. § 2252A by possessing child pornography. The appellant claims that his pleas to Specifications 1 and 2 of the original Charge were improvident, because the original Charge incorporated the unconstitutional definitions of 18 U.S.C. § 2256, under the CPPA, which was partially struck down by the United States Supreme Court in *Free Speech Coalition*. Appellant's Brief of 11 Feb 2003 at 5. Specifically, the appellant asserts that the military judge provided definitions in his case "encompass[ing] all definitions of child pornography as defined by 18 U.S.C. § 2256." *Id*. Thus, in the appellant's opinion, "the military judge's inquiry left open the possibility that [he] was pleading guilty under an unconstitutional provision of the CPPA." *Id*. In effect, the appellant is asserting that the military judge failed to establish whether the real harm of child pornography was even present in this case, i.e., whether children were actually used to produce the explicit images.

However, the military judge informed the appellant that in order to fit the definition of child pornography "it has to be a depiction of an *actual* person." Record at 76 (emphasis added). Further, the appellant conceded that the depictions were of

actual children and not graphic creations. In fact, the appellant stated, "They were *actual* children, sir." *Id*. at 92 (emphasis added).

We disagree with the appellant's argument by comparison, which fails to demonstrate that the Supreme Court's ruling in *Free Speech Coalition* rendered his pleas invalid, and he has established no other grounds for questioning his pleas. In the appellant's case, as in *United States v. Martens*, 59 M.J. 501, 508 (A.F.Ct.Crim.App. 2003), *pet. granted*, 59 M.J. 30 (C.A.A.F. 2003), the appellant never indicated that the pictures in question were child pornography only because they appeared to be *actual* children, nor does the record indicate that the images in question are computer-generated or *virtual* photographs.

In order to determine whether there is a substantial basis in law and fact for questioning the appellant's guilty pleas, we must decide whether the guilty pleas were based, in whole or in part, upon the portions of the definition of child pornography later struck down in *Free Speech Coalition*. In the appellant's case, the military judge did provide definitions of child pornography encompassing all of the four categories under 18 U.S.C. § 2256. Record at 74. After reading the elements of the specifications at issue, the military judge asked after each specification whether those elements and definitions correctly described what the appellant did, to which the appellant replied each time, "Yes, sir." *Id*. at 74, 78. Finally, the military judge asked the appellant, "do you believe and admit that, taken together, the elements of each of these offenses that I listed for you and the stipulation of fact [, Prosecution Exhibit 1,] and the matters we have discussed all correctly describe what you did on each of these occasions?" *Id*. at 100. To which the appellant replied, "Yes, sir." *Id*. Further, after inquiry into the terms of the appellant's pretrial agreement, the military judge asked the appellant if he had any questions concerning his pleas of guilty, his pretrial agreement, or "anything else we have discussed here this morning[,]" which included any questions concerning the elements and definitions, to which the appellant responded, "No, sir." *Id*. at 110.

Although evidence to support the charges against the appellant was submitted on a CD computer disk by the Government during presentencing as evidence in aggravation, Prosecution Exhibit 2, and considered by the military judge, the military judge ordered the face of that CD computer disk photocopied, the CD computer disk excluded from the record, and the photocopy of the face of the CD computer disk substituted in the record of trial. This court *sua sponte* ordered the Government to produce Prosecution Exhibit 2, or advise the court why it was unable to do so. N.M.Ct.Crim.App. Order of 4 Nov 2003.

On 2 December 2003, the Government produced a CD computer disk purporting to be the original computer disk considered by the military judge at trial. Government's Response of 2 Dec

2003. Examination of the face of the CD computer disk provided by the Government and represented as the original considered by the military judge at trial revealed that it was, in fact, not the same CD computer disk, Prosecution Exhibit 2, considered by the military judge at trial. As a result, on 15 December 2003, this court again ordered the Government to produce the original CD computer disk, Prosecution Exhibit 2, considered by the military judge at trial. N.M.Ct.Crim.App. Order of 15 Dec 2003.

On 5 January 2004, the Government responded that the original CD computer disk, Prosecution Exhibit 2, considered by the military judge at trial, "was destroyed, though the original disk from which it was copied remains in the Government's possession." Government's Response of 5 Jan 2004. On 8 January 2004, this court ordered the Government to, using the original CD computer disk from which Prosecution Exhibit 2 was created: (1) print those images that were contained on the CD computer disk reviewed at trial by the military judge; (2) forward those documents under seal to the military judge for authentication; and, (3) following authentication, file these documents with this court. N.M.Ct.Crim.App. Order of 8 Jan 2004.

On 15 March 2004, the Government responded to this court's order of 8 January 2004, submitting an affidavit from the military judge in the appellant's case. Government's Response of 15 Mar 2004. The military judge's affidavit of 9 March 2004 affirms that the CD computer disk provided to him for his authentication contains images that were not on the CD computer disk considered by him at trial as Prosecution Exhibit 2. Military Judge Affidavit of 9 Mar 2004 at 2. Further, the Government acknowledged that after an exhaustive search, it is unable to provide the original CD computer disk or an authenticated copy. Government's Response of 15 Mar 2004 at 2. As such, this court cannot conduct its own evaluation of the child pornography image evidence the military judge considered in aggravation, or may have utilized during the providence inquiry when he questioned the appellant to find that each of the images charged in the offenses depicted *actual* children.

Nonetheless, following *United States v. Washburne*, ___ M.J. ___, No. 200300123 (N.M.Ct.Crim.App. 9 Apr 2004), we find that this is not fatal where, as here, the military judge: (1) considers an adequate descriptive stipulation of fact supporting each charge; and/or, (2) elicits from the accused during the providence inquiry a sufficient verbal description of the child pornography supporting each charge where a child, i.e., "identifiable minor", was actually used to create the child pornography by engaging in "sexually explicit conduct," all as defined in 18 U.S.C. 2256; and, (3) the stipulation of fact and/or providence inquiry make clear that the images in question do depict images of *actual* identifiable minors engaging in sexually explicit conduct, as opposed to *virtual* or morphed images. *Washburne*, ___ M.J. at ___.

In the appellant's particular case, we find that the combination of the colloquy between the military judge and the appellant and the stipulation of fact is more than adequate for our determination as to whether the appellant's providence inquiry is sufficient. We, however, express both our displeasure and our serious concern over the manner in which the Government and the military judge elected to handle Prosecution Exhibit 2. A photocopy of the face of a CD computer disk which is admitted into evidence is not an acceptable substitute for the original CD computer disk, where the *content* of the CD computer disk is the *real* evidence under question, especially in light of the Court of Appeals for the Armed Forces recent decision in *United States v. O'Connor,* 58 M.J. 450 (C.A.A.F. 2003).[1]

In *O'Connor*, our superior court has set forth its test for the providence of pleas to offenses involving the CPPA, as recently followed by this court in *Leco*, 59 M.J. at 709. The Court of Appeals for the Armed Forces held that, after *Free Speech Coalition*, "[t]he 'actual' character of the visual depictions is now a factual predicate to any plea of guilt under the CPPA." *O'Connor*, 58 M.J. at 453. Our superior court also held that the "plea inquiry and the balance of the record must objectively support the existence of this factual predicate." *Id.* This requirement was not met in *O'Connor*, where the accused merely indicated, "the occupants in the pictures *appeared to be* under the age of 18." *Id*.

Here, however, the actual character of the visual depictions is objectively supported by the providence inquiry. The military judge specifically informed the appellant that in order to be guilty of the charged offense, the image at issue would have to "be a depiction of an *actual* person." Record at 76 (emphasis added). The following colloquy between the military judge and the appellant demonstrates that the appellant was fully aware that the pictures he accessed, received, viewed, and downloaded were of *actual* minors visually depicted in sex acts:

MJ: So at the time did you know that you had these images in your file folder?
ACC: Yes, sir.

MJ: And did you know that what was in there was child pornography, as I defined that to you?
ACC: Yes, sir.

[1] The better practice, especially in child pornography cases, would be for the military judge to require the party offering evidence of images in the form of a CD computer disk as evidence, to reduce the evidence to a printed photocopy of the images. Whereupon, at the conclusion of the applicable trial session, the military judge would ORDER the images marked as the exhibit or exhibits, SEALED. This practice would preclude CD computer disks from being made exhibits that are attached to the record of trial, thereby precluding personnel in the post-trial and appellate process, including appellate courts, from having to gain access to the evidentiary images by computer.

MJ: And how did you know that?
ACC: By the physical aspects of the individuals in the pictures.

. . .

MJ: Okay, so if it was just a file that you had no idea what was in it, what would make you think it was child pornography then?
ACC: Just when you open it up.

MJ: Okay, so after you downloaded it, then you would look at it and see what it was?
ACC: Yes, sir.

. . .

MJ: Were these images of children under 16?
ACC: Yes, sir.

MJ: Were they just pictures of individual children or were they pictures of children doing something with adults or with each other or what was sexually explicit about them?
ACC: Those aspects, sir, children with children.

MJ: Some of each, you mean?
ACC: Yes, sir.

. . .

MJ: Okay, so were each of these that you are pleading guilty to possessing, were the children involved in sexually explicit conduct?
ACC: Yes, sir.

MJ: And were they actual individual children involved or were they some sort of graphic creations?
ACC: *They were actual children, sir*.

MJ: You could tell that by what they looked like?
ACC: Yes, sir.

Id. at 90-92 (emphasis added). The appellant made similar admissions concerning the child pornography he possessed on his personal computer supporting Specification 2. *Id*. at 93. The appellant also stipulated that the images in his possession were of children engaged in sexually explicit conduct. Prosecution Exhibit 1.

The court in *O'Connor* was concerned with the "critical significance" of the distinction between *virtual* and *actual* child

pornography. *O'Connor,* 58 M.J. at 453. The facts elicited by the military judge during the appellant's providence inquiry leave no room for doubt that the appellant pled providently to possession of *actual* child pornography. Record at 77-78, 83-95.

The appellant's assertion that the military judge's providence inquiry left open the possibility that he pled guilty under an invalid definition of child pornography is not well taken. The Supreme Court's ruling in *Free Speech Coalition*, 535 U.S. at 258, invalidated only two of the four definitions of child pornography under the CPPA. The provision under the CPPA prohibiting the receipt of visual depictions, the production of which involves minors engaged in sexually-explicit conduct, was untouched by the Supreme Court's ruling. The appellant's conduct clearly fell under that category of contraband "speech." The appellant's effort to differentiate images depicting children engaged in sexually-explicit conduct, and images "produced" using children engaged in sexually-explicit conduct, is rejected by this court, as our superior court and other service courts have rejected other such efforts in the past. *See United States v. James,* 55 M.J. 297, 300-01 (C.A.A.F. 2001)(finding the appellant's pleas provident, despite any constitutional deficiency with certain parts of the CPPA, given the appellant's admissions during the providence inquiry that the images at issue depicted *actual* children); *see also United States v. Appeldorn,* 57 M.J. 548, 550 (A.F.Ct.Crim.App. 2002)(finding an appellant's pleas provident, as his in-court admissions established his guilt under sections of the CPPA which were unaffected by the Supreme Court's ruling in *Free Speech Coalition*)*; and United States v. Coleman,* 54 M.J. 869, 872 (Army Ct.Crim.App. 2001)(rejecting an appellant's claim that his plea under the CPPA was improvident, because the appellant never explicitly admitted on the record that the images at issue depicted *real* children), *rev. denied,* 55 M.J. 476 (C.A.A.F. 2001).

The appellant's belated effort to distance himself from the plain-spoken exchange between himself and the military judge at trial is rejected. We will not accept the appellant's invitation to indulge in post-trial speculation. *See United States v. Johnson,* 42 M.J. 443, 445 (C.A.A.F. 1995)(noting that appellate courts do not engage in post-trial speculation concerning facts that might invalidate an appellant's plea, particularly, when such speculation contradicts the express admissions by the accused on the record).

The military judge questioned the appellant at length about his understanding of the offenses to which he was pleading guilty, and the factual basis for his pleas, as required by R.C.M. 910(e). The military judge informed the appellant of the elements of the offenses. The appellant agreed that the elements accurately described what he did.

Pursuant to the terms of a pretrial agreement, Appellate Exhibit I, the appellant agreed to a detailed stipulation of

fact, Prosecution Exhibit 1, describing the offenses. In response to an inquiry by the military judge, the appellant acknowledged that he understood everything contained within the stipulation of fact, and that everything was, in fact, "the truth." Record at 66. Further, with respect to both Specifications 1 and 2 of the original Charge, the appellant fully understood that the definition of child pornography-—images of minor children engaging in sexually explicit conduct--means:

> [A]ny actual or simulated sexual intercourse, including genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex.
> . . .
> [B]eastiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.

Id. at 75; *see also* 18 U.S.C. § 2256(5), in part.

The stipulation of fact makes it clear the appellant's belief that these images were, in fact, individuals under 18 years of age resulted from viewing the images himself. We are convinced that that definition was sufficient in this case. *See generally Appeldorn*, 57 M.J. at 548. We conclude that any error of law in providing that definition did not create a substantial basis for challenging the plea. *See Leco*, 59 M.J at 710.

Notwithstanding the Supreme Court's ruling in *Free Speech Coalition*, and assuming that the CPPA was not applicable to the appellant's conduct, this court nevertheless would approve a conviction of a closely-related offense under either clause 1 or 2 of Article 134, UCMJ, in light of the stipulation of fact and the appellant's unequivocal and incriminating statements offered during the providence inquiry.

Our superior court has approved a conviction under clause 2 of Article 134, UCMJ, where the conviction for a statute incorporated under clause 3 was deemed improvident or improper, yet the record supported a conviction based on an alternative theory. *See United States v. Sapp,* 53 M.J. 90, 92 (C.A.A.F. 2000); *see also United States v. Augustine,* 53 M.J. 95, 96 (C.A.A.F. 2000)(affirming clause 2, Article 134, UCMJ, convictions, where the appellants' pleas under 18 U.S.C. § 2252 were deemed improvident). We also have applied the same rationale to a similar issue. *United States v. Goddard,* 54 M.J. 763, 767 (N.M.Ct.Crim.App. 2000)(finding the appellant guilty to a simple disorder under clause 1 of Article 134, UCMJ, where his plea to maltreatment was deemed improvident), *aff'd*, 55 M.J. 149 (C.A.A.F. 2001). Here, the appellant's conduct was clearly service discrediting, if not prejudicial to good order and discipline. *See, e.g., United States v. Falk,* 50 M.J. 385, 394 (C.A.A.F. 1999)(Sullivan, J., dissenting)("Possession of 126 computer images of child pornography, lasciviously organized in

four directories on a personal computer, in government housing on a military post, is *per se* service discrediting conduct in my view.”). As such, we decline to grant relief.

Ineffective Assistance of Counsel

In the appellant’s second assignment of error, he asserts that he was denied his Sixth Amendment right under the U.S. Constitution to effective assistance of counsel during the sentencing proceedings when his trial defense counsel failed to prepare and present an effective sentencing case, where a punitive discharge would deny him retirement benefits. The appellant asks this court to set aside the sentence and remand his case for a new sentencing hearing. We disagree.

A military accused enjoys the right to effective assistance of counsel in sentencing hearings. *See United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). To prevail on such a claim, however, an accused must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), and demonstrate: (1) “a deficiency in counsel’s performance that is ‘so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment’; and (2) that the deficient performance prejudiced the defense (through) errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’ ” *Alves*, 53 M.J. at 289 (quoting *Strickland*, 466 U.S. at 687); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

Under the deficiency prong, “[t]he competence of counsel is presumed.” *Scott*, 24 M.J. at 188. This presumption is overcome if the counsel’s performance falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Reasonableness is “evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” *Scott*, 24 M.J. at 188.

At the time of trial, the appellant had over eighteen years of service in the Navy and would become retirement eligible at the end of his current enlistment. Prosecution Exhibit 3. The appellant insists that his trial defense counsel was constitutionally ineffective when he failed to investigate and present the economic impact a punitive discharge would have on the appellant after over eighteen years of military service, and failed to call any witness to testify for him. Specifically, the appellant insists that his trial defense counsel was constitutionally deficient in that he failed “to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation.” *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998); *United States v. Scott*, 24 M.J. at 188 (holding that trial defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary).

To determine whether the "presumption of competence has been overcome," our superior court has outlined a three-part inquiry:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . .(ordinarily expected) of fallible lawyers"? and
> (3) If a defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result.

United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)(quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991), *appeal after remand aff'd*, 59 M.J. 245 (C.A.A.F. 2004). Applying this inquiry, we are of the opinion that the appellant has not overcome the presumption of competence.

The appellant contends that his trial defense counsel: (1) failed to provide the military judge a "cogent financial analysis" of his potential loss of retirement pay if he were to be punitively discharged; and (2) presented a "paltry extenuation and mitigation case involving no live witnesses." Appellant's Brief of 11 Feb 2003 at 7. The appellant relies on *United States v. Marshall*, 52 M.J. 578 (N.M.Ct.Crim.App. 1999)(holding that counsel's failures to "investigate, evaluate, and present" favorable evidence ran afoul of appellant's substantial rights). However, the appellant's assertion has failed to rebut the strong presumption of competency attached to his trial defense counsel's representation.

First, the appellant has failed to show that evidence of the potential loss of future potential retirement benefits was not considered by the military judge during his sentencing case. The appellant admits he was 2 years away from retirement at the time of his court-martial. *Id*. at 8. Therefore, regardless of the outcome of the appellant's court-martial, the potential benefits of future retirement were far from guaranteed. Further, it is this court's opinion that a military judge can be presumed to certainly be aware that retirement entails substantial monetary benefits. As such, we find no prejudice in the appellant's case despite the alleged omission.

With regard to the appellant's attack on his trial defense counsel's presentation of a sentencing case, that attack is not well taken. In fact, his trial defense counsel put on a considerable sentencing case including several written statements from the appellant's former colleagues, service record documents, and a written statement from the appellant's wife concerning her medical condition. Defense Exhibits A-H. Further, the appellant has failed to identify the "live good-military character witnesses" he would have called, what the extent of their testimony would have been, and why he didn't present these

matters to the convening authority before he took his action. Appellant's Brief of 11 Feb 2003 at 9.

We conclude that the appellant has failed to overcome the presumption that his trial defense counsel provided competent assistance and, further, has failed to show there is a reasonable probability that, absent the alleged errors, "there would have been a different result." *Gilley* 56 M.J. at 124. As such, we decline to grant relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court