

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

**BEFORE**

**D.O. VOLLENWEIDER**

**J.E. STOLASZ**

**V.S. COUCH**

**UNITED STATES**

**v.**

**Alvin N. CUENTO  
Aviation Structural Mechanic (E-5), U.S. Navy**

NMCCA 200100281

Decided 7 June 2007

Sentence adjudged 6 July 2000. Military Judge: C.R. Hunt.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commander, Navy Region Southwest, San Diego, CA.

Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel  
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

Following the entry of mixed pleas, a general court-martial composed of officer members convicted the appellant of assault consummated by battery on a child under the age of 16 years and two specifications of indecent acts with another child under the age of 16 years, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The members sentenced the appellant to confinement for 4 years and a dishonorable discharge. The convening authority approved the sentence as adjudged, but granted clemency to the appellant by waiving automatic forfeitures in favor of his dependents.

**History**

The appellant's case is before this court for a second time. We previously affirmed the findings and the sentence in a published decision. *United States v. Cuento*, 58 M.J. 584 (N.M.Ct.Crim.App. 2003). In that decision, we denied a petition for new trial filed by the appellant on the basis of post-trial statements by his daughter "JC" that recanted her trial testimony that the appellant had committed indecent acts upon her. *Id.* at 589-92. After careful consideration of the appellant's petition,

the evidence offered by the appellant in support of the petition, and the entire record of trial, we held that the appellant had not met his burden to show that JC's trial testimony was false. *Id.* at 590.

On appeal to the Court of Appeals for the Armed Forces, the appellant asserted that this Court had abused its discretion by failing to order a fact-finding hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), before deciding whether to grant the petition for new trial. *United States v. Cuento*, 60 M.J. 106, 107 (C.A.A.F. 2004). Our superior court agreed with the appellant, finding that "[u]nder the unique circumstances of this case," the weight of JC's post-trial recantation could not adequately be measured without a *DuBay* hearing "at which [JC] would testify under oath and be subject to cross-examination." *Id.* at 113. While affirming our decision with respect to the other errors asserted by the appellant, the court reversed our decision on the petition for new trial and returned the record to the Judge Advocate General of the Navy for submission to a convening authority for a *DuBay* hearing. *Id.* Our task upon return of the record after the *DuBay* hearing is to determine whether the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused. *Id.* (internal punctuation removed). Our attention was directed to *United States v. Brooks*, 49 M.J. 64 (C.A.A.F. 1998). *Id.*

A *DuBay* hearing was held before a military judge on 14 January and 23 March 2005. JC was the only witness to testify at this hearing. The stipulated expected testimony of three defense witnesses who did not appear was admitted as well. The appellant was present at the hearing, but did not testify. Following the hearing, the military judge entered detailed findings of fact and conclusions of law. Appellate Exhibit LXXIV. The record was subsequently returned to this court.

Upon receipt of the record, we invited the appellant to file a supplemental brief on the remanded issue and/or request leave to file supplemental assignments of error. The appellant elected to file a supplemental brief on the remanded issue. The Government filed a response. The record of trial, the record of the *DuBay* hearing, the appellant's supplemental brief, and the Government's response are now before us.

### **Petition for New Trial**

In his supplemental brief, the appellant asks that we order a new trial because the *DuBay* hearing established that JC lacks any credibility and thus her trial testimony is inherently suspect. We disagree.

"Petitions for new trial based on a witness's recantation 'are not viewed favorably in the law.' They should not be

granted unless 'the court is reasonably well satisfied that the testimony given by a material witness is false.'" *United States v. Rios*, 48 M.J. 261, 268 (C.A.A.F. 1998)(quoting *United States v. Giambra*, 33 M.J. 331, 335 (C.M.A. 1991)). See also *United States v. Johnson*, 61 M.J. 195, 199 (C.A.A.F. 2005). When presented with a petition for new trial, the reviewing court must determine whether the newly-discovered evidence "is sufficiently believable to make a more favorable result probable." *Brooks*, 49 M.J. at 69. Although the appellant generally bears "the heavy burden of establishing his entitlement to relief," we do not place too onerous a burden on an appellant "when the alleged perjurer is the prosecutrix herself." *Giambra*, 33 M.J. at 335.

To understand the meaning of these authorities, and their relevance to our case, it is instructive to review the facts as well as the law contained therein. We will first look at *Brooks*, as required by our superior court. That case did not involve a recanting witness. *Brooks*, 49 M.J. at 69. Nonetheless, the court gave the following general guidance pertaining to petitions for new trial:

When presented with a petition for new trial, the reviewing court must make a credibility determination, insofar as it must determine whether the "newly discovered evidence, if considered by a court-martial, would probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(C). The reviewing court does not determine whether the proffered evidence is true; nor does it determine the historical facts. It merely decides if the evidence is sufficiently believable to make a more favorable result probable.

*Id.*

On the other hand, the *Rios* case did involve a recanting witness. There, the appellant had been convicted of sexual offenses against his fourteen-year-old step-daughter. *Rios*, 48 M.J. at 262. The victim was fifteen years old at the time of trial, but testified that the abuse began when she was twelve. *Id.* at 265. The physical evidence was inconclusive. *Id.* at 266. Significant evidence had been produced at trial that the victim was not a truthful person and that she had a motive to lie. *Id.* More than one year after trial, the appellant's second wife obtained from the victim a notarized statement recanting her accusations against the appellant. *Id.* at 267. In addition, the victim afterwards made false claims of sexual abuse by the adult grandson of her foster parents. *Id.* Social Services assessments diagnosed the victim as manipulative and sought attention by fabricating stories. *Id.*

The *Rios* court noted that "[p]etitions for new trial 'are generally disfavored.' They should be granted 'only if a manifest injustice would result absent a new trial . . . based on

proffered newly discovered evidence.'" *Id.* (citing *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). "Petitions for new trial based on a witness's recantation 'are not viewed favorably in the law.' They should not be granted unless 'the court is reasonably well satisfied that the testimony given by a material witness is false.'" *Id.* at 268 (citing *Giambra*, 33 M.J. at 335). The court cautioned that "[r]ecantations of trial testimony are viewed with 'extreme suspicion.'" *Id.*

With this legal and factual background, the *Rios* court held that the appellant had not met his burden of convincing the court that the victim's trial testimony was false. *Id.* The court noted that evidence of the victim's untruthfulness reflected as much on her recantation as on her trial testimony. *Id.* at 269. It found that the circumstances of the recantation - including the fact that the victim did not volunteer the statement - "reinforce rather than attenuate the extreme suspicion with which post-trial recantations should be viewed." *Id.*

In another case with several parallels to the case *sub judice*, the Court of Military Appeals ultimately found that a new trial was not required. In *Giambra*, the court was presented with a case wherein the appellant had been convicted of sexual offenses against his seventeen-year-old stepdaughter. The stepdaughter either lied at trial or lied after trial when she recanted her testimony to a paralegal at a law firm. 33 M.J. at 332, 335. To determine whether the testimony given at trial was false, the court remanded for a *DuBay* hearing, wherein the appellant would have the burden of proving "by the greater weight of the evidence that the victim lied at his trial." *Id.* at 336.

After the *DuBay* hearing, the Court of Military Appeals found that the appellant had not carried his burden. On remand the trial counsel had obtained a statement from the victim that she did not in fact recant her trial testimony. *United States v. Giambra*, 38 M.J. 240, 241 (C.M.A. 1993). The court found there was not a legitimate dispute whether the victim had recanted her trial testimony.

The rulings by our superior court in *Rios* and *Giambra* are consistent with other federal cases involving recantations of testimony by children who had been sexually abused. In a case very similar to ours, *United States v. Rouse*, 410 F.3d 1005 (8th Cir. 2005),<sup>1</sup> child victims did not recant until their mothers and grandmother told the children that they missed the appellants, were made aware of their uncles' lengthy prison sentences, and had contact with the appellants. The appellants' expert had used suggestive questions and told the children that he was there to help get their uncles out of prison. *Id.* at 1008. The court stated that "[t]his skepticism 'is especially applicable in cases of child sexual abuse where recantation is a recurring phenomenon,' particularly 'when family members are involved and

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<sup>1</sup> Four men were convicted of sexually abusing five of their minor nieces.

the child has feelings of guilt or the family members seek to influence the child to change her story.'" *Id.* at 1009 (quoting *United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992)). See also *United States v. Miner*, 131 F.3d 1271 (8th Cir. 1997) (recantations after visits from mother).

### The New Evidence

In her testimony at the *DuBay* hearing on 14 January 2005, JC rejected her post-trial recantation and reaffirmed her trial testimony that the appellant had molested her. JC testified that she had falsely recanted her trial testimony because she felt guilty and sorry for the appellant after several members of his family told her that he was "miserable and dying" in confinement, and had to get out of jail. The appellant's family *en masse* took JC to the appellant's attorney's office in order for her to do what was necessary to get the appellant out of jail. They told her she should change her story if she wanted to get the appellant out of jail. However, JC testified that if the case were retried, she would give testimony consistent with her testimony at the original trial. Finding that he was not "reasonably well satisfied" that JC's trial testimony was false, the military judge concluded that it was unlikely that her recantation "would probably produce a substantially more favorable result" for the appellant if considered by a court-martial. Appellate Exhibit LXXIV at 3. We have reviewed the military judge's findings of fact and conclusions of law regarding the credibility of JC's post-trial recantation and find them adequately supported by the record of the *DuBay* hearing. We adopt them as our own.

The appellant argues that JC's retraction of her post-trial recantation shows her to be so completely lacking in credibility that, if the appellant's case were retried, she would be unable to convince a court-martial that the appellant had molested her. Although we are mindful that JC's recantation would be useful to the defense in attacking the credibility of her testimony at a retrial, we do not find that JC is without credibility as a witness. Indeed, while it is clear that JC has lied under oath in either her trial testimony or her recantation, it is equally clear that one of these two statements must contain the truth. The appellant either molested JC or he did not. This court must determine whether JC's post-trial statements that she was not molested are "sufficiently believable to make a more favorable result probable" for the appellant. See *Brooks*, 49 M.J. at 69.

We are inclined to give little weight to JC's post-trial recantation of her trial testimony, in light of her emphatic reaffirmation of her trial testimony at the *DuBay* hearing--given in the presence of the father she had not seen in four and a half years--and her plausible explanation<sup>2</sup> for why she had falsely

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<sup>2</sup> We note that the explanation offered by JC at the *DuBay* hearing for why she recanted her trial testimony is consistent with the finding of fact from our

recanted her trial testimony. We are also persuaded by the fact that JC was 15 years old and living with the appellant's family at the time she recanted, but was 19 years old and living on her own at the time of the *DuBay* hearing. This fact tends to support JC's explanation for why she falsely recanted her testimony just six months after the trial, while also negating the reasons JC offered in her recantation for having falsely accused the appellant of molesting her. The appellant has offered no explanation for why JC would still have a motive to falsely accuse him some seven years after the alleged misconduct, at a time when she is living independently and has had no contact with him. We note that unlike her 2000 trial and 2006 *DuBay* hearing testimony, JC's 2001 recanting statements were not made in court and were not subject to the crucible of cross-examination.

We have also considered the factors noted by our superior court in reversing our original denial of this petition, including the "appellant's repudiation of his prior [incriminating] statements, his facially rational explanation for having made [these] statements, and the potential effect that mutually corroborative denials by appellant and [JC] may have at any future proceedings." *Cuento*, 60 M.J. at 112. After considering these factors and in light of the evidence presented at the *DuBay* hearing and the entire record of trial, we see little potential that JC's recantation would have any meaningful effect at a retrial. JC's post-trial recantation, now retracted, in no way enhances the believability of the appellant's self-serving claim. To the extent that evidence of JC's recantation would damage her credibility at a retrial, we note that ample evidence of JC's untruthful character was already before the members.

After reconsidering the appellant's petition for new trial in light of the *DuBay* hearing, we are not "reasonably well satisfied" that JC's trial testimony was false. *Giambra*, 33 M.J. at 335. Accordingly, we conclude that JC's post-trial recantation of her trial testimony, if considered by a court-martial in the light of all other pertinent evidence, would probably **not** produce a "substantially more favorable result" for the appellant. *Brooks*, 49 M.J. at 69.

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original decision in this case that JC felt guilty about her responsibility for the appellant's confinement and did not want him to remain in the brig any longer. *See Cuento*, 58 M.J. at 592.

**Conclusion**

The appellant's petition for new trial is denied. We have previously affirmed the findings and the sentence.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court