

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
K.J. BRUBAKER, M.C. HOLIFIELD, A.Y. MARKS
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BYRON D. REYNOLDS
SENIOR CHIEF DAMAGE CONTROLMAN (E-8), U.S. NAVY**

**NMCCA 201400279
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 March 2014.

Military Judge: CAPT B.L. Payton-O'Brien, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: LCDR Jerod Markley, JAGC, USN.

For Appellant: Stephen H. Carpenter, Jr, Esq.; LT Ryan Aikin, JAGC, USN.

For Appellee: Maj Tracey L. Holtshirley, USMC.

30 November 2015

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

BRUBAKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of disobedience of a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890; aggravated sexual contact with a child in violation of the 2007-2012 version of Article 120, UCMJ, 10 U.S.C. § 920; sexual abuse of a

child in violation of the current Article 120b, UCMJ, 10 U.S.C. § 920b; and a novel specification under Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to 22 years' confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged but, pursuant to a pretrial agreement, suspended all confinement in excess of 20 years and deferred and waived for 6 months all automatic forfeitures. The CA further directed that if, prior to the end of 20 years of confinement, the appellant completes a sex offender treatment program—or if he is unable to do so through no fault of his own—all confinement in excess of 15 years will be suspended.

The appellant alleges three errors: (1) his trial defense counsel (TDC) were ineffective; (2) his conviction of two separate specifications alleging abusive sexual contact and sexual abuse of a child constitutes an unreasonable multiplication of charges; and (3) the CA's action was "ambiguous as it seems to execute the dishonorable discharge."¹ We find no prejudicial error and affirm.

Background

Around March 2013, the appellant's wife, M.R., discovered troubling emails between the appellant, then deployed to the Middle East aboard USS WILLIAM P. LAWRENCE (DDG 110), and their biological daughter, S.R., who had recently turned 12 years old. The emails indicated the appellant had persistently requested S.R. to take and send photographs of herself wearing only a bra and panties. After initially resisting ("Please dad I know what this is and it's kinda a crime"²), S.R. ultimately acquiesced and sent several such pictures accompanied by statements like, "Here now no more asking"³ or "Here it's the last one. No more ok?"⁴ The appellant, undeterred, responded with instructions: "Try and turn more to the side as well??!!";⁵ "No they didn't come out good . . . Did you zoom in? The front view and side view both

¹ Appellant's Brief of 25 Mar 2015 at 24. We resolve this AOE summarily by noting that to the extent the CA's action purports to order the discharge executed, it is a legal nullity. *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

² Prosecution Exhibit 8.

³ PE 11.

⁴ PE 14.

⁵ PE 13.

were blurry please retake and resend. Thanks.”⁶ The appellant sent and received these emails, boldly, on his official navy.mil account.

Upon discovering the emails, M.R. approached S.R. and asked broadly whether anything inappropriate was going on between her and her father. When S.R. indicated she was too embarrassed to talk about it, M.R. asked more specifically if the appellant ever asks for pictures. S.R. replied the appellant had asked for pictures of her in her underwear. M.R. stated, “If that’s it, S.R. that’s horrible, but we can get through it.”⁷ S.R., retreating to a corner of the room with her back to her mother, said, “Mom, there is more.”⁸ S.R. then detailed her father’s repeated sexual abuse of her beginning in the fall of 2011 and continuing until the appellant’s deployment in January 2013.

M.R. initially sought to confront the appellant by email, angrily seeking an explanation. But after the appellant’s repeated denials, she contacted the San Diego Police Department, who turned the matter over to the Naval Criminal Investigative Service (NCIS).

At NCIS’s request, M.R. engaged in a series of pretext email communications with the appellant, beginning with a concocted story that S.R. had recanted the abuse allegations. She then continued, posing as S.R. The appellant’s responses to “S.R.’s” emails, while not directly confessing to the allegations, were highly incriminating. For instance, the appellant stated, “I am glad you now understand that this is what some dad does [sic] and it’s ok. But now that mom knows about all this you have to not talk about it again with her and let everything take its course ok.”⁹ The appellant then quickly transitioned to a fresh request for pictures, which he made clear meant revealing pictures of S.R. In one email, when “S.R.” asked what she should do for the picture, the appellant asked her to “slide it to the side or whatever”¹⁰—which he later stipulated as fact meant sliding her panties to the side.

⁶ *Id.*

⁷ Record at 905.

⁸ *Id.*

⁹ PE 21 at 1.

¹⁰ PE 22 at 2.

Meanwhile, S.R. participated in a videotaped forensic interview. She indicated the abuse started in the fall of 2011. At first, the appellant would come into the room in the middle of the night and touch her private areas over her clothes while she was in bed. Later, he would enter early in the morning, clad in his Navy uniform, and direct her to get on the floor at the foot of the bed. There, he would pull his pants down and one of them would pull her pajama pants and underwear down and he would "touch his private part to [hers]."¹¹ She stated the appellant's penis never went inside her vagina, but it pushed against it and caused pain. After some encounters, S.R. had to clean a white substance off her body and underwear.

Armed with this information, NCIS seized a portion of carpet from the foot of S.R.'s bed, where she said the abuse regularly occurred. Forensic analysis revealed the presence of semen matching the appellant's DNA profile.

Upon his return to the United States, NCIS interviewed the appellant. He initially denied all wrongdoing, but when confronted with the presence of semen at the foot of the bed, he ultimately stated that on one occasion, she had removed her pajama pants and panties and he touched her buttocks—perhaps incidentally touching her vagina—while he masturbated into his hand. He asserted he never touched his penis to her and claimed his daughter had initiated the incident.

The CA referred charges against the appellant alleging the following: two violations of a military protective order (MPO); rape of a child; a novel Article 134 specification for inducing S.R. to take pictures of herself in her underwear; attempted production of child pornography; and sexual abuse of a child. In December 2013, the appellant, with the assistance of counsel (including a civilian defense counsel at that time), submitted an offer to plead guilty to a number of offenses, including attempted rape of a child as a lesser included offense of rape of a child, in return for suspension of all confinement in excess of 12 years. This offer was accompanied by a proposed stipulation of fact signed by the appellant wherein he admitted, *inter alia*, to rubbing his erect penis against S.R.'s vulva and ejaculating on her. The CA rejected this offer and the case proceeded toward trial.

¹¹ PE 6. While she never directly called it her vagina, when asked, she pointed to her vaginal area.

Literally on the eve of the presentation of evidence in what was to be a contested members trial, the defense negotiated an agreement—this time successfully—where the appellant would plead guilty only to the orders violations, the novel Article 134 specification, and the specifications of sexual contact with and sexual abuse of a child with exceptions and substitutions. The original sexual contact with a child specification indicated that the appellant intentionally touched with his hand the buttocks of S.R. The exceptions and substitutions added that he touched with his hand *and penis* the buttocks *and genitalia* of S.R. In return, the CA agreed to withdraw the remaining specifications—including, significantly, those alleging rape of a child—and to suspend all confinement in excess of 20 years. Further, he agreed to suspend all confinement in excess of 15 years if the appellant successfully completed sex offender treatment or was not able to through no fault of his own.

Analysis

Ineffective Assistance of Counsel

Although briefly represented by civilian defense counsel, the appellant was, by the time of trial, represented by two military counsel, Lieutenant (LT) O and LT G. In his brief, the appellant asserts LTs O and G provided ineffective assistance by: (1) conducting a deficient mitigation investigation and presentation related to the appellant's past history of being the victim of sexual abuse; (2) failing to renew a motion to compel production of an expert consultant in child psychology; (3) allowing the appellant to plead guilty by exceptions and substitutions to the sexual abuse offenses; and (4) failing to object to the admission of a series of emails.

In support of his claim, the appellant submitted affidavits from him and his brother. On our order, LTs O and G filed responsive affidavits. The appellant then replied with additional affidavits from him, his brother, and his family pastor, a potential witness. The appellant's affidavits raise additional allegations that his counsel:

- coerced him into entering a pretrial agreement, signing a stipulation of fact, and pleading guilty;

- failed to prepare and present available evidence in mitigation;

-failed to follow up on his tip that his family pastor, Dr. S, "might help in assisting my defense with understanding how my wife could have put my daughter up to the allegation" ¹²;

-declined to pursue a continuance offered by the military judge to secure an expert in child witness susceptibility.

We review claims of ineffective assistance of counsel *de novo*. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). "The Supreme Court has set a high bar for an appellant to prevail on such a claim." *Id.* at 371. The appellant must show both that: (1) his counsel's performance was deficient, that is, fell below an objective standard of reasonableness; and (2) but for his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984))

To establish the first prong, an appellant must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This presumption "is rebutted by a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citation omitted). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Id.* (citations omitted). Further, "strategic choices made [by counsel] after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690. "In considering whether an investigation was thorough, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Akbar* at 379-80 (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)).

Moving to the second prong, even when there is deficient performance, it must be so prejudicial "as to indicate a denial of a fair trial or a trial whose result is unreliable." *Davis*, 60 M.J. at 473 (citation omitted). The appellant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¹² Appellant's Motion to Attach filed on 2 Apr 2015, Appellant's Affidavit of 25 Mar 2015 at ¶ 6.

In the context of a guilty plea, we still apply the two-part *Strickland* test, but the prejudice inquiry "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). An appellant thus "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*; see also *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). When the alleged error is a failure to investigate or to discover potentially exculpatory evidence, whether there was prejudice "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.* "[T]hese predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the idiosyncrasies of the particular decisionmaker." *Id.* at 59-60 (citation and internal quotation marks omitted); see also *United States v. Ginn*, 47 M.J. 236, 246-47 (C.A.A.F. 1997).

When an ineffective assistance claim is raised by affidavit, we apply the six principles established in *Ginn* to determine whether we can decide the case without further fact-finding:

(1) if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis;

(2) if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis;

(3) if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts;

(4) if the affidavit is factually adequate on its face but the appellate filings and the record as a whole compellingly demonstrate the improbability of those facts, the court may discount those factual assertions and decide the legal issue;

(5) when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal; and

(6) the Court of Criminal Appeals is required to order a fact-finding hearing only when the above-stated circumstances are not met.

Ginn, 47 M.J. at 248.

Applying these principles, we find, without need for further fact-finding, that the appellant has failed to establish either deficient performance or prejudice. We start with the most serious allegation—that the appellant's counsel coerced him into pleading guilty. His assertion amounts to this: I didn't touch my daughter's vagina with my penis and only said I did because my counsel told me repeatedly, forcefully, even emotionally, that the evidence against me was strong and that I was facing life without the possibility of parole if I rejected the offered agreement. This fails on several counts.

First, the appellant fails to detail what specifically about this advice or how it was given fell below a professional norm. Indeed, the appellant was facing confinement for life without the possibility of parole and the offer to drop rape of a child and limit exposure to as little as 15 years' confinement was, on this record, quite a bargain. And these counsel were dealing not with a trembling recruit, which perhaps would require a bit more delicacy, but with a senior chief with nearly 20 years in the Navy who had already fired his first counsel. Even assuming for the moment that the appellant felt compelled to plead guilty, his own affidavits make clear that what he feared was the "harsh alternative,"¹³ not the opprobrium of two lieutenants serving as his counsel. Absent is any allegation of incorrect or incomplete advice. So any pressure he felt was inherent to the lawful consequences he faced and not attributable to deficient performance by the counsel charged with advising him of those consequences. Thus, even if we

¹³ Appellant's Motion to Attach filed 16 Oct 2015, Appellant's Affidavit of 16 Oct 2015 at ¶ 24.

assume the appellant's affidavits are true, he has not met his burden to show deficient performance by his counsel.

Second, the appellant is not free to say on appeal that his counsel's advice to plead guilty to certain conduct was faulty because he *didn't do it*—again, absent a more specific showing of deficient performance. He pleaded guilty to the conduct, admitted to it in a stipulation of fact and before the military judge, knowingly forfeited a trial on whether he did it, and waived any objections related to the factual issue of guilt. *Ginn*, 47 M.J. at 248 (“we will not now invalidate his guilty plea on the basis of post-trial speculation or innuendo as to his guilt or permit him to use his complaint of ineffective assistance of counsel to indirectly accomplish the same result”) (internal citations omitted); RULES FOR COURTS-MARTIAL 910(c)(4) and (j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

Finally, the appellant's insinuation that it was his counsel's fault that he pleaded guilty to something he didn't do is directly contradicted by the record of the guilty plea. The military judge conducted a thorough plea inquiry—one expressly intended to ensure that his pleas of guilty were knowing and voluntary and that he was in fact guilty. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). In this colloquy, the appellant assured the military judge:

- that he was pleading guilty because he was, in fact, guilty and believed he was guilty;
- that he understood that if he did not believe he was guilty, he should not plead guilty for any reason;
- that he had enough time to discuss his case with his counsel and that their advice had been in his best interest;
- that he was pleading guilty freely and voluntarily and that nobody had threatened or forced him to plead guilty;
- that if what he said during his plea inquiry was not true, his statements could be used against him in a prosecution for perjury or false statement;
- that he personally had signed the stipulation of fact, that everything in it was the truth, and that nobody had forced or threatened him into entering the stipulation;

- that the military judge could use the stipulation to determine whether the accused was guilty and appellate authorities could use it to determine whether there was legal error;
- that after a paragraph by paragraph review of the stipulation, there was nothing in it he disagreed with or felt was untrue;
- that as he had indicated in his pretrial agreement, he was satisfied with his counsel;
- that he had entered the pretrial agreement freely and voluntarily and that nobody had forced or coerced him into the agreement;
- that he could request to withdraw his pleas of guilty at any time *before the sentence was announced* and that if he had a good reason for doing so, the court would allow him to do so;
- that he had touched S.R. under her clothing on her buttocks, inner thigh, and genitalia area using his hand and his penis;
- that even after going through the full explanation and providence inquiry, he still wanted to plead guilty and was, in fact, guilty of the offenses to which he pleaded guilty.

As this colloquy occurred *after* the appellant's interaction with his counsel, we find no facts that would rationally explain why he would have made such statements at trial but is now changing his story. *Ginn*, 47 M.J. at 248. Thus, without need for further fact-finding, we reject the appellant's claim that he was coerced into pleading guilty.

We next address the allegations that his counsel were ineffective for failing to renew a motion to compel production of an child psychologist to test the veracity of S.R.'s claims of abuse; for "allowing" the appellant to plead guilty to the sexual abuse offenses by exceptions and substitutions; and for failing to object to the admission of a series of emails. Each of these was explicitly covered by a term in the pretrial agreement. The military judge went over the agreement in detail, with the appellant assuring her he understood and agreed to those terms. These were, therefore, not just strategic

decisions by counsel, but terms the appellant freely and voluntarily agreed to as inducements for an unquestionably favorable agreement.

We likewise reject the allegation that TDC's investigation and presentation of the appellant's alleged history of being the victim of sexual abuse was deficient. By the appellant's own account, his first disclosure of alleged sexual abuse as a child was to NCIS after they had confronted him with allegations he had abused his daughter. The appellant then refused to provide details to NCIS or to the defense mitigation expert. The appellant thus leaves to our imagination what additional facts a more thorough investigation would have garnered or how that would have been more favorable to him. More to the point, the appellant's purported abuse as a child was presented and properly considered as mitigation. The defense requested and was granted a mitigation expert, who evaluated the appellant and consulted with the defense team. The decision to present this evidence in the form of the appellant's unsworn statement, a letter from the expert, and argument by counsel was plainly strategic—one we decline to second guess. We not only find no deficient performance but no reasonable probability that more evidence or more argument on this point—if any even existed—would have moved the seasoned military judge to adjudge a lighter sentence.

The assertion that the appellant's TDC refused the offer of a continuance request to pursue an expert in child psychology is also flatly contradicted by the record. The appellant appears to be conflating separate discussions. There was discussion on the record about an expert in child psychology, but the offer to request a continuance came not there, but in the context of a potential fingerprint expert. This pertained to a note the appellant allegedly left on his wife's windshield that became the basis for one of the two specifications alleging MPO violations. The Government had provided notice on the eve of trial that a fingerprint analysis had been completed and revealed two sets of fingerprints, one belonging to the appellant and the other to an unidentified person. The defense team vigorously—and winningly, as it turns out—argued this belated notice was a discovery violation, the only appropriate remedy for which was dismissal of the specification. After consultation with the appellant and colloquy on the record, the defense declined the military judge's invitation to seek a continuance to remedy the purported violation, insisting on dismissal. The efficacy of this strategy was proven by result: dismissal of the specification with prejudice.

We turn, finally, to the appellant's allegation that despite telling his counsel that his family pastor might help the defense team understand "how my wife could have put my daughter up to the allegation" that he touched her genitalia with his penis, they did not contact the pastor until preparing for the sentencing case. Even presuming this to be true, this does not entitle the appellant to relief. The appellant's affidavits support only that the pastor was of the opinion that the appellant's wife was "going overboard"¹⁴ due to anger over past indiscretions and that it was wrong for her "to have been pursuing the rape and intercourse charges" since "all confirmed that there was no rape and no intercourse"¹⁵ Not only does this misinterpret whose role it is to pursue charges in the military justice system, it addresses an allegation that the defense successfully took off the table. We cannot say that failing to pursue evidence of such questionable probity and admissibility was constitutionally required. We also see no indication that the appellant would have changed his pleas but for his counsel's failure to contact Dr. S sooner. See *Ginn*, 47 M.J. at 247. And it is inconceivable to us that earlier discovery of these pastoral insights would have outweighed concrete evidence doggedly pointing to the appellant's guilt and thus changed the outcome.

Unreasonable Multiplication of Charges

The appellant next claims that the military judge abused her discretion by denying a defense motion to find Additional Charges II and III and their sole specifications an unreasonable multiplication of charges (UMC) for sentencing.

The charges encompass numerous, separate instances of sexual abuse beginning around October 2011 and continuing until about January 2013. Recognizing a change in the law during this time, the Government charged one specification of divers occasions of aggravated sexual contact with a child under the former Article 120 for acts prior to 28 June 2012—the effective date of the military's new sexual offenses statute—and a separate specification alleging divers occasions of sexual abuse of a child under the new Article 120b for acts on or after that date.

¹⁴ Appellant's Motion to Attach filed 16 Oct 2015, Dr. S's Affidavit of 16 Oct 2015 at 2.

¹⁵ *Id.* (emphasis omitted).

We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) and *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)). The prohibition against UMC is codified in R.C.M. 307(c)(4): "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." This provides trial and appellate courts a mechanism to address prosecutorial overreaching by imposing a standard of reasonableness. *Quiroz*, 55 M.J. at 337.

A trial court considers the following non-exclusive factors to determine whether charges constitute UMC, either for findings or sentencing:

- (1) whether each charge and specification is aimed at distinctly separate criminal acts;
- (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality;
- (3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure; or
- (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

Campbell, 71 M.J. at 24 (citing *Quiroz*, 55 M.J. at 338).

We find that the military judge did not abuse her discretion here. She applied the correct law—the *Quiroz* factors listed above—and her conclusions are amply supported. As she noted, the Government would have been free to charge every single act of molestation separately. This was not a single transaction. Each time the appellant went into his daughter's room to molest her, he acted on a separate criminal impulse. The fact that the Government prudently grouped these separate acts into two specifications based on a change in the law does not entitle the appellant to punitive exposure as if this happened only once.

Conclusion

The findings and the sentence are affirmed.

Judge HOLIFIELD and Judge MARKS concur.

For the Court

R.H. TROIDL
Clerk of Court

