UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant LARRY M. PAULY
United States Air Force

ACM 36764

11 August 2008

Sentence adjudged 19 November 2005 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 17 years, total forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Richard T. McNeil, Esquire (civilian counsel - Argued), Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Chadwick A. Conn, Captain John S. Fredland, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Captain Jamie L. Mendelson (Argued), Colonel Gerald R. Bruce, and Major Matthew S. Ward.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

WISE, Chief Judge:

The appellant was tried at Elmendorf Air Force Base, Alaska by a general court-martial composed of a military judge. Contrary to his pleas, the appellant was found guilty of one specification of rape of a child under the age of 16 years on divers occasions in violation of Article 120, UCMJ, 10 U.S.C. § 920; one specification of sodomy of a child under the age of 16 years by force and without her consent on divers occasions in violation of Article 125, UCMJ, 10 U.S.C. § 925; and one specification of assault and

battery by striking a child under the age of 16 years with an open hand on the face on divers occasions in violation of Article 128, UCMJ, 10 U.S.C. § 928. He was acquitted of one specification of sodomy of a child under the age of 12 years and two specifications of committing indecent acts on a child under the age of 16 years. The military judge sentenced the appellant to a dishonorable discharge, confinement for 17 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority, after making provisions for monetary payments to the appellant's wife, approved the sentence as adjudged.

On appeal, the appellant raises nine issues. The appellant asserts: (1) the evidence was legally and factually insufficient to sustain the convictions; (2) the military judge erred by permitting LP, who was then under the age of 16 years, to provide remote live testimony pursuant to Rule for Courts-Martial (R.C.M.) 914A based on the provisions of Mil. R. Evid. 611(d)(3);[1] (3) the appellant received ineffective assistance of counsel when his trial defense counsel did not request a forensic psychiatrist as an expert consultant; (4) the military judge erred by admitting Prosecution Exhibit 5, a photograph taken from a video clip produced after the date of the last misconduct; (5) the military judge abused his discretion when he denied the appellant's motion for the judge to view, pursuant to R.C.M. 913(c)(3), the residence in which the alleged crimes were committed; (6) the government failed, pursuant to R.C.M. 701, to timely disclose an internal Air Force Office of Special Investigations (AFOSI) investigation of Special Agent H which hampered the defense's ability to effectively cross-examine the agent; (7) the cumulative effects of the military judge's errors denied the appellant a fair trial; (8) the military judge committed plain error by admitting, during pre-sentencing proceedings, Prosecution Exhibit 35 (an Article 15, UCMJ, administered to the appellant in 1991), Prosecution Exhibit 37 (a letter from the appellant to his then wife written in 1993), and Prosecution Exhibit 38 (an AFOSI investigation of the appellant in 1993) all in violation of Air Force Instruction (AFI) 51-201, *Administration of Military Justice* (26 Nov 2003),[2] and Mil. R. Evid. 401 and 403; and (9) the appellant's sentence to 17 years confinement is inappropriately severe. The appellant has also filed a petition for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873 and R.C.M. 1210, which will be dealt with herein. We have examined the record of trial, the assignment of error, and the government's response and affirm the findings and sentence. The appellant's petition for new trial is denied.

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[1] The appellant, in this assignment of error, characterizes the issue as the military judge erred when he required the "absence of the appellant" during the testimony of the child. That is not what happened. After the military judge determined that remote live testimony by the child was appropriate, the appellant elected to voluntarily absent himself from the courtroom pursuant to R.C.M. 804(c)(1). The appellant captured the issue as we have rewritten it in brief and oral argument before this Court on 17 December 2007.

[2] Citation is to the version of the AFI 51-201 that was in effect at the time of trial. AFI 51-201 was revised on 21 December 2007.

Background

LP, the then 14-year-old natural daughter of the appellant, provided the following testimony. On 24 August 2004, LP fixed the appellant lunch around noon at the family residence on Elmendorf Air Force Base, AK and took it to him. LP found her father sitting in a chair in the "computer room" wearing only a towel. Upon entering the room, the appellant ordered LP to take off her clothes and she complied. The appellant began fondling her breasts and directed LP to touch his penis and then perform fellatio on him. LP complied. The appellant then told LP to sit on his lap while he was sitting in the chair and he engaged in sexual intercourse with her from a posterior position. The appellant next grabbed LP's arm and told her to get on the floor. The jeans LP had discarded were lying next to her on the floor. The appellant got on top of her and again engaged in sexual intercourse with LP and ejaculated on her stomach.

That evening, LP and her brother went to a youth center on base but soon departed and went to see ML, LP's boyfriend. ML resided with his parents in on-base quarters, and LP had been sexually active with ML. ML, during the course of the evening, informed LP that he had seen a physician because he feared that he had contracted a sexually transmitted disease from her. LP, stressed by the confrontation, blurted out that her father had been sexually abusing her. ML immediately informed his stepfather of the accusation who notified military authorities.

LP testified that she was subjected to numerous instances of sexual abuse between 2000 and 2004. These acts began shortly after LP reached puberty at approximately 10 years of age. LP testified that her father would sometimes strike her with his open hand during the sexual acts and, at other times, as a form of corporal punishment.

Legal and Factual Sufficiency

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all of the elements of the offense proven beyond a reasonable doubt. For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

We have carefully reviewed the record of trial and conclude there is no question the government presented legally sufficient evidence to support the findings in this case. Regarding factual sufficiency, we were particularly impressed with the testimony of the

expert forensic examiner who found abrasions to LP's hymen indicative of posterior and anterior vaginal penetration; the testimony of the expert in criminology and detection of DNA who found a semen stain, invisible to the naked eye, on the front of LP's jeans containing spermatozoa; and the findings of the DNA analyst who testified that the spermatozoa found on the jeans "matched" the appellant's DNA (the possibility that someone else provided the spermatozoa was 1 in 22 quintillion). All of this evidence corroborated, to some degree, LP's testimony about the crimes committed on 24 August 2004. We find that the military judge could have found beyond a reasonable doubt that the appellant committed the offenses for which he was convicted. Furthermore, after reviewing the record of trial, we are ourselves convinced beyond a reasonable doubt that the appellant is guilty of the offenses.

Whether the Military Judge Erred by Permitting LP, Who Was Then Under the Age of 16 Years, to Provide Remote Live Testimony Pursuant to R.C.M. 914A Based on the Provisions of Mil. R. Evid. 611(d)(3)

LP was called as the government's first witness in their case-in-chief. The court reporter superbly captured the difficulty LP experienced in testifying in front of the appellant evidenced by crying, stammering, and an inability to testify about specific facts surrounding the alleged criminal acts that occurred on 24 August 2004. After two recesses granted to the prosecution to enable LP to compose herself proved ineffective, the government made a motion to allow LP to testify from a remote location via two-way closed circuit television as authorized by Mil. R. Evid. 611(d). Mil. R. Evid. 611(d)(3) permits the use of live remote testimony when:

> (A) The child is unable to testify because of fear;
> (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
> (C) The child suffers from a mental or other infirmity; or
> (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

Trial defense counsel opposed the motion.

During a hearing on the motion, the government called Colonel (Dr.) Breck Lebegue, a forensic psychiatrist, who was recognized as an expert in forensic psychiatry and the treatment of sexual abuse victims. Dr. Lebegue had previously interviewed LP, LP's biological mother, and LP's step-mother; had reviewed numerous records pertinent to the case; and had observed LP's testimony from the back of the courtroom.

Dr. Lebegue described symptoms he observed in LP when LP attempted to testify in open court in the presence of the appellant including: a "variety of change of facial expressions" that "were consistent with a very troubled emotional state that I would

identify as fear," voice modulation, rapid blinking, squinting her eyes shut and then opening them wide in succession, increased respiratory rate, and stammering. Dr. Lebegue went on to describe specific acts LP exhibited in the courtroom. The expert stated ". . . at all times she's [LP] entered the courtroom she has declined and refused to look at him [the appellant], to look at the defense counsel table, has literally shielded her gaze from that direction by holding her hand in front of the right side of her face, as I am demonstrating, so that she is both averting her gaze from that area as well as shielding her gaze from that area." Dr. Lebegue testified that he believed these symptoms and actions resulted from LP's fear of the appellant and that she was "unable" as opposed to "unwilling" to testify in front of her father.

Dr. Lebegue also testified to the emotional trauma he observed in LP while she was testifying. He stated that he attempted to pass a note to the trial counsel during her direct examination of LP asking the trial counsel to stop the examination because "she [LP] demonstrated facial behavior and voice changes that are consistent with a mental defense known as dissociation" and that the examination in the courtroom "was causing her [LP] substantial mental damage." Dr. Lebegue concluded that if LP was forced to testify in front of her father she would suffer substantial emotional harm. Dr. Lebegue's testimony was unrebutted by the defense.

The military judge, based on his observations and the testimony of Dr. Lebegue, made detailed findings of face. He specifically found that "LP appeared distraught and was unable to answer questions regarding what occurred on 24 August 2005"[3] and that "LP's actions result from a fear of testifying in front of the accused." The judge also found "that further testimony in front of the accused would cause her [LP] substantial emotional harm." The military judge ruled that the trial counsel had met the requirements of Mil. R. Evid. 611(d)(3)(A) and (B) and *Maryland v. Craig*, 497 U.S. 836 (1990).[4] The judge granted the government's motion to have LP provide remote live testimony pursuant to the procedures provided in R.C.M. 914A. The appellant then volunteered to absent himself from the courtroom during LP's testimony pursuant to R.C.M. 804(c), thereby eliminating R.C.M. 914A procedures in accordance with Mil. R. Evid. 611(d)(4). The appellant now argues that the military judge's ruling was unsupported by the facts presented at trial.

A military judge's finding of necessity of remote live testimony of a child is a question of fact that will not be reversed on appeal unless such finding is "clearly erroneous or unsupported by the record." *United States v. McCollum*, 58 M.J. 323, 332 (C.A.A.F. 2003) (citing *United States v. Longstreath*, 45 M.J. 366, 373 (C.A.A.F. 1996)). The military judge's finding that LP was unable to testify in open court in the presence of

[3] The judge later corrected the date to reflect 2004.

[4] Our superior court in *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007) has ruled that the holding in *Maryland v. Craig*, 497 U.S. 836 (1990) permitting remote live testimony of a child was not overruled by *Crawford v. Washington*, 541 U.S. 36 (2004).

the appellant about events that occurred on 24 August 2004 because of fear driven by the appellant's presence and that LP would suffer substantial emotional trauma that would be more than deminimus[5] if forced to testify in the presence of the appellant was well founded by his personal observations and the unrebutted testimony of Dr. Lebegue. The military judge properly applied the provisions of Mil. R. Evid. 611(d).

Whether the Appellant Received Ineffective Assistance of Counsel When His Trial Defense Counsel Failed to Request a Forensic Psychiatrist to Serve as the Appellant's Expert Consultant

The appellant claims that his trial defense counsel provided ineffective assistance of counsel by not requesting an expert mental health consultant to assist the defense team. The appellant has submitted the affidavit of his civilian trial defense counsel in support of his claim. The civilian trial defense counsel states in the affidavit that he was informed that the government intended to obtain the services of a clinical psychologist as a government consultant. Civilian trial defense counsel interviewed the government consultant, Dr. Lebeque, prior to trial and concluded that the consultant's participation would be "inconsequential." Based on this conclusion, trial defense counsel did not request that the government fund an expert mental health consultant to assist the defense team. Civilian trial defense counsel, in his affidavit, concludes that because the government consultant did provide pivotal evidence during portions of the trial, his decision not to seek his own consultant was "less than thorough." The appellant has not provided this Court with any information in the form of a post-trial affidavit, or otherwise, articulating specific guidance or testimony that could or would have been provided by a defense expert mental health consultant/witness had that defense consultant/witness been available at trial. The appellant concludes that such a consultant/witness could have assisted the defense trial team and asks this Court to order a *DuBay*[6] hearing to flesh out the specific benefits such a consultant/witness could have provided at trial.

Dr. Lebeque provided assistance during the trial as follows: 1) testified in support of an unsuccessful government objection to the testimony of a defense witness; 2) testified in support of the government's successful motion to permit remote live testimony by LP; 3) provided advice and guidance to the trial counsel during the examination of LP; 4) was the witness referenced in a Stipulation of Expected Testimony offered by the defense supporting the defense theory that LP was lying; 5) was the witness (in his capacity as a board certified specialist in aerospace medicine and not in his capacity as a forensic psychiatrist) referenced in a Stipulation of Expected Testimony offered by the government providing expert medical advice and guidance on the

[5] All that is required is a showing that a child witness will suffer emotional trauma that is more than deminimus if forced to testify in the presence of the accused. *United States v. McCollum*, 58 M.J. 323, 330 (C.A.A.F. 2003).
[6] *United States v. DuBay,* 37 C.M.R. 411 (C.M.A. 1967).

appellant's medical conditions concluding, in part, that the appellant's back pain, "depending on the severity, could impair [the appellant's] ability to have sexual relations"; and 6) was the witness (in his capacity as a board certified specialist in aerospace medicine and not in his capacity as a forensic psychiatrist) referenced in a Stipulation of Expected Testimony offered by the government further describing the appellant's medical condition, concluding that the appellant's "physical activity is not limited by his strength, but by his pain, and by his variable range of motion." The issue on which Dr. Lebeque provided the most significant benefit to trial counsel was on the motion to permit LP to provide live remote testimony.

The appellant has identified the specific act by his civilian trial defense counsel that he alleges fell below an objective standard of reasonableness, according to the prevailing standards of the profession. The appellant claims that the trial defense counsel should have obtained the services of an expert mental health professional as a consultant and/or expert witness. The government concurs that trial defense counsel did not have the services at trial of such an expert. We can resolve this matter without ordering a post-trial evidentiary hearing relying on the principles announced by our superior court used to determine whether a post-trial evidentiary hearing is required. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant identifies only one viable scenario in which he claims trial defense counsels' failure to have their own expert prejudiced his case. The appellant claims that such an expert would have assisted the defense on the remote live testimony issue involving Mil. R. Evid. 611(d)(3)(B) as to whether LP would have suffered emotional trauma from testifying in open court in front of the appellant.[7]

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, the appellant must show: (1) that counsel's performance was deficient; and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong of *Strickland* requires that the appellant show counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id.* at 687-88. The appellant must identify specific acts or omissions that rendered trial defense counsel's performance "outside the wide range of professionally competent assistance" that could have been provided in any given case. The prejudice prong requires that the appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was

[7] The appellant failed to identify any expert or the essence of any expert's testimony that would have countered or overcome the testimony of Dr. Lebeque. *United States v. Grigoruk*, 56 M.J. 304, 307-08 (C.A.A.F. 2002).

prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687).

We need not reach the issue of deficient performance as we are convinced that the appellant suffered no prejudicial harm as a result of trial defense counsels' failure to obtain at trial the services of a mental health expert consultant/witness. The appellant contends that such a defense consultant/witness could have rebutted the testimony of Dr. Lebeque, pursuant to Mil. R. Evid. 611(d)(3)(B), regarding emotional trauma caused to LP as a result of testifying in open court in front of the appellant. However, such a defense witness/consultant would have had a formidable task in convincing this experienced military judge to disregard his personal observations in arriving at his finding that LP was unable to testify because of fear pursuant to Mil. R. Evid. 611(d)(3)(C). The judge's finding, amply supported by the record of trial, regarding fear exhibited by LP in testifying in open court in the presence of the appellant was sufficient, by itself, to support the military judge's ruling pursuant to Mil. R. Evid. 611(d)(3). Any error in trial defense counsels' failure to obtain their own expert mental health consultant/witness in order to counter the testimony of Dr. Lebeque was harmless.

Whether the Military Judge Erred by Admitting Prosecution Exhibit 5, a Photograph Taken from a Video Clip that Was Produced After the Date of the Last Alleged Misconduct.

LP testified that the appellant began showing her pornography shortly after she reached puberty at approximately 10 years of age. She testified the appellant did so "because he wanted me to do those with him." Trial counsel offered into evidence a video clip (Prosecution Exhibit 3 for identification) that was taken from the appellant's computer containing adult pornography that LP testified was shown to her by her father within "the past year." The video clip was played for the Court. In the opening screens, the clip reflected that it was produced on 9 September 2005, over one year after the last sexual assault testified to by LP. Trial defense counsel objected to introduction of the clip as it could not have been the one shown to LP by the appellant during the relevant period of time. The military judge sustained the objection.

Immediately after the prosecution attempted to introduce the video clip, they offered into evidence a pornographic photograph (Prosecution Exhibit 5). LP further testified that the appellant showed her a pornographic video clip between 2000 and 2004, that she had previously seen the image depicted in the photograph, and it was taken from the video clip shown to her by the appellant. Trial defense counsel objected to the introduction of the photograph, again on the basis of relevancy, stating that while LP "testified that she does not know whether or not it [the photograph] came from the same video clip [Prosecution Exhibit 3 for identification]," that if it did, it would not have been in existence between 2000 and 2004 and could not have been viewed by LP. The military judge admitted the photograph clarifying his ruling by saying, "I just want to be

clear, so both sides understand, the [picture],[8] which I did admit, my recollection was the witness [LP] said she recalled seeing a video clip. She's not sure if it came from this video[9] or another video, but she recalls seeing the video clip."

The photograph did not come from the video clip successfully objected to by trial defense counsel. The photograph was relevant and admissible as it depicted the type of conduct the appellant was grooming LP to engage in with him. The military judge did not abuse his discretion in admitting the evidence. Even if the photograph's admission was erroneous, its admission was harmless error, applying the four-pronged test for prejudice from erroneous evidentiary rulings first announced in *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985).

Whether the Military Judge Abused His Discretion When He Refused Under R.C.M. 913(c)(3) to Personally View the Residence of the Appellant Where the Alleged Misconduct Occurred

The appellant moved the trial court to personally view the family's residence pursuant to R.C.M. 913(c)(3). Trial defense counsels' written motion stated, "With the granting of the view, the members[10] will see and experience the closeness and poor acoustics of those quarters." Trial counsel objected to the viewing and offered as an appellate exhibit,[11] 48 pages of photographs of the residence taken during the search of the quarters on 24 August 2004 including photographs of the computer room in which the alleged sexual crimes occurred, a schematic of the three floors of the residence, and a schematic of the computer room. Trial defense counsel then argued "the gist of our motion is that there is an issue in regard to acoustics." The defense offered that LP would testify that she screamed at the appellant on numerous occasions during the assaults, implying that the viewing combined with family members' testimony would impeach the credibility of LP. The military judge denied the motion stating, in part, "The evidence sought by the defense, that is the closeness of the quarters, to include its acoustics, could be presented through documentary evidence and testimony of witnesses."

The defense called four witnesses who testified, in part, to the poor acoustics of the quarters. The appellant's wife and stepmother of LP, Mrs. Mary Pauly, testified that the acoustics were very poor, that "You could . . . hear everything as clearly as if we were all in the same room talking," and that she had never heard LP "scream or yell for help." SSgt Peggy L. Joyner, the defense paralegal assigned to the Elmendorf Area Defense Counsel office, testified to a demonstration in which she participated by standing in the basement of the quarters and being able to clearly hear statements made in a tone "one

[8] The military judge actually said "the video clip, which I did admit." It is obvious that he was referring to the photograph.
[9] Prosecution Exhibit 3 for identification
[10] The written motion was prepared for a members trial prior to appellant electing to be tried by military judge alone.
[11] Later introduced as Prosecution Exhibit 1.

octave above a normal tone" by the appellant who was located two floors up.[12] The appellant's mother, Mrs. Linda Maloney, testified that she had been a houseguest in the appellant's residence for the week leading up to her appearance in court and testified to the poor acoustics of the quarters concluding that even though she didn't have the "best of hearing," she would have been able to hear someone in the quarters "shouting or yelling." Finally, Master Sergeant (Retired) Brian Mages testified on behalf of the appellant. MSgt Mages was the appellant's next door neighbor in the building housing the appellant's apartment. The appellant's apartment and that of MSgt Mages shared a common wall. MSgt Mages also testified to the poor acoustics of the apartments and that he had never heard anyone scream in the Pauly apartment.

We review a trial judge's decision to permit or deny a viewing for an abuse of discretion. R.C.M. 913(c)(3); *United States v. Huberty*, 50 M.J. 704, 708 (A.F. Ct. Crim. App. 1999). The discussion section under R.C.M. 913(c)(3) states: "A view or inspection should be permitted only in extraordinary circumstances." This nonbinding discussion has been elevated to a requirement that the military judge make a finding of extraordinary circumstances prior to authorizing a view or inspection. *Huberty*, 50 M.J. at 708; *United States v. Ayala*, 22 M.J. 777, 796 (A.C.M.R. 1986). This Court found that "Extraordinary circumstances exist only when the military judge determines that other available alternative evidence is inadequate to sufficiently describe the premises or object. Alternative evidence includes testimony, diagrams, photographs, or videos." *Huberty*, 50 M.J. at 708. This Court will "accord great deference to the military judge's decision." *Id.* at 709.

In the case *sub judice*, adequate alternative evidence to sufficiently depict the "closeness and poor acoustics of the quarters" was available and admitted in the form of photographs, schematics, and testimony. The military judge did not abuse his discretion in denying the defense request for a viewing of the appellant's quarters.

Whether the Government's Failure to Disclose an Internal AFOSI Investigation of Special Agent H Was Harmless Error

The criminal allegations for which the appellant was convicted came to the attention of law enforcement authorities on 24 August 2004. Military trial defense counsel submitted a discovery request to "Trial Counsel" dated 9 September 2004. Charges were preferred against the appellant on 1 June 2005 and originally referred to trial on 21 June 2005. This discovery request was a "continuing request." Paragraph 4(f) requested:

> Any evidence of a derogatory nature or which might tend to diminish the credibility of any potential Government witness. This requests [sic] includes disclosure and production of prior Article 15 action, civilian or

[12] The appellant demonstrated for the court the tone of voice he used during the demonstration.

> military convictions, and any and all adverse administrative actions (e.g. letters of counseling, letters of reprimand, letters of admonishment, memoranda documenting oral counseling or reprimands, adverse training records, revoked security clearances, etc.).

Civilian trial defense counsel submitted another discovery request to the government on 6 July 2005.[13] This document requested:

> 16. All evidence which may negate the guilt of the accused, reduced [sic] the degree of guilt of the accused or reduced [sic] the punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). This request includes the disclosure of any and all evidence affecting the credibility of the government witnesses pursuant to *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975).
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> . . . .
>
> b. Records of previous non-judicial punishment or adverse administration actions against any government witness.

Trial counsel called as a government witness Special Agent (SA) H. The significant portion of her testimony established the chain-of-custody of the jeans LP was wearing during the evening hours of 24 August 2004 and which LP testified she was wearing at the time of the alleged assault on 24 August 2004. These were the jeans on which the appellant's semen and DNA were found by means of forensic examination and discussed earlier in this opinion. On cross-examination, SA H provided testimony that brought into question portions of LP's testimony.

Civilian trial defense counsel, on cross-examination, obtained testimony from SA H that her investigation and her AFOSI office's investigation in this case was "less than professional" because the agents failed to send several articles of seized clothing worn by LP and the appellant to the crime lab for examination because of a faulty understanding of the evidentiary value of commingled clothing in relation to transference. Civilian trial defense counsel obtained the same admission for the same reason from SA B, the AFOSI lead investigative agent in this case.

SA H received a Letter of Admonishment (LOA) dated 1 April 2005 resulting from an internal OSI investigation of her (and others') actions in an unrelated sexual assault investigation. Specifically, SA H was admonished for not obtaining "a properly signed, sworn statement from the Victim" and for failing, at the time, to raise concerns she had about how the lead agent was questioning the victim. The government failed to

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[13] While there is no date on this discovery request, we do not question the appellate defense counsel's assertion as to the date of its submission.

provide this information to the defense prior to trial due to an "unintentional continuity error." Trial defense counsel, in their R.C.M. 1105 submission to the convening authority, did not attribute the government's failure to disclose this information to "ill-motive or malfeasance" and articulated that, in their opinion, the failure to provide the material to the defense resulted from "oversight, inattention to detail, PCS moves, or whatever reason." The appellant does not now argue differently. However, the appellant claims "the failure of the government to provide the proper discovery in a timely manner prejudiced the defense's ability to effectively represent the client" and asks this Court to set aside the findings and sentence or order a *Dubay* hearing "to further investigate the issue of late exculpatory discovery."

Congress directed that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, 10 U.S.C. § 846. The President implemented this direction in R.C.M. 701. Disclosure in military practice is intended to be exceptionally broad. Indeed, the Drafters Analysis of R.C.M. 701 states: "The rule is intended to promote full discovery to the maximum extent possible consistent with the legitimate needs for nondisclosure . . . and to eliminate 'gamesmanship' from the discovery process." (citations omitted).

R.C.M. 701 (a)(2)(A) requires the government to disclose, upon written request from the defense, "documents" that are "material to the preparation of the defense." Material evidence is not "limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy." *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (citing *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)). Had the investigation and LOA been disclosed to the defense, the information could have further assisted trial defense counsel in their theory that the investigation in the case *sub judice* was "less than professional." The information was "material to the preparation of the defense" and should have been disclosed to the defense prior to trial.

Having determined the information should have been disclosed, we must determine the materiality this failure to disclose had on the trial proceedings. The test used to determine materiality depends on the circumstances of the discovery request. If the failure to disclose was in response to a specific discovery request or if the failure was the result of prosecutorial misconduct, the appellant is entitled to relief unless the government can show that the failure to disclose was harmless beyond a reasonable doubt. If the failure to disclose was in response to a general discovery request, the appellant is entitled to relief only if he can show there is a "reasonable probability" that a different result would have occurred had the information been made available to the defense. *Roberts*, 59 M.J. at 326-27. The defense in this case specifically requested "Records of previous non-judicial punishment or adverse administration actions against

any government witnesses." The appellant is entitled to relief unless the failure to disclose was harmless beyond a reasonable doubt.

Civilian defense counsel established through admissions made by SA H and SA B that the OSI investigation in the case *sub judice* was "less than professional." Clearly the defense strategy of attack was not negatively impacted by the failure of the government to disclose this information. We are confident that even if evidence was admitted that SA H, in another investigation, failed to obtain a "properly signed, sworn statement" and "failed to raise her concerns about how the lead agent was questioning the Victim," the impact on the findings of this experienced military judge sitting as a general court-martial would have, at best, been de minimus. SA H testified that she observed LP wearing the jeans in question and established the chain-of-custody for those jeans. The defense never contested that LP was wearing the jeans. In fact, two defense witnesses corroborated SA H, testifying that LP was wearing these jeans during the evening of 24 August 2004. They claimed, however, that LP spilled spaghetti "all over" a pair of beige pants she was wearing during the evening meal and put on the jeans taken from a clothes hamper. The appellant then argued before the trial court that the jeans, while in the hamper, had been contaminated with the appellant's semen in an attempt to explain away the forensic findings. Given the limited testimony provided by SA H, the corroborating testimony provided by two defense witnesses, and the defense theory used at trial by the defense to attack the OSI investigation, we are convinced that the government's failure to disclose was harmless beyond a reasonable doubt.

Whether the Cumulative Effect of the Military Judge's Errors Denied the Appellant a Fair Trial

The appellant maintains that the cumulative effects of the errors alleged denied the appellant a fair trial. Our superior court has provided guidance on the cumulative error doctrine. The Court of Appeals for the Armed Forces in *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) wrote:

> It requires: considering each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy – or lack of efficacy – of any remedial efforts); and the strength of the government's case. The run of the trial may also be important; a handful of miscues, in combination may often pack a greater punch in a short trial than in a much longer trial. *United States v. Sepulveda,* 15 F. 3d 1161, 1196 (1993). [citations omitted]. Moreover, when assessing the record under the cumulative error doctrine, courts "must review all errors preserved for appeal and all plain errors." *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993).

We have found that the only error that occurred in this trial happened when the government failed to provide discovery of an internal AFOSI investigation. We found that that error was harmless beyond a reasonable doubt. The cumulative error doctrine has not been triggered in this case.

Whether the Military Judge Committed Plain Error During Pre-Sentencing Proceedings by Admitting Prosecution Exhibits 35 (Article 15, UCMJ, From 1991), 37 (Letter From the Accused to His Then Wife Written in 1993), and 38 (OSI Investigation From 1993) Where Said Exhibits Were Introduced in Violation of AFI 51-201, Paragraph 8.5.3 and Mil. R. Evid. 401 and 403.

During pre-sentencing proceedings, the government offered three exhibits into evidence: the Personal Data Sheet, an Article 15, UCMJ, 10 U.S.C. § 815, administered to the appellant in 1991 finding that the appellant had physically assaulted LP when she was 17-months-old by "holding both of [his] hands around her neck and closing her mouth with [his] thumbs," and the appellant's EPRs. Trial defense counsel did not object to the admission of these exhibits and there was no discussion of the basis for admitting the Article 15, UCMJ. The government then rested their case calling no witnesses.

Trial defense counsel, during sentencing, called the appellant's wife, Mrs. Mary Pauly; the appellant's stepmother, Mrs. Linda Louise Pauly; the appellant's mother, Mrs. Linda Rae Maloney; and introduced Defense Exhibits I through BY. The appellant then provided sworn testimony before the court. The following evidence was introduced through these witnesses and exhibits:

Mrs. Mary Pauly (the appellant's wife):

> He [the appellant] has been a very caring husband, loving, does little things. He treated the kids really well.
>
> . . . .
>
> He will do anything for the Air Force. He would not mess up his Air Force career, because he's gung-ho on Air Force, and then his family. He is just Air Force.

Mrs. Linda Louise Pauly (the appellant's stepmother):

> No matter what we did, that's what he wanted to do [join the Air Force] and so after graduation [from high school], he went right in, and that's all he ever wanted was to be Air Force. The thought of him doing something that would jeopardize his career is totally unspeakable.

. . . .

> I know how manipulative she [LP] can be. I don't have to lie to defend him. He wanted her to not ever get into trouble, so he was strict with her, as he was strict with his son, which is his stepson. But to be abusive to her? No. If he ever spanked her, I never seen him, but he would get after her, and I don't mean abusively.

Mrs. Linda Rae Maloney (the appellant's mother):

> Sir, please take into consideration that this young man is as fine a young man as you're going to find. . . . He is a family man.

Character statement from Mr. (MSgt retired) Brian Mages:

> During the time I have known him TSgt Pauly has proven to be honest, trustworthy, and reliable. He was always very well mannered and eager to help us in any way. At no time did I ever suspect anything but a normal relationship between him and his daughter.

Character statement from Colonel Franklin T. Ragland:

> I consider TSgt Pauly's character to rank in the top two or three of all the individual's [sic] I've known in my 37 year Air Force career.

Character statement from MSgt Thomas C. Winkler II:

> I believe that TSgt Pauly's character and integrity are above reproach and do not believe that he would purposely jeopardize his family and his career.

Character statement from MSgt Carl J. Clooney, Jr.:

> It is impossible to positively describe Larry's many attributes and contributions to the Air Force, his family, and friends in a single page.

Character statement from MSgt Bradley S. Guritza:

> Larry's character and military bearing appeared to set the example for his peers.

The appellant's sworn testimony:

> I did everything I could to take care of my daughter LP. She always came first, along with my—obviously the Air Force, but I always made sure she had food, clothing, whatever she needed, I made sure she had it. [Period referred to included the date of the actions resulting in the Article 15].
>
> . . . .
>
> Sir, as God is my witness, I did not harm that child in any way. I love her dearly. I don't understand why she did this, other than I found out after I was accused of this that she had a boyfriend, that she was having sexual intercourse with this boyfriend, that there—was suspected that she was having sexual intercourse with other boys.
>
> . . . .
>
> I have loved her ever since [she was born]. She was my pride and joy.

Prior to cross-examination of the appellant, trial counsel moved to introduce Prosecution Exhibits 37 and 38. Prosecution Exhibit 37 was a letter written in 1993 by the appellant to his former wife. The appellant admitted therein that he had been "mean" to LP and had sexually assaulted his then wife and biological mother of LP. The letter was written for the purpose of attempting to reconcile marital difficulties. Prosecution Exhibit 38 is a 10-page OSI report investigating an incident that occurred when LP was three years old. LP's babysitter had taken LP to the base hospital after noticing a bruise on LP's face. Trial defense counsel did not object to the introduction of these documents.

Where, as here, the defense fails to object to the introduction of evidence, we generally grant relief only if the introduction of the evidence was plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). The appellant has the burden of persuading us that: (1) an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Further, in military judge alone trials, "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

The appellant argues that Prosecution Exhibit 35, the 1991 Article 15, UCMJ, should not have been admitted, citing AFI 51-201, ¶ 8.5.3, which does not permit the introduction of an Article 15, UCMJ, that is over five years old. AFI 51-201 implements R.C.M. 1001(b)(2), which is the geneses of the five year limitation found in the AFI. However, R.C.M. 1001(b)(4) permits the introduction of "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found

guilty." This provision was elaborated on by our superior court in *United States v. Nourse*, 55 M.J. 229, 231-32 (C.A.A.F. 2001). That Court found that R.C.M. 1001(b)(4) permits the introduction of evidence of uncharged crimes when the "misconduct is part of a continuous course of conduct involving similar crimes and the same victims." *Id.* at 232.

The appellant was convicted of raping and sodomizing LP, then a child under the age of 16 years of age, on divers occasions. He was also convicted of assault consummated by a battery of a child under the age of 16 by unlawfully striking LP on divers occasions on the face with an open hand. LP testified that the appellant battered her in this manner during sexual assaults and as a means of corporal punishment. The Article 15, UCMJ, detailing a physical assault on LP by the appellant deals with a "similar crime and the same victim." The Article 15, UCMJ, was potentially admissible as evidence of aggravation under R.C.M. 1001(b)(4) as interpreted by *Nourse*. *Id.* at 231-32. As there was a valid basis for moving to enter the Article 15, UCMJ, any error in its introduction was not "plain, clear, or obvious." Further, given the nature of the defense sentencing case and resultant government rebuttal, any error in introducing the Article 15, UCMJ, did not materially prejudice substantial rights owned by the appellant.

The 1993 letter written by the appellant to his then wife (Prosecution Exhibit 37) and the 10-page AFOSI investigative report into allegations that the appellant had physically assaulted LP in 1993 (Prosecution Exhibit 38) were introduced after the appellant had provided sworn testimony to the court-martial. The appellant was thoroughly examined regarding information contained in these exhibits and gave his version of events surrounding the two incidents.

The appellant, through the testimony of witnesses, exhibits, and his own sworn testimony attempted to portray himself as a stellar parent, husband, and Air Force member who would never engage in the conduct for which he was convicted. The appellant, in attempting to support this conclusion, reached back to the very day of LP's birth to establish his credentials as a loving, caring parent. While this evidence was cleverly designed to support trial defense counsel's request that the military judge reconsider his findings pursuant to R.C.M. 924(c),[14] the result was the door to rebuttal evidence was thrown wide open.

R.C.M. 1001(d) permits the prosecution to rebut matters presented by the defense. The letter written by the appellant in 1991 to his then wife rebuts the appellant's attempt to portray himself as an ideal husband and father as does the AFOSI report from 1993. Our superior court has said, "It is well settled that the function of rebuttal evidence is to explain, repel, counteract, or disprove the evidence introduced by the opposing party." *United States v. Hallum*, 31 M.J. 254, 255 (C.M.A. 1990) (citations omitted). The two

[14] We need not decide today whether this was a permissible use of pre-sentencing procedures.

exhibits directly rebut evidence presented by the appellant during the pre-sentencing portion of the trial.

The appellant's claims that these exhibits were "extraordinarily stale," "not relevant," and that their "probative value was substantially outweighed by the danger of unfair prejudice" are equally without merit. The appellant asked the trial court to look at his character dating back to before his enlistment in the United States Air Force to the then present focusing in no small measure on his relationship with his daughter from the date of her birth to that day in court. The appellant established the time frame within which he asked the Court to focus and this evidence documented relevant events that occurred within that period. Further, we are confident that this evidence did not unfairly prejudice this experienced military judge.

Turning to an issue not raised by the appellant, R.C.M. 1001(d) states, in part, "If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree." While the exhibits entered by the defense during pre-sentencing proceedings did not meet the requirements of the Military Rules of Evidence, the government did not object to their entry and they were admitted. The military judge specifically ruled, later in the proceedings, that he had not relaxed the Military Rules of Evidence for pre-sentencing purposes. A proper foundation for Prosecution Exhibits 37 and 38 was not established and their entry constituted plain error. However, we are confident the military judge was not improperly swayed in determining an appropriate sentence by the entry of this evidence and therefore the appellant suffered no material prejudice to a substantial right. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994); *United States v. Robbins*, 52 M.J. 455, 457-58 (C.A.A.F. 2000).

Whether the Appellant's Sentence to Seventeen Years Confinement is Inappropriately Severe

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[ ], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Matters submitted in clemency may be considered in evaluating sentence appropriateness, including items found in the allied papers. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *Healy*, 26 M.J. at 396.

The appellant argues that his sentence of confinement to 17 years is too severe although he does not articulate specific points in support of this conclusion. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the crimes for which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

The Appellant's Petition for New Trial Pursuant to Article 73, UCMJ and R.C.M. 1210 Based on Newly Discovered Evidence

The appellant has petitioned this Court to order a new trial based on newly discovered evidence. The appellant's sole basis for the petition rests on the government's failure to disclose the internal AFOSI investigation of, and action taken against, Special Agent H. While the basis for this petition is the same as that for which the appellant sought relief for the government's failure to disclose the information pursuant to defense discovery requests, the applicable law is quite different. Article 73, UCMJ allows an accused to petition for a new trial "on the grounds of newly discovered evidence or fraud on the court." RCM 1210(f)(2) provides:

> A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
> (A) The evidence was discovered after the trial;
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
> (C) 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.

"A petition for new trial is not favored and, absent a manifest injustice, will not be granted. *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). The petitioner bears the heavy burden of establishing that a new trial is a proper remedy. *United States v. Giambra*, 38 M.J. 240 (C.M.A. 1993)." *United States v. Niles*, 45 M.J. 455, 456 (C.A.A.F. 1996). Our superior court has elaborated on R.C.M. 1210(f)(2)(C): "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 in the light of all other pertinent evidence, would probably

produce a substantially more favorable result for the accused.'" *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998).

We previously ruled that we were convinced that the failure of the government to disclose the internal AFOSI investigation of, and action taken against, SA H pursuant to defense discovery requests was harmless beyond a reasonable doubt. Relying on the same facts and reasoning, we are convinced that had this evidence been considered by the court "in the light of all other pertinent evidence," that consideration would not have resulted in "a substantially more favorable result for the accused." The appellant's petition for a new trial is denied.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court