

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20200715

Private First Class (E-3)
JEROME J. FORREST,
United States Army

Appellant

Tried at Fort Campbell, Kentucky, on
8 May 2019, 6 August 2019, 29
August 2019, 25 October 2019, 2
December 2019, 19 February 2020, 7
December 2020, 9–11 December
2020, and 14–16 December 2020,
before a general court-martial
convened by Commander, Fort
Campbell, Colonel Matthew A.
Calarco and Colonel Jaqueline Tubbs,
Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error¹

**I. WHETHER THE DEFENSE COUNSEL WERE
INEFFECTIVE IN INVESTIGATING AND
PREPARING FOR TRIAL[.]**

**II. WHETHER THE MILITARY JUDGE ERRED
BY DENYING THE DEFENSE’S MOTION TO
COMPEL A MITIGATION EXPERT[.]**

¹ The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

**III. WHETHER THE MILITARY JUDGE ERRED
BY ADMITTING PROSECUTION EXHIBIT 32
OVER DEFENSE OBJECTION[.]**

**IV. WHETHER THE SENTENCE WAS
INAPPROPRIATELY SEVERE[.]**

**V. WHETHER THE MILITARY JUDGE
PROPERLY ADVISED APPELLANT OF HIS
FORUM RIGHTS[.]**

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Statement of the Case

On 16 December 2020, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of unpremeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (2018) [UCMJ]. (R. at 1206). The military judge sentenced appellant to reduction to the grade of E-1, confinement for life with eligibility for parole, and a dishonorable discharge. (R. at 1273). On 3 February 2021, the convening authority approved the findings and sentence, (Action), and the military judge entered judgment. (Judgment).

Statement of Facts

On 17 December 2018, appellant beat his wife to death while her two sons—ages twelve and ten—locked themselves in a room upstairs and her baby granddaughter slept on the couch in the next room. (R. at 128, 320, 368, 372–73, 504).

On the night of the murder, appellant and his wife got into an argument. (R. at 319). ■■■ one of the victim's sons, saw appellant jump on the victim and straddle her while she lay on her back in the kitchen—the same room where she was later found dead. (R. at 322, 325–26, 525, 529; Pros. Ex. 6, p. 12; Pros. Ex. 23). After calling the police, ■■■ went upstairs to his room and heard “glass and [the] sound of someone punching something.” (R. at 308, 340). ■■■ no longer had

his phone, so he used his PlayStation to send text and audio messages to his older brother, who lived on post with their older sister, Ms. ■■■ (R. at 339, 402–03; App. Ex. 40).

Ms. ■■■ drove to appellant’s house. (R. at 407). When she got there, ■■■ came downstairs and opened the door, but appellant slammed the door shut on her. (R. at 407–09). Ms. ■■■ walked around to the back of the house and looked inside through a window. (R. at 411–12). Ms. ■■■ saw her mom lying dead in the kitchen with her “face bashed in” like “putty.” (R. at 412). Appellant was also in the kitchen. (R. at 412). Ms. ■■■ screamed, alerting some of her neighbors, including Sergeant ■■■ who came to the house to investigate. (R. at 413, 514).

Shortly after arriving, Sergeant ■■■ saw appellant open the garage door and attempt to leave the garage in his vehicle, but he was unable to because of another car in the driveway blocking him in. (R. at 516). Law enforcement arrived on the scene and cleared the house. (R. at 525–41). They arrested appellant, who was sitting in his vehicle in the garage, covered in his wife’s blood, with a bloody broken chair leg in the passenger seat next to him. (R. at 537–41, 609, 748, 751, 765–775; Pros. Ex. 9, p. 8, Pros. Ex. 12).

The victim died from “blunt force head trauma due to bludgeoning.” (R. at 874). The mechanism of death was “respiratory depression from . . . brain swelling . . . and a mechanical obstruction of her airway which was caused by the

maxillofacial injuries and also the blood that was pooling in the back of her [throat].” (R. at 862). Appellant inflicted significant injuries on his wife prior to her death, including the loss of her eye and the fracture and avulsion (tearing away) of the lower portion of her jaw. (R. at 840, 844–45; Pros. Ex. 20, pp. 7, 9). During the victim’s autopsy, the medical examiner found teeth and bone shards in her stomach and esophagus, which indicated she was alive and swallowed them during the assault. (R. at 849–50).

Assignment of Error I

WHETHER THE DEFENSE COUNSEL WERE INEFFECTIVE IN INVESTIGATING AND PREPARING FOR TRIAL[.]

Additional Facts

Prior to trial, appellant requested the convening authority appoint Dr. ■ as an expert consultant in the field of neuropsychology, and the convening authority denied the request. (App. Ex. III, p. 3). Appellant filed a motion to compel, stating that he was in a car accident resulting in a head injury the week prior to the murder and arguing, in relevant part, Dr. ■ was necessary for two reasons: (1) to determine whether appellant suffered from a brain injury that may have “affected his cognition, judgment, or impulse control”; and (2) to assist in sentencing preparation, including “conducting mitigation interviews” and “assisting the defense in the presentation of a historical psychological background of

[appellant].” (App. Ex. III, pp. 3–4). After hearing argument at an Article 39(a), UCMJ, session, the military judge denied the motion to compel Dr. ■■■ (R. at 107–120; 184–190). For each of the proposed bases for expert assistance, the military judge found appellant failed to demonstrate both that Dr. ■■■ would be of assistance and that denial of her assistance was reasonably likely to result in a fundamentally unfair trial. (R. at 189).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

Law

Appellant bears the burden of establishing ineffective assistance of counsel. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012). To prevail on a claim of ineffective assistance of counsel, appellant must demonstrate deficient performance by his counsel and that he suffered prejudice because of that deficiency. *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, there must be a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “[A] court need not determine whether counsel's

performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.* at 697.

Argument

A. Appellant suffered no prejudice.

This court does not need to reach the question of whether appellant’s defense counsel were deficient. In the present case, “it is easier to dispose of [appellant’s] ineffectiveness claim on the ground of lack of sufficient prejudice.” *Id.* Accordingly, “that course should be followed.” *Id.* Given the overwhelming evidence demonstrating appellant’s guilt and the egregiousness of his crime, there is no reasonable probability that, even absent defense counsel’s alleged infirmities, the outcome either on the merits or at sentencing would have been different.

1. There is no reasonable probability appellant would have been acquitted of murder.

Appellant concedes that the evidence proving his guilt was substantial, and “there was a high likelihood [he] would be convicted.” (Appellant’s Br. 19). Indeed, the evidence against him was overwhelming. The last time anybody other than appellant saw the victim alive, appellant was fighting with her. (R. at 338). After going upstairs to his room, ■■■ heard what sounded like someone hitting

something. (R. at 340). When appellant was arrested, he was covered in the victim's blood and had the murder weapon next to him in the car. (R. at 609; Pros. Ex. 18, p. 1). The physical evidence at the crime scene, the DNA evidence, (R. at 765–775), the blood splatter analysis, (R. at 977–78), and the medical examiner's findings, (R. at 874), were all consistent with a theory that appellant beat his wife to death with a broken chair leg. Appellant has not presented sufficient evidence to show that any alleged errors by defense counsel were significant enough to demonstrate a reasonable probability of a different outcome.

Appellant argues that if his defense counsel had adequately investigated and litigated his motion to compel Dr. ■■■ it “would very likely have provided the defense with sufficient information to raise the defense of severe mental disease or defect, or at the very least, to present evidence of partial mental responsibility.” (Appellant's Br. 33). However, looking at the evidence provided by appellant in support of this conclusion, it is far too speculative to rise to the level of a reasonable probability.

Dr. ■■■ a forensic psychologist who provided an affidavit filed with appellant's brief, submitted that he would have recommended additional testing on appellant “to ascertain whether there [were] deficits in executive functioning.” (Def. App. Ex. A, p. 3). He then suggests that “[d]eficits in executive functioning *may* result in poor impulse control and reactive unplanned behavior,” and

additional “testing *may* also have yielded findings relevant to his mental state at the time of the offense” (Def. App. Ex. A, p. 3) (emphasis added). Lieutenant Commander (LCDR) ■■■ a forensic psychiatrist, also provided a memorandum filed with appellant’s brief and concluded that “[e]xpert assistance to the defense team in interpretation of the full [R.C.M. 706] report would very likely have led to additional investigation”—though it appears that he believes this information would be relevant for sentencing and not on the merits. (Def. App. Ex. B, p. 3). Regardless, neither Dr. ■■■ nor LCDR ■■■ speculate as to what the results of any of the tests would have been, and this is for a good reason: it would be pure conjecture. Likewise, it would require this court to guess what the test results would have been to find that appellant met his burden in demonstrating that they were reasonably likely to result in a different outcome.

As speculative and broad-brushed as these assertions were, their value—and thus appellant’s argument—is further diminished by the results of appellant’s R.C.M. 706 inquiry before trial:

The Sanity Board determined (a) that the Accused, at the time of the alleged criminal conduct, did not suffer from a severe mental disease or defect; (b) that the Accused, at the time of the alleged criminal misconduct, and as a result of such severe mental disease or defect, was not unable to appreciate the nature and quality or wrongfulness of his conduct; (c) that the clinical psychiatric diagnosis was ■■■ and (d) that the Accused was not presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his defense.

(App. Ex. XIX, pp. 1–2).

Even in a light most favorable to appellant, the evidence he offers on appeal shows only the mere possibility that further testing would have revealed evidence relevant to a defense that may have been available to him at trial. There is no reason to believe—and indeed not a reasonable probability—that he would have prevailed on that defense. “It is not this court’s responsibility” to speculate what the results of any further testing would have been “and then to further speculate whether [their] omission prejudiced appellant. That burden belongs to appellant[.]” *United States v. Myer*, ARMY 20160490, 2019 CCA LEXIS 13, at *32 (Army Ct. Crim. App. 10 Jan. 2019) (unpub. op). Appellant failed to meet that burden. Therefore, his claim of prejudice fails.

2. There is no reasonable probability appellant would have received a less severe sentence.

Appellant was convicted of murdering his wife while her young children hid upstairs and her infant granddaughter slept on the couch in the next room. (R. at 320). The manner in which appellant killed his wife was especially heinous. He bludgeoned her to death with a broken chair leg. Further, even though he beat her to the point that she lost an eye, (Pros. Ex. 20, p. 9), the lower portion of her jaw was removed from her face, (Pros. Ex. 20, p. 7), and she swallowed her teeth and shards of her broken bones, she may still have survived. (R. at 851). The medical

examiner believed her injuries were survivable if she had received “immediate attention and airway management,” which may have been possible “with early arrival of an ambulance” (R. at 864). But instead of seeking medical attention, appellant made a “clean-up effort” and tried to flee the scene. (R. at 516, 944). Appellant faced life in prison *without* eligibility for parole, but he was sentenced to life *with* eligibility for parole.² *Manual for Courts-Martial, United States*, (2019 ed.) [*MCM*], pt. IV, ¶ 56.d.(2); (R. at 1273). It is not clear how testimony that he “[led] the way when it came to physical fitness,” (Appellant’s Br. 19), or any other evidence³ provided by appellant would have mitigated his crime and resulted in a less severe sentence. Simply put, appellant has failed to meet his burden of demonstrating prejudice. *Strickland*, 466 U.S. at 694.

² Appellant argues that he “suffered the worst possible outcome as a result” of his defense counsel’s ineffective assistance. (Appellant’s Br. 18). However, this is not true, given that appellant’s sentence was less severe than the maximum authorized punishment. Additionally, although appellant argues that he was sentenced to “die in prison,” (Appellant’s Br. 35), he will be eligible for parole consideration after serving “at least 20 years of the term of confinement.” Army Reg. 15-130, Army Clemency and Parole Board, para. 3-2 (24 Mar. 2022).

³ As discussed *supra* pp. 6–8, the conclusions from Dr. [REDACTED] and LCDR [REDACTED] that they would have recommended additional testing is far too speculative, as it requires an assumption both that the additional testing would have revealed mitigating evidence and that the mitigating evidence would have been significant enough to result in a sentence less severe than life with eligibility for parole.

B. Appellant's defense counsel were not deficient.

Even if this court does consider the question of whether appellant's defense counsel were deficient, it should reach the same conclusion as the prejudice analysis: appellant has failed to carry his burden. The arguments alleging error and the evidence supporting those arguments fall well short of demonstrating constitutional error on the part of defense counsel.⁴

1. Presentencing.

Appellant argues that his defense counsel were deficient by failing to investigate and present evidence during presentencing about appellant's military service, evidence that his crime was out of character, and evidence that his car accident may have played a role in his offense. (Appellant's Br. 19–22). Each of these arguments ignores the evidence to the contrary contained in the record.

Appellant served in the Army for less than two years before committing murder. (Pros. Ex. 48). This short period of time did not produce a great body of work for defense counsel to present to the military judge for her consideration. In spite of this, defense counsel called the court's attention to appellant's accomplishments during his brief military career. (R. at 1265). The only

⁴ If this court finds the presumption of competence is overcome, the government respectfully requests to "submit a statement or affidavit from . . . defense counsel to rebut the allegations." *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008).

additional evidence offered by appellant on appeal is a statement from one of appellant's supervisors stating that, if called as a witness, he would have testified appellant was a "solid Infantryman," "was always out in front leading the way when it came to physical fitness," "showed moral courage and always motivated others," and wanted to learn more about his job.⁵ (Def. App. Ex. H). Considering the generic nature of these observations, it cannot be said that omitting this evidence was "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

This is especially true in light of the evidence in the record that the government could have used to impeach the witness's testimony. For example, the statement that appellant always showed "moral courage" is severely diminished by his attempt to flee the crime scene. (Def. App. Ex. H; R. at 516).⁶

Appellant's additional argument that his defense counsel "ignored available evidence to demonstrate that [his] crime was out of character" is similarly without merit. (Appellant's Br. 20). From the record, it is clear that defense counsel

⁵ Appellant argues that his defense counsel "had the ability to present military sentencing witnesses who would have provided insight into appellant as a soldier." (Appellant's Br. 19). In support of this argument, appellant provided statements from two other service members; however, neither served with appellant or would have testified to details of his military service. (Def. App. Exs. F, I).

⁶ Additionally, the statement that appellant "[led] the way when it came to physical fitness" is disproved by appellant's enlisted record brief showing his height, weight, and Army Physical Fitness Test score. (Pros. Ex. 48).

sought to demonstrate to the court “the type of person [appellant] is, the man he has become, and the man . . . he will be in the future.” (R. at 1264–65). To do this, they elicited testimony from his family that he was, *inter alia*, “a kind, loving, generous child,” (R. at 1232); a “[com]passionate young man,” (R. at 1240); “[v]ery good” with children, (R. at 1246); and “all about loving those around him and protecting those around him,” (R. at 1253). Even though they did not use the words, “out of character,” defense counsel explicitly asked the court to recognize “that this one event should not define this man”—almost exactly what appellant now argues they failed to do. (Appellant’s Br. 21) (“The defense’s pre-sentencing case . . . did nothing to . . . demonstrate to the military judge . . . that he amounted to more than just his worst moment.”). Although his family regretted not having more time to prepare prior to testifying, the proffered testimony in the affidavits submitted with appellant’s brief is substantially the same as the testimony elicited during presentencing. (Def. App. Exs. C, D, E). Interviewing the presentencing witnesses prior to trial would have perhaps relieve some of the concerns raised by appellant’s family members, but—at least in this case—not doing so was not constitutional error.

Finally, appellant’s argument that his defense counsel’s decision not to present evidence of appellant’s car accident left “the record . . . devoid of any evidence of why he committed a seemingly senseless crime” is not supported by

the record. (Appellant's Br. 25). First, there is no evidence that appellant's car accident played any role in the murder whatsoever,⁷ so there was no reason defense counsel would have presented any evidence about it. Defense counsel did, however, attempt to provide some explanation for appellant's crime. Defense counsel repeatedly sought to admit evidence of two different theories why appellant may have killed his wife: (1) self-defense; and (2) heat of passion in response to viewing text messages that proved his wife's infidelity. (R. at 299, 310–13, 531, 617). Defense counsel even explicitly argued those theories in closing argument on the merits and in presentencing. (R. at 1192–96; 1268–69).

It is clear that defense counsel had a presentencing strategy and they executed that strategy. That now, after receiving a lengthy sentence, appellant disagrees it was the best strategy does not mean his counsel were deficient. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *Strickland*, 466 U.S. at 689, and that is precisely what appellant is doing in the present case. In showing the appropriate deference to his counsel's performance, however, it is clear that it was well "within the wide range of reasonable professional assistance" *Id.* at 689; *see United States v. Grigoruk*, 52 M.J. 312 (C.A.A.F. 2000) ("Our Court will not second-guess the

⁷ To the contrary, as discussed *infra*, pp. 16–17, evidence of appellant's prior incidents of violence and lack of behavioral change cuts against the suggestion that appellant's misconduct was a result of some injury he suffered in the car accident.

strategic or tactical decisions made at trial by defense counsel.” (internal quotations omitted)).

2. Motion to compel Dr. ■■■

Appellant argues that his defense counsel were deficient by failing in their efforts to compel Dr. ■■■ as an expert. (Appellant’s Br. 22–34). This argument fails, however, because appellant fails to demonstrate a reasonable likelihood that he would have prevailed on the motion to compel. *See United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997) (“When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . an appellant must show that there is a reasonable probability that such a motion would have been meritorious.”).

Defense counsel filed a motion to compel Dr. ■■■ (App. Ex. III), but appellant argues that his counsel did not provide sufficient evidence to the military judge to prevail on the motion. (Appellant’s Br. 28). Appellant also takes the position that the military judge erred in denying the motion. (Appellant’s Br. 28). On the one hand, appellant argues that his counsel did not present enough evidence, but on the other hand he argues that the military judge was wrong to have denied the motion based on the evidence presented *by defense counsel*. Setting aside the seeming logical inconsistency, appellant’s argument on appeal still fails.

The military judge made thorough findings on the record discussing why she denied the motion. (R. at 184–190). Nothing appellant presents on appeal is sufficient to demonstrate a reasonable probability that, had she considered it, the military judge would have ruled differently. Indeed, the only evidence presented by appellant that he argues his counsel omitted is a definition from the DSM-5 that loss of consciousness is evidence of a traumatic brain injury (TBI),⁸ (Appellant’s Br. 27); a conclusion from a Centers for Disease Control and Prevention that a Glasgow Coma Scale Score of 7 constitutes a “severe head injury” (Appellant’s Br. 28); and conclusions from Dr. ■■■ and LCDR ■■■ as to the types of additional testing that could have been conducted and what those tests *may* have shown. (Appellant’s Br. 33). This is not enough to tip the scales in appellant’s favor.

Additionally, appellant’s reliance on *United States v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 2013), is misguided. (Appellant’s Br. 23–25) Unlike in *Witt*, appellant’s defense counsel did, in fact, attempt to pursue the potential that appellant’s car accident played some role in the crime he committed.⁹ Indeed, that

⁸ Appellant argues in his brief that he suffered a “*known* TBI.” (Appellant’s Br. 30) (emphasis in original). However, by appellant’s own evidence, there was merely *evidence* of a TBI. (Appellant’s Br. 27) (“[O]ne of the primary *diagnostic criteria* of TBI is a loss of consciousness.” (emphasis added)). Regardless, whether he did or did not suffer from a TBI is not dispositive of whether he is entitled to expert assistance.

⁹ Even assuming forgoing additional testing when given the opportunity by the military judge was error, appellant has failed in his burden to show there was a reasonable probability that he would prevail on the motion to compel if the testing

is the very reason they filed the motion to compel Dr. ■■■ (App. Ex. III, p. 3) (“[T]he Defense requires a neuropsychiatrist [sic] to . . . determine if he suffered from a traumatic brain, concussion, or other injury . . . that might have affected his cognition, judgment, or impulse control and . . . be extenuating, mitigating, or disprove the intent element of the charged offense.”).

Another key distinction is that appellant has *still* provided no evidence that appellant’s car accident actually affected appellant’s behavior at all, thus necessitating Dr. ■■■ assistance. *Contra Witt*, 72 M.J. at 759 (“[A]ppellant's roommate's [observed] a change in the appellant's behavior following the motorcycle accident. He described these changes as being more outspoken, not putting up with anything anymore, and observing the appellant in a fight for the first time after the motorcycle accident.”). The evidence in this case suggests the opposite. Appellant was released from the hospital less than twenty-four hours after being admitted, was described as “awake alert and oriented,” and was not given instructions to follow-up or seek additional screening from any head or brain injury specialists. (App. Ex. III, p. 69). Additionally, not a single witness either at trial or on appeal has described any change of behavior or other adverse effects from his accident, and appellant’s sister even testified that he is “the same boy I

had been conducted. (R. at 120). In other words, the fact that counsel made an error does not mean they were deficient. *United States v. Brown*, 33 M.J. 743, 745 (A.C.M.R. 1991) (“Counsel[’s] [performance] is not required to be error-free.”).

knew growing up.” (R. at 1253). Finally, there is evidence that appellant and the victim had a history of domestic violence that predated the car accident. (App. Ex. XLI, p. 18). Appellant’s arguments suffer from the same shortcomings on appeal as they did at trial: there is insufficient evidence to prevail—or be reasonably likely to prevail—on the motion to compel.

The constitution does not require perfection from defense counsel, but the constitution does not require them to be. *Brown*, 33 M.J. at 745. Appellant has failed to carry his burden to show that any errors by his counsel were so serious that they amounted to a lack of the “counsel” guaranteed by the Sixth Amendment. Accordingly, his claim of ineffective assistance of counsel fails.¹⁰ *Strickland*, 466 U.S. at 687.

¹⁰ Appellant urges this court to find ineffective assistance of counsel under a cumulative error theory. (Appellants’ Br. 34–35). For the same reasons his counsel were not deficient, this court should reject the cumulative error claim. *See United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) (noting “ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions”); *see also Becker v. Luebbers*, 578 F.3d 907, 914 n.5 (8th Cir. 2009) (noting that even if some aspect of counsel’s performance was deficient, prejudice must be limited to constitutionally defective aspects of representation). Additionally, as discussed *supra*, pp. 5–9, appellant suffered no prejudice.

Assignment of Error IV¹¹

WHETHER THE SENTENCE WAS INAPPROPRIATELY SEVERE[.]

Standard of Review

A Court of Criminal Appeals (CCA) reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384–85 (C.A.A.F. 2005).

Law

“Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves.” *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Whether a sentence is appropriate should “be judged by ‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offense and the character of the offender.’” *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180–81 (C.M.A. 1959)). In conducting its Article 66, UCMJ review, “a CCA has discretion to approve only that part of a sentence that it finds ‘should be approved,’ even if the sentence is ‘correct’ as a matter of law.” *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010). While a CCA has “*carte blanche* to do justice,” *United States v. Claxton*,

¹¹ This assignment of error (AE) is addressed here because it relies on many of the same facts and arguments as AE I.

32 M.J. 159, 162 (C.M.A. 1991), it cannot grant clemency. *Nerad*, 69 M.J. 138 at 146 (C.A.A.F. 2010).

Argument

Appellant's sentence to confinement for life with eligibility for parole should be approved. Nothing in the appellate record suggests that this court should exercise its discretion to approve a sentence less severe than that adjudged by the military judge.

Appellant argues that this court should only approve confinement for a term of years because such a sentence "reflects the evidence presented in this appeal, and that which may likely have been collected had defense counsel properly investigated the case, and appellant received proper assistance of an expert consultant in mitigation." (Appellant's Br. 56). In other words, appellant wants this court to exercise its discretionary Article 66, UCMJ, authority to lower the burden of proof for an ineffective assistance of counsel claim. The court should reject appellant's invitation to do so.

For the same reasons appellant cannot demonstrate prejudice in support of his ineffective assistance of counsel claim, *supra* pp. 5–9, appellant's sentence is appropriate and should be approved. Appellant brutally murdered his wife while her two young children and infant grandchild were in the home. (R. at 320, 372–73). After mercilessly bludgeoning her, appellant may still have been able to save

her life. (R. at 864). He chose not to. He instead took steps to clean up and flee the scene. (R. at 516, 944). Appellant faced the possibility of confinement for life without eligibility for parole. *MCM*, pt. IV, ¶ 56.d.(2). The egregious nature of his crime would have justified that sentence. Instead, the military judge sentenced appellant to life with eligibility for parole. (R. at 1273). There is no evidence in the record of trial—nor has appellant presented any evidence on appeal—that mitigates appellant’s heinous acts to the extent that the adjudged sentence should not be approved.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE’S MOTION TO COMPEL A MITIGATION EXPERT[.]

Standard of Review

“A military judge’s ruling on a request for expert assistance is reviewed for an abuse of discretion.” *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

An abuse of discretion occurs when a military judge’s findings of fact are “clearly erroneous,” if the trial judge’s decision is “influenced by an erroneous view of the law,” or if the decision is “outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F.

2008); *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly unreasonable,’ or ‘clearly erroneous.’” *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *Miller*, 46 M.J. at 65; *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

Law

To be entitled to expert assistance provided by the government, an accused must demonstrate necessity. *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986); *United States v. Tinsley*, 81 M.J. 836, 841 (Army. Ct. Crim. App. 2021). That is, an accused “must show the trial court that there exists a reasonable probability *both* that an expert would be of assistance to the defense *and* that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (quoting *Moore v. Kemp*, 809 F.2d 709, 712 (11th Cir. 1987)) (emphasis added). With respect to the first “assistance” requirement, the defense must provide sufficient justification to answer three separate inquiries: “(1) Why is the expert needed? (2) What would the expert accomplish for the defense? and (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop?”

United States v. Gunkle. 55 M.J. 26, 32 (C.A.A.F. 2001); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

Argument

The military judge did not abuse her discretion when she denied appellant's motion to compel Dr. ■ because appellant failed to demonstrate that Dr. ■ assistance was necessary. There were at least two separate bases for the military judge's ruling, and each was well within the "range of choices reasonably arising from the applicable facts and the law." *Miller*, 66 M.J. at 307.

A. Appellant failed to show a reasonable probability that Dr. ■ would be of assistance.

In denying appellant's motion to compel Dr. ■ the military judge announced the correct test for the "assistance" prong of the necessity analysis. (R. at 186); *Gonzalez*, 39 M.J. at 461. Thus, the military judge's decision was not influenced by an erroneous view of the law. The military judge then applied that law to the facts, finding that the defense failed to demonstrate why they could not gather that information on their own. (R. at 189). This decision was well within a range of reasonable choices based on the facts before her. *See United States v. Loving*, 41 M.J. 213, 250 (C.A.A.F. 1994) ("Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses.").

An accused requesting expert assistance has the burden of showing a reasonable probability that the expert will be of assistance, and the military judge rightly concluded that appellant failed to meet that burden. In his motion to compel, appellant argued that Dr. ■■■ was necessary “to assist the defense in conducting mitigation interviews regarding [appellant’s] upbringing and other factual circumstances in order to present a robust mitigation case.” (App. Ex. III, p. 4). However, the only evidence before the military judge that was relevant to Dr. ■■■ role in assisting with mitigation was the stipulated facts contained in the motion—none of which related to appellant’s upbringing—and Dr. ■■■ curriculum vitae. (R. at 91–92; App. Ex. III; App. Ex. IV, p. 1). At most, this evidence proved to the military judge a “mere possibility” Dr. ■■■ would be of assistance to appellant. Accordingly, the military judge was correct to deny the motion to compel. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (“[N]ecessity requires more than the mere possibility of assistance from a requested expert”) (internal quotations and alterations omitted).

Appellant argues that “[t]he military judge denied appellant’s request for a mitigation specialist *because* she mistakenly believed such assistance was only available to capital accused.” (Appellant’s Br. 39) (emphasis added). The record makes clear this is not true. In announcing her findings, the military judge stated, “*Also*, the defense has failed to establish why in a non-capital case an expert in

mitigation is necessary or required.” (R. at 189) (emphasis added). At most, this was an additional basis on which the military judge denied the motion to compel. Additionally, the military judge stated that defense counsel failed to demonstrate why a mitigation expert was necessary or required in a non-capital case, (R. at 189), which is not the same as saying that a mitigation expert is *only authorized* in a capital case, as appellant alleges. (Appellant’s Br. 39). Additionally, a military judge is presumed to know and follow the law. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007).

Finally, there is indeed a difference between a mitigation expert and an expert consultant that will assist the defense team in presenting evidence in extenuation and mitigation. Mitigation experts, or mitigation specialists, are brought in to assist the defense team with developing a presentencing case and used—perhaps—exclusively in capital cases to mitigate against the death penalty. *E.g., Loving*, 41 M.J. 213 at 249–251 (finding defense counsel was not ineffective for failure to request funds for an independent mitigation expert); *see, State v. Stanley*, 2019 Del. Super. LEXIS 47, at *20 (Del. Super. Ct. 22 Jan. 2019) (“The present practice of criminal law does not dictate that a mitigation expert should be hired in non-capital cases.”); *Cf. Monk v. United States*, 2019 U.S. Dist. LEXIS 232094 (W.D. Ky. 25 Jun. 2019) (“[Movant] presented no authority suggesting it was deficient performance for [his counsel] to fail to procure a mitigation expert in

this, non-capital, case.”) To the extent this court finds that the military judge believed appellant was requesting a mitigation expert or mitigation specialist—in addition to the other bases for expert assistance she analyzed—that belief was reasonable in light of the facts before her. During the motions hearing, the military judge asked, “[Y]ou are asking for Dr. ■■■ to act as a *mitigation expert*. Is that an accurate characterization?” (R. at 115) (emphasis added). Defense counsel responded, “That is correct, Your Honor.” (R. at 115). Accordingly, the military judge did not err.

B. Appellant failed to show a reasonable probability that denial of Dr. ■■■ would result in a fundamentally unfair trial.

In addition to finding that appellant’s motion to compel failed the “assistance” prong, the military judge also found “there is not a reasonable probability that, absent expert assistance, a fundamentally unfair trial would result.” (R. at 189). This finding was a proper application of the law and was reasonable given the facts before the military judge. The fairness of appellant’s trial is demonstrated in part by the fact that he was indeed able to present evidence during presentencing about his “upbringing and other factual circumstances” through the testimony of his family members. (App. Ex. III, p. 4; *e.g.*, R. at 1244–45 (testifying that appellant was bullied in public school but after moving him to private school, “everything changed.”)). Even assuming that appointing Dr. ■■■

would have resulted in appellant discovering or presenting additional evidence during presentencing—something appellant has not proved—it cannot be said that a fundamentally unfair trial resulted from her absence on the defense team. *See United States v. Gray*, 51 M.J. 1, 31 (C.A.A.F. 1999) (“[A]ppellant has confused his right to necessary investigative assistance with an unrestricted right to search for any evidence which might be relevant in his case.”).

The military judge’s finding that it was not reasonably likely that denial of Dr. ■ would result in a fundamentally unfair trial, alone, was sufficient to deny appellant’s motion to compel. *Robinson*, 39 M.J. at 89. Because the military judge applied the correct law and her conclusions were reasonable, she did not abuse her discretion, and appellant’s argument fails. *Miller*, 66 M.J. at 307.

C. Any error was harmless beyond a reasonable doubt.

Even if this court finds that the military judge erred in denying Dr. ■ as an expert consultant and the error implicates appellant’s due process rights, the error was harmless beyond a reasonable doubt. For the same reasons discussed *supra* pp. 5–9, appellant suffered no prejudice from her absence. The facts on the record prove beyond a reasonable doubt that, even with Dr. ■ assistance, appellant would have been convicted and would have received a sentence to confinement for life with eligibility for parole. Accordingly, he is not entitled to relief. *See United States v. Kreutzer*, 61 M.J. 293, 298 (“The inquiry for determining whether

constitutional error is harmless beyond a reasonable doubt is ‘whether, beyond a reasonable doubt, the error did not contribute to the defendant’s conviction or sentence.’” (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003))).

Assignment of Error III

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBIT 32 OVER DEFENSE OBJECTION[.]

Additional Facts

Over defense objection, the military judge pre-admitted Pros. Ex. 32, a series of “evidence/property custody documents” (EPCDs) documenting various pieces of evidence that were collected during the investigation and ultimately sent to the U.S. Army Criminal Investigation Lab (USACIL) for analysis. (R. at 261). The military judge later *sua sponte* reconsidered her ruling admitting the evidence and excluded certain pages of the exhibit on the basis of hearsay. (R. at 449). The exhibit was referenced multiple times during various witnesses’ testimony. For example, Special Agent (SA) ■■■ testified that he collected a “furniture fragment” from the car in the garage, and he then identified it in a photograph. (R. at 609–10; Pros. Ex. 9, p. 8). He testified that he memorialized that on an EPCD and used the EPCD number to label a map, showing where he collected the evidence. (R. at 611). Other witnesses used the exhibit in a similar manner when they testified. (E.g. R. at 707–11).

Standard of Review

A CCA reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011). It reviews "the prejudicial effect of an erroneous evidentiary ruling de novo." *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011) (internal quotations omitted).

Law

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. "For nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Kohlbeek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotations omitted). In conducting its prejudice analysis, a CCA considers the four *Kerr* factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (internal quotations omitted); *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). "[T]he Government . . . bears the burden of demonstrating that the admission of erroneous evidence is harmless." *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014).

Argument

Even assuming the military judge abused her discretion by admitting Pros. Ex. 32, appellant suffered no prejudice. Considering the *Kerr* factors in turn, it is clear that any error was harmless and appellant is entitled to no relief.

As appellant concedes, the strength of the government's case was overwhelming. (Appellant's Br. 19). Even if the government offered no DNA evidence whatsoever,¹² there was still ample evidence to prove appellant's guilt beyond a reasonable doubt. ■■■ testified that he saw appellant fighting with his mom in the same room where she was found dead shortly thereafter. (R. at 322). After attempting to flee the murder scene, appellant covered in blood and was arrested with a bloody chair leg next to him in the car. (R. at 516, 609; Pros. Ex. 18, p. 1). The medical examiner's findings and the blood spatter analyst's conclusions were consistent with a theory that appellant beat his wife to death with the chair leg. (R. at 874, 977–78). None of this evidence relied on the admission of Pros. Ex. 32.

The strength of the defense case, on the other hand, was weak. Defense counsel argued three different theories why he was not guilty of murder, but two of those theories conceded that appellant caused the victim's death. (R. at 1174).

¹² The majority of the evidence described in the EPCDs went to USACIL for DNA testing. (Pros. Ex. 32). The other items were cell phones that had no bearing on the result of the trial. (R. at 974).

The only theory that would presumably exclude appellant as the killer amounted to an argument that nobody saw appellant kill the victim, the law enforcement officers that investigated were inexperienced, and blood splatter analysis is faux science. (R. at 1174–91). Of note, defense counsel did not argue—nor was there any evidence to suggest—that there were actual errors in the collection of evidence or that the evidence tested at USACIL was not the same evidence that was collected at the crime scene. Nor did they suggest that the DNA testing results were unreliable. Likewise, there was no logical explanation for why appellant might be covered in blood and in possession of a bloody chair leg immediately after his wife was found dead in their kitchen other than that of his guilt.

Pros. Ex. 32 was not material to the case. As a preliminary matter, Pros. Ex. 32 was not necessary to establish a sufficient chain of custody to admit some, if not all, of the DNA evidence. *See United States v. Maxwell*, 38 M.J. 148, 150 (C.A.A.F. 1993) (discussing the government’s burden in establishing an adequate foundation for admission of both readily identifiable and fungible evidence). More importantly, though, there was sufficient evidence to convict appellant without the DNA evidence at all. This was not a case where identity was at issue. There was no question about who appellant was or who the victim was. Appellant was seen fighting with the victim shortly before her death. (R. at 322). When appellant was arrested, he was covered in blood and had a bloody chair leg in his possession. (R.

at 516, 609; Pros. Ex. 18, p. 1). No DNA evidence was required to readily infer that that blood came from the victim, who lay dead in the same house. Pros. Ex. 32 simply was not necessary to prove appellant's guilt.

Finally, the quality of the exhibit was relatively low. It was duplicative of much of the live testimony and photographic evidence. (*E.g.*, R. at 605–09). While appellant takes issue with the use of the exhibit to label where pieces of evidence were found or collected, (Appellant's Br. 50–52), the fact that the maps were labeled with an EPCD number added little, if any, additional value beyond if the maps had been labeled "Swab 1" or "chair leg."

In sum, to the extent admitting Pros. Ex. 32 was error at all, the error was harmless.

ASSIGNMENT OF ERROR V

WHETHER THE MILITARY JUDGE PROPERLY ADVISED APPELLANT OF HIS FORUM RIGHTS[.]

Additional Facts

Appellant committed his offense on 17 December 2018. (Charge Sheet). The charge was preferred on 11 January 2019 and referred on 18 April 2019. (Charge Sheet).

At arraignment, the military judge advised appellant of the following with respect to his forum rights:

If you are tried by court members, the members will vote by secret, written ballot, and three-fourths of the members must agree before you could be found guilty of any offense. If you were found guilty in a trial with members, you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence.

Alternatively, you may request to be tried by military judge alone. If your request is approved, there will be no court members. The military judge will decide whether or not you are guilty, and if found guilty, the military judge will determine your sentence.

(R. at 12–13). Appellant deferred forum selection. (R. at 13).

On 7 December 2020, the military judge provided appellant an opportunity to be reminded of his forum rights, which appellant declined. (R. at 243).

Appellant elected to be tried by military judge alone and submitted a written request for trial by military judge alone that the military judge approved. (R. at 243–44; App. Ex. XLIII).

Standard of Review

“The interpretation of UCMJ and R.C.M. provisions and the military judge’s compliance with them are questions of law, which we review de novo.” *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).

Law

As part of the Fiscal Year 2017 National Defense Authorization Act (NDAA), Congress enacted the Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016) [MJA 16]. In the MJA 16, Congress made various

changes to sentencing procedures, including an amendment to Article 25(d)(1), UCMJ, which now reads as follows:

Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members.

The MJA 16 also amended Article 53, UCMJ, which now states, in relevant part, the following concerning non-capital cases:

[I]f the accused is convicted of an offense in a trial the military judge shall sentence the accused. . . . If the accused is convicted of an offense by general or special court-martial consisting of a military judge and members and the accused elects sentencing by members under section 825 of this title (article 25), the members shall sentence the accused.

Article 53(b)(1)–(2), UCMJ. In other words, Article 25(d)(1), UCMJ gives an accused the right to request sentencing by the members, and Article 53(b)(2) gives the military judge authority to grant the request. *United States v. Hatfield*, ARMY 20200410, 2022 CCA LEXIS 62, at *7 (Army Ct. Crim. App. 26 Jan. 2022) (summ. disp.).

Not all provisions of the MJA 16 went into effect immediately. Section 5542 of the MJA 16, as amended by the Fiscal Year 2018 NDAA,¹³ granted the President the authority to designate the effective date of the MJA 16 changes—except those otherwise provided for in the act itself—and directed the President to

¹³ NDAA 2018, § 531(n)(1), 131 Stat. at 1387.

“prescribe in regulations whether, and to what extent, the amendments . . . shall apply to a case in which a specification alleges the commission, before the effective date of such amendments, of one or more offenses”

In Section 10 of Executive Order (EO) 13,825, 83 Fed. Reg. 9889, the President designated 1 January 2019 as the default effective date for MJA 16 provisions whose effective date was not otherwise provided in the MJA 16 or elsewhere in the EO. With respect to the new sentencing provisions, the President ordered “any change to sentencing procedures . . . made by Articles 16(c)(2), 19(b), 25(d)(2) and (3), 39(a)(4), 53, 53a, or 56(c) of the UCMJ, as enacted by . . . the MJA . . . applies only to cases in which all specifications allege offenses committed on or after January 1, 2019.” *Id.* The Court of Appeals of the Armed Forces has held that EO 13,825 “was a valid exercise of the President’s rulemaking authority.” *United States v. Brubaker-Escobar*, 81 M.J. 471, 473 (C.A.A.F. 2021).

Argument

Because appellant committed his offense prior to 1 January 2019, the new MJA 16 sentencing procedures that allow for a trial in front of members and sentencing by military judge alone do not apply. Accordingly, the military judge correctly advised appellant of his forum selection rights.

Appellant rightly points out that EO 13,825 does not explicitly designate an effective date for Article 25(d)(1), UCMJ. (Appellant’s Br. 58). Regardless, his

claim of error still fails. Even if Article 25(d)(1), UCMJ, was in effect for appellant's court-martial, that provision provided appellant—at most—the authority to *request* sentencing by military judge alone after being convicted by a panel.¹⁴ Controlling in this case, however, is the fact that the military judge had no authority to sentence appellant after conviction by a panel. *Hatfield*, 2022 CCA LEXIS 62, at *6.

The only authority for a military judge to sentence an accused after conviction by a panel derives from Article 53, UCMJ, which—under the plain language of EO 13,825—does not apply in appellant's case. Without Article 53, UCMJ, the authority for a military judge to sentence an accused comes from Article 51(d), UCMJ, which states that *in a court-martial composed of a military judge alone*, the military judge “shall . . . if the accused is convicted, adjudge an appropriate sentence.” As a result, there are only two forum options for courts-martial involving offenses alleged to have occurred prior to 1 January 2019: (1) trial before members and sentencing by the members if the accused is convicted; or (2) trial by military judge alone and sentencing by the military judge if the accused is convicted. These are precisely the options the military judge described to

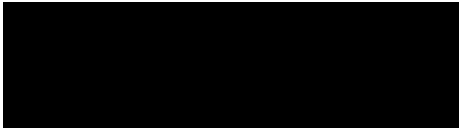
¹⁴ By its plain language, Article 25(d)(1), UCMJ, grants an accused the authority to request sentencing by a *panel*. The article does not grant the authority to request sentencing by a military judge.

appellant. (R. at 12–13). Because it cannot be error to fail to advise an accused of rights he does not have, the military judge did not err.¹⁵

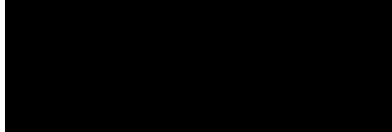
¹⁵ Even if there was error, appellant waived the issue by not raising it at the trial court level. *Hatfield*, 2022 CCA LEXIS 62 at *10. If not waived, the error should be tested for prejudice as a procedural error. *Hatfield*, 2022 CCA LEXIS 62 at *8; *See United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005). Appellant suffered no prejudice because he elected trial by military judge alone, where—even under the new rules—his only option was to be sentenced by the military judge. *See Alexander*, 61 M.J. at 270.

Conclusion

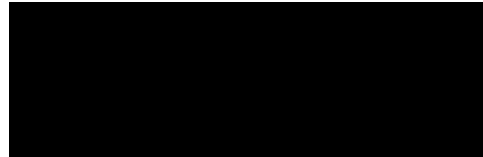
WHEREFORE, the government respectfully requests this honorable court affirm the adjudged findings and sentence.



FOR TIMOTHY R. EMMONS
CPT, JA
Appellate Attorney, Government
Appellate Division



CRAIG J. SCHAPIRA
LTC, JA
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Division

CERTIFICATE OF SERVICE U.S. v. FORREST (20200715)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on this 16th day of May, 2022.

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APPENDIX

United States v. Hatfield

United States Army Court of Criminal Appeals

January 26, 2022, Decided

ARMY 20200410

Reporter

2022 CCA LEXIS 62 *; 2022 WL 252644

UNITED STATES, Appellee v. Sergeant First Class
PATRICK H. HATFIELD, JR., United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Later proceeding at United States
v. Hatfield, 2022 CAAF LEXIS 238 (C.A.A.F., Mar. 28,
2022)

Prior History: [*1] Headquarters, Fort Bliss. Michael S.
Devine, Military Judge (arraignment), Steven C.
Henricks, Military Judge (motions and trial), Colonel
Andrew M. McKee, Staff Judge Advocate.

Counsel: For Appellant: Colonel Michael C. Friess, JA;
Lieutenant Colonel Angela D. Swilley, JA; Captain
Thomas J. Travers, JA; Captain Lauren M. Teel, JA (on
brief); Colonel Michael C. Friess, JA; Lieutenant Colonel
Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA;
Captain Lauren M. Teel, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA;
Lieutenant Colonel Craig J. Schapira, JA; Major Brett A.
Cramer, JA; Captain R. Tristan C. de Vega, JA (on
brief).

Judges: Before BURTON, DENNEY,¹ and PARKER,
Appellate Military Judges. Senior Judge BURTON and
Judge PARKER concur.

Opinion by: DENNEY

Opinion

DENNEY, Judge:

MEMORANDUM OPINION

An enlisted panel sitting as a general court-martial
convicted appellant, contrary to his pleas, of three

¹ Judge Denney decided this case while on active duty.

specifications of child sexual abuse in violation of Article
120b, Uniform Code of Military Justice, 10 U.S.C. §
920b (2012) [UCMJ]. The panel sentenced appellant to
a dishonorable discharge, confinement for eighteen
months, forfeiture of all pay and allowances, and
reduction to the grade of E-1.

On appeal, appellant raised three [*2] assignments of
error, one of which merits discussion but no relief. The
defense alleges the military judge gave an erroneous
instruction to appellant on his forum rights (by not
advising him that he could be sentenced by military
judge alone instead of the panel members after he was
found guilty by the panel at his court-martial). Appellant
alleges this was jurisdictional error.²

BACKGROUND

Appellant was convicted of three specifications of child
sexual abuse (Art. 120b, UCMJ) which occurred no later
than 1 December 2013. The charges and specifications
were preferred on 3 September 2019 and referred on 18
October 2019.

At the arraignment, the military judge advised the
accused of his right to be tried by panel members and
that the panel would sentence him. The accused
acknowledged that he understood the difference
between trial by members and military judge alone. On
13 November 2019, the accused submitted written
notice of forum and pleas to the court. The accused
elected to be tried by an enlisted panel. On 17 July
2020, the military judge reminded the accused of his
right to elect trial by members or military judge alone.
The accused confirmed that he understood his choices
and elected [*3] to be tried by an enlisted panel.

Defense counsel confirmed that since all of the

² We have given full and fair consideration to appellant's other
assignments of error, as well as the matters personally raised
by appellant pursuant to *United States v. Grostefon*, 12 M.J.
431 (C.M.A. 1982), and find them to be without merit.

specifications of the alleged offenses were committed prior to 1 January 2019, the sentencing proceedings were to be governed by "option 1" in the electronic benchbook.³ The military judge informed appellant that "if you are found guilty in a trial by members, you will also be sentenced by the members." Appellant never objected to the forum for sentencing before trial. After the panel returned findings of guilt for three specifications of child sexual abuse, appellant did not object to members sentencing. Nor did appellant object after the panel issued a sentence.

Now for the first time on appeal, the defense alleges the military judge should have advised appellant after he was convicted by the members that appellant could make an election to be sentenced by military judge alone.

LAW AND DISCUSSION

Standard of Review

We review jurisdictional questions de novo. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). "Jurisdiction over the person, as well as jurisdiction over the subject matter, may not be the subject of waiver." *United States v. Garcia*, 5 C.M.A. 88, 94, 17 C.M.R. 88, 94 (1954). A jurisdictional defect goes to the underlying authority of a court to hear a case. Thus, a jurisdictional error impacts the validity [*4] of the entire trial and mandates reversal. *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983). However, where an error is procedural rather than jurisdictional in nature we test for material prejudice to a substantial right to determine whether relief is warranted. Article 59(a), UCMJ; *United States v. Morgan*, 57 M.J. 119, 122 (C.A.A.F. 2002) (citing *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)).

Law and Analysis

Section 10 of Executive Order (EO) 13,825 provides the Military Justice Act of 2016 (MJA)⁴ amendments to

sentencing procedures in Articles 25 and 53 of the UCMJ, apply "only to cases in which all specifications allege offenses committed on or after January 1, 2019."

Article 25(d)(1), UCMJ, states: "Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members."

Article 53(b)(1), UCMJ, states for sentencing:

(A) SENTENCING BY MILITARY JUDGE. --- Except as provided in subparagraph (B), and in subsection (c) for capital offenses, if the accused is convicted of an offense in a trial the military judge shall sentence the accused. (B) SENTENCING BY MEMBERS. --- If the accused is convicted of an offense by general or special court-martial consisting of a military judge and members and the accused elects sentencing by members under section 825 [*5] of this title (article 25), the members shall sentence the accused.

However, Section 10 of the EO was silent on when Article 25(d)(1), UCMJ, would go into effect.

The Court of Appeals for the Armed Forces (CAAF) recently held that "Exec. Order No. 13,825 was a valid exercise of the President's rulemaking authority." *United States v. Brubaker-Escobar*, __ M.J. __, 2021 CAAF LEXIS 818, at *4 (C.A.A.F. 7 Sept 2021). The CAAF also confirmed:

In the [MJA 16], Congress gave the President the authority to designate the effective date of its provisions, as well as the duty to 'prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in which a *specification alleges the commission, before the effective date of such amendments, of one or more offenses* or to a case in which one or more actions under [the UCMJ] have been taken before the effective date of such amendments.

Id. (quoting MJA § 5542(c)(1), 130 Stat. at 2967, as amended by NDAA 2018, § 531(n)(1), 131 Stat. at 1387) (emphasis in original).

³Dep't. of the Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-1-3 (22 Feb 2020), states "Option 1" is "[t]o be used if all specifications allege offenses committed prior to 1 January 2019."

⁴National Defense Authorization Act for Fiscal Year 2017

(NDAA 2017), Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2968 (2016).

Section 5542(a) of the 2017 NDAA states that unless otherwise noted, all of the MJA 2016 amendments go into effect on the date designated by the President, which was 1 January 2019.

Section 5532(c) (as amended by the 2018 NDAA) states that the President shall prescribe regulations to address cases in which the offense was committed, or actions were taken, before 1 January 2019.

The President did in fact [*6] prescribe such regulations, which are contained in EO 13,825.

Section 10 of the EO specifically says that Article 25(d)(2) and (3) and Article 53 apply only to cases in which all offenses were committed after 1 January 2019. Appellant focuses only on the omission of Article 25(d)(1) but ignores that fact that Article 53 (in its entirety) is expressly listed in Section 10 and that Article 53 only applies to cases in which all offenses were committed after 1 January 2019.

This is not a case in which Article 25(d)(1) should be considered in isolation to interpret its effective date. Section 10 of the EO discusses MJA 16 Amendments to sentencing procedures in both Articles 25 and 53. Therefore, Article 25(d)(1) needs to be read in conjunction with Article 53. Article 25 pertains to an accused's election after findings of sentencing by members, and Article 53 pertains to sentencing options by military judge alone or by members.

While Article 25(d)(1) refers to the accused's ability to request sentencing by members, there is nothing in that section that provides for the execution of that request. Rather, it is only in Article 53(b)(1) that allows such a request to be acted upon by providing that "the members shall sentence the accused." As a result, one cannot divorce the two articles with respect to sentencing procedures. [*7]

The present case does not conflict with *United States v. McPherson*, 81 M.J. 372 (C.A.A.F. 2021) in which the CAAF found that the statute of limitations for indecent acts with a child had expired and time barred the offenses of conviction. In *McPherson*, the CAAF found the plain language of the statute to be applied retroactively was unambiguous. *Id.* at 377.

Reading the plain language of Articles 25(d)(1) and 53(b)(1) leads to the same unambiguous result. Simply put, there is nothing in Article 25(d)(1) that actually authorizes the members to sentence appellant, so even if that provision is in effect to the offenses in question in

this case, the most it can do is allow for appellant to make a request. The EO is clear, however, that Article 53(b)(1), which would allow the military judge to actually sentence the accused based on his Article 25(d)(1) request, does not apply to offenses committed before 1 January 2019.

To the extent the omission of Article 25(d)(1) from Section 10 of the EO creates any ambiguity, the ambiguity is resolved by the inclusion of the entire Article 53 in Section 10 of the EO, making it clear that the President did not wish to provide appellants who committed their offenses prior to 1 January 2019 with the right to request judge alone sentencing after a panel trial.

Jurisdictional vs. Procedural Error

Even assuming arguendo that the ambiguity should [*8] be resolved in favor of appellant, the CAAF decision *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005) indicates the error is procedural and not jurisdictional. In *Alexander*, the military judge advised the accused of his forum options, and the accused deferred on forum selection. At a subsequent Art. 39(a), UCMJ, hearing, the military judge informed the accused that he was scheduling the case for an enlisted panel ("On Monday, I intend to impanel -- I believe I was told -- an enlisted panel in this case, and we're going to go forward with trial."). *Id.* at 268. At a subsequent Art. 39(a) hearing, the court discussed the charges and specifications and instructions for the panel members. *Id.* The accused never objected to the members until raising the issue for the first time on appeal. *Id.*

In ruling that the failure of making an election of forum was procedural, not jurisdictional, error, the CAAF stated in *Alexander*:

The right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum by which he or she will be tried. The underlying right is one of forum selection, not the ministerial nature of its recording. Of course, there is no better way to protect the right of selection than through compliance with the specific and straightforward recording [*9] requirements of Article 25. Nonetheless, *where the record reflects that the servicemember, in fact, elected the forum by which he was tried, the error in recording that selection is procedural and not jurisdictional.* Thus, we will not order relief absent a showing of

prejudice.

Alexander, 61 M.J. at 270 (citing *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)) (emphasis added)

Our superior court also rejected the defense claim of prejudice on lack of forum election.

[The appellant] asserts prejudice on the ground that he was not given the opportunity to personally elect his forum, and therefore choose among trial by military judge alone, a panel of officer members, and a panel composed of one-third enlisted members. For the reasons stated above, the record reflects otherwise. The military judge presented Appellant with his options. Appellant acknowledged his options and deferred election. The military judge subsequently stated on the record that an election had been made for a panel including enlisted members, without comment or correction by counsel or Appellant. Appellant proceeded through voir dire and trial with a panel of one-third enlisted members, without objection. Indeed, Appellant did not raise the question of selection and prejudice either in his submissions [*10] under R.C.M. 1105 or before the court below. As a result, for the same reasons that *we find the error in this case procedural and not jurisdictional*, we conclude that he did not suffer material prejudice to a substantial right.

Alexander, 61 M.J. 270 (emphasis added).

In the present case, appellant alleges for the first time on appeal (similar to the accused in *Alexander* that his substantial rights were materially prejudiced because he was deprived his right to select a different forum at sentencing. Appellant alleges he would have elected sentencing by the military judge, if he had been informed of the forum option after being convicted by the panel members, in hopes of obtaining a more lenient sentence. This is entirely speculative and does not establish prejudice.

Waiver

Consequently, the issue was waived by appellant because it was not raised below at the trial level. Even under Article 66, UCMJ, this is not a case in which we would exercise our Article 66 "should be approved" discretion. *United States v. Tinsley*, 2021 CCA LEXIS 679, *45 n. 3 (Army Ct. Crim. App. 15 Dec. 2021);

United States v. Conley, 78 M.J. 747, 750 (Army Ct. Crim. App. 2017).

Because appellant did not raise this issue below, we decline to consider this argument on appeal. See *United States v. Lloyd*, 69 M.J. 95, 100-01 ("We find that the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level."); *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) ("[O]ur [*11] review for error is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that appellate defense counsel now wishes trial defense counsel had submitted.") (emphasis in original). We further recognize that under Article 66, UCMJ, this court retains discretion to "treat a waived or forfeited claim as if it had been preserved at trial" in order to determine if the findings "should be approved." *Conley*, 78 M.J. at 750 (citing *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988)); Article 66(d), UCMJ. For the reasons set forth above, we decline to exercise our discretion to grant relief under Article 66's "should be approved" test.

CONCLUSION

On consideration of the entire record the findings of guilty and sentence are AFFIRMED.

Senior Judge BURTON and Judge PARKER concur.

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United States v. Myer

United States Army Court of Criminal Appeals

January 10, 2019, Decided

ARMY 20160490

Reporter

2019 CCA LEXIS 13 *; 2019 WL 194633

UNITED STATES, Appellee v. Captain ADAM J. MYER,
United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States
v. Myer, 2019 CAAF LEXIS 210 (C.A.A.F., Apr. 3, 2019)

Review denied by United States v. Myer, 2019 CAAF
LEXIS 382 (C.A.A.F., May 29, 2019)

Prior History: [*1] Headquarters, Fort Campbell.
Matthew A. Calarco, Military Judge. Lieutenant Colonel
Robert C. Insani, Staff Judge Advocate.

Counsel: For Appellant: Captain Augustus Turner, JA
(argued); Lieutenant Colonel Tiffany Chapman, JA;
Captain Joshua B. Fix, JA; Captain Augustus Turner, JA
(on brief); Lieutenant Colonel Tiffany D. Pond, JA; Major
Todd W. Simpson, JA; Captain Augustus Turner, JA (on
reply brief).

For Appellee: Captain Brian Jones, JA (argued);
Lieutenant Colonel Eric K. Stafford, JA; Major Pamela
Perillo, JA (on brief).

Judges: Before WOLFE, SALUSSOLIA, and
ALDYKIEWICZ, Appellate Military Judges. Judge
SALUSSOLIA concurs. WOLFE, Senior Judge,
concurring.

Opinion by: ALDYKIEWICZ

Opinion

MEMORANDUM OPINION

ALDYKIEWICZ, Judge:

Appellant, a married chaplain, alleges that his conviction for conduct unbecoming an officer and gentleman for engaging in incest with his legally adopted, eighteen-year-old daughter is "unconstitutionally vague" as applied to him. We disagree. Appellant further alleges

he was denied effective assistance of counsel "where defense counsel failed to reasonably investigate, present crucial evidence, and cross examine witnesses." We likewise find this allegation to be without merit. Both are addressed below. [*2] ¹

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, two specifications of assault consummated by a battery, two specifications of assault consummated by a battery on a child under the age of sixteen, and two specifications of conduct unbecoming an officer and gentleman in violation of Articles 120, 128, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 933 (2012) [UCMJ]. The convening authority approved the adjudged sentence of a dismissal and eight years confinement.

BACKGROUND

Appellant's assaults all involve family members as victims. He was convicted of multiple batteries against his adopted son, NM; multiple batteries against his wife, MM; and, sexual assault against his adopted daughter, EM. The non-assault convictions, that is, his conduct unbecoming an officer and gentleman, involves one specification of incest with EM, and one specification of wrongfully and dishonorably attempting to influence MM and EM from being cooperative and truthful during the law enforcement investigation into appellant's misconduct.

Appellant and MM, his wife of twenty-one years at the time of trial, legally adopted NM [*3] and EM when they were two and five respectively. From approximately age two-and-a-half until adopted, EM was in appellant's and

¹ After due consideration of appellant's third assignment of error, dilatory post-trial delay in violation of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), as well as those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we have determined they warrant neither discussion nor relief.

MM's care and custody as foster parents.

Assaults Against Son

Between on or about 6 December 2012 and on or about 1 March 2013, appellant assaulted NM twice in the family home in Clarksville, Tennessee.² On one occasion, appellant saw NM "upset," and told him to leave the room.³ As NM attempted to leave, he inadvertently bumped appellant's leg causing appellant to "[throw NM] across the room." Sometime thereafter, NM once again found himself "upset." As NM attempted to go upstairs to see his mother, something he often did when upset, appellant tackled him from behind on the stairs, pushed him into the staircase, and "sat" on his back.

Assaults Against Wife

The next victim of appellant's anger was his wife, MM, who refused appellant's demand on Mother's Day 2015 that she discipline NM for simply sitting in the kitchen and "doing nothing at the table." Her refusal to acquiesce to appellant's demand coupled with her apparent focus on her cell phone, rather than appellant, resulted in appellant grabbing her arm. Nearly four months later, appellant, again, assaulted [*4] MM, this time holding her down as he grabbed her arms. This second assault occurred as MM held their one-and-a-half year old son.

Sexual Assault of Daughter and Incestuous Unbecoming Conduct

The last of appellant's victims was his daughter, EM. In approximately the beginning of July 2015, appellant and EM travelled from their home in Clarksville, Tennessee to Fayetteville, North Carolina to work on appellant's rental property. During the trip, appellant and EM stayed in several hotels. One night, after falling asleep fully

clothed, EM awoke with her pants and underwear pulled down below her knees and appellant, her father, digitally penetrating her vagina. Crying, EM asked appellant to stop, which he did.

About one week later, after returning to Clarksville, Tennessee, appellant and EM, unbeknownst to appellant's wife, engaged in a sexual relationship.⁴ Appellant's sexual relationship with his daughter lasted approximately four weeks and included appellant, again, digitally penetrating EM, and each performing oral sex on the other. These sexual acts occurred either on the couch in the family home, as MM and the family slept upstairs, or in appellant's car.

Appellant's Admissions

On or about [*5] 2 August 2015, appellant entered the marital bedroom and told his wife, "I am taking my wife. I have chosen you. I am ready to be your husband again." He then proceeded to make varied admissions to MM about his relationship with EM. He admitted to kissing EM, touching her over her clothes, digitally penetrating her, and engaging in oral sex with her.

LAW AND DISCUSSION

A. Conduct Unbecoming an Officer and Gentleman

1. Notice of Criminality

Appellant challenges his conviction for conduct unbecoming an officer and gentleman by engaging in incest with EM as being "void for vagueness" as applied to him. In short, he argues that he lacked sufficient notice that his sexual activity with his adopted daughter, EM, was proscribed.⁵

² NM was thirteen years-old at the time of both assaults, and seventeen at the time of trial.

³ MM's undisputed testimony was that NM, at the times relevant to the charged offenses, "has a low [intelligence quotient] and emotional age of a six-year-old. So, he tends to have tantrums like a six-year-old would." When asked how he acted during the tantrums, MM responded, "[h]e yells or cries." Both MM and EM confirmed that NM was prone to anger and outbursts that included violence.

⁴ EM testified that she thought the sexual activity with appellant after Fayetteville was "consensual" because she did not tell appellant to stop. She explained she did not tell appellant to stop because she was scared and did not know what he would do.

⁵ Appellant does not challenge the sufficiency of the pleadings specifically. At trial, defense counsel acknowledged he understood which elements appellant had to defend against. See, e.g., *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003) (military judge did not err in denying motion to dismiss Article 134 offense alleging stalking in Germany that was

In support of his argument, appellant notes: incest "is exclusively a state crime [with] fifty unique legal definitions, defenses, and penalties across the country," and "engaging in consensual sexual activity with an adult, adopted child [] is not illegal in all states." In his "supplemental citation of authority," appellant points this court to seventeen states and the District of Columbia where appellant's sexual activity would not violate the relevant statute [*6] criminalizing incest.⁶

Appellant's "supplemental citation of authority" is noticeably silent with respect to the fourteen states and one territory where appellant's actions would, in fact, be criminal and would have been so in July of 2015. Of note, Tennessee, appellant's domicile, place of physical residence, and situs of the incest at issue, is among the states criminalizing digital penetration with an adopted child. See Tenn. Code. Ann. § 39-15-302.

"Void for vagueness' [] 'means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.'" *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (quoting *Parker v. Levy*, 417 U.S. 733, 757, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)). "Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction. *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998). It also requires fair notice as to the standard applicable to the forbidden conduct. See *Parker*, 417 U.S. at 755 (1974); *Vaughan*, 58 M.J. at 31. Sources of notice include: "the [*Manual for Courts-Martial, United States*], federal law, state law, military case law, military custom and usage, and military regulations." *Vaughan*, 58 M.J. at 31 (addressing notice in the Article 134, UCMJ context). The aforementioned list is not exhaustive. As Judge Sullivan noted in his *Boyett* concurrence, notice is also by "any other circumstance which would establish that a servicemember [*7] would have no reasonable doubt that his conduct was unbecoming an officer." *United*

modeled after the Georgia stalking statute because it provided "fair notice" to the accused that his actions were criminal and was sufficiently specific to state an offense).

⁶ See, e.g., Ala. Code § 13A-13-3 (vaginal intercourse required); Alaska Stat. § 11.41.450 (blood relationship required); N.C. Gen. Stat. § 14-178 (carnal intercourse required); N.Y. Penal Law § 255.25 (blood relationship required). Additionally, appellant points to the government's dismissal of Specification 1 of Charge II, which alleged a violation of North Carolina's incest statute, a statute requiring "carnal intercourse," as further proof that appellant lacked the requisite notice that his actions with EM were criminal.

States v. Boyett, 42 M.J. 150, 161 (C.A.A.F. 1995).

2. What constitutes conduct unbecoming an officer and gentleman?

Appellant argues there must be a custom of the service prohibiting incest in order for him to have been on notice that his conduct was criminal under the UCMJ. We disagree.

Conduct unbecoming an officer and gentleman has two elements: (1) that the accused did or omitted to do certain acts; and (2) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. *Manual for Courts-Martial, United States* (2012 ed.) [MCM], pt. IV, ¶ 59.b(1) - (2). "The focus of Article 133, UCMJ, is the effect of the accused's conduct on his status as an officer." *United States v. Diaz*, 69 M.J. 127, 135 (C.A.A.F. 2010) (citing *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009)). "The test for a violation of Article 133, UCMJ, is "whether the conduct has fallen below the standards established for officers." *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009) (quoting *United States v. Taylor*, 23 M.J. 314, 318 (C.M.A. 1987)).⁷

⁷ In describing the nature of the offense and examples thereof, the MCM states, in part:

(2) *Nature of offense.* Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or [*8] disgracing the officer personally, seriously compromises the person's standing as an officer. . . . This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

(3) *Examples of offenses.* Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

When an appellant argues that a statute is "unconstitutional as applied," we conduct a "fact specific inquiry." *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012); see also, *United States v. Amazaki*, 67 M.J. 666, 671 (Army Ct. Crim. App. 2010) ("Each case must necessarily be decided on its own merit." (citations omitted)).

The military, unlike civilian society, is a unique society. "In military life there is a higher code termed honor, which holds its society to stricter[*9] accountability." *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (U.S. Ct. Claims 1891). That officers play a unique and vital role in that specialized society is without question. See, e.g., *United States v. Pitasi*, 20 C.M.A. 601, 44 C.M.R. 31, 37-38 (C.M.A. 1971) (affirming officer's conviction for fraternization under Article 134, UCMJ). Only three years later, in affirming the constitutionality of both Article 133 and 134, UCMJ, the Supreme Court noted:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." . . . "[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty" We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces.

Parker, 417 U.S. at 743-44 (citations omitted).

"[O]ne critically[*10] important responsibility of a military officer is to inspire the trust and respect of the enlisted soldiers who must obey his orders and follow his leadership." *United States v. Frazier*, 34 M.J. 194, 198 (C.M.A. 1992) (officer who resides with an enlisted Soldier's wife is guilty of conduct unbecoming an officer and gentleman notwithstanding the absence of any custom, regulation, UCMJ provision, or express statute prohibiting the relationship or activity).

Contrary to appellant's assertion before this court, the

absence of a "custom of the service" or promulgated prohibition, such as a UCMJ provision, regulation, or express statute, prohibiting incest is not dispositive of whether appellant was on sufficient notice that sexual activity with his eighteen-year-old daughter was unbecoming conduct. As our Superior Court noted in *United States v. Rogers*, "proof of a service custom or regulation [] 'has not commanded a majority of this Court' with the possible exception of officer-enlisted 'fraternization' cases charged under Article 133, instead of Article 134." 54 M.J. 244, 256 (C.A.A.F. 2000) (citation omitted); see also *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994) (purely private letter containing sexual overtures from Army Captain to fourteen-year-old girl constitutes conduct unbecoming an officer and gentleman[*11] notwithstanding absence of any "custom," regulation, or express prohibition prohibiting conduct); *Boyett*, 42 M.J. at 160-61 (custom or regulation not constitutionally required for a valid prosecution under Article 133, UCMJ).⁸

Unfortunately, appellant is not the first officer to be convicted at a general court-martial for incest. In 1994, the Air Force Court of Criminal Appeals affirmed an officer's incest conviction for engaging in consensual sexual intercourse with his natural daughter, a decision reviewed and affirmed by our superior court. See *United States v. Hutchens*, 1994 CMR LEXIS 30 (A.F. Ct. Crim. App. 1994), aff'd, 43 M.J. 177 (C.A.A.F. 1995) (consensual sexual intercourse between forty-six-year-old officer and natural born twenty-four-year-old daughter constitutes conduct unbecoming an officer and gentleman).⁹

⁸ See generally *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994) (publicly associating with known drug smuggler was conduct unbecoming an officer); *United States v. Frazier*, 34 M.J. 194 (C.M.A. 1992) (living with enlisted subordinate's spouse under circumstances falling short of adultery or wrongful cohabitation substantially denigrates marital relationship to constitute conduct unbecoming); *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989) (officer convicted of charging fellow officer \$2,000 for tutoring him in leadership skills constitutes unbecoming conduct, characterized by the court as "corrupt and demoralizing"); *United States v. Giordano*, 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964) (charging enlisted service members exorbitant interest rates on loan unbecoming conduct).

⁹ That *Hutchens* involved intercourse with the officer's natural daughter instead of sodomy and digital penetration with the officer's adopted daughter are distinctions noted by this Court, but insignificant when considering whether appellant was on

For over twenty years, our superior court and sister courts have held incest to be unbecoming conduct. No military decision has held otherwise. While distinguishable from non-intercourse cases, we read *Hutchens* broadly as a commentary on the inappropriateness of sexual activity between father and daughter, activity that is without question unbecoming an officer and gentleman.

3. Appellant's Conduct

On the facts before us, we have no reasonable doubt that a forty-year-old [*12] Army officer, chaplain, husband of twenty years, and father of eleven children, who engages in sexual activity with his eighteen-year-old daughter, has engaged in conduct unbecoming an officer and gentleman. That the daughter is adopted is a distinction without a difference. That appellant's incestuous acts stopped short of "carnal intercourse," making it non-criminal in some states, is unpersuasive.

Equally unpersuasive is that appellant's actions would not be criminal in seventeen states and the District of Columbia. To be criminal under Article 133, UCMJ, the conduct at issue need not be criminal in all fifty states and five U.S. territories. That state laws vary in scope and applicability is no surprise. Appellant cites no authority requiring applicability or uniformity of state laws in order to punish conduct under Article 133, UCMJ.

Finally, appellant was not charged with or convicted of violating a "custom of the military service."¹⁰ Appellant was convicted of conduct unbecoming an officer and gentleman by engaging in incest with his eighteen-year-old daughter, a person who has called him father since the age of approximately two-and-a-half, a legal obligation appellant assumed [*13] when his daughter was five. Any reasonable officer would recognize that engaging in sexual activity with his adopted daughter, under the circumstances of this case, would risk bringing disrepute upon himself and his profession, seriously compromising his standing as an officer. See, e.g., *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A.

notice that his actions were proscribed.

¹⁰ Put differently, having sexual intercourse with one's daughter is so grossly and obviously wrong that there has never been the need to declare it prohibited by Army custom. But if such a declaration is required, we would easily make it.

1994).¹¹

B. Ineffective Assistance of Counsel

Appellant's allegation of ineffective assistance of counsel is an attempt to re-litigate his court-martial with a shotgun blast of alleged errors referencing affidavits which provide information that is largely irrelevant, inadmissible, or both. Our review of the record, appellate pleadings, and all accompanying post-trial affidavits and their enclosures¹² reveal that appellant was neither deprived of a fair trial nor was the trial outcome unreliable. See *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, appellant fails to establish that he was prejudiced by his counsels' performance. Considering everything before us, appellant's trial defense counsel were not ordered to provide responsive affidavits nor was a *DuBay* hearing deemed necessary. See *United States v. Melson*, 66 M.J. 346, 350-51 (C.A.A.F. 2008) (requiring affidavit from defense counsel before finding IAC); *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) (fact-finding hearing necessary if appellate court is unable to resolve conflicting affidavits). [*14]

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015); *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland*, 466 U.S. at 698 (1984)).

To meet his burden regarding deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466

¹¹ While we need not give it any weight, appellant's marital status at the time and military occupational specialty of chaplain would appear to further undermine his argument.

¹² Appellant's written pleadings before this court refer to "[Defense] Appellate Exhibit A [AE A aka DAE A]" with varied page citations. A review of the Record of Trial, to include all appellate filings, reveals the absence of any Defense Appellate Exhibit [DAE] A. Defense appellate counsel confirmed that this was a scrivener's error and that [DAE] A should be [DAE] B.

U.S. at 687. In other words, does counsel's performance meet an objective standard of reasonableness or was it beyond the "wide range of professionally competent assistance" counsel are presumed and expected to provide. *Id.* at 690. In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "'a reasonable probability that, but for counsel's [*15] [deficient performance] the result of the proceedings would have been different.'" *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 694). "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 695). "It is not enough to show that the errors had some conceivable effect on the outcome" *Captain*, 75 M.J. at 103 (citations omitted).

"An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002)); *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000); *United States v. Gray*, 51 M.J. 1, 19 (C.A.A.F. 1999). In assessing an appellant's IAC claim, the performance and prejudice prongs of *Strickland* can be analyzed independently and if appellant fails either prong, his IAC claim fails. *Strickland*, 466 U.S. at 697.

Appellant's IAC blast covers the traditional court-martial processing continuum: pretrial, trial, and post-trial, culminating with an alleged self-assessment by civilian counsel who, when asked by appellant why he did not present certain evidence, allegedly responded by stating that he "just spaced it."

1. Pretrial Effectiveness of Counsel

Appellant alleges that his defense counsel were ineffective because they failed to contact three potential

witnesses: CR, BEM, [*16] and Dr. KC. In addition to appellant's affidavit, appellant submitted affidavits from CR, BEM, and CPT MB.¹³

a. Failure to Contact CR

A review of CR's affidavit reveals this witness lacked any first-hand knowledge of appellant's crimes. His affidavit focuses on his personal and sexual relationship with EM, his "suspicions" and speculation regarding EM's relationship with appellant, and his belief regarding EM's sexual maturity, noting "she is far too sexually advanced to be taken advantage of by [appellant]." Application of Military Rule of Evidence [Mil. R. Evid.] 401, 402, and 403, defining relevant evidence, its admissibility, and the exclusion of otherwise relevant evidence for "prejudice, confusion, waste of time, or other reasons," respectively, Mil. R. Evid. 412, prohibiting evidence of "other sexual behavior" and a "victim's sexual predisposition," and Mil. R. Evid. 802, "[t]he rule against hearsay" result in an affidavit of marginal value at best.

It is appellant's burden to establish prejudice. When appellant pursues a claim of IAC under a theory that certain other evidence should have been admitted, then appellant must at least demonstrate the evidence was admissible. At no point in the pleadings before this court does appellant provide [*17] his theory of admissibility for the information contained in CR's affidavit. For example, CR discusses, in rather graphic detail, his sexual encounters with EM. Appellant fails to articulate how this evidence is logically relevant to any of the charged offenses under Mil. R. Evid. 401 or admissible when considering Mil. R. Evid. 412.

Appellant has failed to meet his burden to establish prejudice by defense counsel's alleged failure to contact CR.¹⁴

¹³ Captain MB wrote an affidavit stating he witnessed a phone conversation between appellate defense counsel and Dr. KC. Captain MB relates in the affidavit a summary of the conversation.

¹⁴ We also conclude that the failure to call CR would have been objectively reasonable. Government appellate counsel makes an excellent point in their brief before this court, one that would, in fact, support a trial defense counsel's tactical decision not to call CR as a witness. "[C]ross-examination of Mr. [R] could have been harmful to appellant's case because [CR] stated the victim had confided in him that appellant raped her, was stalking her, and tried to run her off the road." In

b. Failure to Contact BEM

A review of BEM's affidavit reveals, with the exception of character evidence regarding appellant's character for peacefulness, evidence that is largely inadmissible after application of Mil. R. Evid. 401, 402, 403, 412, and 802. With regard to the potentially admissible character evidence, appellant fails to establish any prejudice by its absence.

The first two paragraphs of BEM's affidavit address how EM allegedly sexually assaulted her and then her brother, NM, the victim of two of appellant's Article 128, UCMJ, convictions. Appellant fails to articulate how this evidence is logically relevant or admissible. BEM goes on to state she was eventually estranged from her parents and no longer resides in the home. Although her date of departure from the family home is unstated, it is [*18] clear from the affidavit that BEM was not residing at home at the time of the sexual activity between appellant and EM. In other words, she has no personal knowledge regarding the sexual assault or incest. Thus, the only information she can offer on the Article 120 and Article 133 convictions is both speculative and based on inadmissible hearsay.

The only evidence in BEM's affidavit that appears to be admissible is her opinion that appellant was a peaceful person toward his family, having "never known or observed [appellant] to be cross, harsh, abusive, or belittling to anyone." She adds, "[Appellant] was generally a very conservative and straight-laced guy."

Assuming without deciding that BEM could have provided character or reputation evidence regarding appellant's character for peacefulness consistent with Mil. R. Evid. 404 and 405, appellant fails to establish how the failure to introduce this evidence resulted in material prejudice to appellant. Having considered the omitted character evidence as well as the remainder of BEM's proffered testimony, we find appellant has failed to meet his burden to establish prejudice by defense counsel's alleged failure to contact BEM.

c. Failure to Contact Dr. KC

Unlike CR and BEM, Dr. KC's [*19] proffered testimony comes to us not via an affidavit, but via affidavit from an individual who "witnessed a phone conversation"

other words, CR would expose appellant to evidence corroborating, not rebutting, EM's allegation of sexual assault.

between Dr. KC and appellate defense counsel. Thus, the affiant has no personal knowledge of the matters (e.g., NM's violent tendencies) that we are being asked to credit. These facts are not properly before us. See *United States v. Cade*, 75 M.J. 923 (Army Ct. Crim. App. 2016).

Assuming *arguendo* we were to consider the affidavit, Dr. KC would have corroborated that NM was prone to violence, sometimes involving weapons, that law enforcement was called to deal with his outbursts, and that MM was scared of NM. This information, however, was already before the court and was uncontested.

NM testified that when he gets upset and is unable to calm down via his coping mechanisms, he will "yell," "scream," and "punch walls." He admitted to hitting his sister. He testified he was going to counseling because "I threatened to kill my mom." EM testified to NM's anger and violence, testifying that NM has hit her. She also testified that appellant has had to discipline him when he had his outbursts. MM testified that NM has hit his brothers and sisters. She also testified to "problems downtown in Montgomery County as far as the juvenile [*20] court;" NM was "angry" and made a "verbal threat [to kill MM]."

Following the cross-examination of NM, EM, and MM, it was clear that appellant had to legitimately use force, at times, to restrain NM during his outbursts. In other words, the defense of parental discipline was clearly in play regarding both assaults of NM. See, e.g., *United States v. Rivera*, 54 M.J. 489, 491 (C.A.A.F. 2001); see also, Dep't of the Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 5-16 (10 September 2014).

Appellant fails to show, however, how failing to call Dr. KC, a witness whose testimony would have been cumulative, would have had any impact on the evidence already before the court. We find appellant has failed to meet his burden to establish prejudice by defense counsel's alleged failure to contact Dr. KC.

2. Effectiveness of Counsel at Trial

a. Failure to call Captain KW

Appellant alleges that CPT KW should have been called to testify to appellant's character for peacefulness towards his wife and children as well as MM's character for untruthfulness and motive to fabricate. Appellant

submits CPT KW's affidavit in support of this allegation.

We agree the affidavit does indicate that CPT KW would have testified that appellant was [*21] a good father and husband. But, nothing in the affidavit presents a "motive to fabricate" unless the fact that appellant and his wife grew apart, separated, and eventually sought a divorce, without more, constitutes a "motive to fabricate." Indeed any "motive" to fabricate likely originates in appellant's betrayal of MM, betrayal highlighted by appellant's sexual activity with their daughter, an issue appellant reasonably would want to avoid.

Nothing in CPT KW's affidavit, or any of the other affidavits, indicates that MM used the allegations against appellant to gain any advantage, legal, financial, or otherwise. Beyond CPT KW's Mil. R. Evid. 404 and 405 character and reputation evidence regarding appellant's character for peacefulness, vis-à-vis appellant's interactions with his children, much of his affidavit is irrelevant testimony on the merits and marginally relevant testimony on sentencing.

Regardless, were we to assume everything in CPT KW's affidavit was admitted, we are confident the outcome of the proceeding remains unchanged. Appellant has failed to meet his burden regarding prejudice as it relates to the failure to call CPT KW on the merits.

*b. Failure to use a 2013 Department of Child Services [*22] Investigation*

The Department of Child Services (DCS) Report contains some information favorable to appellant. It also contains information that is damaging and corroborative of NM's allegations that appellant is violent towards him. The favorable information includes statements by MM that she never witnessed appellant hit NM and that NM is violent and has made threats to his parents. The unfavorable information includes the DCS social worker's statements that NM complained of appellant beating him. It is objectively reasonable for a defense counsel to weigh these competing interests and avoid admission of the report.

Like the testimony of Dr. KC discussed above, much of the information sought, that NM is prone to violent outbursts, to include violence up to and including threatening to kill his mother necessitating Juvenile Court intervention, was already before the court. Appellant fails to proffer how the DCS Report or the evidence contained therein would be admissible

considering Mil. R. Evid. 802, and if admissible, how it was to be used, and what impact, if any that might have had. In other words, appellant fails to establish prejudice regarding the alleged failure to "use" the 2013 DCS report.

*[*23] c. "Pressure" to plead guilty*

Appellant claims that his counsel were ineffective because they "pressur[ed]" him to plead guilty. This claim is frivolous on its face when, as here, appellant pled not guilty.

Appellant fails to cite, nor have we found, any authority that purports to find IAC when counsel applied "pressure" on their client to plead guilty in a case where the client did not plead guilty. In support of his claim, appellant submitted e-mail exchanges between him and his counsel concerning a possible guilty plea. Notably, defense counsel advised appellant that the charges against him are serious and estimated appellant would receive a sentence of, at least, between twelve to twenty-four months of confinement. Appellant replied that he was "unable to feel at ease with anything less than a trial." Fifteen minutes later, defense counsel acknowledged appellant's desire to not plead guilty and stated, "We will be ready for trial."

Rather than "pressure," the e-mail exchanges reveal appellant's defense counsel was concerned for his client and offered well-reasoned advice based on his years of experience as a criminal defense attorney.

Appellant fails to establish any deficiency, let [*24] alone prejudice, stemming from counsel's advice on whether to accept or reject a plea.

d. Defense counsel's failure to file any motions beyond one motion to dismiss

Appellant cites, in support of his IAC allegation, counsel's failure to file any pretrial motions beyond one motion to dismiss.¹⁵ Appellant fails, however, to state what pretrial motions counsel should have filed. "When

¹⁵ Defense counsel successfully moved to dismiss Specification 1 of Charge II, which alleged a violation of Article 133, UCMJ (incest in violation of N.C. Gen. Stat. § 14-178). Defense counsel also successfully moved, pursuant to Rule for Courts-Martial [R.C.M.] 917, for a finding of not guilty to Specifications 1 and 2 of Charge III, violations of Article 90, UCMJ.

a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion [], an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (quoting *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997)). As such, counsel necessarily must articulate what motions should have been argued. Having failed to do so in this case, appellant has failed to show deficient performance or prejudice warranting relief.

e. Defense counsel's failure to present evidence of EM's statements regarding the consensual nature of the relationship with appellant

Appellant alleges deficiency stemming from trial defense counsel's failure to present evidence of alleged statements by EM to two law enforcement personnel and a private investigator regarding the consensual nature of her relationship with appellant. First, [*25] the appellate filings fail to contain an affidavit from any of the three aforementioned personnel. In other words, we have no idea what any of these potential witnesses would say under oath. Next, the fact that EM told law enforcement the relationship, at least the post-Fayetteville sexual assault relationship, was consensual was successfully elicited during cross-examination.

Appellant fails to establish any prejudice from the lack of additional cross-examination of EM. Regarding the sexual assault, appellant fails to provide any evidence, other than appellant's self-serving description of events in his affidavit, that EM told anyone that what occurred in the hotel room in Fayetteville, North Carolina was consensual.

f. Failure to cross-examine JM

Appellant alleges IAC regarding counsel's decision not to cross-examine JM, appellant's son. Again, appellant does not articulate what evidence would have been elicited via cross-examination and what impact, if any, the failure to elicit said evidence would have had on the fairness or reliability of appellant's trial. In other words, appellant fails to carry his burden in establishing deficiency or prejudice regarding the examination of JM. [*26]

We also note appellant ignores blackletter law when he argues JM should have been allowed to testify that he,

JM, believed EM and her mother, MM, fabricated the charges against appellant. JM had no first-hand knowledge regarding any of the offenses nor any evidence that the two fabricated the allegations against appellant. What JM had was his "belief," nothing more, yet appellant believes he should have been allowed to testify to his belief regarding the veracity of the allegations. We disagree. See, e.g., *United States v. Martin*, 75 M.J. 321, 324-25 (C.A.A.F. 2016) (human lie detector testimony prohibited).

g. Failure to impeach EM, NM, and MM

Contrary to appellant's claim, a review of the record reveals defense counsel did, in fact, impeach NM, MM, and EM. That defense counsel's impeachment fell short of fully discrediting the witnesses does not establish deficient performance or prejudice. For example, defense counsel elicited testimony from EM about the consensual nature of her relationship with appellant following the Fayetteville sexual assault. Additionally, defense counsel elicited on cross-examination that EM was kicked out of the house following appellant's disclosure of the sexual activity and argued with her mother "on the porch." [*27] Regarding counsel's failure to impeach EM on her "modus operandi of sexually pursuing adoptive family members," appellant fails to show how this evidence would be admissible when considering Mil. R. Evid. 401-403, 412, and 803. The fact-finder, having evaluated both EM and appellant's credibility, concluded that the sexual act in Fayetteville was non-consensual.

Defense counsel was able to impeach NM by eliciting evidence during trial to corroborate that NM was prone to violent outbursts, that he has been violent towards family members, that he threatened to kill his mother, and that, at times appellant had to discipline NM or physically restrain him during his outbursts. The court found, consistent with NM's testimony, that the two charged incidences of assault were not incidences where appellant was simply exercising legitimate parental discipline; rather, on the two charged occasions, in NM's bedroom and on the stairs, the court found appellant battered NM.

Regarding the assault of MM, appellant offers no evidence of what counsel should have produced, either directly or through cross-examination, that would negate or call into question either assault.

To the extent there was any "failure to impeach" by

defense [*28] counsel, the "failure" was in counsel's inability to get appellant's accusers to agree with appellant's version of events, a "failure" arguably found in every case where an accused puts on a defense and is nonetheless convicted. Appellant fails to meet his burden to establish IAC regarding counsel's performance vis-à-vis impeachment of appellant's accusers.

h. Appellant did not get a chance to testify to help himself

Of all the allegations raised by appellant, this is the most disconcerting.

A military criminal accused, with the advice and assistance of counsel, has four decisions that are uniquely his: by whom he wants to be represented (i.e., counsel); what forum will hear his case; how to plead; and, whether to testify. *United States v. Summerset*, 37 M.J. 695, 699 (A.C.M.R. 1993).

Appellant's pleadings before this court claim his trial defense counsel "prevented" appellant from fully testifying regarding his relationship with EM and the other allegations. Appellant's affidavit states, "I didn't even get a chance to testify to help myself as [appellant's defense counsel] cut me off on the stand." Regarding appellant's claim that he "did not get a chance to testify to help himself," we find that statement to be simply false. That counsel chose [*29] to limit the scope of appellant's testimony is clear from the record. It would appear counsel focused on defeating the sexual assault allegation and limiting appellant's exposure on cross-examination, a strategy that makes absolute sense when reviewing appellant's affidavit, his cross-examination testimony, and the record as a whole.

During the government's case, defense counsel elicited from EM, without objection, that appellant told her, immediately following the alleged sexual assault, that she was on top of him and that he thought she was "awake."

During the defense case, appellant testified to his belief that EM was awake and the aggressor when the sexual assault occurred, testimony consistent with the information counsel obtained from EM earlier. Appellant testified that he fell asleep watching a movie with EM and awoke to EM "rubbing up and down on my genitals" and then EM "got on top of me." He further testified that she did not appear to be asleep. He stated, "my adopted daughter was coming on to me, had sexually aroused

me, was sexually aroused herself, and you know, we were engaging in a physical relationship at that point." He continued:

So that went on for about somewhere [*30] between 5 and 10 minutes, you know, pretty, you know, vigorous contact. She gets to the point where she is moving into having an orgasm. You know, she's breathing heavy, moaning, arching her back, things like that, and right as she kind of gets to that point, I hear, which really kind of chilled me and caught me off guard, she says, you know, "I can't believe you. You know, you are a Chaplain," and immediately, I stopped.

On cross-examination, appellant admitted telling his wife he digitally penetrated his daughter in Fayetteville, leaving consent the only contested issue on the sexual assault charge.

Appellant's allegation regarding his limited ability to defend himself relies entirely on his affidavit. His affidavit, however, like appellant's in-court testimony, focuses on the sexual assault allegation and the follow-on sexual activity in Tennessee. Had appellant testified consistent with the information in his affidavit, he would have certainly dispelled any doubt regarding the charge of incest and left only consent in dispute regarding the charge of sexual assault, an issue to which he did, in fact, testify. Regarding the remaining charges, appellant's affidavit is silent as to what [*31] appellant would have said if given the "chance." In other words, he proffers no testimony regarding the batteries or obstruction charges, at least none that would be exculpatory in nature, if "allowed."

Assuming arguendo that counsel limited appellant's testimony regarding all other offenses, we find appellant has failed to meet his burden to establish prejudice. As noted above, appellant's affidavit focuses on the sexual act in Fayetteville and the sexual acts in Tennessee. We do not know what appellant would have said if "allowed" to testify regarding the remaining offenses. It is his burden to put forth what evidence was kept from the trier of fact and what impact, if any, it would have had. Appellant has failed on both fronts.

3. Effectiveness of Counsel Post-Trial

Appellant asserts his defense counsel was ineffective post-trial because he failed to provide CPT KW's letter of support in his clemency matters. Appellant fails to establish a colorable showing of possible prejudice

regarding this omitted submission. "In post-trial matters involving a convening authority's decision, 'there is material prejudice to the substantial rights of an appellant if there is an error and the appellant [*32] 'makes some colorable showing of possible prejudice.'" *United States v. Fordyce*, 69 M.J. 501, 504 (Army Ct. Crim. App. 2010) (citing *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997))).

Appellant has made no showing of prejudice. Despite having ample time to submit the missing letter, none was submitted. Furthermore, while CPT KW submitted a post-trial affidavit, his affidavit is silent as to what was said in this missing letter. We find appellant failed to meet his burden regarding this omitted letter. It is not this court's responsibility to ascertain from a post-trial affidavit what a missing clemency letter might have said and then to further speculate whether its omission prejudiced appellant. That burden belongs to appellant; he failed to meet that here.

4. Counsel's Self-Assessment

We end our lengthy discussion by commenting on appellant's assertion that his civilian counsel admitted to ineffectiveness via his claim that he, counsel, "just spaced it." Assuming *arguendo* that his defense counsel actually said this, we give slight weight to counsel's subjective, post-trial self-assessment of performance.

"After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that [*33] reflection, to magnify their own responsibility for an unfavorable outcome." *Harrington v. Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In assessing counsel's performance, the standard is an objective one, not subjective. *Strickland*, 466 U.S. at 688. "The *Strickland* standard of objective reasonableness does not depend on the subjective intentions of the attorney, judgments made in hindsight, or an attorney's admission of deficient performance." *Jennings v. McDonough*, 490 F.3d 1230, 1247 (11th Cir. 2007). "Our task in deciding a claim of ineffective assistance is to determine whether counsel's performance was 'objectively unreasonable.'" *Blakeney v. United States*, 77 A.3d 328, 344 (D.C. Cir. 2013) (citations omitted). The issue is not counsel's sincerity but the reasonableness, 'considering all the circumstances,' of counsel's challenged judgment 'under prevailing professional norms.'" *Id.*

"[S]econd-guessing, sweeping generalizations, and hindsight will not suffice" to establish ineffective assistance of counsel. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citations omitted). The Constitution entitles an accused to a "fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). With the benefit of hindsight and varied affidavits, to include appellant's affidavit with enclosures, appellant attempts to re-litigate his court-martial. In so doing, appellant purportedly provides this court with evidence of both deficient performance by his counsel and resulting [*34] prejudice. In other words, appellant was denied a fair trial resulting in an unreliable outcome. We disagree.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA concurs.

Concur by: WOLFE

Concur

WOLFE, Senior Judge, concurring:

I concur fully with today's opinion. I write separately to explain my understanding on how this court weighs claims of IAC.

To my eye, several of the IAC claims we decided today fail on their face. That is, appellant does not state a *prima facie* claim of IAC. This is concerning as either (a) there exists a meritorious claim of IAC but it wasn't presented to us; or (b) facially invalid claims were submitted for our consideration. Both are troubling, but the first is more so. Failure to properly present a meritorious claim of IAC to this court will significantly affect the likelihood of success on any future direct or collateral attacks on the conviction.

*Why throwing it at the wall and seeing what sticks does not work for most IAC claims.*¹⁶

Most assigned errors this court reviews are contained in the record of trial. Under Article 66(c), UCMJ, this court

¹⁶My analysis here is limited to claims of IAC based on evidence not in the record of trial.

conducts a de novo review of the entire record. Thus, we review a record for errors even when no errors are [*35] assigned and no specific relief is sought. At least for preserved errors, an appellant has no burden to obtain relief on appeal. See *United States v. Washington*, 57 M.J. 394, 399-400 (2002). Theoretically, the judges on this court should identify and grant relief regardless of the arguments of the parties.¹⁷ For example, in *United States v. Grostefon*, our superior court relied on our broad review when deciding that seminal case:

There can be little harm in [raising *Grostefon* issues] since the Court of Military Review has the mandatory responsibility to read the entire record and independently arrive at a decision that the findings and sentence are correct in law and fact. Hence, raising an issue that counsel does not think is meritorious would, at worst, signal the Court of Military Review to consider the record in light of that issue.

12 M.J. at 435 (1982).

A cheerful view of our Article 66(c) responsibilities is that the judges on this court attempt to get to the legally and factually correct result notwithstanding how an issue might be briefed. But, that logic applies only to our review of the record of trial. We do not conduct a de novo review of matter that is not part of the record of trial — if such a thing is even possible. Nor does our factfinding authority [*36] extend to matter outside the record. *United States v. Ginn*, 47 M.J. 236, 242-43 (1997).

In other words, the practical burden of proof on an appellant is entirely different depending on whether the factual basis for a claim is based on evidence inside or outside the record of trial. An appellant who seeks relief because of preserved instructional error should do their best to convince us they are entitled to relief. But, a failure to connect the dots in an appellate brief will not be fatal to our de novo review of the claim. By contrast,

an appellant who seeks relief while relying on facts that are not in the record will fail if the facts are not presented in a manner the court can accept. *United States v. Cade*, 75 M.J. 923, 929-30 (Army Ct. Crim. App. 2016).

For emphasis, consider a more cynical framing. Under Article 66(c), our review includes a determination as to whether the findings are correct in law. In the case of an IAC claim, whether a finding is correct in law will not be determined by whether counsel were ineffective in the abstract, or whether a counsel is ineffective if only the true facts were to be discovered. This court is an appellate tribunal not an investigative body. Rather, a finding will only be incorrect in law if an appellant presents the facts to meet his burden under *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

At several [*37] instances, appellant claims that his trial attorney was "most egregious[ly]" ineffective for failing to provide the court-martial with certain testimony and evidence. But, if this was error, it was an error that is repeated on appeal. And because we too are not provided with the allegedly key testimony and evidence, it is an error that is likely fatal.

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¹⁷To be clear, the parties' adversarial perspective often provides different insight, identifies issues that we might have missed, and benefits us greatly. As our superior court stated, "we must also recognize that even the most conscientious counsel and judges will occasionally overlook an error in the press of dealing with a load of case[s], and, for that reason, any assistance in the identification of issues can further the proper administration of military justice." *Grostefon*, 12 MJ at 436 (1982).