UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39065

UNITED STATES
Appellee

v.

Matthew A. CAVADA
Technical Sergeant (E-6), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 30 August 2017

Military Judge: J. Wesley Moore.

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1. Sentence adjudged 24 February 2016 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey.

For Appellant: Major Jarett F. Merk, USAF.

For Appellee: Major Jeremy D. Gehman, USAF; Major Amanda L.K. Linares, USAF; Gerald R. Bruce, Esquire.

Before DREW, MAYBERRY, and SPERANZA, *Appellate Military Judges*.

Chief Judge DREW delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge SPERANZA joined.

DREW, Chief Judge:

A military judge sitting alone as a general court-martial convicted Appellant, consistent with his pleas and pursuant to a pretrial agreement (PTA), of multiple specifications of knowingly and wrongfully possessing and distrib-

uting child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] All of the offenses occurred on or before 1 April 2014. The military judge sentenced Appellant to a dishonorable discharge, two years' confinement, total forfeiture of pay and allowances, and reduction to E-1. The convening authority disapproved the adjudged forfeitures, but otherwise approved the adjudged sentence.[2]

On appeal, Appellant asserts that the staff judge advocate's recommendation (SJAR) contained erroneous advice regarding the convening authority's ability to grant clemency. The Government concedes error. We agree but, as we find the error did not materially prejudice Appellant's substantial rights, we affirm.

I. BACKGROUND

The SJAR erroneously advised the convening authority that he did not have the authority to disapprove, commute, or suspend in whole or in part the sentence to confinement or the bad-conduct discharge.[3] The addendum to the SJAR did not correct this erroneous advice.[4] In his clemency request, Appellant asked only that the convening authority disapprove the adjudged forfeitures. The trial defense counsel, in his submission along with Appellant's clemency request, did not disagree with the erroneous advice in the SJAR. Rather he stated:

> Prior to the recent changes in Article 60, UCMJ we would have asked you to grant relief in the form a [sic] reduction in the term of confinement. However, due to the change in the law all

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[1] Allegations of twice violating a United States Central Command general order by wrongfully possessing child pornography, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and of possessing with intent to distribute child pornography, in violation of Article 134, were dismissed after arraignment in accordance with the PTA. In addition, prior to announcing the sentence, the military judge reconsidered his findings, withdrew his findings of guilt as to Charge II, Specifications 5 and 6, merged the two specifications and found Appellant guilty of the newly merged Specification 5.

[2] The convening authority waived the mandatory forfeitures for a period of six months, or release from confinement, and directed them to be paid for the benefit of Appellant's dependent children. The adjudged sentence was not affected by the PTA, which capped confinement at 26 months.

[3] Appellant was actually adjudged a dishonorable discharge.

[4] It did recommend that the convening authority approve the dishonorable discharge, but did not draw attention to the incorrect reference to a bad-conduct discharge in the original SJAR.

> you are authorized to do is alleviate some of the financial hardship that his children are experiencing by disapproving the forfeitures of pay that were adjudged by the court-martial and then waiving the mandatory forfeitures for the benefit of his children.

The convening authority ultimately granted Appellant's clemency request, disapproved the adjudged forfeitures and waived the mandatory forfeitures in favor of Appellant's children.

II. DISCUSSION

We review de novo alleged errors in post-trial processing. *See United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least "some colorable showing of possible prejudice." *United States v. Scalo*, 60 M.J. 435, 436–37 (C.A.A.F. 2005) (quoting *Kho*, 54 M.J. at 65).

Failure to timely comment on matters in the SJAR or addendum, to include matters attached to it, forfeits the issue unless there is plain error. Rule for Courts-Martial (R.C.M.) 1106(f)(6); *Scalo*, 60 M.J. at 436. Under a plain error analysis, the appellant bears the burden of showing: (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right of the appellant. *Kho*, 54 M.J. at 65.

The National Defense Authorization Act for Fiscal Year 2014 modified Article 60, UCMJ, 10 U.S.C. § 860, limiting the convening authority's ability to grant clemency. Pub. L. No. 113-66, § 1702, 127 Stat. 955–58 (2013). The effective date of the change was 24 June 2014. *Id.* at 958. The pertinent text of Article 60 now reads, "the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A).

R.C.M. 1107 was amended on 17 June 2015 by Executive Order No. 13696, 80 Fed. Reg. 35810 (22 Jun. 2015), to implement the changes to Article 60 and by adding a note to R.C.M. 1107 stating, "if at least one offense in a case occurred prior to 24 June 2014, then the prior version of R.C.M. 1107 applies to all offenses in the case . . . ." This was further clarified a year later on 20 May 2016 by Executive Order 13730, which amended R.C.M. 1107 once again to read "if at least one offense . . . occurred prior to 24 June 2014, or includes a date range where the earliest date in the range for that offense is before 24 June 2014, then the prior version of R.C.M. 1107 applies to all offenses in the case . . . ." 81 Fed. Reg. 33338 (26 May 2016).

As Appellant was charged with offenses that occurred *before* 24 June 2014, the changes to Article 60 and R.C.M. 1107 did not apply in his case. The advice in the SJA was error and it was plain and obvious. Yet, finding error does not end our inquiry, as Appellant must still demonstrate a colorable showing of possible prejudice to prevail on this issue. Whether an appellant was prejudiced by a mistake in the SJAR generally requires us to consider whether the convening authority "plausibly may have taken action more favorable to" the appellant, had he or she been provided accurate or more complete information. *United States v. Johnson*, 26 M.J. 686, 689 (A.C.M.R. 1988), *aff'd*, 28 M.J. 452 (C.M.A. 1989); *see also United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). Having reviewed the record in this case, we find Appellant has not met his burden of establishing prejudice.

The SJA submitted an affidavit conceding the advice given to the convening authority was incorrect. However, the SJA asserted that even with the convening authority's broader discretion, his recommendation would have remained the same. More importantly, the convening authority also submitted an affidavit noting that he would not have provided Appellant with additional relief on the sentence, even with the knowledge now that he had the authority to do so during clemency. As Appellant is unable to demonstrate a colorable showing of possible prejudice, he cannot prevail on this issue. *Scalo*, 60 M.J. at 436-37.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court