# UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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**No. ACM 39093**

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**UNITED STATES**
*Appellee*

**v.**

**Jerrid J. OLSON**
Master Sergeant (E-7), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 22 December 2017

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*Military Judge:* Charles E. Wiedie, Jr.

*Approved sentence:* Dishonorable discharge, confinement for 45 years, and reduction to E-1. Sentence adjudged 23 February 2016 by GCM convened at Joint Base Pearl Harbor-Hickam, Hawaii.

*For Appellant:* Major Allen S. Abrams, USAF.

*For Appellee:* Lieutenant Colonel Joseph J. Kubler, USAF; Major Mary Ellen Payne, USAF; Major Meredith L. Steer, USAF; Gerald R. Bruce, Esquire.

Before MAYBERRY, JOHNSON, and MINK, *Appellate Military Judges*.

Senior Judge JOHNSON delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge MINK joined.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.**

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JOHNSON, Senior Judge:

A general court-martial composed of a military judge convicted Appellant, in accordance with his pleas, of one specification of willfully disobeying a law-

ful order on divers occasions, two specifications of rape by force, five specifications of sexual assault by causing bodily harm, seven specifications of abusive sexual contact, two specifications of indecent visual recording on divers occasions, one specification of obstruction of justice, two specifications of creating child pornography on divers occasions, one specification of possessing child pornography, and one specification of incest in violation of Hawaiian law[1] on divers occasions, in violation of Articles 90, 120, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 890, 920, 920c, 934.[2] The court-martial sentenced Appellant to a dishonorable discharge, confinement for 50 years, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority approved the dishonorable discharge, confinement for 45 years, and reduction to E-1; although not required by the agreement, he also waived mandatory forfeitures for six months for the benefit of Appellant's spouse and dependent children.

Appellant raises four issues for our consideration on appeal: (1) whether Appellant is entitled to a new post-trial process; (2) whether the sentence is inappropriately severe; (3) whether Appellant's pretrial confinement warrants additional sentence relief;[3] and (4) whether Appellant was denied effec-

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[1] *See* HAW. REV. STAT. §§ 572-1, 707-741.

[2] Most of the offenses for which Appellant was convicted were committed against his daughter, PO. Appellant pleaded not guilty to three specifications of sexual assault on divers occasions, one specification of indecent conduct on divers occasions, one specification of indecent visual recording on divers occasions, and one specification of forcible sodomy on divers occasions, in violation of Articles 120, 120c, and 125, UCMJ, 10 U.S.C. §§ 920, 920c, 925. These additional charges involved alleged offenses against Appellant's spouse, DO. In accordance with a pretrial agreement, the Prosecution withdrew these charges and, after the military judge announced the sentence, dismissed them with prejudice.

[3] Appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Prior to entering pleas, the Defense filed a motion seeking Appellant's release and additional confinement credit for his allegedly illegal pretrial confinement. The military judge conducted a motion hearing and issued a thorough, well-supported written ruling denying the motion. As the Defense now concedes, both Appellant and trial defense counsel affirmatively acknowledged Appellant's guilty plea in accordance with the pretrial agreement waived appellate review of this issue. *See United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). Acknowledging our authority under Article 66(c), UCMJ, to grant relief despite such waiver, if warranted (*see United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016)), we find neither sentence relief nor further discussion of this issue is warranted here. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

tive assistance of counsel.[4] We find no error that materially prejudiced a substantial right of Appellant; accordingly, we affirm the findings and sentence.

## I. BACKGROUND

Beginning in September 2013, Appellant committed a series of sexual offenses against his then-16-year-old biological daughter, PO,[5] in their on-base residence at Joint Base Pearl Harbor-Hickam, Hawaii. These offenses included two instances of rape by force; multiple other instances of sexual assault causing bodily harm involving penetration of PO's vulva by Appellant's penis, tongue, and fingers as well as one instance each of penile penetration of PO's mouth and penetration of her vulva with a sex toy; and multiple instances of abusive sexual contact by touching PO's genitalia, breast, inner thighs, and buttocks, and on one occasion causing her to touch his penis with her hand. Appellant used a video camera to record some of these assaults. He also created, or had PO create at his direction, 22 still images of child pornography depicting PO. In addition, Appellant used hidden video cameras in PO's bedroom and shower to secretly create videorecordings, including while she was unclothed, engaged in sexually explicit conduct, or both. On one occasion, Appellant used the same hidden video camera in the shower to secretly record an adult female friend of the family while she was naked. Finally, unrelated to PO, Appellant obtained and saved five videos from the internet depicting child pornography.

In February 2014, PO first confided to her then-boyfriend that Appellant had been sexually assaulting her. At PO's request, the boyfriend initially kept the information secret. However, as the assaults continued and his concern grew, the boyfriend reported the abuse to the civilian child protective services agency and to civilian police on 17 May 2014. The police transferred the investigation to the Air Force Office of Special Investigations (AFOSI) on the same day.

On 22 May 2014, Appellant's commander issued an order that Appellant have no contact with PO, Appellant's spouse DO, or his two sons. The order expressly prohibited in-person, telephonic, electronic, written, verbal, and indirect contact. Appellant acknowledged the order, which was renewed on 31 July 2014 and 30 January 2015 and remained continuously in effect until 30 June 2015. Appellant violated this order by having his sister deliver two writ-

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[4] Appellant raises this issue pursuant to *Grostefon*, 12 M.J. 431.

[5] PO reached 17 years of age during the charged time frame.

ten letters to DO on his behalf, leaving voice messages on DO's cellular phone, and sending DO numerous text messages. Data analysis of DO's cellular phone revealed 17 calls and over 1,700 text messages from Appellant to DO between 7 October 2014 and 15 January 2015. Those communications included, *inter alia*, requests for DO to pressure PO to change her statement to indicate the sexual intercourse was consensual and threats to withhold financial support. After these communications came to light, Appellant was placed in pretrial confinement on 2 February 2015 and remained there until the conclusion of his trial on 23 February 2016.

## II. DISCUSSION

### A. Post-Trial Process

#### 1. Additional Background

The staff judge advocate's recommendation (SJAR) dated 15 April 2016 accurately stated, *inter alia*, the convening authority could disapprove, commute, or suspend the adjudged sentence in whole or in part in this case. The staff judge advocate (SJA) recommended, in accordance with the pretrial agreement, the convening authority approve the dishonorable discharge, reduction to E-1, and only 45 years in confinement. The SJAR was served on the Defense.

The original memorandum (1st Memo) from Appellant's Area Defense Counsel (ADC), Captain (Capt) KR, in support of his clemency request is a one-page document dated 27 May 2016 with three attachments. This document requested Appellant's confinement be reduced to 30 years. However, it also purported to acknowledge "at this time, due to the status of the law, you are unable to lower the confinement sentence. However, should it become possible for you or a later authority to reduce the confinement at a later date, we ask that you do so."

The legal office noted the inaccurate advice in Capt KR's memo and provided the Defense an opportunity to correct the error and resubmit its clemency request. In response, Capt KR signed a second, two-page memo, also dated 27 May 2016 and with the same three attachments (2d Memo). Capt KR again requested Appellant's confinement be reduced to 30 years, but included the following analysis:

> . . . As to at least one of the offenses for which [Appellant] was found guilty of [sic] occurred prior to 24 June 2014, you are able to apply the old law under Rules for Court Martial [sic] (R.C.M.) 1107 of the UCMJ regarding clemency. Reading the Fiscal Year 2015 National Defense Authorization Act, Section 531, the sta-tute is unclear on whether you can also set aside

> the Dishonorable Discharge, however, given that it would be unfair to retroactively apply the mandatory minimum to sexual assault charges occurring before the change and may be in violation of Supreme Court case law, we ask that you consider setting aside the Dishonorable Discharge as one of your options in mitigating the sentence.
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> [ ] According to the prior version of R.C.M. 1107(d), the Convening Authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. Therefore, it is within your discretion to lower the total time in confinement as [Appellant] requests or mitigate the sentence in any way as you determine.

The SJA subsequently prepared an addendum to the SJAR which advised the convening authority he was required to consider, *inter alia*, Appellant's clemency submission. Capt KR's 2d Memo was attached, along with its three attachments. The Addendum stated that, having reviewed the clemency submission, the SJA's recommendation remained unchanged. The convening authority signed an indorsement to the addendum indicating he had considered the attached matters. The convening authority took action in accordance with the SJA's recommendation and the pretrial agreement, approving only so much of the sentence as provided for a dishonorable discharge, confinement for 45 years, and reduction to E-1.[6]

**2. Law**

The proper completion of post-trial processing is a question of law, which this court reviews de novo. *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (citing *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted)). In order to obtain relief for errors connected with the convening authority's post-trial review, an appellant must demonstrate an error, resulting prejudice, and action he would take to resolve the error. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). In this context, the appellant must make some colorable showing of possible prejudice. *Id.* at 289. "The low threshold for material prejudice with respect to an erroneous post-trial recommendation reflects the convening authority's vast

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[6] The action also documented that the convening authority had previously waived mandatory forfeitures for six months for the benefit of Appellant's spouse and dependent children.

power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005). However, while the threshold is low, there must be some colorable showing of possible prejudice. *Id.*

Except as otherwise provided by law, a convening authority may approve, disapprove, commute, or suspend the sentence of a court-martial in whole or in part. 10 U.S.C. § 860(c)(2)(B). Effective 24 June 2014, Article 60(c)(4)(A), UCMJ, provides: "Except as provided in subparagraph (B) or (C), the convening authority . . . 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." 10 U.S.C. § 860(c)(4)(A). Similarly, effective 24 June 2014, R.C.M. 1107(d)(1)(B) states: "Except as provided in subparagraph (d)(1)(C) of this rule, the convening authority may not disapprove, commute, or suspend, in whole or in part, that portion of an adjudged sentence that includes [ ] confinement for more than six months; or [ ] dismissal, dishonorable discharge, or bad-conduct discharge." These changes were clarified on 20 May 2016 by Executive Order 13730, which amended R.C.M. 1107 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).

**3. Analysis**

Appellant acknowledges the SJAR correctly stated the convening authority's power to modify the adjudged sentence; however, relying on *United States v. Addison*, 75 M.J. 405 (C.A.A.F. 2016), he asserts the SJA's failure to correct the ADC's "misstatements of the law" requires a new post-trial process. We disagree.

Appellant's position is based in part on a misunderstanding of which version of Capt KR's memo was presented to the convening authority. Admittedly, two factors contribute to a lack of clarity in the record. First, although the (more accurate) 2d Memo is appropriately located in the record as an attachment to the addendum to the SJAR that went to the convening authority, the (inaccurate) 1st Memo, though not attached to the addendum and apparently unused, is separately included in the record. Second, in listing its attachments, the addendum describes Capt KR's memo as consisting of one page, which is true of the (inaccurate) 1st Memo which was not attached, but not true of the (more accurate) two-page 2d Memo that was actually attached.

However, the Government has presented a declaration from Col DD, the SJA at the time, which greatly clarifies the situation. Col DD explained that, when presented with a clemency submission that contained legal errors, his office's practice was "to provide the defense an opportunity to correct and resubmit [the] clemency request[ ]," and to always present such corrected copies to the convening authority. With this explanation, we are satisfied that the 2d Memo attached to the addendum in the record was the version of the clemency request that went to the convening authority in this case.

This case is therefore unlike *Addison*. In that case, this court's opinion acknowledged the appellant's clemency submission erroneously stated the limitations on a convening authority's power applied to action on offenses that occurred in April 2014, before the effective date of 24 June 2014. *United States v. Addison*, No. ACM S32287, 2016 CCA LEXIS 288, at *2–3 (A.F. Ct. Crim. App. 6 May 2016) (unpub. op.). However, this court concluded R.C.M. 1106 did not require the SJA to affirmatively address and correct such an error. *Id.* at 4. The Court of Appeals for the Armed Forces (CAAF) granted review on this issue and summarily set aside this court's decision and the action and returned it to The Judge Advocate General for a new post-trial process. *Addison*, 75 M.J. 405. However, rather than providing the convening authority with inaccurate advice from the Defense, with or without an explanation of the error, in Appellant's case the SJA rendered the courtesy of permitting the Defense to correct its own error, so that the error did not go to the convening authority.

Appellant suggests that even the 2d Memo "cast doubt over the convening authority's power" by stating the law was "unclear" at that time as to whether he could set aside Appellant's dishonorable discharge. However, the Defense nevertheless argued the convening authority should consider doing so. The 2d Memo expressed no reservations as to whether the convening authority could reduce the term of confinement, and concluded its section on the convening authority's power by affirming his ability to "mitigate the sentence in any way as you determine."

Assuming, *arguendo*, the SJA erred in failing to address the ADC's legal advice, Appellant has failed to demonstrate any prejudice from the error. Read in conjunction with the SJAR, addendum, and Col DD's declaration, we have no concern the clemency submission misled or confused the convening authority as to the extent of his authority to modify the sentence in Appellant's case. The Defense in fact requested the convening authority consider setting aside the dishonorable discharge and reducing Appellant's term of confinement. Considering the extremely serious nature of the offenses in this case, the pretrial agreement that reduced Appellant's adjudged confinement by five years, and the content of the clemency request itself, we find no color-

able showing of possible prejudice to Appellant's rights. *See Wheelus*, 49 M.J. at 289.

**B. Sentence Appropriateness**

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 4 (C.A.A.F. 2006) (citing *United States v. Cole,* 31 M.J. 270, 272 (C.M.A. 1990)). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(c), UCMJ. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we have great discretion to determine whether a sentence is appro-priate, we have no power to grant mercy. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

Appellant essentially makes two arguments that his sentence is inappropriately severe. First, he compares his case to two other cases in which this court found sentences imposed for sexual offenses against the accuseds' biological children to be inappropriately severe and granted relief, *United States v. Ciulla*, 29 M.J. 868, 870 (A.F.C.M.R. 1989), and *United States v. Saul*, 26 M.J. 568, 575 (A.F.C.M.R. 1988). Although these cases are not "closely related" to Appellant's, and he does not contend that they are, we acknowledge that we may compare these cases to consider the propriety of Appellant's sentence, al-though we are not required to do so. *See United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001); *Ciulla*, 29 M.J. at 870. Yet we are not persuaded. In *Ciulla*, where the appellant faced a maximum term of 54 years in confinement for sodomy and indecent acts against his minor daughter and was sentenced to 40 years, we reduced the term of confinement to 30 years. 29 M.J. at 869–70. In *Saul*, the appellant faced a maximum term of 81 years in confinement for three specifications of indecent liberties, two specifications of sodomy with a child under 16 years, and one specification of assault with intent to commit rape; he was sentenced to 40 years in confinement, which we reduced to 28 years. 26 M.J. at 569, 575. Appellant, by comparison, faced a maximum term of confinement for life without the possibility of parole for 21 total specifications, 18 of which were sex-related offenses against his daughter, including two forcible rapes and multiple other sexual assaults. A military judge determined a sentence to 50 years of confinement, as well as a dishonorable discharge and reduction to E-1, was the appropriate punishment for these crimes. Appellant's pretrial agreement limited his term of confinement to 45 years. On the record before us, we are not persuaded that justice requires us to reduce Appellant's term of confinement to one comparable to those in *Ciulla* or *Saul*.

Second, Appellant argues that his 20 years of service in the Air Force and other evidence of rehabilitative potential indicate he could return to society as a productive and law-abiding citizen, and that a sentence that creates a "reasonable probability" he will die in prison is unwarranted. Appellant's speculation as to when and under what conditions he may ultimately be released from confinement or die does not alter the severity of his crimes. Having considered Appellant, his record of service, the nature and seriousness of the offenses, and all matters contained in the record of trial, we find his sentence is not inappropriately severe.

### C. Effectiveness of Counsel

#### 1. Law

The Sixth Amendment guarantees Appellant the right to effective assistance of counsel. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citing *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000)). Accordingly, we "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009). We review allegations of ineffective assistance of counsel de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *Mazza*, 67 M.J. at 474).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
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> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
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> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

*Gooch*, 69 M.J. at 362 (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

#### 2. Analysis

Appellant personally asserts the performance of his trial defense counsel was deficient in certain respects. His declaration in support of these contentions, which we have carefully considered, touches on several aspects of his

court-martial. However, Appellant concentrates on three allegations that we address here: (1) before trial, his defense counsel did not provide him with certain evidence that affected his decision to plead guilty to raping PO in September 2013; (2) his trial defense counsel should have contested certain specifications, to which he pleaded guilty, that alleged he committed offenses on the island of Oahu on or about 18 April 2014, when he was in fact on Guam on that date; and (3) his trial defense counsel caused him to falsely plead guilty to possession of child pornography.

In response, we ordered and received affidavits from both of Appellant's trial defense counsel—his military defense counsel, Capt KR, and his civilian defense counsel, Mr. ET. Their affidavits generally refute Appellant's assertions. Because we are presented with conflicting declarations, we must consider whether a post-trial evidentiary hearing is required in this case. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967). In doing so, we apply the principles articulated in *Ginn* including, *inter alia*:

> [I]f the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
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> . . .
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> [I]f the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.
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> [W]hen an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

47 M.J. at 248. Applying these principles to the record before us, we find an evidentiary hearing is not required and Appellant is not entitled to relief for the reasons stated below.

***a. September 2013 Rape Allegation***

Appellant pleaded guilty to Specification 1 of Charge II, which alleged he committed rape by force against PO between on or about 1 September 2013 and on or about 30 September 2013. Appellant now claims he was denied ac-

cess to evidence that this allegation was not true, which impacted his decision to plead guilty. Specifically, Appellant refers to the video of PO's interview by AFOSI agents in which she initially appears to indicate the sexual abuse by Appellant began in April 2014. Appellant states that he saw the recording of PO's AFOSI interview for the first time only after his trial. Appellant further states that although "[e]very time he saw [his] military or civilian defense . . . I begged to see what was being used against me . . . . I was not given enough evidence to allow me to enter a guilty plea on this charge." However, Appellant does not deny reviewing a *transcript* of PO's AFOSI interview before trial. Appellant now contends he wanted to contest the forcible rape allegations but believes Mr. ET convinced Capt KR to "sell" Appellant on pleading guilty to them. We are not persuaded.

Capt KR's affidavit states Appellant was shown the evidence before trial, including the entire transcript of PO's AFOSI interview, which documented the inconsistency. Capt KR relates that she specifically discussed with Appellant the inconsistencies in the offense dates reported by PO and how the Defense might be able to use those at trial. However, according to Capt KR, Appellant consistently made clear that although he would not plead guilty to the offenses alleged by his wife, DO,[7] he wanted to plead guilty to the offenses against PO if he could get "an advantageous deal." Capt KR further clarified that, although Appellant believed PO's timeline was "off" by "a couple of months," he never denied raping her. Further, Appellant understood the concept of being charged with, and pleading guilty to, an offense charged "on or about" a certain date, and he told his counsel he could providently plead guilty to Charge II, Specification 1. Mr. ET's affidavit states Appellant viewed all of the digital evidence AFOSI had and was shown all of the documents provided to the Defense by the Government, which he reviewed for several hours and discussed with Mr. ET and Capt KR.

The record of trial further undermines Appellant's suggestion that a lack of awareness of PO's inconsistency as to dates led him to plead guilty to the September 2013 rape. The stipulation of fact, which Appellant affirmed under oath that he had read and was true, stated Appellant raped PO between on or about 1 September and 30 September 2013. The transcript of the AFOSI interview was attached to the stipulation. When questioned by the military judge regarding the date of this offense, Appellant stated it was "around September, I don't remember the exact date," lending credence to Capt KR's assertion that Appellant thought PO's dates might have been "off" without

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[7] See note 2, *supra*.

denying he raped her "around" that time. With respect to the interview itself, although PO initially indicated the first sexual assault occurred in April 2014, she subsequently repeatedly stated it occurred around September 2013 and clearly indicated it was well before her birthday in February 2014. In summary, the record compellingly demonstrates the improbability of Appellant's claim that his counsel failed to provide him with evidence of timeline discrepancies related to the September 2013 rape, which induced him to plead guilty to Specification 1 of Charge II. Similarly, in light of the record, we conclude Appellant has failed to rationally explain why he would swear to the military judge that he wanted to plead guilty to raping PO "around" September 2013, and was in fact guilty of doing so, if that was not in fact the case.

***b. Offenses on 18 April 2014***

Appellant contends his trial defense counsel should have contested Specifications 5 and 8 of Charge II, alleging that he committed a sexual assault and abusive sexual contact on PO on the island of Oahu on or about 18 April 2014.[8] Appellant states he now remembers he was on temporary duty on Guam on 18 April 2014 and could not have committed the offenses charged on that date. However, he fails to assert that he informed his trial defense counsel of this. Capt KR affirms Appellant never previously claimed to have been on Guam on that date. In addition, although Appellant asserts corroborating information exists, he has failed to provide any, much less any that trial defense counsel should have been aware of before trial. Assuming, *arguendo*, Appellant did not commit these offenses precisely on 18 April 2014, as he told the military judge under oath that he did, he could still providently plead to the specification if he committed the offenses on a date close in time to 18 April 2014. Even if Appellant's present assertion were true, we find neither fault with trial defense counsel's performance nor any basis for relief.

***c. Possession of Child Pornography***

Appellant also contends evidence of his innocence of Specification 4 of Charge IV, which alleged wrongful possession of five videos depicting child pornography unrelated to PO, was withheld from him. He asserts: "The truth is I have never seen these videos. . . . A few days after trial, [sic] was over I was told by my defense that our forensics guys could prove that these videos

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[8] Appellant's declaration also contends his temporary duty on Guam implicates Specification 2 of Charge II, which alleged forcible rape of PO on the island of Oahu. However, the charged time frame for this specification is between on or about 1 April 2014 and on or about 15 April 2014.

were part of a mass 2 minute download . . . and that I never opened the folder nor the files. Innocent!"

Capt KR specifically addresses this claim and states the Defense's computer forensics expert indicated that although there was no *specific* evidence the files had been viewed, "there was indication of guilt given the way the folder was saved or named and where the images were found and that there would be litigation risk in fighting it." She further avers Appellant "was aware of this evidence" but wanted to plead guilty to this specification.

Again, the record lends credence to trial defense counsel's assertion that no exculpatory evidence was withheld from Appellant. In response to the military judge's questions at trial, Appellant indicated he found the files on his external hard drive after a mass download, opened them, saw they appeared to depict minors, did not delete them, and renamed the folder they were in. This echoes Capt KR's description of the state of the evidence.

Appellant further contends he "professed his innocence on this charge to every ear that would listen to me back in 2015," including his military and civilian defense counsel. Yet, he complains, "[m]y defense never even tried to fight this." Capt KR addresses this claim in some detail:

> [W]e also talked about the evidence regarding the child pornography charge. I told him we could argue this was all part of a mass download. . . . It was at this time [Appellant] exclaimed, "yes that's what happened! I never saw child porn," or words to that effect. This is the first time [Appellant] ever claimed to be innocent of this charge. And what I took from this was more that maybe he did not knowingly download it. Given that he had previously indicated he wanted to plead guilty to this charge and this was the first time he indicated he was innocent in any manner, I had to stop him and tell him that I could not let him plead guilty to something he did not believe he was guilty of and if one did not knowingly download it and if also he then did not look at it he could not say he knowingly and wrongfully possessed it and by that virtue I could not let him plead guilty to it. I was worried in that moment that maybe he only wanted to plead guilty so that he could get the benefit of a deal. I explained with [our defense paralegal] present that I could not let him plead guilty to get the benefit of a cap on confinement if he did not believe he was guilty. He said, ma'am, I understand and I can plead guilty. . . . He was then able to provide both Mr. [ET] and myself answers on how he believed he was guilty. He knew we could fight this charge and it was his decision not to fight it.

Appellant told the military judge he had had adequate time to consult with his trial defense counsel, had consulted with them, and was satisfied with them. He told the military judge everything in the stipulation of fact was true, and explained, specification by specification, why he believed he was guilty of each of the offenses to which he pleaded guilty. Capt KR and Mr. ET confirm Appellant never told them he was in fact not guilty of any offense to which he pleaded guilty.[9] Appellant consistently told his trial defense counsel he would not plead guilty to the alleged offenses against DO, but he wanted to plead guilty to the other offenses.

Now, on appeal, Appellant asserts: "I understand that I lied in several documents. . . . Nobody reading this knows what it is like to be stuck in pretrial confinement and be told take a 45 year plea or die in prison." However, after reviewing the record of Appellant's guilty plea, we are not persuaded that Appellant, who insisted on pleading not guilty to certain charges not involving his daughter, would falsely plead guilty to another charge not involving his daughter. We reject Appellant's effort to resurrect a partial defense he might have presented at trial, but deliberately laid to rest in order to secure the benefit of a pretrial agreement that dismissed six additional specifications and curtailed possible confinement for life without parole to a maximum fixed term of 45 years.

## 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 sentence are **AFFIRMED**.

FOR THE COURT

KATHLEEN M. POTTER
Acting Clerk of the Court

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[9] Capt KR relates that his one comment that he "never saw child porn" was in the context of a discussion of how the files were *downloaded*, rather than a denial that he ever knowingly possessed the child pornography. According to Capt KR, Appellant subsequently confirmed he could providently plead guilty to the possession charge and explained why he believed he was in fact guilty of the charge.