**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**
**WASHINGTON NAVY YARD**
**WASHINGTON, D.C.**

**BEFORE**

**E.E. GEISER** **F.D. MITCHELL** **J.G. BARTOLOTTO**

**UNITED STATES**

**v.**

**GENER PIZARRO**
**Aviation Storekeeper First Class (E-6), U. S. Navy**

NMCCA 200400713 Decided 19 December 2006

Sentence adjudged 13 December 2002. Military Judge: C.J. Gaasch. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan.

LT S.C. REYES, JAGC, USN, Appellate Defense Counsel
FRANK J. SPINNER, Appellate Civilian Defense Counsel
Capt JAMES WEIRICK, USMC, Appellate Government Counsel



GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of making a false official statement, murder, maiming, ten specifications of assault and battery, adultery, and reckless endangerment of a child, in violation of Articles 107, 118, 124, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 918, 924, 928, and 934. The appellant was sentenced to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.[1]

The appellant raises three assignments of error. He first argues that the military judge abused her discretion when she excluded portions of a defense expert's sentencing report from her consideration. Second, the appellant asserts that his plea

[1] The pretrial agreement provided that the convening authority would disapprove all forfeitures and confinement in excess of 25 years. The convening authority action disapproved *execution* of these punishments but not the punishments themselves as required by the pre-trial agreement. We will take appropriate action in our decretal paragraph.

of guilty to assault and battery with a slipper was improvident. Finally, the appellant avers that an approved sentence of 25 years confinement coupled with a dishonorable discharge constitutes excessive punishment.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

**Exclusion of Sentencing Evidence**

During the sentencing phase of the trial, the appellant offered, *inter alia*, a 46-page mitigation report by David Randall, Ph.D., a psychosocial sentencing consultant. The report reflected summaries of numerous interviews conducted by Dr. Randall in the course of his evaluation. In addition to the interview summaries and other factual matters, the report contained generalized sentencing recommendations, assertions regarding the goals of sentencing, and Dr. Randall's opinion regarding the appellant's intent and motivations at the time he committed the offenses against his daughter.

The military judge considered the entire report with the exception of Dr. Randall's generalized sentencing recommendations, portions of the report asserting the goals of sentencing, and his opinion regarding the appellant's intent and motives; all of which she found to be irrelevant to her deliberations. Record at 162, 282-83. The appellant concedes that the military judge correctly excluded Dr. Randall's sentencing recommendations but argues, nonetheless, that the military judge's decision to exclude portions of the mitigation report dealing with the goals of sentencing and Dr. Randall's opinion regarding the appellant's specific intent and motivations at the time of the offenses was error. We disagree.

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. Her ruling will not be overturned on appeal "'absent a clear abuse of discretion.'" *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F 1977)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F 2000). A military judge's ruling on admissibility of evidence will only be overturned if it is "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. Miller* 46 M.J. 63, 65 (C.A.A.F 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). In conducting our review, we are required to consider the evidence in the light most favorable to the prevailing party. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

RULE FOR COURTS-MARTIAL, 1001(b)(5)(D), MANUAL COURTS-MARTIAL, UNITED STATES (2002 ed.) does not apply to defense evidence offered in mitigation under R.C.M. 1001(c). However, the scope of a defense presentation is not boundless. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). The evidence offered must be relevant to a matter before the court. While we agree with the appellant's assertion that the threshold for relevance is low, it is not nonexistent.

In the instant case, the military judge excluded a section of Dr. Randall's report styled as "Goals of Sentencing." That section essentially argues that the military judge should consider "the goals of sentencing: incapacitation, rehabilitation, retribution, and deterrence as well as the nature of the crime and Petty Officer Pizarro's personal circumstances."[2] The section then goes on to argue that the appellant should not be sentenced to "a lengthy term of confinement."[3]

We note that the heart of the appellant's right to present matters in extenuation and mitigation is to give him an opportunity to present additional relevant facts and circumstances relating to himself or his offenses. The excluded section cited above does not present any additional information regarding the appellant or his offenses, but rather presents Dr. Randall's argument on how to properly balance the evidence. We agree with the military judge that such information is irrelevant. Even assuming *arguendo* that it was error to exclude this material, we are confident the military judge was fully cognizant of the widely-cited goals of punishment referenced by Dr. Randall and that, therefore, such error was harmless beyond a reasonable doubt.

The military judge further excluded a sentence from page 2 of Dr. Randall's report which stated the doctor's personal opinion that the appellant "did not intend or plan to kill his daughter Janine."[4] To begin, there was no evidence presented and the Government never asserted that the appellant specifically intended to kill his daughter. On the contrary, during the providence inquiry, the appellant stated that his intent when he took his daughter into the bathroom and used the shower head to spray water into her face was to punish her because he was angry that she'd disobeyed him. Record at 59. The record also reflects that when Janine lost consciousness, the appellant immediately attempted Cardio-Pulmonary Resuscitation (CPR) to revive her which is inconsistent with a specific intent to murder the girl. *Id.* at 60.

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[2] The Appellant's Brief dated 28 Aug 2006 at 45.

[3] *Id*.

[4] *Id* at 2.

It is also important to note that the military judge was not excluding from consideration evidence that the appellant did not intend or plan to kill his daughter but rather was excluding Dr. Randall's personal opinion regarding the appellant's intent. We agree with the military judge that Dr. Randall's opinion of the appellant's intent at the time he murdered his daughter is not relevant. What was relevant and what was considered by the military judge was the unrebutted evidence in the record that the appellant did not specifically intend to murder his daughter. We find, therefore, that the military judge did not abuse her discretion when she excluded the cited irrelevant portions of Dr. Randall's report from consideration. Assuming *arguendo* that the military judge did err in excluding the cited portions of the report, we find that such error was harmless beyond a reasonable doubt.

**Improvident Plea**

A military judge's decision to accept or reject an accused's guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). An abuse of discretion is more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *McElhaney*, 54 M.J. at 130. We will find a military judge abused his discretion in accepting a guilty plea only if the record shows a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Rejecting a guilty plea must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

The appellant asserts that his plea of guilty to Specification 3 of Charge IV (assault and battery with a slipper) was improvident. Specifically, he argues that the degree of harm suffered by his daughter when he struck her with an indoor all-cloth slipper was insufficient to overcome an affirmative parental discipline defense. Record at 84-88. Force may be used by parents or guardians when the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of her misconduct; and the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. *United States v. Rivera*, 54 M.J. 489, 491 (C.A.A.F. 2001).

The appellant argues on appeal that being struck with an all-cloth indoor slipper cannot result in or reasonably be expected to create the kind of substantial risk of death, serious bodily injury, disfigurement, extreme pain, mental distress or gross degradation needed to overcome a parental discipline defense. We agree that being struck with a cloth slipper may not

normally be expected to result in extreme pain or injury; however, the circumstances of this case were anything but normal.

During providence, the military judge expressly questioned the appellant regarding applicability of the parental discipline defense to Specification 3 of Charge IV. In response, the appellant stated that he believed his daughter felt extreme pain because she was being struck with the slipper on an area already covered with painful bruises and injuries from previous spankings accomplished with a bamboo back-scratcher and a belt. Record at 88. The appellant's belief that being spanked with the slipper caused extreme pain is corroborated by his responses to the other 9 specifications of assault and battery which detailed the earlier assaults on his daughter. It was further corroborated by the testimony of Dr. Craig, a pediatric expert who reviewed autopsy photographs of the dead girl. Dr. Craig opined that the photos depicted injuries in various stages of healing which, in her professional judgment, would make subsequent impacts on the area intensely painful because of the existing bruises and injuries. Record at 367-68; Prosecution Exhibit 6.

We find that there is no substantial basis in law and fact to question the appellant's plea to Specification 3 of Charge IV. Therefore, the military judge did not abuse her discretion in accepting the plea.

**Conclusion**

Although not raised by the appellant, we note that the convening authority's action expressly approves the adjudged sentence including confinement for life with the possibility of parole and forfeiture of all pay and allowances. The convening authority then goes on to disapprove *execution* of the approved confinement and forfeitures. This is inconsistent with the pre-trial agreement which requires the convening authority to disapprove confinement in excess of 25 years and all adjudged forfeitures.

Well-established precedent of the Court of Military Appeals, now the Court of Appeals for the Armed Forces, and this court, provides that where a CA has failed to take action that he was required to take under the terms of a pretrial agreement, this court has the authority to enforce the agreement. *United States v. Phillips,* 2004 CCA LEXIS 5 (N.M.Ct.Crim.App. 2004)(citing *United States v. Cox,* 46 C.M.R. 69, 72 (C.M.A. 1972) and *United States v. Carter*, 27 M.J. 695, 697 (N.M.C.M.R. 1988)). Consistent with that authority and the interests of judicial economy, we will take corrective action, rather than directing the CA to do so.

We affirm the approved findings and only so much of the approved sentence as includes a dishonorable discharge, confinement for 25 years, and reduction to pay grade E-1. We

specifically find that the approved sentence, as affirmed, is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Judge MITCHELL and Judge BARTOLOTTO concur.

For the Court

R.H. TROIDL
Clerk of Court