15 March 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

Senior Airman (E-4)
ERMEN-RENE BARNETT,
UNITED STATES AIR FORCE,
Appellant.

Crim. App. Misc. Dkt. No. 37578

USCA Dkt. No. 12-0251/AF

APPELLANT'S BRIEF

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INFORMED THE MEMBERS OF APPELLANT'S ILLEGAL PRETRIAL PUNISHMENT CREDIT AND THEN FAILED TO INSTRUCT THE MEMBERS BASED ON A SUBMITTED QUESTION THAT THEY WERE NOT ALLOWED TO NULLIFY SOME OR ALL OF THAT CREDIT BY INCREASING THE SENTENCE.

Statement of Statutory Jurisdiction

This case was reviewed below by the Air Force Court of Criminal Appeals pursuant to Article 66(b)(1), UCMJ, and is filed with this Honorable Court under Article 67(a)(3), UCMJ.

Statement of the Case

Between 8-10 April 2009 and 14-15 April 2009, Appellant was tried by a general court-martial composed of officer members at Luke AFB, AZ. He entered mixed pleas for eight specifications in violation of Article 92; he was found guilty of all eight specifications. He pled guilty to a single specification in violation of Article 112a, divers use of marijuana. He was found

not guilty of three specifications in violation of Article 134, obstruction of justice. JA 23-26.

Appellant was sentenced to a reduction to the grade of E-1, eight months' confinement, and a bad-conduct discharge. JA 136. On 10 November 2009, the convening authority approved the sentence as adjudged; however, he waived all mandatory forfeitures for a period of six months. JA 19. On 14 November 2011, AFCCA affirmed the findings and sentence. JA 224.

Statement of Facts

A. Article 13 Credit

Based on Article 13, UCMJ, the military judge awarded Appellant 100 days' confinement credit. JA 48. Appellant's duties on "Thunder Pride" from 5 December 2007 until 8 April 2009 provided the factual basis for the Article 13 credit. JA 34. The military judge found that Thunder Pride was a holding unit consisting of Airmen under investigation, facing potential disciplinary action, or awaiting separation. JA 35. He found the duties generally consisted of picking up trash, painting, moving furniture, cutting grass, working at the Airman's Attic, pulling weeds, and performing base beautification. JA 36-37.

The local base instruction indicated that Airmen should not remain on Thunder Pride for more than 60 days without consulting the legal office. JA 35. Appellant's unit did not consult with the legal office during Appellant's 16 months on Thunder Pride. JA 35, 47. The military judge found that besides violating the

local instruction, the government did little to contest evidence presented through defense witnesses who testified regarding unsafe working conditions and tasks that did not fit within Thunder Pride's stated purpose. JA 41-42. However, the military judge also found no intent to punish Appellant. JA 44.

B. Article 13 Instructions.

Over defense objection, the military judge instructed the members that Appellant had been awarded 100 days' illegal pretrial punishment credit. JA 51, 130. During sentencing deliberations, the members asked if they could nullify Appellant's 100 days' Article 13 credit by adding an extra 100 days to whatever punishment they felt was appropriate. R. 114. Specifically, the members asked,

> So legally, is it okay for us to consider that hundred days of credit less than what we would consider actual confinement? That's the question that's come up in our discussions. And maybe for ease of understanding and, please, this is just for the example, if we consider 300 days as appropriate confinement but we know the hundred days credit is there but we think that the 300 days confinement should be actual confinement so we bump it up to 400 days because we know we're going to subtract a hundred days; is that legal for us to do that?

Id.

Outside the members' presence, defense counsel asked the military judge to instruct the members that they were not permitted to nullify the confinement credit. JA 125. Instead, the military judge reread the mandatory instruction that informs

the members that they alone decide an appropriate sentence without regard to others' potential actions. JA 130.

Not satisfied with the military judge's recitation of a previously read instruction, one of the members asked, "Sir, is it the way we posed the question or is there a way we can pose the question that will get an answer?" JA 132. The military judge responded as follows:

> Well, I mean, I've provided you the instruction. I mean the bottom line for the members is, you need to look at the evidence you have, my instructions on the law, and determine an appropriate sentence for this accused considering the various factors and considerations that I've presented to you.

Id.

Summary of the Argument

Appellant is entitled to the entirety of his pretrial punishment credit. Panel members are not allowed to nullify that credit. A military judge is required to tailor sentencing instructions based on the facts of a case. The military judge in this case abused his discretion and failed to properly tailor his instructions when he did not inform the panel members that they were not allowed to negate some or all of Appellant's Article 13 credit.

Issue

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INFORMED THE MEMBERS OF APPELLANT'S ILLEGAL PRETRIAL PUNISHMENT CREDIT AND THEN FAILED TO INSTRUCT THE MEMBERS BASED ON A SUBMITTED QUESTION THAT THEY WERE NOT ALLOWED TO NULLIFY SOME OR ALL OF APPELLANT'S 100 DAYS OF CONFINEMENT CREDIT BY INCREASING THE SENTENCE.

Standard of Review

While counsel may request specific instructions, the military judge has substantial discretion concerning whether the requested instruction is appropriate. *United States v. Smith,* 34 M.J. 200, 203 (C.M.A. 1992). This discretion must be exercised in light of correct principles of law as applied to the facts and circumstances of the case. *United States v. Greaves,* 46 M.J. 133, 139 (C.A.A.F. 1997). The proper application of pretrial punishment credit is reviewed de novo. *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002).

Law and Analysis

The members asked if they could impose additional days of confinement to offset some or all of the confinement credit that the military judge had awarded. The answer to that question is no. Yet, despite the defense's request that the military judge provide that answer to the members, he did not. The military judge abused his discretion when he failed to instruct the members that they were not allowed to nullify Appellant's pretrial confinement credit.

A military judge has authority to award credit for illegal pretrial punishment. *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). "The primary mechanism for addressing violations of Article 13, UCMJ, has been confinement credit." *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011). Credit for

illegal pretrial punishment is applied against the adjudged sentence. *United States v. Rock*, 52 M.J. 154, 157 (C.A.A.F. 1999); *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007). In fact, if an accused can establish an Article 13 violation at trial, he is "entitled to sentence relief." *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)); see also *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2011); *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984).

While military judges have broad discretion in tailoring sentencing instructions, that discretion is limited by required instructions in the *Manual for Courts-Martial*. *See United States v. Wheeler*, 38 C.M.R. 72, 75 (C.M.A. 1967) (noting that a military judge has a duty "to tailor his instructions on the sentence to the law and the evidence, just as in the case of prefindings advice."); *see also United States v. Hopkins*, 56 M.J. 393 (C.A.A.F. 2002).

Pretrial confinement credit is similar to illegal pretrial punishment credit. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985); *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). A military judge is required to instruct on pretrial confinement credit. *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003).

In *Allen*, the Court found that the appellant was entitled to pretrial confinement credit. *Allen*, 17 M.J. at 126-27. The

Court found that the military judge abused his discretion when he instructed the members that they were required to consider the appellant's pretrial confinement but were not required to credit appellant for the pretrial confinement. *Id*. However, the court found that the appellant was entitled to the pretrial confinement credit, so the members had no right to negate that credit. *Id*. In fact, the appellant was entitled to day-for-day credit for his pretrial confinement. *Id* at 129.

In this case, the military judge abused his discretion when he failed to instruct the members that they were not allowed to nullify the 100 days of credit awarded by the court. JA 113-14, 132. The military judge has a duty to tailor his instructions to the unique facts of the case. *Wheeler*, 38 C.M.R. at 75. The military judge failed to do so, which allowed the members to negate some or all of the judicially ordered Article 13 confinement credit.

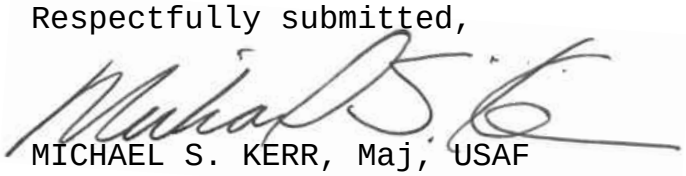
In its opinion below, the Air Force Court was concerned about the possibility of Appellant receiving two bites at the pretrial punishment apple. *See* JA 223. The Court believed that it was proper to give the members sufficient information to preclude them from unknowingly duplicating relief for pretrial punishment that the military judge had already awarded. The lower court's opinion does not appear to address the central problem in this case: that the military judge's instructions left the members free to negate the credit that the military

judge awarded. The threat that this case presents is not two bites at the pretrial punishment apple. Rather, the threat is that Appellant was wrongly required to spit out the one bite to which he was entitled.

Having informed the members of the pretrial confinement credit he had already awarded, the military judge was required to answer the members' questions by informing them that they could not increase what they viewed as the appropriate punishment to offset that credit in whole or in part. Had the military judge done so, then Appellant would have received the one bite – and only the one bite – to which he was entitled.

WHEREFORE, Appellant respectfully requests this Honorable Court set the sentence aside an order a rehearing.

Respectfully submitted,



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