12 April 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Senior Airman (E-4) ERMENRENE BARNETT, USAF, *Appellant.*	)	Crim. App. Dkt. ACM 37578
	)	USCA Dkt. No. 12-0251/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

BRIAN C. MASON, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 33634

LINELL A. LETENDRE, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 35346

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 27428

DON M. CHRISTENSEN, Col, USAF
Chief, Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35093

INDEX

TABLE OF AUTHORITIES

COURT OF APPEALS FOR THE ARMED FORCES

AIR FORCE COURT OF CRIMINAL APPEALS

FEDERAL CASES

MISCELLANEOUS

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ERMENRENE BARNETT, USAF, *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES Crim. App. Dkt. ACM 37578 USCA Dkt. No. 12-0251/AF

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

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3) (2006).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF THE FACTS

Between October 2005 and May 2007, Appellant was an enlisted recruiter. (J.A. at 144-47.) During that time, Appellant used marijuana repeatedly, including during the weekends, during the

duty day, during lunch breaks, and in his government vehicle. (J.A. at 74.) Also during that time, Appellant sought out sexual favors from three different Air Force applicants or recruits in direct violation of a general regulation. (J.A. at 16-17.) Additionally, he developed a sexual relationship with another Air Force recruit also in violation of a general regulation. (J.A. at 16.) In the fall of 2007, Appellant was under investigation for these offenses and other allegations. (J.A. at 34.) When the investigation closed in November 2007, Appellant's commander reassigned Appellant to perform duties as a member of the "Thunder Pride" team. (Id.) Appellant reported for duty with the Thunder Pride team from about 5 December 2007 until about two to three weeks prior to trial in this case, a period roughly sixteen months long. (Id.)

The Thunder Pride team was composed of approximately fifteen to twenty people, the majority of whom were awaiting the results or completion of an investigation, potential disciplinary or administrative action. (J.A. at 35.) Individuals who were assigned to the Thunder Pride team did not have any restrictions on their movements with the exception of normal duties hours when they would report for and complete duty. (J.A. at 43.) They could come and go as they needed to, including to utilize leave. (Id.)

At trial, Appellant raised the issue of a violation of Article 13, U.C.M.J. asserting that his time in Thunder Pride was illegal pretrial punishment. When ruling on this motion, the military judge found that there was no intent to punish Appellant. (J.A. at 44-45.) Further, the military judge found that there were not any circumstances Appellant faced constituting any type of pretrial restraint or conditions tantamount to confinement. (J.A. at 45.) However, the military judge found that because of the length of time Appellant spent on the Thunder Pride team coupled with the failure of the unit to "adhere strictly with the local instruction for Legal Office review[,]" Appellant was entitled to "some relief." (J.A. at 47-48.) The military judge then determined that Appellant would be credited with 100 days of confinement credit. (J.A. at 48.)

After ruling on the Article 13 motion, the military judge asked the parties if they had a position on whether it was appropriate for the court members to be instructed on the confinement credit. (J.A. at 51.) Defense counsel indicated that they did not want the members to be instructed on the credit. (Id.) Trial counsel argued that the members should be instructed on the credit. (J.A. at 50, 52.) The military judge stated, "All right. That's a matter that we're going to have to sort out so start taking a look at that." (J.A. at 52.) The case then proceeded through the findings phase of the trial. (Id.)

After the members announced their findings, the court held an Article 39(a) session to pre-admit several exhibits. At this session, the defense offered their documentary exhibits. (J.A. at 225.) The military judge asked if the trial counsel had any objections. (J.A. at 226.) Trial counsel asserted that if the exhibits referencing Appellant's time spent on the Thunder Pride team were admitted, then he would want the court to instruct the members on the Article 13 confinement credit. (Id.) The military judge then stated that he thought it was appropriate for the members to be instructed on the confinement credit, but referenced the defense's ability to object to the instruction. (J.A. at 227-28.) The defense did not object at that time. (J.A. at 227-29.)

During the pre-sentencing phase of the trial, Appellant published his exhibits to the members, including those that referenced his time on the Thunder Pride team. (J.A. 165-71.) In these exhibits, there are descriptions of some of the specific duties that were performed and both express and implied assertions that these duties amounted to pretrial punishment. (Id.) Appellant provided both oral and written unsworn statements. (J.A. at 58-63.) In his written unsworn statement, Appellant said, "[w]hen the investigation began, I was assigned to the Thunder Pride program at Luke AFB. I remained there for 18 months. The work included picking up trash, sweeping streets, trimming hedges, and various other labor intensive work. I felt

like my world had some [sic] crashing down." (J.A. at 174.) In his oral unsworn statement, Appellant specifically requested the members to sentence him with a bad conduct discharge. (J.A. at 62.)

Following the presentation of all of the pre-sentencing evidence, the military judge excused the members so that the military judge could discuss the proposed instructions with the parties. (J.A. at 63-64.) The military judge indicated that he intended to instruct on the pretrial confinement credit. (J.A. at 65.) The proposed instruction stated,

> In determining an appropriate sentence in this case, you should consider that the accused has been granted 100 days of confinement credit. If you adjudge confinement as part of your sentence, these days will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve his confinement and will be given on a day-for-day basis.

(Id.) The military judge asked if there was any objection to the specific wording of the instruction. (Id.) Both trial and defense counsel indicated that they had no objections. (Id.)

After the discussion on instructions, the parties argued on sentence. (J.A. at 70-97.) During his argument, trial counsel referenced the defense exhibits discussing Appellant's experiences in Thunder Pride. (J.A. at 76-77.) He reminded the members that the court had already taken those conditions in Thunder Pride into account and credited Appellant with 100 days of confinement

credit. (J.A. at 77.) Defense counsel's argument also referenced Appellant's Thunder Pride experiences. (J.A. at 90-92.) Defense counsel acknowledged that their sentencing argument was presented in a manner that asserted that because Appellant was already punished in Thunder Pride, Appellant should receive a lighter sentence from the members.[1] (J.A. at 122.)

The military judge instructed the members on sentencing, including the earlier discussed language regarding the pretrial confinement credit. (J.A. at 98-111.) Neither trial or defense counsel objected to the instructions as given. (J.A. at 111.) Approximately an hour after closing for deliberations, the court members asked a question. The following exchange occurred:

> PRES: The question is, understanding based on the defense exhibits that we were provided and knowing what Thunder Pride is and knowing that it's not actual confinement, is it okay for us to differentiate from that hundred days or do we have to consider that as confinement?
>
> MJ: Okay. There had been a motion for some credit that I had to take up related to the circumstances of Thunder Pride. And after reviewing the evidence and the issues involved in that, I determined that the accused was to be granted 100 days of credit toward any confinement that the court may adjudge. So as I instructed earlier, if the court adjudges confinement, then the 100 days credit that I granted already will be applied toward that to be applied by the correctional facility wherever the accused would go for any period of confinement.
>
> PRES: So legally, is it okay for us to consider that hundred days of credit less than what we would consider

[1] For example, in his argument, defense counsel stated, "[t]he government's used up its punishment that it's requested here in confinement by putting him on Thunder Pride and having him perform those duties." (J.A. at 102.)

> 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 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?
>
> MJ: What I can instruct in this regard is that you should determine a sentence that you believe is appropriate for this accused for the offenses that he's been found guilty of, considering all of the evidence that you've been presented in the case. You've been provided the fact or circumstance that, if you adjudge confinement, then he will have 100 days of credit toward any period of confinement that is adjudged by the court.

(J.A. at 113-15.) Following this exchange, the military judge excused the members and discussed the members' question with the parties. (J.A. at 117.) During that session, defense counsel requested that the military judge specifically instruct them that "if their determination is that 300 days is appropriate, they should give 300 days confinement, not that that's a specific number, without any consideration about how many days pretrial confinement credit he received." (J.A. at 118.) In the alternative, defense counsel requested that the members be instructed that "they're not allowed to re-litigate the Article 13 motion and determine that Thunder Pride was not punishment that should have been awarded 100 days." (J.A. at 127.) The military judge determined that, without trying to guess or assume that they

were undermining the instructions provided so far, the members should be instructed:

> [I]t is their duty to adjudge an appropriate sentence for this accused that they regard as fair and just when it is imposed and not one whose fairness depends upon actions that others may or may not take in this case. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged for they alone are responsible for determining an appropriate sentence in this case. In arriving at their determination, they should select a sentence which best serves the ends of good order and discipline, the needs of the accused, and the welfare of society.

(J.A. at 128.) The military judge then provided that instruction to the members. (J.A. at 130.) One of the members then 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?" (J.A. at 142.) The military judge responded,

> 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.) When the members returned thirteen minutes later, they announced their sentence. (J.A. at 132, 135-36.)

SUMMARY OF THE ARGUMENT

Appellant's request for relief should be denied because: (1) the military judge properly instructed the members on how the defense evidence regarding Appellant's Thunder Pride experiences resulted in a credit of 100 days towards any

adjudged confinement; (2) the military judge did not abuse his discretion in declining to provide the specific instruction requested by defense counsel; and (3) even if this Court determines that the military judge did not properly instruct the members, Appellant suffered no material prejudice to any substantial right.

ARGUMENT

THE MILITARY JUDGE PROPERLY INSTRUCTED THE MEMBERS ON APPELLANT'S CONFINEMENT CREDIT FOR HIS THUNDER PRIDE EXPERIENCES AFTER APPELLANT PRESENTED NUMEROUS EXHIBITS IN HOPES OF DOUBLE MITIGATION CREDIT FOR THESE EXPERIENCES. THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DECLINING TO GIVE THE SPECIFIC INSTRUCTION REQUESTED BY DEFENSE COUNSEL.

Standard of Review

Issues concerning non-mandatory instructions are reviewed for an abuse of discretion. United States v. Forbes, 61 M.J. 354, 358 (C.A.A.F. 2005). 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.)

Law and Analysis

(1) The military judge's instruction informing the members of Appellant's pretrial confinement credit was proper.

"The military judge shall give members appropriate instructions on sentence." R.C.M. 1005(a). These instructions

will include a statement that the members should consider all matters in extenuation, mitigation, and aggravation. R.C.M. 1005(e)(5). In cases involving pretrial confinement, a military judge has a duty to instruct the members to consider an accused's pretrial confinement in arriving at an appropriate sentence. United States v. Miller, 58 M.J. 266, 269 (C.A.A.F. 2003); United States v. Davidson, 14 M.J. 81, 86 (C.M.A. 1982); *See* R.C.M. 1005(e)(5) Discussion (tailored instructions should bring members' attention to several factors including any pretrial restraint imposed on the accused).

Appellant argues first that the military judge's instruction on his pretrial confinement credit was error. This argument should be rejected. This Court made clear in Miller and Davidson that a military judge *must* instruct on pretrial confinement. However, both of those cases involved credit for actual pretrial confinement served and not pretrial confinement credit based upon an Article 13, U.C.M.J. violation. In this case, the military judge, after ruling on the Article 13 motion and awarding Appellant 100 days of confinement credit, advised the parties to start thinking about if/how the members were to be instructed on this credit. (J.A. at 52.) During the pre-sentencing phase of the trial, Appellant offered exhibits referencing his time spent in Thunder Pride. (J.A. at 225.) After all the sentencing evidence and arguments were presented

to the members, the military judge then instructed the members on the pretrial confinement credit. (J.A. at 102.) Given this Court's holdings in Miller and Davidson, it was completely proper for the military judge to instruct, in an abundance of caution to avoid any potential error, the members on the confinement credit.

This case is substantially analogous to United States v. Balboa, 33 M.J. 304 (C.M.A. 1991). In Balboa, the accused was credited with 68 days of pretrial confinement credit. Id. at 304-05. The military judge properly instructed the members on this credit. Id. at 305. Balboa was sentenced to, among other punishments, 12 months and 68 days of confinement. Id. at 304. This Court held that the military judge's instruction informing the members of the pretrial confinement credit was not error. Id. at 305. This Court held that the military judge's instruction was not precluded by Davidson. Id. at 306. Further, this Court held that "the language of R.C.M. 1001(b)(1) permitting evidence of the duration and nature of any pretrial restraint is broad enough to include this credit information, at least if such language is construed in the interests of reliable and truthful sentence." Id. Finally this Court held, "the administrative ramifications of pretrial confinement were both certain and immediate and thus were not collateral or

inadmissible matters within the meaning of Mil.R.Evid. 403." Id.

Like Balboa, the members here were instructed on the pretrial confinement credit. Like Balboa, Appellant argues that the instruction informing the members was error. For all of the reasons articulated in this Court's decision in Balboa, the Court should reject this argument.

It is important to recognize that during the pre-sentencing phase of the trial, Appellant chose to offer several exhibits that discussed his time on the Thunder Pride team. (J.A. 165-71.) By doing so, he created a duty for the military judge to instruct the members on how to receive and consider this evidence. United States v. Hopkins, 56 M.J. 393, 394-95 (C.A.A.F. 2002); *see* United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967).

This Court recognized this duty with regards to admission of non-judicial punishment for the same offense in United States v. Gammons, 51 M.J. 169, 182 (C.A.A.F. 1999), by stating that "[e]ach of the choices available to the accused has differing consequences. . . ." Id. at 183. This Court provided specific guidance to military judges when this type of evidence is offered by an accused at trial stating, "[i]f the accused offers the record of a prior NJP during sentencing by members for the purposes of evidence in mitigation, the military judge must

instruct the members on the specific credit to be given for the prior punishment under NJP." Id. at 184. Thus, Appellant's admission of this evidence mandated that the military judge instruct the members on the specific credit to be given. Id. The military judge upheld his duty and doing so was not error.

This Court stated in Gammons, "where the accused—as gatekeeper—has allowed the NJP to become an issue in the sentencing proceeding, the Pierce dicta could be used to transform the shield of Article 15(f) into a sword that misinforms or misleads the court-martial." 51 M.J. at 180 citing United States v. Pierce, 27 M.J. 367 (C.M.A. 1989). In other words, an accused cannot present evidence of a non-judicial punishment in hopes of mitigating an adjudged sentence, and then expect to hide from the sentencing authority the fact that he would receive credit for the non-judicial punishment towards the court-martial sentence. That is exactly what Appellant tried to do in this case with his confinement credit. The military judge correctly instructed the members on the confinement credit in response to this deliberate attempt to get two bites at the mitigation apple.

AFCCA correctly analogized this case to Gammons. The Court said, "the appellant stands as the 'gatekeeper' as to whether or not the evidence of illegal pretrial punishment is presented to the members." United States v. Barnett, 70 M.J. 568, 572 (A.F.

Ct. Crim. App. 2011) (citing Gammons, 51 M.J. at 182). Appellant opened the gate to the members being informed of his confinement credit when he offered the multiple defense exhibits referencing his experiences in Thunder Pride in mitigation.

Applying this Court's holding in Gammons to this case, Appellant opened the gate to this instruction. When Appellant chose to admit evidence of his experiences on the Thunder Pride team as evidence in mitigation, he surrendered any right he may have had to keep hidden from the members the fact that he would receive 100 days confinement credit. Therefore, the instruction here was proper.

(2) The military judge did not abuse his discretion by declining to give the specific nullification instruction requested by defense counsel.

"While counsel may request specific instructions, the military judge has substantial discretion in deciding on the instructions to give and whether the requested instruction is appropriate." Miller, 58 M.J. at 270. Denial of a requested instruction is error if: (1) the requested instruction is correct; (2) it is not substantially covered in the main charge; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation. Id., citing United States v. Zamberlan, 45 M.J. 491, 492-93 (C.A.A.F. 1997) (quoting United States v. Eby, 44 M.J. 425, 428 (C.A.A.F. 1996)); *see*

also United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993).

Here, Appellant requested the military judge to instruct the members that "if their determination is that 300 days is appropriate, they should give 300 days confinement, not that that's a specific number, without any consideration about how many days pretrial confinement credit he received." (J.A. at 118.) In the alternative, defense counsel requested that the members be instructed that "they're not allowed to re-litigate the Article 13 motion and determine that Thunder Pride was not punishment that should have been awarded 100 days." (J.A. at 127.)

Applying this test, Appellant fails to meet at least the second and third requirements. Evaluating the second requirement, the military judge more than substantially covered this issue in his main charge of instructions. The military judge instructed the members that Appellant was granted 100 days of confinement credit. (J.A. at 102.) He instructed that the credit would be given by the correctional authorities. (Id.) He instructed that the members were to focus on an appropriate sentence for Appellant for the offenses of which he was convicted. (J.A. at 107.) He instructed the members that their duty was to adjudge an appropriate sentence for Appellant that the members regard as fair and just when it is imposed and not one whose fairness depends upon action that others may or may

not take in the case. (Id.) He emphasized to the members that they were not to adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (J.A. at 99.) The main charge substantially covered how the members were to consider Appellant's confinement credit and what matters to consider when deciding on a sentence.

Furthermore, in direct response to the members' question about the credit, the military judge's instructions provided to the members, though not the specific wording requested by defense counsel, more than substantially covered the issue. The military judge instructed first:

> There had been a motion for some credit that I had to take up related to the circumstances of Thunder Pride. And after reviewing the evidence and the issues involved in that, I determined that the accused was to be granted 100 days of credit toward any confinement that the court may adjudge. So as I instructed earlier, if the court adjudges confinement, then the 100 days credit that I granted already will be applied toward that to be applied by the correctional facility wherever the accused would go for any period of confinement.

(J.A. at 113-14.) After consultation with the parties, the military judge instructed:

> Your duty is to adjudge an appropriate sentence for this accused that they regard as fair and just when it is imposed and not one whose fairness depends upon actions that others may or may not take in this case. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select a sentence which best

> serves the ends of good order and discipline, the needs of the accused, and the welfare of society.

(J.A. at 130.) Taking all of these instructions together, the instruction requested by defense counsel was substantially covered and further instructions were not necessary or appropriate.

With regards to the third requirement, a more specific instruction on this issue was not necessary because this was not a vital point in the case such that failure to give the instruction deprived Appellant of a defense or seriously impaired its effective presentation. Miller, 58 M.J. at 270. The defense requested instruction was essentially an anti-nullification instruction. Nullification is viewed as an aberration of the criminal justice system. United States v. Bruce, 109, F.3d. 323, 27 (7th Cir. 1997), *cert. denied*, 522 U.S. 838 (1997); s*ee also* United States v. Carr, 424 F.3d, 213, 219-21 (2d Cir. 2005); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1998). Hence, an aberration can hardly be argued as being a vital part of a defense case.

Moreover, the defense was provided a full and meaningful opportunity to have their entire mitigation and extenuation case evaluated by the members. The defense offered in pre-sentencing forty-eight exhibits, including fifteen character statements. (J.A. at 5-8.) Appellant also presented testimony from one live witness and made both verbal and written unsworn statements.

(J.A. at 9). The issue of Appellant's confinement credit was raised by the defense as noted above, but clearly it was a negligible part of the defense case in mitigation and extenuation. *See* Miller, 58 M.J. at 270.

Appellant fails to meet the three requirements to show that denial of the specific wording of the defense requested instruction was error. The instructions given by the military judge in the main charge and then in direct response to the members' questions were legally correct and factually sufficient. Under the facts and circumstances of this case, there was no abuse of discretion in not giving the specific wording of the requested instruction.

(3) Assuming that the military judge erred in his instructions, Appellant suffered no prejudice as he received the sentence for which he asked.

An appellant will not be entitled to relief on appeal unless an error at trial materially prejudiced a substantial right. Article 59(a), U.C.M.J. In this case, after Appellant pled guilty to a specification of marijuana use and was convicted of eight specifications of violations of Article 92 for abusing his position as a recruiter by seeking out and engaging in sexual relationships with recruits, providing alcohol to those recruits, and misusing government property for his own gain. (J.A. at 16-18.) For his crimes, Appellant was facing a maximum punishment of 14 years, 6 months of

confinement, a dishonorable discharge, reduction to E-1, and forfeitures of all pays and allowances. (J.A. at 99.) In his verbal unsworn statement, Appellant specifically requested the members to include a bad conduct discharge as part of their sentence. (J.A. at 62.) When trial counsel argued on sentence, he recommended that Appellant be sentenced to reduction to E-1, 24 months of confinement, and a bad conduct discharge. (J.A. at 71.) When defense counsel argued on sentence, he said,

> The defense asks that you give Airman Barnett an amount of punishment, an amount of confinement that will allow him to return to his family and not destroy the new life he has begun, and give him a punitive discharge which is appropriate considering that his crimes are military in nature.

(J.A. at 97.) Appellant was sentenced to reduction to E-1, 8 months of confinement and a bad conduct discharge. (J.A. at 136.) This adjudged sentence is essentially the sentence for which he asked and his counsel argued. Yet, having received what he requested, he now complains that he was prejudiced and asks for a rehearing.[2] Obviously, this argument lacks merit.

Appellant implies here, as he did before the courts below, that the members negated/nullified some or all of the confinement credit when the actual sentence was determined.

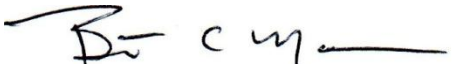
[2] If the Court determines that Appellant was prejudiced by having received what he asked for, there is no need to order a sentencing rehearing as Appellant requests. (App. Br. at 10.) The absolute maximum relief Appellant would be entitled to would be an additional 100 days confinement credit to apply against the adjudged sentence. If the Court determines that there was prejudicial error here, the Court should simply order that credit.

(App. Br. at 9.) Such an implication is pure speculation. No evidence exists in the record that after receiving all of the instructions from the military judge that the members arrived at an appropriate sentence and then increased the confinement time in an effort to nullify the credit awarded by the military judge. In fact, evaluating how the members announced the sentence leads strongly to the conclusion that the members did not increase the confinement at all. When the members originally asked the military judge if it was legal for them to increase the sentence, they did so by using an example that quantified the confinement in "days," matching units to the 100 "days" of confinement credit. (J.A. at 114.) However, when the sentence was announced, the confinement portion was announced as "0 years, 8 months and 0 days." (J.A. at 136.) *Cf.* Balboa, 33 M.J. at 307-08 (Cox, J. concurring) (noting "[i]t seems curious (and more than coincidental) that the confinement adjudged was `68 days, plus 12 months'—not 14 months or 15 months—when the court-martial members knew that their announced sentence to confinement would be reduced by precisely 68 days."). Considering this difference, it is highly speculative to assert that the members inflated the sentence after arriving at an appropriate sentence in an effort to nullify the 100 days confinement credit.

In sum, the instructions given by the military judge in this case were proper. The military judge was well within his discretion to decline to utilize the specific language of the defense counsel's proposed instruction. Even if the Court disagrees, there was absolutely no prejudice because Appellant received the sentence he asked for. Therefore, this Court should deny Appellant's claim.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.



BRIAN C. MASON, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33634

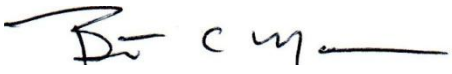
LINELL A. LETENDRE, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4803
Court Bar No. 35346

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

DON M. CHRISTENSEN, Col, USAF
Chief, Government Trial and Appellate
Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35093

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 12 April 2012.



BRIAN C. MASON, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33634

COMPLIANCE WITH RULE 21 (b)

1. This brief complies with the size limitation of Rule 21(b) because the brief is 22 pages.

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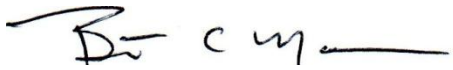

BRIAN C. MASON, Capt, USAF

Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 12 April 2012