IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20080401
Specialist (E-4) **MICHAEL A. GARNER**, United States Army, Appellant	)	USCA Dkt. No. 12-0282/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

THE MILITARY JUDGE ERRED WHEN SHE FAILED TO GIVE THE NECESSARY INSTRUCTIONS ON RECONSIDERATION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866 (2008). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On September 24 and 28, 2007, December 10, 2007, March 7, 25, and 26, 2008, and April 21-26, 2008, Specialist (SPC) Michael A. Garner (appellant) was tried at Fort Eustis, Virginia, before a general court-martial composed of officer and enlisted members. Contrary to his pleas, appellant was

convicted of desertion, disobeying a lawful order, rape, forcible sodomy, possession of child pornography, and indecent assault in violation of Articles 85, 90, 120, 125, and 134 of the UCMJ; 10 U.S.C. §§ 885, 890, 920, 925, and 934.[1] The panel sentenced appellant to reduction to E1, total forfeitures, confinement for life, and a dishonorable discharge. The convening authority approved the adjudged sentence and credited appellant with 338 days of confinement toward the sentence to confinement.

On November 29, 2011, the Army Court affirmed the findings and sentence in a Summary Disposition. *United States v. Garner*, No. 20080401 (Army Ct. Crim. App. November 29, 2011) (unpublished). The Army Court agreed with appellant's second assignment of error that all the charged images were of the same child in Specification 2 of Charge III. *Id.* at 5. Accordingly, the Army Court corrected the language of Specification 2 of Charge III. *Id.* Finally, the Army Court *sua sponte* noted that Specification 1 of Charge III fails to specifically allege the terminal element of Article 134 but that Specification 1 nonetheless states an offense. *Id.* at 3-4.

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[1] Appellant pled not guilty to and was acquitted of one specification of rape, one specification of forcible sodomy, one specification of producing child pornography, and one specification of indecent language. (JA at 10.)

Appellant petitioned this Court for a Grant of Review and filed the Supplement to his Petition on February 15, 2012. On April 18, 2012, this Court ordered briefs filed under Rule 25 of this Court's Rules of Practice and Procedure.[2]

Statement of Facts

Following the military judge's initial sentencing instructions,[3] the court-martial closed at 1521 hours for the panel to deliberate on appellant's sentence. (JA at 29.) At 1644 hours, the military judge opened the court for the panel's

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[2] Though this Court ordered briefs only on the issue presented here, this Court also granted appellant's petition for the following issue:

> WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT SPECIFICATION 1 OF CHARGE II STATES AN OFFENSE EVEN THOUGH THE GOVERNMENT DID NOT ALLEGE THE TERMINAL ELEMENT, EITHER EXPRESSLY OR BY NECESSARY IMPLICATION, AS REQUIRED BY UNITED STATES v. FOSLER, 70 M.J. 225 (C.A.A.F. 2011).

(R. at Order Granting Review.)

[3] As part of the initial sentencing instructions, the military judge, gave the following instruction:

> You may reconsider your sentence at any time prior to its being announced in open court. If, after you determine your sentence, any member suggests that you reconsider your sentence, open the court, and the president should announce that reconsideration has been proposed, without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will then give you specific instructions on the procedure for reconsideration.

(JA at 26-27.)

announcement of the sentence.[4] (JA at 36.) The military judge examined the sentence worksheet and informed the president of the panel that the sentence worksheet was not in the proper form. *Id.* In the "RESTRAINT" section of the sentence worksheet, the panel wrote, "35 years no parole." (JA at 47.)

The military judge told the president of the panel, "the sentence worksheet is not in the proper form." (JA at 36.) She instructed the panel:

> As I have already indicated, this Court may sentence the accused to confinement for life without eligibility for parole. Unless confinement for life without eligibility for parole or confinement for life is adjudged, a sentence to confinement should be adjudged in either full days or full months or full years. Fractions, such as one-half or one-third should not be employed.
>
> So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. The example should be taken only [sic] as a suggestion, not [sic] as an illustration of how to properly announce your sentence.

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[4] At 1600 hours, the military judge opened the court-martial to address the panel's question regarding how to calculate the sentence. (JA at 35, 48.) The military judge instructed the panel to evaluate the offenses "as a whole" and to "issue one sentence for all of those offenses as a whole. The maximum punishment I give you is a ceiling on your discretion, and you are at liberty to arrive at any lesser legal sentence." (JA. at 35.) She also reminded the panel not to "adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority." *Id.*

> So you have distinct periods of confinement. You have days, you have months, you have years, you have life, and you have life without eligibility for parole. So what I will tell you is that right now the sentence of confinement is not an appropriate sentence.

(JA at 37.)

The president of the panel replied affirmatively to the military judge's question whether the panel needed further instructions. *Id.* The military judge returned the panel to the deliberation room and conducted an Article 39(a) session in which she informed the parties that she believed the sentence worksheet was "ambiguous and inconsistent" and that she intended for the members to deliberate to clarify the sentence. (JA at 37-38.) She announced her intent to reinstruct the panel on a term of time and the definitions regarding confinement for life and confinement for life without eligibility for parole and to "make sure that they are clear that the only time they get to weigh in on parole is if they have determined that a life sentence is appropriate, and then they determine life or life without eligibility for parole." *Id.* She continued, "If they're giving some kind of quantifiable term, they may not weigh in with regards to the parole - it is not an option for them; it is not an authorized punishment - and explain to them that life without eligibility for parole is an encompassing term

of confinement and the highest form, and the others are all lesser forms." (JA at 38-39.)

Appellant objected to the military judge's plan because the panel had already voted on a sentence with the least severe punishment. (JA at 39.) Appellant's defense counsel stated:

> Your Honor, defense believes that a requisite number of panel members have voted on a sentence that includes a term of years; an therefore, it is a legal sentence. We believe that the presence of a more severe term of confinement on the sentencing worksheet should have no effect because the panel has reached a decision on the least severe punishment. We believe, therefore, that that should be the sentence and the other terminology should be disregarded.
>
> The sentence should be strictly the term of years that is listed on the sentencing worksheet with the - for the term of confinement.

(JA at 39.)

The military judge disagreed with appellant's defense counsel. *Id.* She said, "I believe it's completely ambiguous as to what the panel members meant, and it is up to them to clarify for the Court what it is that they meant, and I will be returning them back to their deliberations with a clean sentencing worksheet in order to clarify in proper form what their sentence is." *Id.* The military judge asked appellant's defense counsel if he objected to her proposed instructions. *Id.* Appellant's defense counsel had no objections. *Id.*

The military judge called the court-martial to order and informed the members that the sentence worksheet was "ambiguous" and they could not "do both a quantified term of years and a life without eligibility for parole. You cannot have those two sentences coexist." (JA at 41.) She continued:

> There is a quantifiable term of confinement that you can give, which would be days, months, years, or a mix. And then there is life. And I defined life for you earlier, which involves the possibility of a parole situation occurring, and there is life without possibility of parole, which is the highest level of confinement within your authority to adjudge, and it's all encompassing. It's life, and unless somebody in some - let me find my instruction and reread it to you so there is no mistake about it.
>
> But you do not have a vote with regards to parole unless you determine that a sentence to life is appropriate, and then you have a say as to whether it's life or life without the possibility of parole. You do not have any say about any type of a parole situation with regards to a quantifiable term.

Id.

The military judge repeated her earlier instructions regarding confinement, including the following instruction:

> A sentence to confinement for life without eligibility for parole means that the accused will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to confinement for life or any lesser confinement term by comparison means that the accused will have the possibility of earning parole from confinement under such circumstances as are or

> may be provided by law or regulation.
>
> Parole is a form of conditional release of a prisoner from actual incarceration before his sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete his sentence to confinement if the conditions of parole are violated.
>
> In determining whether to adjudged [sic] confinement for life without eligibility for parole or confinement for life, if either, you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole actions by the convening authority or any other authority.

(JA at 42-43.)

The members had no questions, so the military judge closed the court for deliberations at 1735 hours. (JA at 43.)

At 1833 hours, the military judge opened the court-martial for the announcement of the sentence. *Id.* The military judge examined the sentence worksheet and found it satisfactory. (JA at 44.) The panel sentenced appellant to reduction to the grade of E-1, total forfeitures, confinement for life, and a dishonorable discharge. (JA at 49, 44, 45.)

Issue Presented and Argument

> WHETHER THE MILITARY JUDGE ERRED WHEN SHE FAILED TO GIVE THE NECESSARY INSTRUCTIONS ON RECONSIDERATION.

A military judge's failure to give a sentencing instruction is reviewed *de novo*. *United States v. Miller*, 58 M.J. 266, 269

(C.A.A.F. 2003); *see United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982).

Rule for Courts-Martial (RCM) 1005(a) requires a military judge to "give the members appropriate instructions on sentence." Generally, sentencing instructions shall be given after closing arguments and before the members close for deliberations, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time. RCM 1005(b). Here, the military judge erred to the substantial prejudice of appellant when she failed to *sua sponte* give additional instructions, to wit: instructions on reconsideration of the panel's sentence.

The panel incorrectly included parole as an element of the sentence to confinement on the original sentence worksheet. Though confinement for life without eligibility for parole was the maximum authorized punishment for appellant's offenses,[5] a

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[5] Appellant was convicted of raping SG on divers occasions between on or about October 15 and December 31, 2006. (JA at 6.) Because the Congressional amendments to Article 120 did not take effect until October 1, 2007, the 2005 edition of the Manual for Courts-Martial (MCM) governed appellant's trial. The 2005 MCM prescribed "death or such other punishment as a court-martial may direct" as the maximum authorized punishment for rape. MCM, pt. IV, ¶ 45e(1). The convening authority did not refer a capital case, such that confinement for life without eligibility for parole was the maximum authorized punishment. (JA at 6.) *See* the Discussion to RCM 601. The military judge correctly informed the panel that confinement for life without

court-martial panel does not have the authority to adjudge parole as an element of a sentence and the panel should not have considered the possibility of parole in arriving at an appropriate sentence for appellant. *See United States v. McNutt*, 62 M.J. 16, 19, (C.A.A.F. 2005) (citing *United States v. Duncan*, 53 M.J. 494, 499 (C.A.A.F. 2000)).

Rule for Courts-Martial 1009 prescribes two procedures to be used when questions arise regarding a sentence. First, "[a] sentence may be clarified at any time prior to action of the convening authority on the case." RCM 1009(c). For a sentence adjudged by members, clarification is used when the sentence is "ambiguous." *Id.* Second, reconsideration is used when the adjudged sentence is beyond the panel's legal power to impose. *United States v. Jones*, 3 M.J. 348, 351 (C.M.A. 1977) (quoting *United States v. Long*, 15 C.M.R. 101 (C.M.A. 1954)). *See* RCM 1009(d) ("When a sentence adjudged by the court-martial is apparently illegal, the convening authority may return the matter to the court-martial for reconsideration . . . .")

Reconsideration is available only if the sentence has not been announced.[6] RCM 1009(a). Though the military judge

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eligibility for parole was the maximum authorized punishment. (JA at 17.)

[6] Rule for Courts-Martial 1009(e) provides, "Any member of the court-martial may propose that a sentence reached by the members be reconsidered." The Analysis of RCM 1009 states that

examined the original sentence worksheet, which provided for a sentence to confinement for "35 years no parole," she did not permit the president of the panel to announce the adjudged sentence. The "perusal of the sentencing worksheet by the judge . . . for error prior to the reading of the sentence by the president of the court . . . [does] not amount to an 'announcement' of the sentence . . . ." *United States v. Perkinson*, 16 M.J. 400, 401 (C.M.A. 1983) (quoting *United States v. Justice*, 3 M.J. 451, 454 (C.M.A. 1977) (Fletcher, C.J., concurring)). Accordingly, the sentence was not announced. Because the original sentence was not announced in the presence of all parties, reconsideration was available to the panel.

The military judge erroneously found that the panel's original sentence required clarification and not reconsideration. Reconsideration is appropriate when the sentence contains an illegality, such as when a panel adjudges a sentence beyond its legal power to impose. *See United States v. Jones*, 3 M.J. 348, 351-52 (C.M.A. 1977). In *Jones*, the panel sentenced the accused, *inter alia*, "To be discharged from the service as undesirable at the completion of confinement," even though such a discharge was not an authorized punishment. *Id.* at 349. The military judge informed the panel that the sentence

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reconsideration may be "initiated by the military judge or a member. . . ." MCM, pt. A21-80.

was not legal and he instructed the panel to reconsider the sentence in light of the authorized potential discharges of a bad-conduct discharge or a dishonorable discharge. *Id.* The panel thereafter sentenced the accused to a bad-conduct discharge.[7] *Id.* This Court's predecessor, the Court of Military Appeals (CMA) affirmed the military judge's obligation to bring an "ambiguity or apparent illegality in the sentence" to the panel's attention "so that it may close to reconsider and correct the sentence." *Id.* Though the CMA declared that reconsideration was appropriate for both "ambiguity or apparent illegality in the sentence," the remainder of the opinion makes clear that reconsideration is necessary for situations in which the panel adjudges an "illegal sentence" or a sentence "contravene[s] certain special limitations set out in the [MCM] whereas the panel may "correct" a situation "in which, through inadvertence, the president of a court-martial may fail properly to announce the actual sentence of the court." *Id.* at 350, 351.

Clarification of a sentence is appropriate to correct a mistake in the announcement of a sentence, such as a "slip of the tongue" or a verbal or clerical error. *See United States v. Liberator*, 34 C.M.R. 279 (C.M.A. 1964); *United States v.*

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[7] The original sentence included confinement at hard labor for eighteen months but the reconsidered sentence included confinement at hard labor for twelve months. *Jones*, 3 M.J. at 349.

Robinson, 15 C.M.R. 12 (C.M.A. 1954). In *Robinson*, the president of the court-martial announced the sentence which included, *inter alia*, forfeiture of "$58.80 for three years." 15 C.M.R. at 14. The court-martial adjourned but opened just two minutes later. *Id.* The President stated that he "did not correctly announce the sentence which the court adjudged" and that he wished the record to show that his original announcement "was in error." *Id.* The President stated that he had made a "clerical error plus a verbal error" and that it was unnecessary for the court to "revoke its former sentence because the sentence was correct. The President's announcement was in error." *Id.* The President then announced that the correct sentence included forfeiture of "$58.80 per month for a period of three years." *Id.* The CMA concluded that:

> [T]here was not a reconsideration of the sentence. . . . A reconsideration involves something more than a change in phraseology necessary to express truly the sentence agreed upon and that is all we have here. A procedure cannot be made so technical and inflexible that a court-martial is denied the power to correct a sentence inadvertently pronounced unless the correction in a material way clashes with the rule of being twice punished for the same offense.

Id. at 15.

In *Liberator*, the top half of the sentence worksheet indicated that the panel included confinement at hard labor for six months as part of the sentence, but the written statement at

the bottom of the worksheet, which the president of the panel read aloud, did not include confinement. 34 C.M.R. at 281. The panel had voted on six months confinement at hard labor, but the president of the court-martial did not include the sentence to confinement when he announced the sentence. *Id.* An hour after the original announcement of the sentence, the court-martial reconvened to announce the previously voted on sentence. *Id.* at 282. The CMA considered the error in the original announcement to be a "slip-of-the-tongue" and found that the panel did not reconsider the sentence or increase the severity of the sentence upon the second announcement. *Id.* at 281-82 (quoting *Robinson*, 15 C.M.R. at 15.) Rather, the CMA found that the "sole extent of the additional proceedings . . . was to correct the inadvertent and mistaken announcement, and impose the sentence the court members had actually voted for initially." *Id.* at 284.)

While there are no reported cases which define clarification and reconsideration, the above cases make clear that clarification is proper for ambiguities involving mistakes in the announcement of a sentence or verbal or clerical errors. In short, clarification is appropriate to correct a mistake or error, whereas reconsideration is appropriate when the panel has imposed an illegal sentence.

Here, though the panel's original sentence was illegal because it contained an unauthorized punishment, the sentence itself was not ambiguous. There was no mistake in the announcement of the sentence, nor was there a verbal or clerical error. The panel intended for appellant to serve a full thirty-five year sentence to confinement. The original sentence contained an illegal element, such that reconsideration was the only correct procedure. Accordingly, the military judge erred when she concluded that the panel should clarify its original sentence rather than reconsider the sentence.

Rule for Courts-Martial 1009(e) states that when a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration, which include that the members shall vote by secret written ballot whether to reconsider the sentence already reached by them and that members may reconsider a sentence with a view of increasing it only if a majority of them vote for reconsideration. Here, the military judge failed to instruct the panel regarding reconsideration. During the initial sentencing instructions, the military judge was aware that reconsideration was a possibility and she advised the panel that she would give those instructions if and when the time came. While "[i]t is clear that the ultimate responsibility for framing issues and providing guidance to the members is upon the

military judge," when the time came to give those instructions the military judge wholly failed to discharge her duty in providing necessary instructions to the panel. *Jones*, 3 M.J. at 352 (Fletcher, C.J., dissenting.)

In *United States v. Butler*, the special court-martial panel's original sentence worksheet included a general discharge. 41 M.J. 211 (C.M.A. 1994). The military judge told the members:

> You have to make a decision. You have to decide whether or not you're going to adjudge a bad-conduct discharge or no discharge. You have no authority to adjudge any other type of discharge other than a bad-conduct discharge. So, I'll ask you to go back and deliberate and arrive at a legal sentence, okay?

Id.

The military judge gave no additional instructions. *Id.* The CMA considered whether a military judge erred when he ordered the panel to reconsider its illegal sentence without properly instructing them on the voting procedures to follow on reconsideration. *Id.* The CMA held that while the military judge "was under an obligation to take corrective action," he did not err even though "he might have convened a session under Article 39(a), UCMJ, . . . and solicited the views of counsel as to how to proceed, or he might have chosen to provide the members with additional guidance *sua sponte*." *Id.* at 212.

The CMA's decision in *Butler* should not persuade this Court that military judges have no obligation to provide instructions on reconsideration when the panel's sentence contains an illegality. First, the military judge in *Butler* did not convene an Article 39(a) session to solicit the views of counsel regarding how to proceed. *Id.* Here, the military judge immediately recognized the illegality in the panel's original sentence and convened an Article 39(a) session. The military judge announced her intent to have the panel "clarify" its decision and she sought counsels' views on the matter. Appellant's defense counsel objected. When faced with the illegality of the panel's original sentence and appellant's objection to mere clarification of the sentence, the military judge should have instructed the panel on reconsideration of the sentence.

Additionally, the CMA examined the issue pursuant to RCM 1009(c)(2)(B) of the 1984 MCM. *Id.* That version of RCM 1009 provided:

> When a sentence reached by members is ambiguous or apparently illegal, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned.

Id.

The 2005 version of RCM 1009 does not contain the above provision, such that the analysis of a non-existent rule should not apply to the instant case.

The military judge's failure to instruct the panel on reconsideration erred to the substantial prejudice of appellant. Though the military judge informed both parties that she intended for the panel to "clarify" the sentence, she did not tell the members that they were to clarify the sentence to confinement; she did not instruct the panel to correct an inadvertent announcement in the sentence, nor did she instruct the panel on how to correct a verbal or clerical error. Instead, the military judge instructed the members to deliberate again on the sentence. Essentially, the military judge instructed the panel to deliberate anew on any sentence to confinement. When the panel returned to announce the second sentence, it was clear that the panel had reconsidered, rather than clarified, the sentence to confinement. The sentence to confinement skyrocketed from thirty-five years to confinement for life. Because the military judge failed to provide the necessary instructions on reconsideration, it is unknown whether a required majority of the panel voted to increase the sentence to confinement. Appellant received an immeasurably harsher sentence after the military judge ordered the panel to re-deliberate but did not instruct the members how to conduct the

second set of deliberations. The military judge's failure to give the necessary instructions regarding reconsideration erred to the substantial prejudice of appellant who has been sentenced to confinement for life after he was originally sentenced to thirty-five years confinement.

Conclusion

Wherefore, appellant respectfully requests that this Honorable Court set aside the sentence and order a rehearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Garner, Crim. App. Dkt. No. 20080401, Dkt. No. 12-0282/AR, was delivered to the Court and Government Appellate Division on June 4, 2012.

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