IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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

Granted Issue

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) (hereinafter UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] UCMJ, art. 66(b), 10 U.S.C. §866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. §867(a)(3).

Statement of the Case

A panel composed of officer and enlisted members convicted appellant, contrary to his pleas,[3] of desertion, willfully disobeying a superior commissioned officer, rape, forcible sodomy, indecent assault, and possession of child pornography, in violation of Articles 85, 90, 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ).[4] The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for life with the possibility of parole, and to be dishonorably discharged from the service.[5] The convening authority approved the sentence as adjudged,[6] and credited appellant with 338 days of confinement against the sentence to confinement.[7]

On November 29, 2011, the Army Court summarily affirmed the findings[8] and sentence. On January 27, 2012, appellant filed a petition for review with this Court, and on February 15, 2012, filed his Supplement to Petition for Grant of Review. This Court granted appellant's petition on April 18, 2012.

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[3] Joint Appendix (JA) at 14.
[4] JA at 15-16.
[5] JA at 44-45.
[6] JA at 46.
[7] JA at 46. The convening authority waived the automatic forfeiture of all pay and allowances for a period of six (6) months, effective 17 July 2009.
[8] JA at 1-5. The Army Court disapproved the finding of Specification 2 of Charge II regarding images of "children," but affirmed a finding as to images of "a child," since all of the images at issue depicted the same child. JA at 3.

Statement of Facts

Following the conclusion of the parties' evidence and arguments during the sentencing phase of appellant's court-martial, the military judge instructed the panel concerning the law as it relates to sentencing and the procedures they were to follow in adjudging appellant's sentence.[9] Specifically, she instructed the panel that the maximum punishment they may adjudge was reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for life without eligibility for parole, and a dishonorable discharge.[10]

Regarding confinement, the military judge reiterated that the panel may sentence appellant to life without the possibility of parole.[11] She also instructed them that "[u]nless 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."[12] In addressing parole, she explained that a sentence to life without the possibility of parole meant that appellant would never be eligible for parole, whereas "[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

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[9] JA at 17-29.
[10] JA at 17-18.
[11] JA at 20.
[12] JA at 20.

confinement under such circumstances as are or may be provided by law or regulations."[13]

The military judge instructed the panel that should they sentence appellant to confinement for life (with or without parole), or confinement in excess of ten years, the sentence required the concurrence of at least six members.[14]

In discussing procedure, the military judge explained that following submission of proposed sentences by members and voting on those proposals, "once a proposal has been agreed to by the required concurrence, then that is your sentence."[15] She went on to explain that the panel may reconsider their sentence at any time prior to its being announced in open court.[16] The military judge explained that if any member suggests reconsideration, the president of the panel was to announce to the court that reconsideration has been proposed.[17] The military judge finally informed the panel regarding reconsideration that she would provide specific instructions if reconsideration were requested.[18]

The panel broke for deliberations at 1521 hours on 26 April 2008. At 1553 hours the panel sent a question regarding whether

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[13] JA at 20-21.
[14] JA at 26.
[15] JA at 26.
[16] JA at 26.
[17] JA at 26.
[18] JA at 27.

they were to sentence appellant for each individual offense or for all offenses together.[19] The military judge recalled the members at 1600 hours following an Article 39(a) session and reiterated that "a single sentence shall be adjudged for all offenses of which the accused has been found guilty."[20] The court-martial closed for deliberations at 1602 hours.

The panel returned with its initial sentence at 1644 hours; however, the military judge noted, before announcement of the sentence, that "the sentencing worksheet is not in the proper form."[21] On the sentencing worksheet, under the section "Restraint," the panel apparently sentenced appellant to both confinement for 35 years as well as "life without eligibility for parole."[22]

The military judge first attempted to re-instruct the panel regarding the permissible punishments to confinement.[23] She informed the panel that their sentence to confinement "is not an appropriate sentence"; however, the president of the panel indicated that the panel required further instructions.[24] The military judge then excused the members and conducted an Article

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[19] JA at 31, 48.
[20] JA at 35.
[21] JA at 36.
[22] JA at 47. Appellant incorrectly states that the panel wrote "35 years no parole" on the sentencing worksheet. (Final Brief on Behalf of Appellee at 4).
[23] JA at 37.
[24] JA at 37.

39(a) session with counsel for the parties to discuss the matter.[25] Appellant argued that because the panel selected confinement for a term of years (35), "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."[26]

The military judge disagreed and held that the sentencing worksheet was "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."[27] Appellant did not have any objection to the instructions given by the military judge.[28]

The military judge recalled the members and re-instructed them regarding sentencing appellant to confinement.[29] She explained in particular that the panel did 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

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[25] JA at 37.
[26] JA at 39.
[27] JA at 39.
[28] JA at 39.
[29] JA at 41-43.

say about any type of a parole situation with regards to a quantifiable term."[30]

After re-instructing the panel, the military judge asked the president "are the members ready to resume deliberations to try to clarify for the Court what your sentence . . . is?"[31] The president of the panel indicated they were prepared, and the court-martial closed at 1735 hours for continued deliberations.[32] The court-martial reconvened almost an hour later at 1833 hours when the panel returned with its sentence of reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for life, and a dishonorable discharge.[33] The sentencing worksheet this time correctly only circled "life" under the heading, "Restraint."[34]

GRANTED ISSUE AND ARGUMENT

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

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed de novo."[35]

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[30] JA at 41.
[31] JA at 43.
[32] JA at 43.
[33] JA at 44-45, 49.
[34] JA at 49.
[35] *United States v. Ignacio*, 71 M.J. 125 (C.A.A.F. 2012), (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008); *but see*

Law and Analysis

Because the initial sentencing worksheet returned by the panel in this case was ambiguous as to the sentence to confinement, the issue was one of clarification (R.C.M. 1009(c)), not reconsideration (R.C.M. 1009(e)). There was no sentence to reconsider because no lawful sentence to confinement had been adjudged.

Rule for Courts-Martial [R.C.M.] 1009(c) provides that "[a] sentence may be clarified at any time prior to action of the convening authority on the case."[36] In courts-martial involving members, "[w]hen a sentence adjudged by members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned."[37]

The clear rule regarding sentencing is that "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them."[38] "A sentence that is internally ambiguous or self-contradictory to the point that a reasonable person

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United States v. Hopkins, 56 M.J. 393, 395 (C.A.A.F. 2002)("The sentencing instructions of a military judge are reviewed for abuse of discretion.").

[36] R.C.M. 1009(c).

[37] R.C.M. 1009(c)(2).

[38] *United States v. Stewart*, 62 M.J. 291, 294 (C.A.A.F. 2006) (citing *United States v. Daugherty*, 269 U.S. 360, 363, 46 S. Ct. 156 (1926)).

cannot determine what the sentence is may be found illegal."[39] Further, "[a] sentence need not be so clear as to eliminate every doubt, but sentences should be clear enough to allow an accused to ascertain the intent of the court or of the members."[40]

It should be without question that the panel's initial sentence of appellant to both 35 years confinement and confinement for life without parole was internally ambiguous, self-contradictory, and consequently illegal. Rule for Courts-Martial 1009(c)(2) therefore required the military judge to take corrective action, which she did. The only question is whether the panel, in selecting a new sentence, was required to follow the procedures for reconsideration under R.C.M. 1009(e) and be instructed accordingly.

The Army Court of Military Review interpreted paragraphs 76*c*[41] and 76*d*[42] of the *Manual for Courts-Martial* (1969 edition),

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[39] *Stewart*, 62 M.J. at 294 (citing *United States v. Earley*, 816 F.2d 1428, 1430 (10th Cir. 1987)).

[40] *Id.*

[41] "If the military judge notes any ambiguity or apparent illegality in the sentence as announced by the court, he should bring the irregularity to the attention of the court so that it may close to reconsider and correct the sentence." *Manual for Courts-Martial*, United States (1969 ed.) [hereinafter *MCM*, 1969], Chapter XIII, para 76c.

[42] "[A]ny member of the court may propose that a sentence be reconsidered. The question shall be determined by secret written ballot, and a reballot on the sentence with a view to increasing it will be taken only if a majority of the members present vote in favor thereof; but a reballot on the sentence

the precursor to R.C.M. 1009(c) and (e), and held specifically in *United States v. King*,[43] that:

> [w]hen reconsideration is initiated by the military judge under paragraph 76c prior to formal announcement of the sentence . . . the procedures for balloting on the motion to reconsider which are set out in paragraph 76*d* are not applicable and instructions regarding those procedures are unnecessary. The balloting procedures in paragraph 76*d* apply only when a court member proposes reconsideration."[44]

Applying the holding of *King* to the current version of the R.C.M., when the military judge orders the panel to correct an ambiguous sentence under R.C.M. 1009(c)(2), the procedures of R.C.M. 1009(e) consequently do not apply, and instructions as to those procedures are not necessary.

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with a view to decreasing it will be taken if the vote therefore indicates that reconsideration *is not opposed* by the number of votes required for the sentence that was previously agreed upon." *MCM*, 1969, Chapter XII, para 76d.

[43] 13 M.J. 838 (A.C.M.R. 1982), *pet. denied*, 14 M.J. 232 (1982).

[44] *King*, 13 M.J. at 841. The Analysis of R.C.M. 1009 points out that R.C.M. 1009(c)(2)(B) (*Manual for Courts-Martial*, 1984 ed.) was drafted to clarify "that a formal vote to reconsider is necessary when reconsideration is initiated by the military judge," citing to a lack of clarity between the *MCM*, 1969, and *King*. However, R.C.M. 1009(c)(2)(B) (1984) provided that the procedures for reconsideration only applied if the ambiguity or illegality was discovered *after* adjournment. If discovered prior to adjournment, however, the rule did not require the procedures for reconsideration to be employed. *See United States v. Butler*, 41 M.J. 211, 212 (C.M.A. 1994). R.C.M. 1009 was again amended in 1995, deleting the language of R.C.M. 1009(c)(2)(B) (1984).

This Court's precedent is consistent with the holding in *King*. In *United States v. Butler*,[45] following initial sentence deliberations the panel impermissibly returned a sentence to a general discharge.[46] The military judge, after reviewing the worksheet indicating the unlawful sentence, instructed the panel that they may only adjudge either a bad-conduct discharge or no discharge, and that they had no authority to adjudge any other type of discharge.[47] The military judge then instructed the panel to "go back and deliberate and arrive at a legal sentence, okay?"[48] The military judge gave no further instructions and neither party objected or requested additional instructions.[49] The panel then returned with a sentence including a bad-conduct discharge.[50]

The Appellant in *Butler* argued that "the court members impermissibly increased his sentence without proper instructions on the procedures for reconsidering a sentence."[51] The Court of Military Appeals disagreed and, citing to the predecessor of R.C.M. 1009(c)(2),[52] held that because the panel "originally had reached an illegal sentence by attempting to impose a general

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[45] 41 M.J. 211 (C.M.A. 1994)
[46] *Butler*, 41 M.J. at 211.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Butler*, 41 M.J. at 211.
[51] *Id.* at 212.
[52] R.C.M. 1009(c)(2)(B). *See* footnote 44, *infra*.

discharge . . . the military judge was under an obligation to take corrective action."[53] The Court found the military judge was not required to provide additional instructions regarding reconsideration to the panel.[54]

Similarly, in *United States v. Perez*,[55] the panel returned an illegal verdict by finding the accused guilty of conspiracy but also excepting the language of the overt act from the specification.[56] Prior to the announcement of findings the military judge informed the panel that their findings were improper and instructed them to reconsider their findings, without first giving the "reconsideration" instructions.[57] The Court of Military Appeals held that while the military judge could have instructed the panel that their finding amounted to a finding of not guilty and asked if they wished to reconsider their sentence, he was not required to.[58] The military judge properly acted within his discretion by informing the panel that their findings were illegal and returned them for further deliberations.[59]

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[53] *Id.*
[54] *Id. See also United States v. Champion*, 2003 WL 1907882 (N.M.C.C.A. April 21, 2003)(*unpublished*).
[55] 40 M.J. 373 (C.M.A. 1994).
[56] *Perez*, 40 M.J. at 375.
[57] *Id.* at 375-376.
[58] *Id.* at 377-78.
[59] *Id.* at 378.

Appellant's primary argument regarding why the procedures of R.C.M. 1009(e) must be used in this case is because case law has used the term "reconsideration" when describing a panel being required to correct an illegal sentence.[60] However, as *Butler*, *Perez*, and *King* make clear, there is a difference between "reconsideration" of an ambiguous sentence that is a legal nullity, and reconsideration with a view towards either increasing or decreasing an otherwise lawfully adjudged sentence. The former does not require the procedures of R.C.M. 1009(e), while the latter does.[61]

This difference in procedure makes logical sense. The clear purpose of the procedures under R.C.M. 1009(e) is to ensure finality of sentences that will not be disturbed unless a requisite number of panel members agree to reconsider their lawfully imposed sentence. Where a legal sentence has not been

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[60] *See e.g., United States v. Jones*, 3 M.J. 348 (C.M.A. 1977); *King*, 13 M.J. 838.

[61] The holding in *Jones* does not lead a different result in this case. In *Jones* the panel's decision to not sentence the accused to a punitive discharge was clear on the face of the sentencing worksheet when they crossed out both potential punitive discharges. *Jones*, 3 M.J. at 351, n.8. Therefore, any later decision by that panel to include a punitive discharge would have necessarily been with a view towards increasing their original intended punishment. Here, however, it is entirely unclear whether the panel intended to sentence appellant to 35 years of confinement or life without parole; thus, the intent of the panel regarding confinement was entirely unclear. The holding in *Jones* should be limited to its facts and application of the particular provisions at issue there in light of this Court's later decision in *Butler*.

adjudged, there is no issue of finality. Further, as the Discussion to R.C.M. 1009 states, "[a]fter a sentence has been adopted by secret ballot vote in closed session, no other vote may be taken on the sentence unless a vote to reconsider succeeds." The vote for reconsideration is for the members to determine "whether to reconsider a sentence already reached by them."[62]

It is illogical to require that the procedures of R.C.M. 1009(e) be utilized when the military judge orders clarification of an illegal sentence because those procedures could lead to absurd results. For example, if a panel returns an illegal sentence (as was done in this case and *Butler*), and the military judge was required to instruct regarding the procedures of R.C.M. 1009(e), the panel, in following those procedures, could potentially vote to choose not to modify their illegal sentence. The court would then be left with the unique circumstance of a partially ambiguous and illegal sentence. The purpose of R.C.M. 1009(e) cannot be such that it allows a panel the discretion to choose not to correct an illegal sentence before announcement.

Here, appellant's case is squarely on point with *Butler*. Once the panel returned with an ambiguous and illegal sentence, the military judge was required to bring the matter to the

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[62] R.C.M. 1009(e)(2).

attention of the members.[63] Consistent with *Butler* and *King*, the military judge was not required to instruct the panel regarding the procedures for "reconsideration" under R.C.M. 1009(e). Implicit in any reconsideration under R.C.M. 1009(e) is that an actual sentence had been reached by the panel.[64] Because the initial sentencing worksheet returned by the panel in this case was ambiguous as to the sentence to the confinement, the issue was one of clarification (R.C.M. 1009(c)), not reconsideration (R.C.M. 1009(e)). There was no sentence to reconsider because no lawful sentence to confinement had been adjudged.

Consequently, as in *Butler* and *King*, the military judge was not required to provide additional instructions concerning reconsideration. The additional instructions actually provided by the military judge were appropriate under the circumstances and adequately advised the panel regarding how to properly arrive at a sentence for appellant.

Finally, even assuming this Court holds (contrary to *Butler*), that the procedures of R.C.M. 1009(e) are required when clarification is ordered under R.C.M. 1009(c), any error in appellant's case for failing to follow those procedures would be harmless. Because the threshold for reconsideration requires at

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[63] R.C.M. 1009(c)(2).

[64] "When *a sentence has been reached by members* and reconsideration has been initiated . . . ." R.C.M. 1009(e)(1)(emphasis added).

most only the concurrence of a simple majority of the panel members,[65] and a sentence to confinement for life with the possibility of parole (as was adjudged in appellant's case) requires the concurrence of at least three-fourths of the panel,[66] this Court can be satisfied that had the panel here been first required to vote whether to reconsider appellant's illegal sentence, they would have voted to do so.[67]

For these reasons, appellant's assignment of error is without merit.

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[65] R.C.M. 1009(e)(3)(A).
[66] R.C.M. 1006(d)(4)(B).
[67] *See King*, 13 M.J. at 841 n.1 ("even if the members were required to vote on this question whether to reconsider even though reconsideration was initiated by the military judge, failure to ballot on the preliminary question whether to reconsider would have been a harmless procedural error in this case, since it is reasonable to expect that if two-thirds of the members voted to add a bad-conduct discharge, a simple majority would have to voted to reconsider with a view toward increasing the sentence.").

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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