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. Dkt. No. 20121046
Private First Class (E-3) **COLLIN J. CARTER,** United States Army, Appellant	)	USCA Dkt. No. 14-0792/AR

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellee, v. Private First Class (E-3) **Collin J. Carter,** United States Army, Appellant	)	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20121046 USCA Dkt. No. 14-0792/AR

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

Issue Granted

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY PREVENTING DEFENSE COUNSEL FROM PRESENTING FACTS OF APPELLANT'S UNLAWFUL PRETRIAL PUNISHMENT AS MITIGATION EVIDENCE AT SENTENCING.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On September 24 and November 17-18, 2012, at Camp Casey, Republic of Korea, an enlisted panel sitting as a general court-martial tried Private First Class Collin J. Carter [hereinafter

appellant]. The enlisted panel convicted appellant, contrary to his pleas, of indecent act (one specification) in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2008). The enlisted panel found appellant not guilty of aggravated sexual assault (one specification) and assault consummated by battery (one specification) under Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928 (2008).

The enlisted panel sentenced appellant to six months confinement, reduction to E-1, and a bad-conduct discharge. The military judge awarded appellant twenty-seven days of confinement credit against the sentence to confinement (two days for pretrial confinement and twenty-five days for the government's violation of Article 13, UCMJ). The convening authority approved the sentence as adjudged and approved twenty-seven days of confinement credit against the sentence to confinement.

The Army Court affirmed the findings and the sentence on July 21, 2014. (JA 1). Appellant was notified of the Army Court's decision and subsequently petitioned this Court for a grant of review on August 22, 2014. On October 23, 2014, this Honorable Court granted appellant's petition for grant of review.

Statement of Facts

Defense counsel at trial made a motion for Article 13 credit based on unlawful pretrial punishment of PFC Carter. (JA 15-30). The military judge ultimately ruled that twenty-five days of Article 13 credit would be granted, along with two days of pretrial confinement credit. (JA 5-6). Defense counsel later called Sergeant (SGT) Cory Lincourt at sentencing to testify as to the restrictions that were placed on PFC Carter prior to trial as mitigation evidence. (JA 7). The government objected based on relevance, and the military judge immediately sustained the objection without allowing defense counsel an opportunity to fully explain her position. (JA 8-9). Defense counsel requested an opportunity to more fully preserve their objection on the record during a Rule for Courts-Martial [hereinafter R.C.M.] 802 conference, which the military judge allowed in an Article 39(a) session. (JA 10-12).

During the Article 39(a) session, the military judge explained that she conducted research and was relying on the decisions in *United States v. Southwick* and *United States v. Gammons* in determining that the circumstances which support granting Article 13 credit should not also be allowed to be presented by the defendant to a panel as mitigation evidence at sentencing. (JA 11-12). The military judge explained her reasoning as follows:

> Under *U.S. v. Gammons*, it appears as though defense counsel has an option as to how to present that evidence; one of four different ways. I believe that the defense counsel already chose how to present the evidence, and so, it would be inappropriate to allow them to have a second bite at the apple and get credit, as well as try to present it as mitigation.

(JA 12).

Summary of Argument

The military judge abused her discretion by improperly interpreting and applying *Southwick* and *Gammons* in denying defense counsel's attempt to introduce evidence of unlawful pretrial punishment during sentencing. (JA 11-12); *United States v. Southwick*, 53 M.J. 412, 416 (C.A.A.F. 2000); *United States v. Gammons*, 51 M.J. 169, 182-84 (C.A.A.F. 1999). Specifically, the military judge applied the wrong law when she relied on the portion of *Southwick* that had been specifically overruled by this Court's decision in *Inong*. *United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003). This error materially prejudiced the appellant because he was denied his substantial right to present the panel with mitigation evidence under R.C.M. 1001(c)(1)(B).

The decision to present a panel with evidence of unlawful pretrial punishment after a motion for Article 13, UCMJ, credit has been litigated is a tactical decision that should be left to defense counsel and the accused. A bright line rule is not

necessary because the framework with which a military judge may make case-by-case determinations about whether to allow the defense to do so already exists via application of Military Rule of Evidence [hereinafter Mil. R. Evid.] 403 to sentencing evidence. Mil. R. Evid. 403; *See United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2008). If the military judge allows such evidence to be presented as mitigation, a proper instruction by the military judge to the panel would obviate any concern about "double credit." *See United States v. Barnett*, 71 M.J. 248, 255 (C.A.A.F. 2012) (Baker, C.J., concurring in part and in the result).

Issue

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY PREVENTING DEFENSE COUNSEL FROM PRESENTING FACTS OF APPELLANT'S UNLAWFUL PRETRIAL PUNISHMENT AS MITIGATION EVIDENCE AT SENTENCING.

Standard of review

Courts review a military judge's decision to admit or exclude evidence at sentencing for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2008). Sentencing evidence is subject to a Mil. R. Evid. 403 balancing test. *Id.; United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Manns*, 54 M.J.

at 166. "A military judge receives less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing." *Id.*

Law

This case, as postured, presents a novel issue for this Court with regard to whether unlawful pretrial punishment may be presented to a panel on sentencing if such punishment has already been the subject of an Article 13 motion by defense counsel. *See United States v. Barnett*, 71 M.J. 248, 253-54 (C.A.A.F. 2012) (Erdmann, J., special concurrence). A tactical decision by defense counsel to not raise unlawful pretrial punishment in an Article 13 motion at trial precludes an appellant from then seeking Article 13 relief on appeal. *United States v. Inong*, 58 M.J. 460, 463-64 (C.A.A.F. 2003) (citing *United States v. Southwick*, 53 M.J. 412, 416 (C.A.A.F. 2000)).

Southwick analogized unlawful pretrial punishment with pretrial non-judicial punishment, and borrowed the reasoning from *Gammons* to hold that "appellant's trial tactics were tantamount to an affirmative waiver." *Southwick*, 53 M.J. at 416; *United States v. Gammons*, 51 M.J. 169, 182-84 (C.A.A.F. 1999). *Inong* directly and specifically overruled *Southwick* on this point of law. *Inong*, 58 M.J. at 464 ("[W]e also overrule *Southwick*, 53 M.J. at 416 . . . to the extent [it] establish[es]

a 'tantamount to affirmative waiver' rule in the Article 13 arena.").

"The proper application of credit for illegal pretrial punishment and lawful pretrial confinement are questions of law, reviewed de novo." *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002). Judge Erdmann, in a special concurrence to *Barnett*, postulated that whether an accused has been subjected to unlawful pretrial punishment and any resulting credit against confinement "could be viewed as issues solely for a military judge." 71 M.J. at 253 (Erdmann, J., special concurrence). Judge Erdmann also acknowledged that this Court has previously recognized an accused's right to present evidence of unlawful pretrial punishment to a panel as a "tactical decision." *Id.* "If, however, an accused were free to pursue both forums, there would be no tactical decision to make . . . the underlying rationale for such rule may be that if an accused opts to pursue an Article 13 motion before the military judge, the matter has been properly litigated." *Id.* at 254.

Chief Judge Baker, in a separate concurrence in *Barnett*, accepted that an accused could choose to argue pretrial punishment during sentencing, but the military judge would then be obliged to properly instruct the members that: (1) the accused was already credited for the Article 13, UCMJ, violation, and (2) they must "assess a sentence based on the

accused's conduct and all other relevant matters independent of any credit the accused might be entitled to under Article 13, UCMJ, based on the government's conduct." 71 M.J. at 254 (Baker, C.J., concurring in part and in the result). Chief Judge Baker further distinguished Article 13, UCMJ, credit as "relief for the government's conduct, not a sentencing factor related to the accused's offenses." *Id.* at 255.

The punishment adjudged as a result of a conviction is within the discretion of the court-martial, and the range of punishments includes reprimand, forfeiture, reduction, restriction, hard labor, confinement, punitive separation, and, in some cases, death. R.C.M. 1002; R.C.M. 1003. A sentencing authority has the ability to recommend clemency to the convening authority in conjunction with a sentence adjudged under R.C.M. 1003. *See* R.C.M. 1106(c)(2); *see also* R.C.M. 1001(c)(1)(B). A military judge considering a motion for violation of Article 13, UCMJ, may only award credit against a sentence to confinement as a remedy for such violation. *See United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999) (discussing various types of confinement credit that may be awarded by a military judge for legal and illegal pretrial confinement, violations of Article 13, UCMJ, and prior punishment under Article 15, UCMJ); R.C.M. 305(k); *United States v. Suzuki*, 14 M.J. 491, 493 (U.S.C.M.A. 1983).

Argument

A. The military judge abused her discretion by improperly interpreting and applying *Southwick* and *Gammons* in denying defense counsel's attempt to introduce evidence of unlawful pretrial punishment during sentencing.

The military judge in this case abused her discretion by improperly interpreting the law with regard to appellant's use of unlawful pretrial punishment evidence for both Article 13 credit and mitigation at sentencing. (JA 11-12). The military judge should have relied on R.C.M. 1001(c)(1)(B) and applied an R.C.M. 403 balancing test to determine whether evidence of appellant's unlawful pretrial punishment could be presented by defense at sentencing. *Stephens*, 67 M.J. at 235; *Manns*, 54 M.J. at 166. Instead, the military judge relied on an overruled portion of *Southwick* to ultimately deny presentation of the evidence by reasoning that the defense had to make a mutually exclusive choice between an Article 13, UCMJ, motion or presentation of unlawful pretrial punishment to the panel. (JA 12); *Inong*, 58 M.J. at 464 ("[W]e also overrule *Southwick*, 53 M.J. at 416 . . . to the extent [it] establish[es] a 'tantamount to affirmative waiver' rule in the Article 13 arena."). *Southwick*, and in particular the portion of *Southwick* relied on by the military judge, does not support the military judge's ruling, and interpreting *Southwick* in this manner was error.

The holding in *Southwick* is clear, such that the option as to how to present pretrial punishment evidence is relevant to a determination of waiver and *not* relevant to a determination of whether such evidence may be used for both Article 13 credit and mitigation at sentencing. *See Southwick*, 53 M.J. at 416. The language of the holding, in stating that "it was not plain error for the military judge not to grant, *sua sponte*, additional confinement credit," indicates that the military judge has the discretion to grant confinement credit in the absence of a request by defense counsel and in concert with use of pretrial punishment evidence as mitigation at sentencing. *Id.* *Inong* gives a succinct and accurate interpretation of the holding in *Southwick* that indicates the military judge misinterpreted and misapplied the holding in *Southwick* to this case at trial. *Inong*, 58 M.J. at 463.

Because the military judge did not apply a Mil. R. Evid. 403 balancing test in making her determination, she is not entitled to deference by this Court. *Manns*, 54 M.J. at 166. Had the military judge applied the proper analysis to the issue, appellant would have been able to present evidence of pretrial punishment under R.C.M. 1001. Evidence of unlawful pretrial punishment is relevant under Mil. R. Evid. 401 and 402 because it demonstrates a justification for the panel "to lessen the punishment to be adjudged by the court-martial, or to furnish

grounds for a recommendation of clemency." R.C.M. 1001(c)(1)(B); Mil. R. Evid. 401; Mil. R. Evid. 402. Such evidence is probative because the sentencing authority should be made aware of all circumstances that could impact sentence determination or provide a foundation for a clemency recommendation, and any potential prejudice to the government in the form of a "double benefit" to accused could be mitigated by a proper instruction to the panel regarding any credit the accused has already received. Mil. R. Evid. 403; R.C.M. 1001(c)(1)(B); *See Barnett*, 71 M.J. at 254 (Baker, C.J., concurring in part and in the result).

B. Private First Class Carter was materially prejudiced by the military judge's error because he was denied his substantial right to present the panel with mitigation evidence under R.C.M. 1001(c)(1)(B).

Private First Class Carter was prejudiced because he was not able to present the panel with a full and complete picture of the punishment he had already been subjected to, and as a result received a harsher sentence than he would have had he been able to present the desired mitigation evidence. Because defense counsel did not have the opportunity to present the evidence to the members, this Court is in the difficult position of attempting to speculate as to what effect, if any, such evidence would have had on the member's sentencing determination. Because the member's deliberations are

"immutable" in a similar fashion as a convening authority's judgment on clemency, appellant should only have to demonstrate "a colorable showing of possible prejudice" to obtain relief from this Court. *See Barnett*, 71 M.J. at 255 (Baker, C.J., concurring in part and in the result) (citing *United States v. Rodriquez-Rivera*, 63 M.J. 372, 384 (C.A.A.F. 2006).

Even if a standard Article 59(a) prejudice standard is applied, appellant should still be granted relief because appellant was subjected to significant unlawful pretrial punishment that would have resonated with the members. (JA 15-16). He was handcuffed to a bench for nine hours after requesting counsel during questioning. (JA 15). A detention sergeant asked if his was uncomfortable, and when appellant responded in the affirmative, the detention sergeant responded, "how do you think she felt?" and the handcuffs were not loosened. (JA 15). Appellant was made to sleep on the floor for several nights, remained under escort at all times for approximately one month, and was restricted to post. (JA 15). Appellant was also singled out by platoon leadership as part of a group of soldiers accused of crimes and referred to as "the convicts" or "the fab five" in front of the entire platoon, including platoon leadership telling the platoon that anyone who spoke to "the fab five" would be smoked. (JA 15-16).

Before trial, on October 20, 2012, appellant was accused of having urinated on his battery commander's car and was then ordered into pretrial confinement by his battery commander. (JA 16). While in pretrial confinement, appellant was only provided two meals a day and was forced to shower in shackles while being watched by guards. (JA 16). Appellant was also shackled at his court appearance on October 22, 2012, and the military judge had to order his shackles removed. (JA 16). Appellant was thereafter released from pretrial confinement, but his battery commander placed him on a detail at a different location and appellant was escorted at all times during his performance of the detail. (JA 16). After returning from the detail on October 26, 2012, appellant had to sleep on the floor of a Non-Commissioned Officer's room, was restricted to the battery area, was not allowed to wear civilian clothes, was required to sign in every two hours between 0600 and 2200 hours every day, and was ordered not to consume alcohol. (JA 16-17).

A panel, as the sentencing authority, has broad discretion across a wide range of punishments to ascribe during sentencing. R.C.M. 1002; R.C.M. 1003. A military judge faced with a motion alleging a violation of Article 13, UCMJ, can only award confinement credit as a remedy for the government's behavior. *See Rock*, 52 M.J. at 156; R.C.M. 305(k); *Suzuki*, 14 M.J. at 493. A properly informed panel in this case could have decided that

the government's actions warranted (1) a lighter sentence in the form of no punitive discharge, or (2) a clemency recommendation to the convening authority. Given the nature of the pretrial punishment suffered by appellant, it is reasonable to infer that the panel would have been impacted by such evidence and their sentencing determination or decision to provide a clemency recommendation would have been affected.

C. The decision to present a panel with evidence of unlawful pretrial punishment after a motion for Article 13, UCMJ, credit has been litigated is a tactical decision that should be left to defense counsel and the accused.

While the determination of confinement credit provided as a remedy for the government's violation of Article 13, UCMJ, is certainly a question of law and one solely within the purview of the military judge, the facts of the underlying unlawful pretrial punishment are matters that should be properly presented to the sentencing authority for their consideration in determining a proper sentence. Because of the limited remedy a military judge can provide (confinement credit only) and the sentencing authority's broad range of available punishments and ability to recommend clemency, a motion for Article 13, UCMJ, credit does not fully litigate the matter.

If a decision to make an Article 13, UCMJ, motion resulted in prohibiting presentation of the underlying government conduct to the panel for sentencing consideration, the defense would be

deprived of the panel hearing all facts in mitigation and the panel would likewise be deprived of considering all relevant facts in informing their decision as sentencing authority. Conversely, if defense is prevented from making an Article 13, UCMJ, motion because they wish to present evidence of pretrial punishment to the panel, then the defense is deprived of its opportunity to seek a specific judicial remedy for government misconduct. The matter of confinement credit granted as a remedy for the government's violation of Article 13, UCMJ, is unrelated to how the underlying facts of the violation affect mitigation and clemency determinations by a sentencing or convening authority; because they are unrelated, one should not forestall the other.

The decision to make a motion for Article 13, UCMJ, credit or to argue pretrial punishment as mitigation at sentencing, either collectively or to the exclusion of one or the other, is a decision that should be left to defense counsel and accused. As in *Barnett*, the decision to do both can backfire on the defense, but that risk should be assessed and evaluated by defense as part of their trial strategy. The risk of prejudice to the government is minimal, as there is no guaranteed "double credit" that accompanies a defense decision to raise pretrial punishment in both a motion and on sentencing. A military judge could deny the motion, or the panel could disregard the argument

entirely; if one forestalls the other, then it is possible that the government could violate Article 13, UCMJ with impunity if the defense happens to guess wrong with regard to how to raise the issue. Further, a properly instructed panel would make their sentencing determination "based on the accused's conduct and all other relevant matters independent of any credit the accused might be entitled to under Article 13, UCMJ." *Barnett*, 71 M.J. at 255 (Baker, C.J., concurring in part and in the result).

Mil. R. Evid. 403 provides the manner in which a military judge, in their discretion and on a case-by-case basis, can determine whether unlawful pretrial punishment should be presented as mitigation to members after an Article 13 motion has been litigated. The specific factual circumstances for claims of unlawful pretrial punishment vary widely, so allowing Mil. R. Evid. 403 to serve as a tool of discrimination for the military judge will avoid a bright line rule that could significantly hinder an accused in seeking a remedy for the government's violation of Article 13, UCMJ, and potentially allow the government to engage in egregious acts of unlawful pretrial punishment without consequence.

Because the Congress, the President, and this Court have historically recognized an accused's right to present unlawful pretrial punishment to the panel as mitigation, and because a

framework already exists to curtail and resolve an possible prejudice to the government via Mil. R. Evid. 403 and instructions to the panel, this Court should continue to allow the defense to raise unlawful pretrial punishment issues through motions to the military judge and to the panel as matters in mitigation under R.C.M. 1001.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court remand this case for a resentencing hearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Carter, Crim. App. Dkt. No. 20121046, Dkt. No. 14-0792/AR, was delivered to the Court and Government Appellate Division on November 20, 2014.

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