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

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Granted 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.

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Granted 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.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ.[1]

Statement of the Case

An enlisted panel sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of an indecent act in violation of Article 120, UCMJ.[2] The panel members also found appellant not guilty of aggravated sexual

[1] 10 U.S.C. § 867(a)(3).
[2] SJA 1.

assault and assault consummated by battery under Articles 120 and 128, UCMJ.[3] The panel sentenced appellant to be reduced to the grade of E-1, to total forfeiture of all pay and allowances, to confinement for six months, and to be discharged with a bad-conduct discharge.[4] The convening authority approved the adjudged sentence but credited appellant with twenty-seven days of confinement credit against the sentence to confinement.[5] On July 21, 2014, the Army Court of Criminal Appeals affirmed the findings and sentence.[6] On October 23, 2014, this Honorable Court granted appellant's petition for review of the above assignment of error.

Statement of Facts

At some point prior to the announcement of findings, defense counsel moved for credit for alleged unlawful pretrial punishment, confinement credit, and restriction tantamount to confinement.[7] For these alleged violations, defense counsel requested "no less than 45 days of confinement credit."[8] Before the military judge ruled on the motion, the parties agreed upon an appropriate remedy for the asserted violations.[9] Specifically, appellant agreed to twenty-five days credit for

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[3] SJA 1.
[4] JA 13.
[5] JA 14.
[6] JA 1.
[7] JA 5-6, 15.
[8] JA 21.
[9] JA 5-6.

unlawful pretrial punishment and two days credit for pretrial confinement.[10] The military judge asked appellant whether he agreed to the credit and appellant stated "Yes, your honor."[11]

During the presentencing proceedings, defense counsel attempted to introduce evidence concerning the same alleged violations.[12] The government objected and the military judge asked the defense to explain the relevancy of the evidence.[13] Defense counsel proffered that the evidence was relevant to appellant's possible sentence.[14] In sustaining the objection, the military judge stated "I believe that's already been addressed."[15]

Later in the proceedings, the military judge allowed the defense counsel to elaborate upon the purported relevancy of the evidence.[16] Defense counsel stated "the defense was attempting to discuss some of the conditions under which the accused was subjected prior to trial...." Defense counsel also stated, "We would have sought to introduce information related to Article 13, restriction tantamount to confinement and pretrial

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[10] JA 5-6.
[11] JA 5-6.
[12] JA 8.
[13] JA 8.
[14] JA 8.
[15] JA 9.
[16] JA 10.

confinement, to the members as potential mitigation evidence...."[17]

The military judge re-considered her prior ruling and explained that she was "certainly willing to reconsider if there was case law that said that the defense counsel ought to be allowed to, really, have two bites at the apple."[18] The military judge researched the issue and reviewed cases such as *United States v. Southwick*, 53 M.J. 412 (C.A.A.F. 2000), *United States v. Gammons*, 51 M.J. 169 (C.A.A.F. 1999), and *United States v. Barnett*, 71 M.J. 248 (C.A.A.F. 2012).[19] First, she explained that there is an apparent link between the presentation of unlawful pretrial punishment and the presentation of a nonjudicial punishment for the same court-martial offense.[20] Next, she explained that for the presentation of nonjudicial punishment for the same court-martial offense "[u]nder U.S. v. Gammons, it appears as though defense counsel has an option as to how to present that evidence; one of four ways."[21] Likewise, she explained in this case 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,

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[17] JA 10-11.
[18] JA 11-12.
[19] JA 11-12.
[20] JA 11-12.
[21] JA 12.

as well as try to present it as mitigation."[22] Finally, she distinguished *United States v. Barnett* from the facts of this case because the government objected to the introduction of the evidence in this case.[23]

Summary of Argument

The military judge did not abuse her discretion in preventing appellant from re-litigating the alleged unlawful pretrial punishment during the presentencing proceedings because appellant is not entitled to receive double credit for the same alleged government action. Appellant is the gatekeeper of unlawful pretrial punishment evidence. As the gatekeeper, appellant exercised a tactical decision to present this evidence to the military judge instead of the panel members.

Having previously received relief for the alleged unlawful pretrial punishment, appellant failed to establish a separate basis for the relevancy of this evidence under Rule for Courts-Martial [hereinafter R.C.M.] 1001(c) and Military Rule of Evidence [hereinafter Mil. R. Evid.] 403 during the presentencing proceedings. Unlawful pretrial punishment focuses on government action. Once this evidence has been adjudicated prior to presentencing, the probative value of such evidence is low because it does not explain the circumstances surrounding

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[22] JA 12.
[23] JA 12.

the commission of an offense nor can it lessen the punishment to be adjudged without affording an appellant a double credit. In this case, the low probative value of the evidence was substantially outweighed by the danger of wasting time and presenting cumulative evidence.

Assuming *arguendo* the military judge abused her discretion, appellant also failed to demonstrate that the error materially prejudiced his substantial rights under Article 59(a), UCMJ. Appellant received an appropriate remedy to the alleged unlawful pretrial punishment. In fact, he agreed to twenty-five days confinement credit.[24] Moreover, the maximum punishment authorized included five years confinement.[25] Yet, the panel members only imposed six months confinement.[26] Given appellant's agreement to the credit he received and the light sentence imposed, this court can say with "fair assurance . . . that the judgment was not substantially swayed by the error."[27]

Standard of Review

Sentencing evidence is subject to the balancing test of Mil. R. Evid. 403.[28] This court reviews a military judge's decision to admit or exclude sentencing evidence under an abuse

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[24] JA 5-6.
[25] *MCM*, pt. IV, ¶ 45.f.(6).
[26] JA 13.
[27] *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001)(quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).
[28] *United States v. Mann*, 54 M.J. 164, 166 (C.A.A.F. 2000).

of discretion standard.[29] Under this standard, a military judge enjoys "'wide discretion'" in applying Mil. R. Evid. 403.[30] If a military judge conducts a proper balancing test, her ruling will not be overturned absent a clear abuse of discretion.[31] However, a military judge receives less deference if she fails to articulate her balancing test on the record and receives no deference if she fails to conduct the balancing test.[32]

Law and Argument

A. The military judge did not abuse her discretion in finding that appellant, as gatekeeper, was not entitled to double credit for the same government action.

Article 13, UCMJ, prohibits the imposition of punishment prior to trial and conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure an accused's presence for trial.[33] The proper application of credit for illegal pretrial punishment is a question of law[34] and appellant bears the burden of establishing his entitlement to relief.[35] If appellant does not raise unlawful pretrial punishment at trial,

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[29] *Id.*
[30] *Id.* (quoting *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)).
[31] *Id.*
[32] *Id.*
[33] UCMJ art. 13; *United States v. Harris*, 66 M.J. 166, 167-68 (C.A.A.F. 2008).
[34] *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011)(citing *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002)).
[35] *Harris*, 66 M.J. at 168.

he waives consideration of this legal issue on appeal absent plain error.[36]

The military judge properly interpreted *United States v. Southwick* and *United States v. Gammons*, to find that appellant is the gatekeeper of unlawful pretrial punishment evidence.[37] Indeed, in *Southwick*'s concurring opinion, Judge Crawford explicitly stated that the "accused serves as the gatekeeper in deciding who should apply the credit."[38] In *Southwick*, the appellant made a tactical decision to present unlawful pretrial punishment evidence to panel members during presentencing instead of to the military judge at an Article 39(a) session.[39] In *Southwick*, this court discussed appellant's trial tactic, which "involved an election between two available alternatives."[40] Next, this court compared these alternative options to the alternative options available to an appellant when seeking relief for a prior nonjudicial punishment for the same court-martial offense under *United States v. Gammons* and *United States v. Edwards*.[41] When seeking relief for a prior

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[36] *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003).
[37] *See Southwick*, 53 M.J. at 416; see also, *Gammons*, 51 M.J. at 183.
[38] *Southwick*, 53 M.J. at 419 (Crawford, J., concurring).
[39] *Id.* at 416.
[40] *Id.*
[41] *Id.* (drawing a parallel between the available alternatives for presenting unlawful pretrial punishment evidence with the available alternatives for presenting evidence or a prior nonjudicial punishment)(citations omitted).

nonjudicial punishment for the same court-martial offense under *Gammons*, an accused is the gatekeeper of the evidence.[42] As gatekeeper, an accused must choose between four options in presenting prior nonjudicial punishment evidence such as presenting it: (1) during presentencing; (2) during an Article 39(a) session; (3) to the convening authority prior to action; or (4) not presenting the evidence at all.[43] Likewise, appellant should choose between alternative options in presenting unlawful pretrial punishment evidence.

This court did not overrule appellant's role as gatekeeper in *United States v. Inong*. Rather, this court held that if an appellant does not raise unlawful pretrial punishment at trial, he waives consideration of the issue on appeal absent plain error.[44] The holding in *Inong* was limited to overruling the "affirmative, fully developed waiver" rule established in *United States v. Huffman*[45] and the "tantamount to affirmative waiver" rule expressed in *Southwick and United States v. Tanksley*.[46]

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[42] *Gammons*, 51 M.J. at 183 ("The accused, as gatekeeper, may choose whether to introduce the record of a prior NJP for the same act or omission covered by a court-martial finding and may also choose the forum for making such a presentation").
[43] *Id.* (emphasis added).
[44] *Inong*, 58 M.J. at 465.
[45] *Id.* at 464 ("We now overrule [*United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994)]....").
[46] *Id.; see also, Barnett*, 71 M.J. at 254 (Erdmann, J., concurring) ("To the extent that *Southwick* and *Tanksley* established a 'tantamount to affirmative waiver' rule for

Specifically, this court stated "we also overrule *Southwick*...and *Tanksley*...to the extent they establish a 'tantamount to affirmative waiver' rule in the Article 13 arena."[47] Accordingly, the principles relating to appellant's role as gatekeeper remain unchanged and the military judge properly interpreted *Southwick* and *Gammons* in concluding that appellant was the gatekeeper of unlawful pretrial punishment evidence.

For a number of policy reasons, this court should expressly hold that an accused is the gatekeeper of unlawful pretrial punishment evidence and must choose one method from viable options in which to present such evidence. First, in the interests of judicial economy, such a holding will prevent the defense from engaging in gamesmanship that will waste time re-litigating the same legal issue. For example, if an appellant moves for credit from a military judge at an Article 39(a) session and later presents identical evidence to the panel members during presentencing, appellant is essentially asking the panel members to adjudicate the same legal issue previously decided by the military judge. Likewise, if an appellant moves for credit from the military judge prior to the announcement of the sentence but after introducing evidence to the panel members

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asserted violations of Article 13 raised for the first time on appeal, they were overruled by...*Inong*...").

[47] *Inong*, 58 M.J. at 464 (emphasis added).

during presentencing, he again is essentially asking the military judge to adjudicate the same legal issue presented to the panel members.

Second, this holding will prevent an appellant from receiving a windfall in the form of a double credit for the same government action. Conversely, it will also protect an appellant from a decision to nullify previously awarded credit. An instruction from the military judge attempting to address these concerns risks confusing panel members. In *United States v. Barnett*, the defense introduced evidence of unlawful pretrial punishment after the military judge awarded credit.[48] Unlike this case, the government did not object to the introduction of this evidence during presentencing.[49] While this court held the military judge did not abuse his discretion by instructing on this issue, this court limited the holding in *Barnett* to the circumstances of that case.[50] Ultimately, the question of "whether an accused was subject to pretrial punishment and entitled to credit is a question of law for the military judge to decide."[51] If an appellant requests panel members to adjudicate an issue already resolved by the military judge, the

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[48] *Barnett*, 71 M.J. at 250.
[49] *Id.*
[50] *Id.* at 252-53 ("Under the circumstances of this case, we hold that the instruction correctly responded to the members' question").
[51] Id. at 255 (Baker, J., concurring); *see also*, *Spaustat*, 57 M.J. at 260.

panel members will need tailored instructions that explain "what legally qualifies as pretrial punishment under Article 13, UCMJ."[52]

Third, expressly holding the accused is the gatekeeper will remove any potential ambiguity in *Southwick*, *Gammons*, and *Inong*. Finally, under this policy, an appellant's rights are still protected because so long as an appellant raises unlawful pretrial punishment at trial, the issue will be subject to appellate review.[53]

B. Appellant failed to meet his burden of demonstrating the relevancy of the unlawful pretrial punishment evidence.

Defense extenuation and mitigation evidence is subject to the requirements of R.C.M. 1001(c) and Mil. R. Evid. 403.[54] The burden rests with the defense, as the proponent of this evidence, to establish its relevancy.[55] Under R.C.M. 1001(c)(1)(A), matters in extenuation serve to "explain the circumstances surrounding the commission of an offense." Under R.C.M. 1001(c)(1)(B) matters in mitigation may be introduced to "lessen the punishment to be adjudged." Unlawful pretrial

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[52] *Barnett*, 71 M.J. at 255 (Baker, J., concurring).
[53] *Inong*, 58 M.J. at 465. Likewise, an appellant may also request relief from the convening authority. R.C.M. 1105 and 1106.
[54] *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009).
[55] *See United States v. Simmons*, 48 M.J. 193, 196 (C.A.A.F. 1998)(discussing potential defense evidence to present during presentencing and stating "the burden is upon the proponent, the defense in this case, to establish its relevancy").

punishment is not a "sentencing factor related to [an] accused's offenses."[56] Rather, unlawful pretrial punishment credit provides "relief for the government's conduct."[57] In other words, the government's conduct does not address the circumstances surrounding the commission of an offense. Likewise, once unlawful pretrial punishment has already been adjudicated, such evidence cannot serve to lessen the sentence adjudged without also conferring double credit for the same government conduct. Therefore, in circumstances in which unlawful pretrial punishment has already been adjudicated, appellant bears the burden of demonstrating its relevancy beyond the government's action.

Moreover, in this case, the probative value of the previously resolved unlawful pretrial punishment evidence was particularly low because appellant expressly agreed to the credit he received.[58] Appellant's defense counsel proffered only one basis for the admission of this evidence, the same government conduct that served as the basis for appellant's motion for relief. Specifically, appellant's defense counsel stated she wanted to discuss "some of the conditions under which [appellant] was subjected to prior to trial" and present

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[56] *Barnett*, 71 M.J. 248, 255 (Baker, J., concurring)(emphasis in original).
[57] *Id.* (emphasis in original).
[58] JA 5-6.

"information related to Article 13, restriction tantamount to confinement and pretrial confinement."[59] Since appellant agreed to twenty-five days of confinement credit as a remedy for these conditions,[60] the minimal probative value of this evidence was substantially outweighed by the risk of wasting time and presenting cumulative evidence.[61]

C. Assuming *arguendo* the military judge erred, appellant failed to demonstrate that the error materially prejudiced his substantial rights.

Under Article 59(a), UCMJ, appellant has not shown that the asserted error materially prejudiced his substantial rights.[62] In this case, this court can say with "fair assurance...that the judgment was not substantially swayed by the error..."[63] because appellant agreed to twenty-five days credit.[64] Appellant speculates that the panel could have provided other relief and erroneously asserts that the military judge can only provide confinement credit.[65] However, the military judge is not limited to only providing confinement credit as a remedy to violations

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[59] JA 10-11.
[60] JA 5-6.
[61] Mil. R. Evid. 403.
[62] UCMJ art. 59(a); *see also*, *Simmons*, 48 M.J. at 196 ("[A]ppellant has not shown that he was prejudiced by this error.").
[63] *Hursey*, 55 M.J. at 36 (quoting *Kotteakos*, 328 U.S. at 765).
[64] JA 5-6.
[65] Appellant's Br. 13-14.

of Article 13, UCMJ.[66] Depending upon the circumstances, relief can even include dismissal of the charges because this court emphasized in *United States v. Zarbatany* that "[w]here relief is available, meaningful relief must be given for violations of Article 13, UCMJ."[67] In this case, the only relief appellant requested from the military judge was "no less than 45 days of confinement credit."[68] Then appellant made a tactical decision to agree to twenty-five days of confinement credit as a remedy.[69]

Moreover, the trial counsel notified the panel about the duration and nature of appellant's confinement and restraint, which was listed on block eight of the charge sheet.[70] Defense counsel referenced that information in her sentencing argument.[71] The panel convicted appellant of an indecent act and appellant faced a maximum punishment that included reduction to the grade of E-1, total forfeitures of all pay and allowances, confinement for five years, and a dishonorable discharge.[72] Nevertheless, the panel only sentenced appellant to reduction to E-1, total forfeiture of all pay and allowances, six months confinement,

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[66] *Zarbatany*, 70 M.J. at 175 ("[A]though R.C.M. 305(k) is the principal remedy for Article 13, UCMJ, violations, courts must consider other relief for violations of Article 13, UCMJ, where the context warrants").
[67] *Id.* at 170.
[68] JA 21.
[69] JA 5-6.
[70] SJA 2-3.
[71] SJA 9.
[72] *MCM*, pt. IV, ¶ 45.f.(6).

and a bad-conduct discharge.[73] This sentence was warranted as the panel properly considered the evidence supporting appellant's conviction and his additional misconduct. Defense called Private First Class (PFC) Cameron Gordon who offered the opinion that appellant was a good leader.[74] When the trial counsel tested the basis of PFC Gordon's opinion on cross-examination, the panel learned that appellant previously used Oxycodone[75] and urinated on his commander's car.[76] Given that fact that appellant's sentence was a fraction of the maximum punishment, the appellant's conviction and additional misconduct, and the confinement credit appellant agreed to receive, appellant has not shown that the asserted error materially prejudiced his substantial rights.

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[73] JA 13.
[74] SJA 4.
[75] Oxycodone is a schedule II controlled substance. SJA 4-5.
[76] SJA 4-5.

Conclusion

The military judge did not abuse her discretion by preventing appellant from receiving a double credit. Because the unlawful pretrial punishment issue was previously resolved, appellant failed to demonstrate its relevancy during the presentencing proceedings. Even assuming *arguendo* that the military judge abused her discretion, appellant has also failed to demonstrate prejudice as he received a light sentence and because he agreed to the confinement credit.

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the findings and sentence.

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//s//
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December 20, 2014

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing BRIEF ON BEHALF OF APPELLEE, *United States v. Carter,* Crim. App. Dkt. No. 20121046, Dkt. No. 14-0792/AR was filed electronically with the Court on the 22nd day of December, 2014, and contemporaneously served electronically on military appellate defense counsel, Captain Patrick Crocker.

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