IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States, Appellee v. Sean C. Mooney, Senior Airman (E-4) U.S. Air Force Appellant	APPELLANT'S BRIEF IN SUPPORT OF GRANTED ISSUE USCA Dkt. No. 17-0405/AF Crim. App. No. 38929

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

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ISSUE PRESENTED

WHETHER THE CONVENING AUTHORITY'S ACTION IS VOID *AB INITIO* WHERE IT PURPORTS TO ORDER APPELLANT'S ADJUDGED COURT-MARTIAL SENTENCE TO RUN CONSECUTIVE TO HIS PREVIOUSLY ADJUDGED FEDERAL SENTENCE INSTEAD OF CONCURRENTLY AS REQUIRED BY ARTICLE 57, UCMJ?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (CCA) had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(2012). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)(2012).

Statement of the Case

On September 1, 2015, a military judge sitting as a general court-martial convicted Senior Airman (SrA) Mooney, in accordance with his plea, and pursuant to a pretrial agreement, of one specification of sexual assault of a child and one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). (J.A. 15, 21, 22, 29, 60.) The military judge sentenced Appellant to be reduced to the grade of E-1, forfeiture of all pay and allowances, confinement for forty-five months, and a dishonorable discharge. (J.A. 39.)

On December 2, 2015, in accordance with the pretrial agreement, the Convening Authority (CA) approved only so much of the sentence as provided for reduction to E-1, forfeiture of all pay and allowances, confinement for two years, and a dishonorable discharge. (J.A. 12-13, 63.) After being advised by his Staff Judge Advocate (SJA) he was authorized to do so, the CA ordered Appellant's adjudged confinement to run consecutive to his sentence adjudged

in the United States District Court for the District of Delaware (District Court). (J.A. 13.)

In a published decision, the CCA affirmed the findings and the sentence. (J.A. 2-11.) This Court granted review on July 25, 2017. (J.A. 1.)

Statement of Facts

Overview & Underlying Conduct

Appellant entered into two plea agreements with the United States. (J.A. 47-51, 60-63.) The first was for a prosecution in District Court. (J.A. 47-51.) The other was for a prosecution in the case at bar, a general court-martial at Dover Air Force Base, Delaware. (J.A. 15, 60-63.) Both prosecutions arose from Appellant's relationship with a fourteen year-old, S.B. (J.A. 28, 40, 44-45, 69-72.)

Appellant, who was twenty-one years old at the time of his relationship with S.B., started serving at a volunteer fire company in January 2014, around the same time that S.B. was also voted into the department as a volunteer. (J.A. 32, 40.) S.B. is the daughter of the department's secretary. (J.A. 30.) Appellant and S.B. interacted on a daily basis, and the relationship eventually became sexual. (J.A. 32.) Appellant had sexual intercourse with S.B. on five occasions between July 1, 2014, and September 9, 2014. (J.A. 41-42.) Between August 1, 2014, and September 29, 2014, S.B. also sent SrA Mooney text messages containing sexually explicit photographs of herself. (J.A. 44, 46.)

Procedural Chronology Leading to the Court-Martial

The court-martial charge and specifications were preferred on December 3, 2014, and referred on December 24, 2014. (J.A. 20.) But SrA Mooney's court-martial was interrupted by the United States' election to simultaneously prosecute him in District Court. On January 12, 2015, Appellant was arrested at Dover Air Force Base, and then held in the Federal Detention Center in Philadelphia, Pennsylvania, pending resolution of his case in District Court. (J.A. 44.)

Appellant ultimately pleaded guilty to a one-count information alleging receipt of child pornography, and he was convicted in accordance with his plea. (J.A. 47-51.) On August 25, 2015, the District Court sentenced him to seventy-two months of confinement for receipt of child pornography from S.B. (J.A. 46-53.) The District Court's sentence took into account the mandatory minimum sentence of five years confinement, and a presentencing report concluded Appellant's sexual acts with S.B. were an aggravating factor. (J.A. 44-45, 47.) Appellant's plea agreement required Appellant to plead guilty to both the receipt of child pornography in District Court and both specifications referred to SrA Mooney's court-martial. (J.A. 48.)

Accordingly, on September 1, 2015, nearly a week after the District Court entered its judgement, the U.S. Marshall delivered SrA Mooney to his

general court-martial so that he could be convicted and sentenced. (J.A. 58-59.) The U.S. Marshall returned him to the Bureau of Prisons later that day. (*Id.*)

Issue of Consecutive Sentences

The issue of whether Appellant's court-martial sentence would run consecutively or concurrently with his District Court sentence was first raised in the Addendum to the SJA's Recommendation. (J.A. 73.) The SJA advised the CA that Appellant's court-martial sentence should run consecutively with his District Court sentence, despite informing the CA that "consecutive sentences in this case appear to be barred by Article 57(b), UCMJ," the court-martial sentence could not be suspended, and the sentence could not be deferred. (J.A. 73-75.) The SJA found support in regulatory guidance and the lower court's decision in *United States v. Ellenson*, 19 M.J. 605 (A.F.C.M.R. 1984), which addressed Article 14(b), UCMJ, 10 U.S.C. § 814(b) (2012). (JA 74.)

Trial defense counsel disagreed, arguing the sentences should run concurrently. (J.A. 76-79.) Trial defense counsel stated Appellant never had requested deferment of his court-martial sentence. (J.A. 78.) The SJA was unmoved by the defense's argument. (JA 80.) The CA followed the advice of his SJA, stating in his Action that the court-martial sentence would run consecutive to SrA Mooney's District Court sentence. (J.A. 12-13, 80-82.)

Argument

THE CONVENING AUTHORITY'S ACTION IS VOID *AB INITIO* WHERE IT PURPORTS TO ORDER APPELLANT'S ADJUDGED COURT-MARTIAL SENTENCE TO RUN CONSECUTIVE TO HIS PREVIOUSLY ADJUDGED FEDERAL SENTENCE INSTEAD OF CONCURRENTLY AS REQUIRED BY ARTICLE 57, UCMJ.

Summary of Argument

The UCMJ sets forth a comprehensive statutory scheme that provides for the interruption, deferment, and suspension of sentences adjudged at courts-martial. *See* Articles 14(b), 57a, 60, UCMJ, 10 U.S.C. §§ 814(b), 857a, 860 (2012). Absent these express, statutory exceptions, the plain language of Article 57, UCMJ, commands that a sentence to confinement begins to run on the date it is adjudged. 10 U.S.C. § 857 (2012). The plain language of this statutory scheme is buttressed by this Court's precedent acknowledging the legislative history that brought about its enactment. *See United States v. Bramer*, 45 M.J. 296 (C.A.A.F. 1996).

Although the CCA declared it was filling a statutory void created by "the absence of guidance restrict[ing] the convening authority's discretion in directing the running of Appellant's military sentence to confinement," (J.A. 6), "there is simply no gap in this statute to be filled by implication." *Burke v. Fannie Mae*, 221 F. Supp. 3d 707, 711 (E.D. Va. 2016). "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation."

Perry v. MSPB, 198 L. Ed. 2d 527, 545 (2017) (Gorsuch, J., dissenting). Indeed, Congress has recently demonstrated its ability to modify the statutory scheme at issue, but declined to substantively change the plain language that dictates Appellant's sentence must run concurrent with his District Court sentence. The CA's action was void *ab initio*.

Standard of Review

This Court reviews issues of statutory construction *de novo*. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007).

Law & Analysis

A) Appellant's Sentence to Confinement Began to Run when It Was Adjudged

The statutory text of Article 57(b) provides, "Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial." 10 U.S.C. § 857(b). The rule is not without exception, as "periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement." *Id.*

When assessing the meaning of statutes, this Court begins "by simply reading the plain language of the rule giving effect to every clause and word." *United States v. Fetrow*, 76 M.J. 181, 186 (C.A.A.F. 2017). "When the words of a

statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

Applying this framework to Appellant's case, Appellant's court-martial adjudged a sentence to confinement on September 1, 2015. (J.A. 139.) Absent one of the exceptions set out in Article 57(b), the sentence began to run that same day by operation of law. 10 U.S.C. § 857(b). Accordingly, the CA's order of consecutive sentences is erroneous because it defies the plain language of Article 57.

B) <u>No Statutory Exceptions Tolled Appellant's Court-Martial Sentence</u>

As a factual and legal matter, none of the exceptions set forth in the UCMJ that authorize tolling of an adjudged sentence apply to this case. Factually, the CA did not order that any period of the sentence be suspended or deferred, meaning Appellant's sentence continued to run. (*See* J.A. 12-14.) Legally, he could not have done so.

The plain language of the statutes governing interruption, deferment, and suspension of court-martial sentences are not applicable to Appellant's case. The UCMJ contemplates three potential exceptions: suspension by the CA pursuant to Article 60, as identified in Article 57(b); interruption of the sentence pursuant to Article 14(b), UCMJ; and deferment by the convening authority pursuant to Article 57a, as identified in Article 57(b).

Suspension was not available to the convening authority because of amendments to the UCMJ preceding Appellant's court-martial. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1702, 1705, 127 Stat. 672, 956-60 (2013) (amending Articles 56(b)(2)(B), 60(c)(4)(A), UCMJ, 10 U.S.C. §§ 856(b)(2)(B), 860(c)(4)(A)); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531(g), 128 Stat. 3292, 3365-66 (2014) (clarifying implementation of earlier amendments). As a result of those amendments, Appellant faced a dishonorable discharge as a mandatory minimum sentence for his offense, and the CA was stripped of the power to suspend a sentence that, like Appellant's, contained a dishonorable discharge or sentence to more than six months of confinement. *Id.*

Though not expressly set out as an exception under Article 57(b), a previously adjudged military sentence to confinement may be interrupted pending proceedings in a "civil tribunal" under Article 14, UCMJ. However, this Court has already determined Article 14, UCMJ, does "not speak to the situation at bar." *Bramer*, 45 M.J. at 299.

Article 57(b) contemplates one final exception to the rule that Appellant's sentence to confinement began to run on the date adjudged: deferment. 10 U.S.C. § 857(b). Like interruption of a sentence under Article 14(b), deferment is governed by specific language set out in Article 57a, UCMJ.

10 U.S.C. § 857a. It provides for three avenues for deferment of a sentence to confinement, none of which apply to Appellant's case.

The first avenue is when requested by an accused. 10 U.S.C. § 857a(a). The record shows that SrA Mooney never made such a request. (J.A. 78.) The CA did not insist that Appellant do so as part of the terms of their pretrial agreement. (J.A. 60-62.) As such, the CA lacked the authority to defer Appellant's sentence to confinement on this basis.

A second avenue for deferment under Article 57a permits the Secretary concerned to defer the sentence when the Judge Advocate General sends a case to this Court for review. 10 U.S.C. § 857a(c) (citing Article 67(a)(2), 10 U.S.C. § 867(a)(2) (2012)). This provision is inapplicable to Appellant's case because the Judge Advocate General did not order Appellant's case sent to this Court for review and, even if the Judge Advocate General had, there is no evidence the Secretary ordered deferment.

The third, remaining, potential avenue for deferment may be employed by a CA without the member's consent. 10 U.S.C. § 857a(b). Instead of granting CAs broad discretion to defer confinement, Congress constrained this power to when certain conditions are met. *Id.* at § 857a(b)(2). Those prerequisites are that (1) the member is "in the custody of a State or foreign county," (2) the member is "temporarily returned by that State or foreign country to the armed forces for trial by court-martial," and (3) "after the court-

martial, the member is returned to that State or foreign country under the authority of a mutual agreement or treaty." *Id.* Leaving nothing to chance, the term "State" is defined as including "the District of Columbia and any commonwealth, territory, or possession of the United States." *Id.* at § 857a(b)(3).

None of these preconditions are met in Appellant's case. Appellant was not in the custody of a foreign country or a state. Rather, he was in the custody of the Bureau of Prisons at the behest of the United States. (J.A. 58-59.) Though Appellant was temporarily brought from confinement for trial, he was not returned by a "State or foreign country," but from a Federal Detention Center following prosecution by the United States. (J.A. 52-59.) Likewise, Appellant was not returned to a State or foreign country following his court-martial, but to the U.S. Marshall, District of Delaware. (J.A. 59.)

Because none of the statutory exceptions to Article 57(b) apply, the plain language of the statute began to run on the date adjudged controls. And this Court's precedent confirms the plain language of Article 57(b) deprived the CA of the power to order a consecutive sentence in this case.

C) Precedent Requires the Application of the Plain Language of the UCMJ

The interplay between Articles 57 and 57a was illuminated by this Court in *Bramer*, 45 M.J. 296. In that case, the appellant was held in jail pending trial by state authorities before being charged by the Navy. *Id.* at 296. The state

then tried and sentenced the appellant before he pleaded guilty in his court-martial under a pretrial agreement. *Id.* After the court-martial, he was returned to the state, where he completed his state sentence to confinement. *Id.* Thereafter, he was returned again to the Navy to serve his court-martial confinement. *Id.* This Court considered whether the appellant was entitled to credit for the time he was in state confinement. *Id.*

This Court rejected the CCA's reliance on the "military common law" in holding the military sentence ran consecutively to the state sentence. *Id.* at 297. Instead, this Court decided the case based on the plain language of the statutes and legislative intent. *Id.* at 298-99; *see also*, *id.* at 299 (Sullivan, J., concurring in part and dissenting in part) (concurring with the resolution of the case based on the plain language of Article 57(b) and disagreeing with the use of legislative history).

This Court noted that the government was unable to explain the "clear and unambiguous language" set out by the Department of Defense when it urged Congress to adopt Article 57a: "Any sentence of confinement imposed by the court-martial would have to run concurrently with the accused's confinement by the sender state in the absence of this legislation." *Id.* at 298. This Court described the pre-1996 legal landscape that preceded the amendment to Article 57a:

> [T]he best we can say is that absent the amendment to Article 57, the clearest rule of law was that a Secretary of a Department could promulgate a regulation which determined when sentences would run concurrently or consecutively and that, at a minimum, misconduct which occurred after the first sentence to confinement began could result in a consecutive sentence.

Id. at 299. But the enactment of Article 57a in 1996, filled the void at issue in *Ellenson*, which involved a state court conviction, release to military authorities, and a return to state authorities. *Id.* (citing 19 M.J. at 606.)

With Article 57a not yet in effect, this Court concluded the appellant's sentence began to run when it was adjudged in accordance with the plain language of Article 57(b). *Id.* at 299. Helpfully, this Court "ma[de] clear" the roadmap for future cases:

> [F]irst, Article 57(b) compels us to conclude that a member's sentence to confinement runs from the date it is adjudged. Second it may be deferred by the convening authority under Article 57a(b). Third, if it is not deferred, then the sentence to confinement would run concurrently with any state sentence an accused was serving.

Id. at 299.

The lower court agreed with SrA Mooney that the SJA erred in relying upon Article 14(b), UCMJ, to advocate deferring SrA Mooney's court-martial sentence, and "that *Bramer* is controlling." (J.A. 5, 73-75). But, like the SJA below, the lower court read *Bramer* to permit a CA to determine "whether a sentence should run consecutively or concurrently when there is not a specific statutory provision at play." *Id.*

According to the lower court, "the enactment of Article 57a, UCMJ, did not eliminate the military's historical preference for consecutive sentences." (J.A. 5.) While that may be true, the military's "historical preferences," like the "military common law" relied upon by the CCA in *Bramer*, are irrelevant in light of the Congressional mandate set forth in Articles 57 and 57a, UCMJ. There is no "absence of guidance," (J.A. 6), affording the armed services the discretion to promulgate contrary service regulations as in *Ellenson*.

Although departmental regulations[1] state that court-martial sentences will not be served concurrently with any other court-martial or civil court sentence, those provisions must yield to the plain language of the statute and *Bramer*. *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (stating departmental regulations may not conflict with a higher source of authority such as the UCMJ).

D) <u>Congress Amended Articles 57 and 57(a), but Not Their Substance</u>

In response to this Court's decision in *Bramer*, Congress could have amended the UCMJ to preclude consecutive sentences and avoid a repeat of the concurrent sentences that resulted. *See, e.g.*, *United States v. Lopez de Victoria*, 66 M.J. 67, 71-72 (C.A.A.F. 2008) (discussing the congressional response to

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[1] DoD 1325.7M, *DoD Sentence Computation Manual*, ¶ C2.7.1 (July 27, 2004); Army Regulation 633-30/Air Force Regulation 125-30, *Military Sentences to Confinement*, ¶ 4.b (December 2, 2015).

amend Article 43, UCMJ, 10 U.S.C. § 843, following this Court's decision in *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000)). In the context of Articles 57 and 57(a), Congress has recently demonstrated its ability and willingness to make changes it deems necessary. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5302(a)-(b)(1), 130 Stat. 2921 (2016).

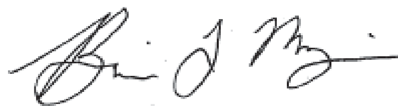
The recent amendment repeals Article 57a and amends Article 57 to include Article 57a's provisions governing deferral of sentences. *Id.* Even under the amended language, sentences to confinement will continue to run on the date adjudged, unless suspended or deferred. *Id.* The provisions for suspension also remain unchanged. *Id.*

None of these amendments change the framework addressed by this Court in *Bramer*. If anything, they bolster the plain language and underlying intent analyzed by this Court in *Bramer*.

Because the governing statutes remain unchanged, so must the result. Appellant's sentence began to run on the date it was adjudged by operation of Article 57(b). No law, or valid regulation, provided for deferment, suspension, or interruption of Appellant's sentence. The CA's order for consecutive sentences lacked lawful authority and is void.

WHEREFORE, Appellant respectfully requests this Court remand this case for new post-trial processing.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on August 24, 2017, pursuant to this Court's order dated July 22, 2010, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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