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.	REPLY TO APPELLEE'S ANSWER 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

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Senior Airman (SrA) Sean Mooney, the Appellant, hereby replies to the government's answer.

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.

This case centers on the Convening Authority's (CA) action, which is the last step in the court-martial process before disposition of the record for appellate review. *See* Article 65, Uniform Code of Military Justice (UCMJ), 10

U.S.C. § 865 (2012). At trial—prior to action—Appellant entered into a pretrial agreement to waive all waivable motions and unconditionally plead guilty. (J.A. 21, 60.) SrA Mooney's guilty plea has no bearing on the granted issue because it arose from events subsequent to Appellant's trial. (*Compare*, J.A. 13, *with*, J.A. 15.)

As the government's brief correctly notes, Appellant's guilty plea had the effect of waiving "antecedent" issues. (J.A. 60; Appellee's Br. at 23 (quoting *United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014)).) However, in arguing that Appellant waived the right to complain about error subsequent to his court-martial, Appellee's brief misapprehends the definition of "antecedent." (Appellee's Br. at 22-25.) As defined by Black's Law Dictionary, "antecedent" means "Earlier; preexisting; previous." Black's Law Dictionary (3rd pocket ed. 2006.) There is no evidence in the record indicating that when the CA and SrA Mooney entered into a pretrial agreement on May 26, 2015, that either contracting party was aware the CA's Staff Judge Advocate (SJA), on September 16, 2015, would successfully advance in his recommendation a reading of Article 14, UCMJ, 10 U.S.C. § 814 (2012), that was so inconsistent with the plain language of the statute and this Court's precedent it was quickly abandoned by the lower court. (J.A. 5-9, 61-64, 73-75.)

The government's advocacy for waiver is equivalent to arguing that an accused who enters a guilty plea waives the right to object to errors during the

ensuing sentencing hearing that could have been addressed by a pretrial motion *in limine*. Such a position is not supported by this Court's case law. *See*, *e.g.*, *United States v. Price*, 76 M.J. 136, 136-37 (C.A.A.F. 2017) (considering objection to providence inquiry after entry of unconditional guilty plea pursuant to pretrial agreement); *United States v. Ellis*, 68 M.J. 341, 342 (C.A.A.F. 2017) (considering defense's objection to the government expert's testimony about rehabilitation potential after entry of unconditional guilty plea). Indeed, none of the cases cited by Appellee support the proposition that waiver of pretrial errors had the effect of waiving a future error in the CA's action. (Appellee's Br. at 23-25.)

Over twenty years ago, in *United States v. Bramer*, 45 M.J. 296, 298-99 (C.A.A.F. 1996), this Court surveyed the law as it existed before the then-recent adoption of Article 57a, UCMJ, 10 U.S.C. § 857a, before opining on how the adoption of Article 57a altered that landscape. Before 1996, the law permitted service secretaries to set out rules for determining when sentences would run concurrently or consecutively. *Id.* at 298. The Air Force did just that in *United States v. Bryant*, 12 U.S.C.M.A. 133 (C.M.A. 1961), and *United States v. Ellenson*, 19 M.J. 605 (A.F.C.M.R. 1984). *Bramer*, 45 M.J. at 299. And because action in *Bramer* was prior to the 1996 amendments to the UCMJ, this Court also looked to whether there was a Navy regulation on point. *Id.*

The government attempts to evade this Court's prospective reading of the plain language of Article 57a, UCMJ, in *Bramer* by invoking this Court's now-distant decision in *Bryant*. According to the government, *Bramer*'s description of how regulations were used in the decades before Article 57a, UCMJ, "reaffirmed" *Bryant*. (Appellee's Br. at 10, 13-14, 18-22.) However, as this Court noted in *Bramer*, the three-judge *Bryant* court "dealt with a second sentence by a court-martial for an offense which occurred after the first sentence took effect, and it was clearly limited by the concurring opinion of Chief Judge Quinn to those facts." *Id.* at 298. That is not the fact pattern in the case at bar, with all of the charged offenses involving Ms. S.B. occurring prior to any judicial proceedings. (J.A. 40-45.)

In *Bryant*, Judge Ferguson dissented on the basis that the plain language of Article 57(b) should control. *Id.* at 139-42 (Ferguson, J., dissenting). Rather than being an "old" and rejected argument, Judge Ferguson's dissent is, in effect, the state of the law after the adoption of Article 57a, UMCJ, and *Bramer*. (Appellee's Br. at 22.) In *Bramer*, this Court explained that "clear" framework emerged governing future cases through the 1996 amendment to the UCMJ and the introduction of Article 57a, UCMJ. *Bramer*, 45 M.J. at 299. Consistent with Article 57(b), UCMJ, 10 U.S.C. § 857 (2012), Appellant's sentence began to run from the date it was adjudged. *Id.* It "may be deferred by the convening

authority under Article 57a(b)." *Id.* Absent deferment, "then the sentence to confinement would run concurrently" with Appellant's other sentence. *Id.*

While Appellee's brief agrees that the plain language of statutes is the starting point for analysis in this case, the government's brief declines to apply this canon of statutory construction. (Appellee's Br. at 15.) Instead, Appellee's brief contends the UCMJ is silent. (Appellee's Br. at 16-22.) While the UCMJ declines to give a CA the power to interrupt or defer a court-martial sentence to confinement for an earlier sentence in federal district court, it is anything but silent about when sentences to confinement begin to run: the date adjudged. 10 U.S.C. § 857(b).

In turn, like the Navy-Marine Corps Appellate Government Division's brief in *Bramer*, Appellee's brief "offers no explanation for the clear and unambiguous language found in the letter of transmittal [sending Article 57a, UCMJ, to Congress]: 'Any sentence to 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.'" *Bramer*, 45 M.J. at 298. Through this transmittal, the Department of Defense recognized that Article 57 and, in turn, the UCMJ, is not silent concerning concurrent sentences: They are the result compelled by Article 57 absent a statutory mechanism for deferment. *Id.* at 299.

As conceded by the CA's SJA, a mechanism for the convening authority to defer SrA Mooney's sentence was lacking on the face of Article 57a(b), UCMJ. (J.A. 73.) The CA declined to expressly defer Appellant's sentence to confinement. (J.A. 12-13.) Accordingly, as *Bramer* explained, Appellant's sentence began to run on the date it was adjudged and therefore runs concurrently as a matter of law pursuant to Article 57(b), UCMJ. *See Bramer*, 45 M.J. at 299.

Despite the clarity of *Bramer*'s holding, and that holding's consistency with the underlying statutory framework and legislative intent, Appellee's brief argues that following the plain language of Article 57(b) and Article 57a(b), UCMJ, would lead to an absurd result. (Appellee's Br. at 21-22.) Yet "[t]he plain language of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statue will produce a result demonstrably at odds with the intentions of its drafted.'" *United States v. Ron Pair Enters*, 489 U.S. 235, 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). This Court found one of those rarities in *United States v. Lewis*, 65 M.J. 85, 89 (C.A.A.F. 2007), where the rule at issue precluded the appellant from claiming self-defense in a fight because he did not withdraw, even though his failure to withdraw was because he was pinned down.

This is not one of those rare cases. Unlike in *Lewis*, Article 57, UCMJ, does not require the government to do the implausible. Rather, the statutory

scheme surrounding the running and deferment of sentences to confinement requires what this Court has already found could and should happen, just as when this Court found the appellant's sentences ran concurrently in *Bramer*. 45 M.J. at 299. The Department of Defense and this Court agreed that a plain reading of Article 57, UCMJ, is that it means what it says and says what it means. *Id.* at 298-99. This Court reached that conclusion despite the cases—*Bryant* and *Ellenson*—cited by Appellant to reach the opposite conclusion. *Id.*; (Appellee's Br. at 13-15.)

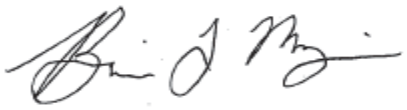
There is nothing absurd in the resolution that, in the absence of authority to defer Appellant's sentence, concurrent confinement must result. Violations of the UCMJ and "violations of the United States Code are all crimes against a single sovereign, namely, the United States." *Goode v. Markley*, 603 F. 2d 973, 976 (D.C. Cir. 1979).

Along those same lines, Chief Judge Quinn's limitation in *Bryant* was grounded "in the light of the military rule that all offenses should be tried at the same time." *Bryant*, 12 U.S.C.M.A. at 139 (Quinn, C.J., concurring). But rather than prosecuting SrA Mooney for all of his known offenses in a court-martial, the United States elected to prefer a court-martial charge and, the following month, arrest then charge him in federal district court for the same relationship with Ms. S.B. (J.A. 19-20, 44-46.) While the strict elements test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), may permit the government to

take the extraordinary step of prosecuting a single transaction in two federal courts within a single federal district, the United States should not be heard to complain of the statutorily imposed consequences of that choice.

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

Respectfully submitted,



Brian L. Mizer
Senior Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33030

Allen S. Abrams, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35282
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on October 5, 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.

ALLEN S. ABRAMS, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35282
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

Counsel for Appellant