IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. No. 38929
Senior Airman (E-4) SEAN C. MOONEY, USAF, *Appellant.*	)	USCA Dkt No. 17-0405/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

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 (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

From July to September 2014, Appellant, who was then 21 years old, engaged in a sexual relationship with a 14-year-old girl. (J.A. at 41-42.) Appellant had sex with the victim a total of five times and engaged in other acts of sexual contact with her. (J.A. at 41-42.) Between August and September 2014, Appellant also received pornographic photos of the same child, which she sent to him. (J.A. at 44, 46.)

On 12 January 2015, U.S. Marshals arrested Appellant, and he was detained at the Federal Detention Center in Philadelphia, Pennsylvania. (J.A. at 44.) After a hearing with a judicial magistrate, on 23 January 2015, Appellant remained at the Federal Detention Center in Philadelphia, Pennsylvania. (J.A. at 44.)

On 13 May 2015, Appellant signed a plea agreement with the United States Attorney's Office for the District of Delaware. (J.A. at 46-51.) Appellant agreed to plead guilty to one charge of Receipt of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(2), which carries a mandatory minimum sentence of 5 years. (J.A. at 47.) In that agreement, Appellant also agreed "that the terms of th[e] Plea Agreement [were] expressly conditional upon [his] entry of a plea of guilty" to his court-martial charges. (J.A. at 48.)

On 19 May 2015, Appellant entered into a pretrial agreement with the convening authority. (J.A. at 60-64.) In that agreement, Appellant agreed to plead guilty to two specifications of one charge of violating Article 120b, UCMJ. (J.A. at 60.) The Appellant also agreed to "[w]aive and not to raise any pretrial motion to dismiss any specification of any motion to suppress evidence, and to waive all motions which may be waived under the Rules for Court-Martial." (J.A. at 60.) In exchange for Appellant's agreement to plead guilty and enter into other terms of the pretrial agreement, the convening authority agreed to "not approve confinement in excess of two (2) years." (J.A. at 63.)

On 26 August 2015, Appellant pled guilty one count of Receipt of Child Pornography in violation of 18 U.S.C. § 2252A(a)(2) in the United States District Court for the District of Delaware. (J.A. at 52.) On the same day, Appellant was sentenced by the District Court Judge to 72 months of confinement at the Bureau of Prisons. (J.A. at 53.)

On 1 September 2015, U.S. Marshals delivered Appellant from Federal Detention Center in Philadelphia to Dover Air Force Base for his court-martial pursuant to a Petition for Writ of Habeas Corpus Ad Proseqendum. (J.A. at 58-59.) On the same day, Appellant pled guilty to two specifications of one charge of violating Article 120b, UCMJ at Dover

Air Force Base: one specification for committing sexual acts on a child between 12 and 16 years old, and one specification for committing lewd acts on a child between 12 and 16 years old. (J.A. at 21.)

During Appellant's court-martial, the military judge discussed the terms of Appellant's pretrial agreement with him. When discussing Appellant's waiver of motions, neither Appellant nor defense counsel raised any concerns regarding consecutive sentences. (J.A. at 22-25.) Defense counsel made reference to a potential motion to suppress evidence but raised no other concerns. (J.A. at 23.) During this inquiry, Appellant expressly stated he understood that by this term he was "giv[ing] up the right to make any motion, which by law, is given up . . . [by] plead[ing] guilty" and that the term "preclude[d his court-martial] or any appellate court from having the opportunity to determine if [he] was entitled to any relief" based on any motions he could have filed. (J.A. at 23-24.)

After finding that Appellant fully understood his pretrial agreement, the military judge also reviewed the effect of Appellant's federal case on the jurisdiction of his court-martial. (J.A. at 27-28.) Appellant expressed he understood that even though the military was also part of the federal government, there were no double-jeopardy concerns as he was being tried in his court-martial for a separate offense from his other federal case. (J.A.

at 28.) Following this inquiry, and finding Appellant's plea was provident, the military judge found the Appellant guilty of the two specifications of Article 120b, UCMJ. (J.A. at 29.)

At sentencing, defense counsel acknowledged the defense's expectation that Appellant would serve his court-martial sentence consecutive to his federal sentence. Arguing against trial counsel's request for a five-year sentence to confinement, defense counsel argued for a sentence with no confinement, explicitly stating Appellant already "has another five years and change that he has to spend in federal custody." (J.A. at 38.) The military judge sentenced Appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 45 months, and a dishonorable discharge. (J.A. at 39.) This sentence was modified by the Appellant's pretrial agreement to allow for no more than two years of confinement. (J.A. at 39.) Later on 1 September 2015, following the conclusion of the Appellant's Court-Martial, Appellant was returned to the custody of the U.S. Bureau of Prisons. (J.A. at 58-59.)

On 16 November 2015, Appellant submitted his first Request for Clemency. (J.A. at 67-72.) Both defense counsel and Appellant again expressed the defense's expectation that Appellant's court-martial sentence would run consecutive to his federal sentence. Defense counsel explained

"[b]etween his two cases, AB Mooney is sentenced to serve the next approximately seven years behind bars." (J.A. at 67.) Appellant similarly made clear that he would serve a total of almost eight years in prison between his six years from his federal sentence and his two years from his court-martial sentence. (J.A. at 69.)

On 18 November 2015, the staff judge advocate first raised the concern of consecutive sentences in his Addendum to the Staff Judge Advocate Recommendation. (J.A. at 73-79.) The staff judge advocate advised "that Article 57a(b)[, UCMJ] simply does not apply to the factual scenario before you, and that Article 57(b)[, UCMJ] is rendered inapplicable given the DOD guidance mandating consecutive sentences when read in conjunction with Article 14(b)[, UCMJ] and the [United States v.]Ellenson[, 19 M.J. 605 (A.F.C.M.R. 1984] and [United States v.]Bramer[, 45 M.J. 296 (C.A.A.F. 1996)] decisions." (J.A. at 74-75.)

On 25 November 2015, responding to the Addendum, Appellant for the first time argued his court-martial sentence should run concurrent to his federal sentence. (J.A. at 76-78.)

On 2 December 2015, the convening authority took action on Appellant's case. The convening authority, in line with the Appellant's pretrial agreement, approved a sentence of a dishonorable discharge,

confinement for two years, forfeiture of all pay and allowances, and a reduction to the grade of E-1. (J.A. at 12-13.) In the Action, the convening authority also ordered that "[u]pon completion of his federal sentence as adjudged in the United States District Court for the District of Delaware, [Appellant] will be remanded from the Federal Bureau of Prisons' System to the Air Force Security Forces Center Confinement and Corrections Directorate for the completion of his approved military confinement sentence, which will be served consecutively." (J.A. at 12-13.)

On 21 March 2017, the AFCCA published its opinion in Appellant's case. The AFCCA agreed that this Court's decision in Bramer is controlling and that Bramer allows "the convening authority to rely on regulatory guidance in determining whether a sentence should run consecutively or concurrently when there is not a specific statutory provision at play." (J.A. at 5.) Accordingly, the Court found "the convening authority's action was sufficient to toll the effective date of confinement under Article 57(b), UCMJ and thereby require Appellant's military sentence to confinement [to] be served consecutively with his federal sentence." (J.A. at 8.)

SUMMARY OF THE ARGUMENT

The convening authority properly relied on department regulations to defer Appellant's confinement. Both this Court and the U.S. Supreme Court

have recognized, when addressing the effect of Article 57(b), UCMJ, that "Congress did not mention all contingencies which would prevent an accused from being credited with time served." Bramer, 45 M.J. at 298 (quoting Noyd v. Bond, 395 U.S. 683, 691 (1969) (quoting United States v. Bryant, 30 C.M.R 133, 137 (C.M.A. 1961))). Moreover, Article 57a(b), UCMJ has not changed this holding. That Article was designed to effectuate consecutive sentences from other governments – specifically state and foreign governments – and is silent in regards to federal sentences. Given the plain language and intent of the relevant UCMJ Articles – namely Article 14, Article 57(b), and Article 57a(b) – interpreting that silence as precluding consecutive sentences to confinement with a federal court sentences would be the very type of absurd result statutory interpretation aims to avoid.

In addition to the convening authority's proper actions, Appellant waived this issue on appeal. Appellant entered into a pretrial agreement in which he agreed to "waive all motions which may be waived under the Rules for Court-Martial." (J.A. at 60.) Appellant likewise told the military judge during his plea colloquy that he understood by this term that he was "giv[ing] up the right to make any motion, which by law, is given up . . . [by] plead[ing] guilty." (J.A. at 23.) This is the very type of "non-

jurisdictional," antecedent complaint that an Appellant waives in an unconditional guilty plea. United States v. Lee, 73 M.J. 166, 170 (C.AA.F. 2014). As such, Appellant has given up the opportunity to complain about his serving consecutive sentences on appeal.

ARGUMENT

APPELLANT IS PROPERLY SERVING CONSECUTIVE SENTENCES TO CONFINEMENT AS THE CONVENING AUTHORITY RELIED ON PROPER AUTHORITY WHEN DEFERRING APPELLANT'S CONFINEMENT — AN ISSUE APPELLANT HAS WAIVED.

Standard of Review

Post-trial processing and statutory construction both involve questions of law, which this court reviews de novo. United States v. Fields, 74 M.J. 619, 624 (C.A.A.F. 2015); United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008). Likewise, whether Appellant has waived an issue is also a question of law that this Court reviews de novo. United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law and Analysis

A. Service regulations directing consecutive sentences allowed for deferment of Appellant's confinement and are not preempted by other UCMJ articles silent about federal sentences.

1. Department regulations provide the authority to defer court-martial sentences.

a. This Court has consistently held that department regulations can properly provide the authority to defer a court-martial sentence and allow for consecutive sentences. When initially addressing Article 57(b), UCMJ as a recently enacted statute, this Court first expressed "Congress did not mention all contingencies which would prevent an accused from being credited with time served." Bryant, 30 C.M.R. at 137. In Bryant, this Court held that service regulations were sufficient to defer Article 57(b), UCMJ's direction that a court-martial sentence run from the date the sentence is adjudged, and allowed for two court-martial sentences to be served consecutively. Id. at 138. Arguing that "Article 57(b) established the date confinement would begin to run," the appellant "insisted vigorously [the exceptions then in the code] are exclusive and a term of confinement cannot be interrupted for any other reason." Id. at 137. This Court rejected the appellant's argument. Id.

Acknowledging the norm of consecutive sentences in the military, this Court recognized "Section 22 of Title 5, United States Code, provides that Secretaries of Departments may promulgate rules and regulations and they are presumptively valid unless arbitrary and unreasonable or contrary to or

inconsistent with the Code." Id. at 138. Pursuant to that authority, "service regulations such as Air Force Manual 125-2 . . . [were] merely designed to preserve the concept of consecutive sentences while implementing the codal requirement that a sentence to confinement begins to run from the date adjudged, and such directives are not inconsistent with Article 57(b)." Id. Indeed, the U.S. Supreme Court endorsed this holding when explaining "like the Court of Military Appeals, we do not believe congress intended that the general rule stated in Article 57(b) be inexorably applied in all situations." Noyd, 395 U.S. at 691 (citing Bryant, 30 C.M.R. at 137).

In Bramer, this Court reaffirmed "there are several exceptions to the plain rule [of Article 57(b)] stemming from 'common sense,' Supreme Court Writs of Habeas Corpus, or Air Force Regulations." Bramer, 45 M.J. at 298. In that case, this Court held that Article 57(b), UCMJ required a subsequent Navy court-martial sentence to be served concurrently with a prior state court sentence. Id. at 299. Concurrent sentences were required because the convening authority had no authority available to defer the confinement. Id. Article 14, UCMJ was inapplicable as the civilian sentenced preceded the court-martial sentence. Id. Article 57a(b), UCMJ, which the convening

authority had relied on in deferring the sentence, was *ultra vires*.[1] Id. Most significantly here, distinguishing the facts from prior cases considering the issue, the Navy had "no regulation in place which contemplated deferment of sentence . . . ." Id. While ultimately determining concurrent sentences were required, the Court's ruling was limited to the facts as it was addressing a subsequent state court sentence, which would soon be able to be deferred when Article 57a(b), UCMJ would no longer be *ultra vires*. Id. Moreover, in reviewing the significance of a lacking service regulation, the Court's holding highlighted that such a regulation could provide the authority to defer a sentence to confinement so that it could be served consecutive with another sentence. Id.

The service courts of appeals, following this Court's guidance, have likewise relied on service regulations to defer sentences so that they may run consecutively with other sentences. In Ellenson, the Air Force Court of Military Review relied in part on service regulations when holding that a subsequent court-martial sentence could run consecutive to a prior state court sentence. Ellenson, 19 M.J. at 607. This Court later corrected Ellenson's liberal interpretation of Article 14(b), and it also highlighted the

[1] As discussed in Bramer, this statute was initially enacted as Article 57(e), UCMJ in 1992, and it was later redesignated as Article 57a(b), UCMJ in 1996. Bramer, 45 M.J. at 297.

authority of service regulations in recognizing the Ellenson Court "had good reason to rely on its regulation." Bramer, 45 MJ at 298. Most recently, the Army Court of Criminal Appeals recognized that service regulations are an independent basis allowing for consecutive sentences when holding that a service members' prior court-martial sentence could run consecutive to a subsequent state court sentence.[2] United States v. Willenbring, 56 M.J 671, 682 (Army Ct. Crim. App. 2001), aff'd 57 M.J. 321 (C.A.A.F. 2002).

b. In the present case, consistent with Bramer, Bryant, Ellenson, and Willenbring, service regulations in place when Appellant was sentenced directed that Appellant serve consecutive sentences. Department Secretaries retain the authority to issue regulations: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its

[2] The Army Court of Criminal Appeals explained that the sentence was properly deferred as the service secretary had promulgated "that sentences adjudged by courts-martial or civil tribunals shall not run [concurrently], regardless of when the accused committed the misconduct or who tried the accused first." Willenbring, 56 M.J. at 682-83. The opinion states: "shall not run *consecutively*," which appears to be a typo. Id. at 682 (emphasis added). "Concurrently" both fits into the meaning of the holding and is the language used in the regulation cited as authority. *See* Id. (quoting AR 633-30/AFR 125-30, Apprehensions and Confinement: Military Sentences to Confinement, paragraph 4(b), February 1989)); *see also*, *infra*, note 3.

records, papers and property." Government Organization and Employees, 5 U.S.C. § 301 (replacing 5 U.S.C. § 22); *see also* Bryant, 30 C.M.R. at 138. Pursuant to this authority, both the Department of Defense and the Army and Air Force have promulgated regulations requiring service members serve consecutive sentences when made to serve multiple sentences.

Department of Defense Instructions direct that "[a] sentence to confinement adjudged by a court-martial shall not be served concurrently with any other sentence to confinement adjudged by a court-martial or a civil court." Department of Defense Instruction 1325.7, Department of Defense Sentence Computation Manual, paragraph C2.7.2, July 2004.[3] Existing Air Force Regulations likewise direct the exact same. Army Regulation 633-30/Air Force Regulation 125-30, Military Sentences to Confinement, paragraph 4(b), March 1989. As such, the regulations existing at the time of Appellant's sentence fits well within the "several exceptions" this Court has recognized "to the plain rule [of Article 57(b)] stemming from

[3] This is the same language used in each regulation reviewed by this Court or a service Court of Criminal Appeals when addressing this issue. *See* Bryant, 130 C.M.R. at 135 (discussing AFM 125-2, September 1956); Ellenson, 19 M.J. at 606-07 (discussing AFR 125-30, paragraph 4(b), November 1964); Willenbring, 56 M.J. at 682 (discussing AR 633-30/AFR 125-30, paragraph 4(b), March 1989). Most recently on 2 December 2015, the Army and Air Force republished its regulation, which still contained the same provision, using the same language, prohibiting concurrent sentences. AR 633-30/AFR 125-30, paragraph 4(b), December 2015.

'common sense,' Supreme Court Writs of Habeas Corpus, or *Air Force Regulations*." Bramer, 45 M.J. at 298 (emphasis added). Appellant's court-martial sentence to confinement was appropriately ordered to run consecutive to his federal sentence.

2. *The Uniform Code of Military Justice is silent about consecutive court-martial sentences following a federal civilian sentence.*

a. Statutory Interpretation Should Avoid Absurd Results. This Court has repeatedly held that "[s]tatutory construction begins with a look at the plain language of a rule." United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) (citing United States v. Ron Pair Enters., 489 U.S. 235, 241-42 (1989)). "When the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." United States v. Matthews, 68 M.J. 29, 36 (C.A.A.F. 2009); United States v. Custis, 65 M.J. 366, 370 (2007) (internal citations omitted). In Ron Pair Enters., the U.S. Supreme Court recognized "rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of the drafters." Ron Pair Enters., 489 U.S. at 241 (citing Griffin v. Oceanic Contractors, 458 U.S. 564, 571 (1982)). In these cases, "the intention of the drafters, rather than the strict language, controls." Id.

b. The relevant UCMJ Articles are silent about preceding federal court sentences, and each have a specific purpose they were enacted to achieve. Most notably, the plain language of Article 57a(b), UCMJ is silent about the effect of a federal court sentence on a court-martial sentence. As such, Article 57a(b), UCMJ does not preclude subsequent court-martial sentences from running consecutively to prior federal court sentences. Therefore, this Court's prior holding should control, and service regulations should sufficiently defer Appellant's confinement for purposes of Article 57(b), UCMJ.

Appellant makes great effort to present various Articles of the UCMJ, most significantly, Article 14, Article 57(b) and Article 57a(b) as a "comprehensive statutory scheme."[4] (App. Br. at 6.) However, these Articles are far from the type of "comprehensive" legislation that appears elsewhere in the UCMJ. *Cf* Custis, 65 M.J. at 370 (interpreting a "comprehensive set of evidentiary rules with regard to privileges and exceptions thereto.") A review of the legislative history of these statutes shows they were each intended for a specific goal – none of which have the

[4] Appellant also makes effort to graft Article 60, UCMJ into part of this "comprehensive statutory scheme." (App Br. at 6, 9.) However, the recent enactment of the applicable parts of these Articles in 2013 and 2014 only underscores the patchwork nature of the UCMJ exceptions to Article 57(b), UCMJ.

intent of requiring concurrent sentences. Interpreting the gaps between these articles to require concurrent sentences would be the very type of absurd result this Court directs statutory interpretation should avoid.

(i) Article 14, UCMJ ensures civilian access to military members. The provisions of Article 14, UCMJ have their origins in the revised Articles of War in 1776. Caldwell v. Parker, 252 U.S. 376, 381-82 (1920). As Justice White explained, given the terms of statute's predecessor "and the fact that it was drawn from the British Articles, where the supremacy of civil law has long prevailed, it results that its provisions gave the civil courts, if not a supremacy of jurisdiction, at least a primary power to proceed against military offenders violating the civil law." Id. at 382. By 1916, this predecessor statute was split among various Articles; and Article 74 of the Articles of War required the delivery of offenders to civil authorities and, if the member was serving a court-martial sentence, permitted interrupting the sentence until the member was returned. Id. at 383-84; Army Appropriations for 1917, Pub. L. No. 64-242, 39 Stat 619, 662 (1916); *see also* Bryant, 30 C.M.R. at 137.

By 1950, that statute was again reenacted, largely as it is today, as Article 14, UCMJ. Uniform Code of Military Justice, Pub. L. No. 81-506; 64 Stat 107, 112 (1950). As such, the Article is designed to ensure civilian

access to military members, not to curtail military sentences. The Ninth Circuit, in balancing civilian and military jurisdiction, explained that Article 14(b), UCMJ demonstrated that "Congress deemed it necessary to interrupt the military sentence while the civil sentence was being served, thus avoiding any conflict with the concurrent sentencing of civil courts and preserving intact independent military sentencing." Edwards v. Madigan, 281 F.2d 73, 77 (9th Cir. 1960); *see also* Bryant, 30 C.M.R. at 137. In Bramer, this Court made clear that Article 14(b), UCMJ only interrupts a court-martial sentence when the court-martial sentence precedes a civilian sentence. Bramer, 45 M.J. at 299.

(ii) Article 57(b), UCMJ ensures military members do not serve additional confinement as administrative delay waiting for appellate courts to approve a sentence. Again, as this Court addressed Article 57(b), UCMJ as a newly enacted statute, it also explained the Article was "enacted to prevent accused persons from languishing in confinement between sentence and date of execution without receiving credit therefor." Bryant, 30 C.M.R. at 138.[5] The Navy-Marine Corps Court of Criminal Appeals similarly

[5] In Bryant, this Court referenced passages of congressional hearings showing this intent; those passages explained: "even if it goes up on review he starts getting credit on his sentence from the date of the sentence. He does not just stay there until after the board of review has passed on it." Uniform Code of Military Justice: Hearing on H.R. 2498 Before the

explained that Article 57(b), UCMJ was designed to correct a system that existed under the Articles for Government of the Navy and Articles of War wherein "an accused received no credit for either pretrial confinement or post-sentence unexecuted confinement imposed to ensure the presence of the accused for execution of the sentence; in fact, such post-trial confinement was considered merely an extension of pretrial confinement." United States v. Valead, 30 M.J. 634, 636-37 (N-M.C.M.R. 1990) (internal citations omitted). As such, the Article acts as a safe guard to ensure military members only serve the time they were sentenced to confinement and not more.

(iii) Article 57a(b), UCMJ ensures service members serve consecutive terms of confinement to any state or foreign sentence to confinement. As referenced in Bramer, the Department of Defense's letter of transmittal gives context to the intent of this statute. Bramer, 45 M.J. at 297. Following guidance from this Court in United States v. Greer, 21 M.J. 338 (C.M.A. 1986) that military courts are considered federal courts for the purpose of the Interstate Agreement on Detainers Act ("IADA"), Pub. L. No. 91-538, 84 Stat 1397 (1970), Article 57a(b), UCMJ was designed to allow:

Subcomm. of the Comm. on Armed Services, 81st Cong, 1089-90 (1949); Bryant, 30 C.M.R. at 138.

> the convening authority to defer the running of a sentence to confinement when a state or foreign country has temporarily released the accused from its custody to allow the military to try the accused before a court-martial and the military is then obligated by agreement such as the Interstate Agreement on Detainers Act, 18 App U.S.C. or a treaty to return the accused to the sender state's custody after the court-martial is completed.

141 Cong. Rec. S5812 (daily ed. April 27, 1995). As such, Article 57a(b), UCMJ affirmatively ensures that a military member's court-martial confinement can be served consecutively to any state or foreign sentence in light of new obligations imposed by the IADA or other unspecified treaties.

Notably, Article 57a(b), UCMJ does not address similar scenarios regarding federal civilian courts. Significantly, the IADA does not impose any additional obligations between federal civilian courts and military courts, as they are the same party.[6] As neither the IADA nor unspecified treaties imposed additional obligations on the military as related to the federal court system, there was no need to address sentences imposed by federal courts. Silence in the statute about federal court sentences does not

[6] In Greer, this Court cited to section 5 of the IADA when stating that the "Agreement applies to the military." Greer, 21 M.J. at 340. That section of provides: "All courts, departments, agencies, officers and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its provisions." § 5, 84 Stat 1397, 1402-03.

evidence an intent to preclude concurrent court-martial and federal court sentences, and it should not be interpreted as such. Rather, that silence should be interpreted in light of this Court's prior case law in Bramer that service regulations can direct whether a sentence should be served consecutively or concurrently.[7] Bramer, 46 M.J at 299; s*ee, e.g.*, Lewis, 65 M.J. at 88-89 (interpreting silence left in a rule through common law principles).

c. In light of the legislative history of the relevant statutes, interpreting the silence in the UCMJ to require concurrent sentences would be the type of absurd result that statutory interpretation aims to avoid. Article 14, UCMJ ensures civilian access to military members and accommodates the civilian preference for concurrent sentences, while maintaining the military's preference for consecutive sentences in the process. The focus to ensure civilian access to military members does not

[7] Appellant contends that recent technical changes in renumbering Article 57a(b), UCMJ within Article 57, UCMJ evidences Congress's ability to change the statute and bolsters the "plain language and underlying intent analyzed by this Court in Bramer." (App. Br at 14-15.) The Government agrees that these technical amendments renumbering the statute do nothing to change the function of the Article or its interpretation in Bramer. However, again, Bramer underscored the authority of a department regulation requiring consecutive sentences to defer a court-martial sentence of confinement to give that regulation effect. Bramer, 45 M.J. at 299.

lead to an intent to cut short military confinement. Article 57(b), UCMJ ensures an appellant only spends time sentenced to confinement and not more. Congress did not intend to provide a windfall through undue credit by serving multiple sentences simultaneously, particularly in light of regulatory guidance to the contrary.

Finally, Article 57a(b), UCMJ ensures appellants serve sentences of confinement consecutive to any other sentence issued by a state or foreign country in light of the obligations of the United States to those states and foreign countries. It would be ironic indeed to interpret a statute designed to ensure consecutive sentences as precluding that very thing. Such irony should be a hallmark of an absurd result this Court aims to avoid in interpreting statutes.

As this Court has previously observed, "the position advocated by appellate defense counsel is not novel. It has been pressed before and uniformly rejected." Bryant, 30 CMR at 136. This Court should again reject Appellant's old argument as the convening authority properly deferred Appellant's confinement to allow for consecutive sentences, consistent with the intent of the relevant UCMJ articles.

B. Appellant Waived This Issue on Appeal.

1. An Appellant can knowingly and consciously waive all non-jurisdictional issues. This Court has consistently held that "a plea of guilty waives all non-jurisdictional errors that occurred in the earlier stages of the proceedings." Lee, 73 M.J. at 170 (citing United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981)); s*ee also* United States v. Bradley, 68 M.J. 279, 281 (C.A.A.F. 2010); United States v. Rehorn, 9 U.S.C.M.A. 487, 488-89 (C.M.A. 1958) ("It is a fundamental principle of Federal criminal law that a plea of guilty waives all defects which are neither jurisdictional nor deprivation of due process of law."). While waiver has limits, as this Court has explained:

> those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained. Such limits do not arise where an appellant merely complains of antecedent constitutional violations or a deprivation of constitutional rights that occurred prior to the entry of the guilty plea, rather they apply where on the face of the record the court had no power to enter the conviction or impose the sentence.

Lee, 73 M.J. at 170 (internal citations omitted). Furthermore, "waiver is the 'intentional relinquishment or abandonment of a known right' . . . [w]hen . . . an appellant intentionally waives a known right at trial, it is extinguished and my not be raised on appeal." United States v. Gladue, 67 M.J. 311, 313

(C.A.A.F. 2009). Where a military judge conducts a "detailed, careful, and searching examination of Appellant to ensure that he understood the effect of the PTA provision," and Appellant "explicitly indicate[s] his understanding" of the provision, Appellant waives all motions that lawfully can be waived regardless of "whether discussed by the military judge and []defense counsel." Id. at 314; *see also* United States v. Broce, 488 U.S. 563, 573 (1989) ("Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty.")

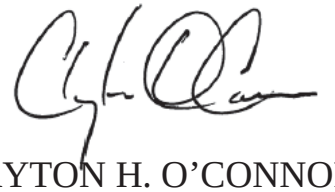
2. Appellant's antecedent complaint is the very kind of motion that can lawfully be waived. Appellant understood when he entered his guilty plea that he would be sentenced to confinement and anticipated serving it consecutive to his federal court sentence. Appellant's defense attorney argued as much during sentencing, and Appellant stated so much during his initial clemency request. (J.A. at 38, 76-78.) Despite his anticipation of serving consecutive sentences, Appellant now complains that doing so would be a violation. This complaint does not address the jurisdiction of the court-martial to try or sentence him. Indeed, he explicitly recognized the authority of the court-martial to try and sentence him in light of his federal sentence. (J.A. at 27-28.) Rather, Appellant's after-the-fact complaint of

serving consecutive sentences for separate crimes from different courts is simply a claim of a "non-jurisdictional error" that Appellant has intentionally relinquished, and is now "extinguished and may not be raised on appeal." Lee, 73 M.J. at 167; Gladue, 67 M.J. at 313.

3. By entering his unconditional guilty plea, in accordance with the terms of his pretrial agreement, Appellant waived the opportunity to complain about serving his court-martial sentence consecutive to his federal civilian sentence. While understanding he could serve his two sentences consecutively, Appellant did not complain about it when entering his guilty plea and waiving his rights. (J.A. at 22-25.) Furthermore, his silence in raising the complaint when entering his guilty plea does not preserve it for appeal. During the military judge's examination and colloquy ensuring Appellant understood the effect of his waiver provision in his Pretrial Agreement, Appellant expressed his understanding that he was "giv[ing] up the right to make any motion, which by law, is given up . . . [by] plead[ing] guilty." (J.A. at 23.) As this Court has previously recognized, the military judge's careful examination of the provision and Appellant's explicit understanding of it has the effect of Appellant waiving this motion even without explicitly discussing it. Gladue, 67 M.J. at 314.

CONCLUSION

WHEREFORE the Government respectfully requests this Honorable Court affirm the findings and sentence in this case.



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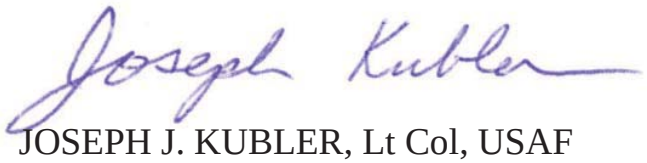

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 September 2017.

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Date: 25 September 2017