IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES Appellee v. Staff Sergeant (E-6) **MICHAEL E. HARRIS** United States Army Appellant	**FINAL BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 18-0364/AR Crim. App. Dkt. No. 20170100

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

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

ISSUE PRESENTED

WHETHER THE ARMY COURT ERRONEOUSLY AFFIRMED THE MILITARY JUDGE'S DENIAL OF 291 DAYS OF *ALLEN* CREDIT FOR PRETRIAL CONFINEMENT APPELLANT SERVED IN A CIVILIAN CONFINEMENT FACILITY AWAITING DISPOSITION OF STATE OFFENSES FOR WHICH HE WAS LATER COURT-MARTIALED.

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

On February 22, 2017, at Fort Meade, Maryland, a military judge sitting as a general court-martial convicted the appellant, Staff Sergeant (SSG) Michael E. Harris, pursuant to his pleas, of one specification of desertion and three specifications of possessing child pornography, in violation of Articles 85 and 134, UCMJ, 10 U.S.C. §§ 885 and 934. (JA 22). The military judge sentenced the appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for five years, and to be discharged from the service with a bad-conduct discharge. (JA 64). The military judge credited appellant with 191 days of confinement credit. (JA 64). The convening authority approved the sentence as adjudged. (JA 12).

STATEMENT OF FACTS

In March 2013, the appellant was attached to the 308th Military Intelligence Battalion's Orlando field office as a counter-intelligence agent. (JA 68). On March 22, 2013, Florida Department of Law Enforcement (FDLE) officers executed a search warrant at the appellant's Orlando residence to search for child pornography and seize the appellant's digital devices. (JA 68). The FDLE subsequently arrested the appellant, booked him, and released him on bond. (JA 68).

In August 2013, the Florida state's attorney charged the appellant in Florida Criminal Court with forty-four counts of possessing child pornography in violation

of Florida law. (JA 71). On January 17, 2014, the appellant departed Florida and traveled to Cambodia with the intent to remain there as a fugitive. (JA 15-17). On January 28, 2014, having fled to Cambodia, the appellant missed a pretrial hearing in Florida Criminal Court for the child pornography charges, and was subsequently charged with one count of failure to appear. (JA 72-73).

After living in Cambodia for approximately nine months, the appellant turned himself in to Cambodian authorities on October 29, 2014. (JA 72). The appellant then spent approximately seven days in confinement in Cambodia. (JA 28). Cambodian officials transferred custody of the appellant to the United States Marshals on November 5, 2014, who then transported the appellant to Florida where he arrived on November 6, 2014. (JA 28-29). The appellant was confined at the Orange County Jail in Florida, where he remained for 655 days awaiting disposition of the charges for possessing child pornography and failing to appear. (JA 29, 72).

Finally, on August 22, 2016, "[d]ue to an inability to secure the presence of a critical witness" for its child pornography case against the appellant, the Florida state's attorney entered official notice abandoning all forty-four counts of possessing child pornography, i.e., announced *nolle prosequi*. (JA 72). The appellant pled no contest to the single count of failure to appear and was sentenced to 364 days confinement. (JA 72, 127). Because the appellant already spent 655

days in civilian confinement–from November 7, 2014 through August 22, 2016–awaiting disposition of the child pornography and failure to appear charges, the judge considered the appellant's 364-day sentence served. (JA 127).

Following his no contest plea in Florida Criminal Court, the appellant remained in confinement in Florida at the request of military authorities for nine days until military authorities could transport the appellant from Florida to Fort Meade, Maryland. (JA 9, 51, 72). Upon his arrival at Fort Meade, the appellant's command placed him on restrictions tantamount to confinement for thirty-three days, preferred charges against him for desertion and possessing child pornography–the same charges abandoned by the state of Florida–and placed him in military pretrial confinement pending court-martial. (JA 3, 52, 73).

At trial, the defense requested 482 days of confinement credit be applied to the appellant's sentence. (JA 59). This total consisted of 7 days of confinement in Cambodia; 1 day of transportation in shackles from Cambodia to Florida; 291 of the 655 days spent in civilian pretrial confinement awaiting disposition of the child pornography and failure to appear charges; 9 days of civilian confinement at the request of military authorities; 33 days of restriction tantamount to confinement while at Fort Meade; and 141 days of military pretrial confinement leading up to the court-martial. (JA 59). The appellant did not request credit for the remaining 364 of the 655 days he spent in civilian pretrial confinement in Florida because

those 364 days had already been applied to the 364-day sentence imposed for the one count of failure to appear. (JA 127).

Ultimately, the military judge awarded 191 days of pretrial confinement credit to be applied against the appellant's sentence to confinement. (JA 64). These 191 days consisted of all credit requested by the defense except the 291 days for time served by the appellant in Florida that were not applied to his sentence for failing to appear. (JA 60-64). As necessary, additional facts relevant to the issue presented are included in the sections below.

Confinement Type	***Amount Requested***	***Amount Awarded***
Civilian Confinement in Cambodia	7	7
Transportation from Cambodia to Florida	1	1
Civilian Pretrial Confinement in Florida	291	0
Military Requested Confinement	9	9
Restriction Tantamount to Confinement	33	33
Military Pretrial Confinement	141	141
Total Confinement Credit	**482**	**191**

SUMMARY OF THE ARGUMENT

The military judge erred in failing to credit the appellant with 291 days against his sentence to confinement. For 655 days, the appellant was held in civilian pretrial confinement awaiting disposition of the child pornography and failure to appear charges against him. However, the child pornography charges were ultimately abandoned and the appellant was explicitly sentenced to 394 days confinement for failing to appear to a pretrial hearing. This left the appellant with 291 days of pretrial confinement served exclusively as a result of the child pornography charges. After the appellant was transferred from civilian confinement to military authorities, the government charged the appellant with possessing child pornography–the same charges abandoned by the civilian authorities. Despite the appellant pleading guilty to the same charges for which he spent 291 days in pretrial confinement, the military judge erroneously concluded that the appellant was not entitled to the 291 days of confinement credit. This conclusion ignored the express language of Department of Defense Instruction (DoDI) 1325.07 and Department of Defense Manual (DoD) 1325.7-M, and this Court should find that the military judge and the Army Court erred in denying the appellant the 291 days of confinement credit.

STANDARD OF REVIEW

This Court reviews questions of whether an appellant is entitled to pretrial confinement credit de novo. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002) (citations omitted). Additionally, this Court defers to a military judge's findings of fact where they are not clearly erroneous, but reviews the military judge's application of those facts to the law de novo. *United States v. Harris*, 66 M.J. 166, 168 (C.A.A.F. 2008) (citations omitted).

LAW

When *United States v. Allen* was originally decided, the Court of Military Appeals (CMA) "concluded that the Secretary of Defense adopted the pretrial confinement provisions of 18 U.S.C. § 3568" for those subject to courts-martial "by promulgating DoDI 1325.4, Treatment of Military Prisoners and Administration of Military Corrections Facilities (7 October 1968)." 17 M.J. 126, 127 (C.M.A. 1984). The instruction required that the procedures for computing military sentences conform to those published by the Department of Justice. *Id*. When Congress repealed 18 U.S.C. § 3568 in 1984, it subsequently enacted 18 U.S.C. § 3585(b), which provided for awarding sentence credit in cases where (1) pretrial confinement resulted from the offense for which the sentence was imposed, and (2) pretrial confinement resulted from other, unrelated offenses.

By 2013, DoDI 1325.4 and its successor, DoDI 1325.7, were both superseded by DoDI 1325.07, which became effective on March 11, 2013. Department of Defense Instruction 1325.07 was the applicable instruction at the time of the appellant's court-martial, and it remains the applicable instruction as of this appeal. In contrast to 18 U.S.C. § 3585(b), DoDI 1325.07 "expressly makes *unrelated* crimes credit inapplicable to sentencing at a trial by courts-martial." Credit for *related* offenses under DoDI 1325.07, however, remains available.

Department of Defense Instruction 1325.07 directs that "[s]entence computation shall be calculated in accordance with DoD 1325.7-M." Encl. 2, para. 3.a. Department of Defense Manual 1325.7, in turn, requires military judges to "direct credit for each day spent in pretrial confinement or under restriction tantamount to confinement for crimes for which the prisoner was later convicted." DoD 1325.7-M, para. C2.4.2. In the wake of the statutory and regulatory changes, the service courts continue to grant credit for pretrial confinement.[1]

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[1] *United States v. Thompson*, No. 36943, 2007 CCA LEXIS 377, at *4 (A.F. Ct. Crim. App. Sept. 24, 2007) ("We order that the appellant receive a credit of three days against the confinement portion of his sentence."); *United States v. Gilchrist*, 61 M.J. 785, 787 n.3 (Army Ct. Crim. App. 2005) ("[W]e will order one additional day of [pretrial confinement] credit, pursuant to *United States v. Allen* . . . ."); *United States v. Gonzalez*, 61 M.J. 633, 635 (C.G. Ct. Crim. App. 2005) ("We will grant [a]ppellant one day of credit for pretrial confinement . . . ."); *United States v. Simmons*, No. 200100335, 2002 CCA LEXIS 294, at *7 (N-M. Ct. Crim. App. Nov. 25, 2002) ("[W]e . . . order an additional 5 days of credit pursuant to *United States v. Allen* . . . ."); *cf. United States v. Flores-Muller*, No. S31183, 2007 CCA LEXIS 540, at *4-5 (A.F. Ct. Crim. App. Nov. 13, 2007) (finding that had

ARGUMENT

The military judge correctly framed the issue in terms of whether the appellant had been held in civilian pretrial confinement for crimes to which he later pled guilty at his court-martial. The military judge, however, incorrectly determined that the appellant's time in pretrial confinement in Florida was for the offense of failure to appear alone, rather than for the forty-four counts of possessing child pornography. (JA 68). Appellant did not ask the military judge to award him sentence credit for the 364 days applied to his civilian sentence for failing to appear; he did not ask for "double" credit. Instead, the appellant requested that the remaining 291 of the 655 days he spent in pretrial confinement in Florida be applied to his court-martial sentence as required by paragraph C2.4.2 of DoD 1325.7-M and case law.

1. The military judge's determination that there was no link between the appellant's civilian pretrial confinement and the charges for which he was convicted at court-martial is clearly erroneous.

When issuing his ruling regarding the 291 days of confinement credit requested by the appellant for time confined in a civilian facility in Florida, the

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appellant not already been awarded pretrial confinement credit against his civilian sentence, he would have been entitled to such credit against his military sentence pursuant to *Allen* and 18 U.S.C. § 3585(b) (2000)). Major Michael L. Kanabrocki, *Revisiting United States v. Allen: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)*, 2008 Army Law. 1, 2 (2008).

military judge stated, "[t]here's no evidence before the court linking the pretrial confinement in Florida and the sentence adjudged by that state to the offenses of which Florida elected not to prosecute the accused, nor to the offenses to which the accused pled guilty today in court." (JA 62). This is factually inaccurate.

While the appellant was not placed in pretrial confinement until after he committed the offense of failure to appear, it is illogical to ignore the fact that the event to which the appellant failed to appear was a pretrial conference for forty-four counts of possessing child pornography. (JA 127). The bonds forfeited by the appellant when he fled to Cambodia existed to ensure his presence in Florida's pretrial court proceedings *for the child pornography charges*. (JA 127). Practically speaking, the appellant's confinement after he failed to appear for the pretrial conference ensured his availability to be tried for the child pornography charges, and was merely an escalation of the restrictions on the appellant's liberty already in place in the form of posting bail.

Additionally, during the motions hearing regarding confinement credit, the military judge asked the trial counsel if, during the appellant's almost two years in civilian pretrial confinement, the state of Florida was pursuing child pornography charges. (JA 50). The trial counsel responded, "They were, Your Honor." (JA 50). The military judge then asked the trial counsel whether the reason the Florida state's attorney did not go forward with the child pornography charges was

unavailability of a key witness, to which the trial counsel responded, "They had an issue with a key witness; they apparently came to a plea deal, which we saw, and that was part of the reason why those charges were dismissed, yes." (JA 50). The evidentiary basis for the trial counsel's responses were reiterated in Prosecution Exhibit 1, the Stipulation of Fact. Paragraph 21 of the stipulation addresses the ultimate disposition of the Florida charges against the appellant. (JA 72). Specifically, with respect to the child pornography charges, paragraph 21 confirms that the state's attorney abandoned them "due to an inability to secure the presence of a critical witness." (JA 72).

Furthermore, after the Florida state's attorney declined to prosecute the appellant for the child pornography charges, the appellant's digital media devices originally seized by the Florida law enforcement for containing child pornography were transferred to the Army's Criminal Investigative Command (CID). (JA 73). Upon receipt of the devices, Army investigators obtained a search authorization and searched the contents of the devices. (JA 73). Based on the contents of the devices discovered during the search, the government charged the appellant, in three specifications, with possessing forty-four images and videos depicting child pornography. (JA 9).

Ultimately, the government based three of its four specifications against the appellant at court-martial on the very evidence seized by Florida law enforcement

to support the forty-four counts of possessing child pornography charged in Florida Criminal Court. This creates an undeniable link between the abandoned Florida charges and the specifications to which the appellant pled guilty before the military judge.

In sum, the state of Florida pursued child pornography charges against the appellant during the entire 655-day period he spent in civilian pretrial confinement. Additionally, the state's attorney dropped the child pornography charges the same day the appellant was sentenced for failing to appear. Furthermore, the sentencing order (JA 127), plea form (JA 129), and Register of Actions (JA 133) submitted by the Florida government counsel at trial all referenced the Florida child pornography charges against the appellant. Accordingly, the appellant was held in civilian pretrial confinement for possessing child pornography, but was only sentenced in civilian court for failing to appear–a sentence of 364 days confinement. Therefore, the remaining 291 days of pretrial confinement is directly attributed to the child pornography charges–the same charges to which the appellant pled guilty at court-martial. Considering the totality of the evidence, the military judge erred in finding that there was no link between the possession of child pornography charges and the appellant's Florida pretrial confinement.

2. The military judge erred when he relied on *United States v. McCullough* to deny the appellant pretrial confinement credit.

In his ruling, the military judge stated that his decision to deny the appellant sentence credit for the 291 days of pretrial confinement in Florida was "consistent with the reasoning of *United States v. McCullough*, 33 M.J. 595, 596 (A.C.M.R. 1991)," also cited by the trial counsel. (JA 63). Though the military judge did not specify what aspect of his ruling was consistent with *McCullough*, the portion of the ruling that overlapped with the trial counsel's brief addressed the question of whether the appellant had already been "credited" with the 291 days he sought. (JA 62). In this case, the military judge's reliance on *McCullough* is misplaced for two reasons. First, *McCullough* relies on the language of 18 U.S.C. § 3585(b), which is no longer applicable to military members. Second, the appellant was explicitly sentenced to 364 days of confinement for failing to appear, and was not sentenced to 655 days; the complete time he served in pretrial confinement.

In the government's brief, the trial counsel relied on *McCullough* to support the assertion that the appellant was not entitled to the requested 291 days of credit because 364 of the 655 days he spent in non-military pretrial confinement had already been applied to the appellant's civilian sentence for failure to appear. (JA 98). However, this assertion ignores the current statutory and regulatory framework governing confinement credit.

The Army court decided *McCullough* based on a line of cases interpreting 18 U.S.C. § 3585(b), which allowed credit for pretrial civilian confinement "that has not been credited against another sentence." As noted by the trial counsel in the government's brief, the provisions of 18 U.S.C. § 3585(b) are no longer applicable to military members. (JA 96). Department of Defense Instruction 1325.07 removed the reference to Department of Justice procedures, and by extension, it removed the 18 U.S.C. § 3585(b) language restricting credit to that which "has not been credited against another sentence." Because 18 U.S.C. § 3585(b) is no longer applicable to military members, prior opinions which turn on its statutory language should not be relied on without substantial analysis of whether the opinions' precedents remain intact under current statutory and regulatory frameworks. Cases like *McCullough* should not be cherry picked for language in a way that ignores the greater legal context in which that language appeared.

Paragraph C2.4.2 of the current sentencing manual states that a "judge will direct credit for each day spent in pretrial confinement…for crimes for which the prisoner was later convicted." DoD 1325.7-M. The appellant in this case is seeking exactly that. The appellant was sentenced in Florida to 364 days of confinement for his failure to appear at a pretrial conference. (JA 127). Because he already spent 655 days in pretrial confinement, the state of Florida considered the appellant's 364-day sentence to confinement served. (JA 127).

In his ruling, the military judge erroneously reasoned that because the Florida sentencing order acknowledged the appellant had acquired credit for 1 year and 294 days of time served, the entirety of the 1 year and 294 days had been applied to the appellant's sentence for failure to appear. (JA 62, 127). Although the Florida sentencing order acknowledged that the appellant was entitled to sentence credit totaling 1 year and 294 days, the sentencing order did *not* give the appellant a sentence that encompassed the entire time he served in pretrial confinement. (JA 127). To the contrary, the sentencing order reflected an explicit sentence of 364 days for failing to appear. To say that Florida applied all 1 year and 294 days of credit to a 364-day sentence is a practical impossibility, and clearly erroneous based on the evidence at hand. Absent language in DoDI 1325.07, DoD 1325.7-M, or case law from a superior court prohibiting the application of unused but otherwise applicable confinement credit to court-martial sentences, the reasoning used by the trial court to deny the appellant's requested credit does not withstand scrutiny. The Army Court's decision to affirm the military judge's misplaced reasoning must be reversed.

CONCLUSION

WHEREFORE, SSG Harris respectfully requests that this Honorable Court find the Army Court erred in failing to grant the 291 days of confinement credit.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and the Government Appellate Division on January 18, 2019.

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