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	**REPLY 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:

ISSUE PRESENTED

WHETHER THE ARMY COURT ERRONOUSLY 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.

ARGUMENT

The appellee's argument has surface level appeal, but a closer examination reveals its flaws. Appellee's position is essentially that crime X was committed (possession of child pornography); crime Y (failure to appear on bail) was committed after crime X; therefore the appellant is not entitled to confinement credit for crime X during preceding confinement for crime Y. The flaw to the appellee's argument is that these charges are more unique than simply their chronological order, and thus require a closer examination into the relationship between the two crimes.

The state of Florida charged Staff Sergeant (SSG) Michael Harris with possession of child pornography. (JA 71). Florida then required SSG Harris to pay a bond—a form of restriction to ensure his cooperation in the criminal justice process. (JA 71). Staff Sergeant Harris fled to and remained in Cambodia to avoid prosecution for the charges pending against him in Florida. (JA 72). Once returned to Florida, SSG Harris was placed in pretrial confinement and charged with failure to appear on bail. (JA 72).

Appellee asserts that the appellant is ignoring the "notwithstanding" provision of DODI 1325.07, specifically the provision in DODI 1325.07-M that "if a prisoner is confined in a non-military facility for a charge or offense for which the prisoner had been arrested after the commission of the offense for which the

military sentence was imposed, the prisoner shall receive no credit for such time confined in the non-military facility when calculating his or her sentence adjudged at court-martial." (Appellee's Br. 7) (quoting DODI 1325.07-M para. C2.4.2). The appellee's argument, however, glosses over the fact that the charge of failure to appear could not exist without the charge for possession of child pornography.

Failure to appear is dependent on the original charge of possession of child pornography in a manner that no other crime can be. Had SSG Harris robbed a bank after being released on bond, the appellee would be correct in their analysis; the hypothetical bank robbery would have had no relation with the original charges SSG Harris was free on bond for. Here, however, not only do the charges have an inherent relationship, but the logical escalation of restriction on freedom by the state of Florida cannot be ignored. After failing to appear and forfeiting his bond the State of Florida would then, reasonably, have placed SSG Harris in pretrial confinement for the original charges of possession of child pornography, it just so happens that he was also facing the new charge of failure to appear on bail. It is unreasonable to assert or believe that SSG Harris was in pretrial confinement for 655 days pending the disposition of his failure to appear on bail charge. Interpreting DODI 1325.07-M with purely an "always" or "never" view, will open the door to injustices and absurd results. "Simply put, the default rule that 'intention must be gathered from the words' does not deny judges the authority to

avoid 'absurdity, which the legislature ought not to be presumed to have intended.'"[1] Appellant is asking this court to avoid an absurd and unjust result. SSG Harris will—if the Army Court's decision is upheld—have spent the better part of a year of his life (291 days) incarcerated for the charges the Army convicted him of without ever being credited for them.

[1] John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2400 (2003) (If a given statute contradicts commonly held social values, courts presume the absurd result would have been corrected by Congress had the issue come up during the enactment process).

CONCLUSION

WHEREFORE, Appellant respectfully requests that this honorable court grant meaningful relief.

PATRICK G. HOFFMAN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0652
USCAAF Bar No. 36913

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 34640

JACK EINHORN
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 35432

ELIZABETH G. MAROTTA
Colonel, Judge Advocate
Division Chief
Defense Appellate Division
USCAAF Bar No. 34037

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 March 1, 2019.

PATRICK G. HOFFMAN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0682
USCAAF Bar No. 36913