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) APPELLEE))) Crim. App. Dkt. No. 20170100)) USCA Dkt. No. 18-0364/AR))

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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.

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

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this matter pursuant to 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 appellant, pursuant to his pleas, of three specifications of possession of child pornography and one specification of desertion, in violation of Articles 85 and 134,[1] UCMJ, 10 U.S.C. §§ 885 and 934 (2012). (JA 22). The military judge sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for five years, and a bad-conduct discharge. (JA 64). The military judge credited appellant with 191 days against his adjudged sentence to confinement. (JA 64). The convening authority, pursuant to the terms of a pretrial agreement, approved the adjudged sentence;[2] he also ordered that 191 days of confinement credit be awarded against appellant's sentence to confinement. (JA 64, 12). On July 13, 2018, the Army Court affirmed the findings and sentence. (JA 8). On October 1, 2018, appellate defense counsel filed a Petition for Grant of Review. On December 3, 2018, this Honorable Court granted review.

[1] Appellant pleaded not guilty to the following words in the original charge: "terminated by apprehension." The military judge found appellant not guilty of the excepted language and guilty of the amended charge. (JA 22).

[2] The quantum portion of the pretrial agreement provided that the convening authority would disapprove any confinement in excess of five years. (JA 64).

Statement of Facts

The following timeline is relevant to appellant's request of 291 days' pretrial confinement credit. In March 2013, civilian authorities arrested appellant for possession of child pornography and released him on bond. (JA 68). In August 2013, the State of Florida charged appellant with forty-four counts of possession of child pornography. (JA 71). Appellant remained free on bond awaiting his trial. (JA 71). Six months later, appellant fled to Cambodia with the intent of leaving the United States permanently. (JA 15). Appellant remained in Cambodia from January to October 2014 in order to avoid prosecution for the felony charges pending against him in Florida. (JA 72). On January 28, 2014, appellant failed to appear at the pretrial hearing date for the child pornography charges. (JA 72). Out of concern for his own safety, appellant turned himself into local law authorities. (JA 20). Appellant was transferred back to the United States and on November 6, 2014, civilian authorities put appellant into pretrial confinement in Orange County, Florida and charged him with failure to appear on bail, a felony under Florida State law.[3] (JA 72).

On August 22, 2016, the Florida state's attorney agreed to *nolle prosequi* (not pursue) the forty-four counts of child pornography. (JA 72). Instead, the state

[3] Fla. Stat. § 843.15(1)(a), Failure of a Defendant on Bail to Appear, a felony carrying a potential maximum sentence of five years imprisonment plus a total maximum fine of $5,000.

pursued a single count of failure to appear based on appellant's deliberate absence at the pretrial conference. (JA 72). Appellant agreed to plead *nolo contendre* (no contest) to failure to appear in exchange for a sentence recommendation from the prosecutor of 364 days of confinement *with credit for time served*. (JA 72, 129). The amount of time served, which appellant acknowledged in the plea agreement he signed, was one year and 294 days. (JA 127, 129). In accordance with the plea agreement, appellant was found guilty and sentenced to 364 days' confinement with credit for time served. (JA 129). Because appellant's time in pretrial confinement exceeded the adjudged sentence, appellant did not spend further time in jail for his state felony conviction.

On February 22, 2017, appellant pleaded guilty at court-martial to all charges and was sentenced to a five-year term of confinement. (JA 64). The military judge awarded appellant 191 days of confinement credit: eight days for the time appellant was held in the Cambodian jail, nine days for the time state authorities held appellant after his no contest plea, thirty-three days for restriction at appellant's Fort Meade unit, and 141 days for the time appellant spent in military pretrial confinement. (JA 63-64).

At trial, appellant requested an additional 291 days of administrative credit for the time appellant spent in a Florida jail in excess of 364 days. The military judge denied appellant's request and made the following findings of fact:

> [T]he evidence shows the entirety of the accused's time in pretrial confinement in Florida was discharged as credit towards his offense [failure to appear] to which he pled "no contest" in Florida. There wasn't any indication or evidence that Florida was holding the accused for the military, or there was any coordination between the State of Florida and the U.S. Army. Instead, this request for confinement credit is exactly the type covered by the DoD Instruction. The accused was confined in a non-military facility for the offense of failure to appear, for which he was arrested well after the offenses for which this court-martial shall impose sentence today.

(JA 62).

The military judge found the following provision of Department of Defense Instruction 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority [hereinafter DODI 1325.07], encl. 2, para. 3.c. (11 March 2013), dispositive:

> [I]f a prisoner (accused) 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 (accused) shall receive no credit for such time confined in the non-military facility when calculating his or her sentence adjudged at court-martial.[4]

(JA 61).

[4] This instruction has been updated twice since the date on which appellant was sentenced. The changes incorporated into this DODI in September 2017 and April 2018 do not affect the terms or applicability of the above-cited paragraph.

Standard of Review

A military judge's decision on a motion for sentence credit is reviewed *de novo*. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002). A military judge's findings of fact are reviewed under a clearly erroneous standard. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Summary of Argument

Under the controlling authority, appellant is not entitled to administrative credit for the time he served in the civilian confinement in Florida because he was arrested and confined for an offense, which he committed after "the offense for which the military sentence was imposed . . . ." DODI 1325.07, encl. 2, para. 3.c.

Law and Argument

This Court should not grant appellant's requested administrative credit because he was arrested and confined in the non-military facility for failing to appear, an offense committed after he had already committed the offense of possession of child pornography for which he was court-martialed.

I. Controlling law requires denial of appellant's requested credit.

Department of Defense Sentence Computation Manual 1325.07 [hereinafter DOD 1325.07-M], para. C2.4.2 provides: "The [military] judge will direct credit for each day spent in pretrial confinement or under restriction tantamount to confinement for crimes for which the prisoner was later convicted." However,

DODI 1325.07 clarifies that "[n]otwithstanding any other provision of this instruction or . . . [DOD 1325.07-M], if a prisoner (accused) 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 (accused) shall receive no credit for such time confined in the non-military facility when calculating his or her sentence adjudged at court-martial." encl. 2, para. 3.c. Appellant repeatedly ignores this provision and argues that DOD 1325.07-M "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[,]'" without addressing the controlling "notwithstanding" provision, which is an exception to day for day confinement credit and is applicable here. (Appellant's Br. 8, 9, 14) (quoting DOD 1325.07-M, para. C2.4.2).

Rather than address the governing provision, appellant argues the military judge was clearly erroneous and erred on the following two issues respectively. First, appellant argues "[t]he 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." (Appellant's Br. 9-12). Second, appellant argues, "[t]he military judge erred when he relied on *United States v. McCullough* to deny the appellant pretrial confinement credit."

(Appellant's Br. 13-15). Appellant's focus is misplaced: First, "some link" is not the applicable legal standard; and, second, the military judge did not rely on *McCullough* to deny appellant credit, rather stating merely that the denial of pretrial confinement credit was "consistent with the applicable Instruction and Manual, and consistent with the reasoning of *U.S. v. McCullough* . . . ." (JA 63). While the military judge's reference to *McCullough* is not incorrect, it is also not dispositive in this case. In fact, appellant and appellee agree that the dispositive provisions in this appeal are DODI 1325.07 and DOD 1325.7-M. (Appellant's Br. 8). Indeed, the military judge applied those very provisions to find that "[t]he accused was confined in a non-military facility for the offense of failure to appear, for which he was arrested well after the offenses for which this court-martial shall impose sentence today." (JA 200). Accordingly, appellant "shall receive no credit for such time confined in the non-military facility when calculating his or her sentence adjudged at court-martial." DODI 1325.07 encl. 2, para. 3.c. Therefore, under the plain reading of this instruction, this Court should not grant appellant confinement credit for the 291 days spent in Orange County Jail.

II. The military judge's findings of fact are not clearly erroneous and support denial of the 291 days requested pretrial confinement credit.

The military judge made five findings of fact, which are confirmed in the record and support denial of pretrial confinement credit. First, when appellant was

arrested and charged in Florida state criminal court with forty-four counts of possession of child pornography, he was not placed in civilian confinement, but rather remained free on bail. (JA 62). Both parties agree on the accuracy of this in the stipulation of fact. (JA 70). The extent of appellant's liberty is highlighted by his ability to travel to Cambodia and failure to appear at a pretrial hearing in Florida state court. (JA 70-72). Second, appellant was confined only after he failed to appear and was charged with that offense. (JA 72). Appellant agreed to this finding in the stipulation of fact and admitted to it in his providency inquiry. (JA 29, 62). Third, no evidence exists in the record that the State of Florida confined appellant at the request of or in coordination with the Army. (JA 46, 72). Fourth, in exchange for appellant pleading no contest to the failure to appear charge, the entirety of the time appellant served was credited against his sentence for failure to appear. (JA 62). Both parties agreed in the stipulation of fact that appellant was convicted of failure to appear and sentenced to "time already served." (JA 72). This finding is also supported in civilian court documents presented to the military judge at the motions hearing. (JA 127, 129). Therefore, contrary to appellant's argument, appellant did not merely receive 364 days' credit against his sentence for the failure to appear offense. Instead, the civilian judge explicitly ordered appellant to serve 364 days in the Orange County Jail *with credit for 1 year 294 days, time served*. (JA 127, 129).

Further strengthening the military judge's factual finding that appellant was placed in civilian confinement for failing to appear and not for child pornography, The Army Court added the following reasoning: "The crucial question is: what does the DoDI mean by 'confined . . . for a charge,' and specifically, what does the word 'for' mean in this context?" *United States v. Harris*, 78 M.J. 521, 525 (A. Ct. Crim. App. 2018). "When a term is not otherwise defined, courts will accord that term its ordinary meaning." *Id.* (citing *United States v. Hendrix*, 77 M.J. 454 (C.A.A.F. 2018)). The government agrees with the Army Court that "[i]n the context at issue . . . the correct meaning of 'for' is closest to 'because of' or 'on account.'" *Id.* (quoting Webster's Third New International Dictionary 886 (1981)). Appellant committed the offense of failing to appear and was confined "for" or "because of" his failure to appear after he committed the offenses of possessing child pornography, the crime for which he was sentenced at court-martial. Therefore, pursuant to DODI 1325.07, this Court should not grant appellant any additional confinement credit.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 2,192 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on appellate defense counsel, on February 19, 2019.

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