IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **JACOB L. BRUBAKER-ESCOBAR,** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190618 USCA Dkt. No. 20-0345/AR

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

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Issue Presented

WHETHER THE CONVENING AUTHORITY'S FAILURE TO TAKE ACTION ON THE SENTENCE AS A RESULT OF THE STAFF JUDGE ADVOCATE'S ERRONEOUS ADVICE DEPRIVED THE ARMY COURT OF JURISDICTION UNDER ARTICLE 66, UCMJ.

Statement of the Case

On October 30, 2020, this Court granted appellant's Petition for Grant of Review. On November 30, 2020, appellant filed his brief with the Court. The government responded on December 30, 2020.

Argument

1. Executive Order 13,825 required the convening authority to act on the sentence—and he clearly did not.

The government appears to concede that the convening authority was required to take action on the sentence in this case. After all, Section 6(b)(1) of Executive Order (EO) 13,825, 83 Fed. Reg. 9889 (Mar. 1, 2018) clearly mandates that the version of Article 60 in effect at the time of the earliest misconduct for which appellant was found guilty "*shall* apply . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence." (emphasis added). The 2016 version of Article 60, in effect for appellant's case, provided the convening authority "shall" take action on the sentence. Article 60(b)(2)(A), UCMJ (2012 & Supp V 2018). To circumvent this clear mandate, the government

seeks to contort logic and redefine "action" in a new and novel way: that "no action" is actually "action." (Appellee's Br., 9).

To begin with, "no action" is—quite literally—the opposite of "action." It is the absence of action. It is inaction. But the government's argument does not end with flipping logic on its head. It also disregards how Article 60 defined what constituted "action" prior to the Military Justice Act of 2016 (MJA 16).[1] That version of Article 60, in effect for appellant's case, provided that to take action means to "approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part." Article 60(B)(2)(B), UCMJ (2012 & Supp V 2018). The convening authority did none of those things in this case. Inaction was not listed among the possible actions.

The government contends that the convening authority's inaction is consistent with RCM 1110(g) (2019), which outlines the MJA 16 procedures for the convening authority's action. RCM 1110(g) creates a binary choice for the convening authority: take "No action" under RCM 1110(g)(1) or take "Action on sentence" under RCM 1110(g)(2). When the convening authority wrote "No action" on his memorandum, he was clearly acting under the new version of RCM

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[1] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2932 (Dec. 23, 2016).

1110(g)(1)'s "No action" provision. Yet, EO 13,825 took away that binary choice for the convening authority in a limited class of cases, including appellant's, where some of the misconduct was committed prior to January 1, 2019. It mandated he take "Action on the sentence" under RCM 1110(g)(2), where "Action on the sentence" under pre-MJA 16 version of Article 60 entailed approving, disapproving, suspending, or commuting all or part of the adjudged sentence. Again, the convening authority did none of those things in this case.

The most harmonious reading of all of the subsections of Section 6(b) of EO 13,825 together is this: the convening authority retains all of the same obligations, discretion, and limitations as he or she did under the version of Article 60 in effect at the time the earliest offense was committed. Thus, just as was done in every pre-MJA 16 case, a convening authority was required to act on a sentence by either approving, disapproving, commuting, or suspending it in whole or in part, subject to the limitations on his ability to act for certain qualifying offenses. The convening authority does not "act" within the sense of the pre-MJA 16 version of Article 60 unless he or she takes one of those limited affirmative actions. Having failed to do so here, the convening authority erred.

2. The error is jurisdictional.

In enacting the MJA 16, Congress inextricably tethered its limited grant of jurisdiction to the service courts of appeals under Article 66 to Article 60c, which lays out the procedure for entering judgment. The government wholly ignores that linkage, and limits its "plain language" analysis entirely to the words of Article 66. Reading Article 66 in a vacuum ignores a "fundamental canon of construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)); *see also United States v. Briggs*, 141 S. Ct. 467, 2020 U.S. LEXIS 5989, at *7 (Dec. 10, 2020) (emphasizing that the UCMJ is a "uniform code," where "a natural referent for a . . . provision within the UCMJ is other law in the UCMJ itself.").

Considering the statutory scheme as a harmonious whole involves reading Article 66 in conjunction with Article 60c. *See Food & Drug Admin*, 429 U.S. at 123 ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.") (internal quotations omitted); *Smith v. United States*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a

statute.") Article 60c is clear on its face that the entry of judgment must be executed "in accordance with the rules promulgated by the President": here, EO 13,825. Plainly, the President's rules laid out in EO 13,825 were not followed in this case, which renders the judgment defective and incomplete. If jurisdiction is based solely on judgment, it cannot be that a defective or invalid judgment can confer jurisdiction. Certainly it cannot be so for courts of limited jurisdiction —as military courts undoubtedly are. *See United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015).

3. Under this Court's precedent, an ambiguous or incomplete action by the convening authority requires remand even without a showing of prejudice.

Even if this Court finds the error is procedural, rather than jurisdictional, remand for corrective action is still the appropriate remedy. The question is whether to test for prejudice, and if so, what the appropriate prejudice standard is.

The government contends this Court should apply the "plain error" test and determine whether there was "material prejudice to appellant's substantial rights." (Appellee's Br., 19-20). However, the government does not specify what prejudice standard should be applied. (Appellee's Br., 19-20). See *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) ("'[M]aterial prejudice' for purposes of Article 59, UCMJ, must be understood by reference to the nature of the violated right.").

Presumably, the standard the government refers to is "some colorable showing of possible prejudice": the standard this Court has applied where the convening authority took complete and unambiguous action, but the action was based on erroneous information provided to him or her. See, e.g., *United States v. Scalo*, 60 M.J. 435, 436-437 (C.A.A.F. 2005); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *United States v. Wheelus*, 49 M.J. 283, 298 (C.A.A.F. 1998).[2] In each of those cases, for example, the convening authority's action was based on a staff judge advocate's advice that contained errors or omissions that had the possibility of misleading the convening authority to the accused's detriment. For example, the advice contained material omissions about the military judge's recommendation and inaccurately described the offenses (*Kho*), contained new matters in the addendum (*Wheelus*), or omitted information about pre-trial restraint

[2] It is unclear whether the Army Court applied this low prejudice standard to appellant's case when it tested for prejudice. The Army Court found there was no prejudice to "appellant's substantial right to seek clemency from the convening authority." (JA 002-003). This articulation of the prejudice standard first appeared in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020) (opinion of the court). In *Coffman*, the Army Court cited *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005) for the prejudice standard. *Alexander*, however, dealt with a panel selection error under Article 25, UCMJ, not an error in the convening authority's post-trial action. *Id.*

(*Scalo*). Any of these omissions or inaccuracies could have swayed the convening authority into taking unfavorable action for the accused.

But this Court has taken a markedly different approach in cases where the convening authority's action on the findings has been incomplete or ambiguous. In those cases, this Court has *not* tested for plain error or prejudice. Instead, it has uniformly remanded the case to the convening authority for corrective action. See, e.g., *United States v. Captain*, 75 M.J. 99, 105 (C.A.A.F. 2016); *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006); *United States v. Scott*, 49 M.J. 160 (C.A.A.F. 1998).

There are several sound reasons for remanding without testing for prejudice where the action is incomplete or ambiguous. Without knowing what sentence was approved or disapproved, an appellate court cannot assure itself that it has jurisdiction. Nor can it meaningfully determine what part of the findings and sentence "should be approved" if it does not know what was approved in the first place.

Those reasons for remanding without a showing of prejudice remain sound, even though Congress has incrementally limited the convening authority's power to disapprove the findings or the sentence over the past few years. Where the convening authority retains discretion, it is unfettered. Appellate judges should not

engage in guesswork or assumptions about what the convening authority might have done if he had taken complete action. *See Captain*, 75 M.J. at 105 ("[W]e pause to underscore the importance of a convening authority clearly stating his or her approval, disapproval, commutation, or suspension of each aspect of an accused's sentence when taking action pursuant to R.C.M. 1107(d)(1).").

Appellant's case falls into this latter line of cases, where the convening authority has taken incomplete or ambiguous action. As detailed above, the action was incomplete in this case because taking "no action" on the sentence is the literal opposite of "action." The Staff Judge Advocate only created more ambiguity and confusion by citing different versions of the rules for court-martial in the clemency advice. In the header, the Staff Judge Advocate refers to the 2016 version of RCM 1107 being in effect, but then ultimately recommends "No action"—an option not available under that version of RCM 1107. (JA018-019). In other portions of the clemency advice, there are references to rules for court-martial from that came into effect on January 1, 2019. In short, it is not clear under which set of rules the convening authority failed to act on the sentence.

The convening authority's action was defective in the sense that it was incomplete and ambiguous, not because the clemency advice contained erroneous information that would sway him into taking unfavorable action to the accused.

Contrary to the government's suggestion (Appellee's Br., 20-21), no appellate court can "correct" a failure to take action: that power belongs solely to the convening authority. Appellate courts can correct some errors in the post-trial process, but the government points to no authority for the Army Court to take action on a sentence where none exists. Consistent with the *Captain*/*Politte*/*Scott* line of authority, therefore, cases like appellant's should be remanded without testing for prejudice to ensure that everyone is operating under the same understanding as to what sentence is actually under review.

Conclusion

The convening authority's inaction in this case was error under EO 13,825. Even if this Court finds the error purely procedural, however, the appropriate remedy is remand for corrective action without testing for prejudice.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Brubaker-Escobar, Crim. App. Dkt. No. 20190618, USCA Dkt. No. 20-0345/AR, was electronically filed with the Court and Government Appellate Division on January 11, 2021.

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