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	) FINAL BRIEF ON BEHALF OF) APPELLEE)))) Crim. App. Dkt. No. 20190618)) USCA Dkt. No. 20-0345/AR)

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

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

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 Statutory Jurisdiction

This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3) (2018) [UCMJ]. On October 30, 2020, this Court granted appellant's petition for review. (JA001).

Statement of the Case

On July 12 and September 16, 2019, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of five specifications of maltreatment and one specification of assault consummated by a battery, in violation of Articles 93 and 128, UCMJ (2016), 10 U.S.C. §§ 893 and 928. (JA 012–16). The military judge sentenced appellant to reduction to the grade of E-1 and a bad-conduct discharge. (JA011). The convening authority signed a document titled, "Convening Authority Action in the case of U.S. v. Jacob L. Brubaker Escobar [sic]." (Action Memo). In the block for "Convening authority's action on the findings and/or the sentence," he annotated "No Action." (JA019). The military judge entered judgment on September 26, 2019. (JA020). On June 9, 2020, the Army Court of Criminal Appeals (ACCA) exercised its jurisdiction under Article 66, UCMJ, and affirmed the findings and sentence. (JA002).

Statement of Facts

A. Appellant battered and maltreated his subordinates.

Throughout 2018, appellant used his position as a superior and supervisor to inflict physical and emotional pain on his subordinates. (JA021–30). Appellant maltreated one subordinate, Private First Class (PFC) JL, when he punched her in the leg, struck her in the leg with a pipe, punched her on her knee and hip almost daily, and pinched the backs of her arms. (JA022–23). Private First Class JL told

appellant to stop hitting her, but he told her that she should "stop bitching" and "be a man." (JA022–25). Appellant called another subordinate, PFC BR, a "pussy" and "bitch" in front of other soldiers and punched him in the genitals. (JA023). Appellant punched a different female subordinate, PFC AP, in the chest, which caused a fist-sized bruise. (JA024). He also punched her in the arm. (JA024–26).

Appellant punched yet another subordinate, PFC SM, in the chest and ribs multiple times. (JA026). On a separate occasion, appellant grabbed PFC SM by the hips, pulled him toward appellant's own genitalia, and told PFC SM, "the Ancient Greeks were known to take their students as young lovers." (JA027). Appellant also struck PFC SM on the arm with his closed fist, wrapped his arms around PFC SM's neck and applied pressure, and wrapped a tourniquet around PFC SM's neck and applied pressure. (JA028). Appellant repeatedly referred to PFC SM as "dickbird," "cockhead," "reject," "faggot," and "retard," and he told PFC SM to "suck a dick." (JA028).

Appellant maltreated a different subordinate, Specialist (SPC) KG, when he repeatedly struck him in the ribs and chest. (JA027). Appellant greeted SPC KG with a homophobic slur. (JA028). Appellant also attempted to kick SPC KG in the genitals, but instead struck the inside of his thigh. (JA027–28). Lastly, appellant punched a newly promoted sergeant (SGT), SGT FR, in the chest with a closed fist. (JA029). "[Appellant] was warned on several occasions by different

[noncommissioned officers] about his conduct. [Appellant] was not confused by their admonishments, but yet ignored their orders and retaliated against his [soldiers] for reporting his conduct." (JA029).

B. The convening authority referred appellant's case to court-martial in 2019, and he was convicted of his crimes in 2019.

On June 26, 2019, the convening authority referred appellant's case to a general court-martial. (JA004–05). On September 9, 2019, appellant entered into a pretrial agreement (PTA) with the convening authority. (JA031–34). Appellant agreed to plead guilty to some of the charged offenses—the earliest of which occurred on April 1, 2018—in exchange for a sentence limitation of twelve months' confinement and a bad-conduct discharge. (JA031–35). Absent the sentence limitation in the PTA, appellant faced a maximum punishment of 10 years and 6 months of confinement, total forfeitures, reduction to E-1, and a dishonorable discharge. Articles 93(e) and 128(e), UCMJ (2016); (JA004–08). On September 16, 2019, the military judge found appellant guilty, in accordance with his pleas, and sentenced him to reduction to E-1 and a bad-conduct discharge. (JA011). Thus, the PTA did not have any effect on the sentence. (JA035). The Statement of Trial Results (STR) was completed the same day and accurately reflected the findings and sentence. (JA012–16). Appellant also waived his post-trial rights under R.C.M. 1106 on the day of his court-martial. (JA017).

On September 25, 2019, the staff judge advocate provided written clemency advice to the convening authority. (JA018–19). The staff judge advocate advised the convening authority that he "[may] not take action on findings" or "disapprove, commute, or suspend . . . that portion of an adjudged sentence that includes . . . [a] bad-conduct discharge." (JA018–19). The staff judge advocate recommended that the convening authority "take *no action* on the findings and sentence." (JA018) (emphasis added). The convening authority signed the Action Memo and indicated he would take "[n]o [a]ction" on appellant's findings or sentence. (JA019). On September 26, 2019, the military judge entered judgment and noted the convening authority took "no action." (JA020). Appellant did not file a post-trial motion under R.C.M. 1104 that alleged error in the convening authority's action.

Standard of Review

This Court reviews questions of jurisdiction and statutory interpretation de novo. *United States v. Carter*, 76 M.J. 293, 295 (C.A.A.F. 2017) (citing *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016); *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016). In addition, "when 'an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error.'" *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). To prevail on plain error, an appellant "has the burden of establishing (1) error that is; (2) clear or obvious and (3) results in material

prejudice to his substantial rights." *Lopez*, 76 M.J. at 154 (quoting *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). Appellant cannot prevail under plain-error review unless he satisfies all three prongs. *Lopez*, 76 M.J. at 154. (internal citations omitted).

Summary of Argument

The convening authority did not err when he decided to take "no action" to "approve, disapprove, commute, or suspend "any part of the sentence in appellant's case. Articles 60(c)(2)(B), UCMJ (2016). The convening authority's decision of "no action" on the Action Memo was "action" under the legacy requirements of Article 60, UCMJ. The convening authority considered appellant's case, weighed his options—or lack thereof—and made a decision. This constituted "action."

Even assuming it was an error for the convening authority to take "no action," the error was procedural, not jurisdictional. Article 66(b)(3), UCMJ, provides the Army Service Court with jurisdiction. In the Military Justice Act of 2016,[1] Congress amended Article 66, UCMJ, and now predicates a service court's jurisdiction on the entry of judgment. MJA 2016, §§ 5330(b). Put differently, the statute no longer requires the convening authority's action before appellate review.

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

Article 66(b)(3), UCMJ. Here, the military judge sentenced appellant to a bad-conduct discharge and entered judgment in appellant's case. (JA020). This triggered automatic review by the Army Service Court. Article 66(b)(3), UCMJ.

Further, even if this court finds that this was a procedural error, appellant forfeited his claim when he failed to allege error in the convening authority's action under R.C.M. 1104. Consequently, this Court should review his claim for plain error—a burden appellant cannot meet. Regarding the second prong, the conflicting decisions from the Courts of Criminal Appeals demonstrate that the error was not clear or obvious.

Additionally, the convening authority's decision did not prejudice any of appellant's substantial rights. Appellant received a lenient sentence—reduction to E-1, a bad-conduct discharge, and no confinement—in light of the brazenness of his crimes and the maximum punishment he faced. (JA011). Additionally, appellant expressly waived his right to seek clemency, (JA017), and the convening authority would not have been able to provide any relief for the punitive discharge, which triggered the ACCA's jurisdiction in this case. Articles 60(c)(4)(A), UCMJ (2016) and 66(b)(3), UCMJ (2018). The staff judge advocate (SJA) correctly advised the convening authority on this limitation. (JA018). Moreover, any action on the rank reduction would have been meaningless because the punitive discharge

triggered an automatic reduction to E-1. Article 58a, UCMJ (2016). Thus, appellant cannot carry his burden under plain error review.

At worst, the convening authority's decision to take "no action" was a procedural error and should be tested for prejudice. *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005). As noted above, appellant did not suffer any prejudice in this case based on the convening authority's decision to take "no action." Consequently, appellant's claim fails on every analytical level.

Law & Argument

A. The convening authority did not err when he acted on appellant's case by deciding to take "no action" on the findings and sentence.

The Military Justice Act of 2016[2] [MJA 2016] dramatically changed the rules for post-trial processing. The previous version of Article 60, UCMJ (2016), required the convening authority to take action, which triggered jurisdiction for the Courts of Criminal Appeals (CCAs). Article 66(c), UCMJ (2016) ("In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority."). In contrast, the post-MJA 2016 version of Article 66, UCMJ, now confers jurisdiction to the CCA upon the entry of a qualifying judgment. Article 66(b)(3), UCMJ (2018) ("A Court of Criminal Appeals shall have jurisdiction over a court-martial in which the

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

judgment entered into the record under section 860(c) of this title (article 60c) includes a sentence of . . . a bad-conduct discharge"). The post-MJA 2016 versions of Article 60c (Entry of Judgment) and Article 66, UCMJ (2018), apply to this case because it was referred after January 1, 2019. Executive Order 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) [EO 13,825]; (JA005, 042–44).

While the majority of the changes to the post-trial rules became effective on January 1, 2019, one notable exception is Article 60, UCMJ. EO 13,825. Executive Order 13,825 provides that the convening authority shall use the version of Article 60, UCMJ, that was "in effect on the date of the earliest offense of which the accused was found guilty . . . *to the extent that* Article 60: . . . (2) *permits* action by the convening authority on the findings; . . . [or,] (5) *authorizes* the convening authority to approve . . . a sentence in whole or in part." (JA043) (emphasis added). Here, appellant committed all of his crimes prior to January 1, 2019. (JA004–08). Thus, the convening authority was required to use the 2016 version of Article 60, UCMJ, "to the extent that" he was "permitted" to act on the findings or "authorized" to approve the sentence.

Contrary to appellant's claim that "the convening authority[] fail[ed] to take action," (Appellant's Br. 1), the convening authority did not sit passively by; he took action when he decided to take "no action"—in writing— in appellant's case. (JA019–20). The SJA presented the convening authority with his options and

correctly advised him that he "may not disapprove" the bad-conduct discharge. (JA018–19); R.C.M. 1109(c)(1). Additionally, while the convening authority could have reduced, commuted, or suspended the reduction to E-1, such relief would have been meaningless because the punitive discharge made appellant's reduction to E-1 automatic at action. R.C.M. 1109(c)(5); Article 58a, UCMJ (2016).[3] The convening authority made a decision not to give meaningless relief.

Further, "no action" is consistent with the post-MJA 2016 Rules for Courts-Martial, which were in effect at the time of appellant's case. *See* R.C.M. 1109(g)(1) (outlining procedures for when "the convening authority decides to take no action on the sentence under this rule"); R.C.M. 1110(e)(1) (same). Consequently, the convening authority's annotation of "no action" on the Action Memo was "action" under the legacy requirements of Article 60, UCMJ.

B. Even if it was error for the convening authority to take no action, the error was procedural, not jurisdictional.

"The Supreme Court has instructed courts to use caution in labeling errors 'jurisdictional.'" *United States v. Bane*, 948 F.3d 1290, 1295 (11th Cir. 2020) (citing *Union Pac. R.R. Co. v. Bhd. Of Locomotive Eng'rs & Trainmen Gen. Comm. Of Adjustment*, 558 U.S. 67, 81 (2009)). "A jurisdictional defect goes to

[3] The amendment to Article 58a of the UCMJ "appl[ies] only to cases in which all specifications alleged offenses committed on or after January 1, 2019." EO 13,825, §6(a).

the underlying authority of a court to hear a case." *Alexander*, 61 M.J. at 269. This Court has found that failure to comply with strict terms of the UCMJ are procedural and not jurisdictional error. *See United States v. Townes*, 52 M.J. 275, 275–76 (C.A.A.F. 2000) (holding the error was not jurisdictional where the military judge failed to follow the precise terms of Article 25, UCMJ); *Alexander*, 61 M.J. at 270 (holding that an error was "procedural and not jurisdictional" where the accused did not make a verbal or written request for an enlisted panel, which contravened Article 25, UCMJ); *United States v. Morgan*, 57 M.J. 119, 120 (C.A.A.F. 2002) (same); *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996) ("Any error in this case was in the technical application of the statutory rules and was not a matter of substance leading to jurisdictional error."). "[W]here an error is procedural rather than jurisdictional in nature [this Court] test[s] for material prejudice to a substantial right to determine whether relief is warranted." *Alexander*, 61 M.J. at 269.

Following the implementation of the MJA 2016, entry of judgment not convening authority action, confers jurisdiction upon the Courts of Criminal Appeals (CCAs). Effective January 1, 2019, Congress amended Article 66, UCMJ, and tethered a CCA's jurisdiction to the military judge's entry of judgment, as opposed to the convening authority's action. MJA 2016, § 5330(b). This "revision of appellate procedures" struck the old limitations—that a CCA could act

only with respect to the findings and sentence as approved by the convening authority—and inserted a "new" subsection. MJA 2016, § 5330(b)(2). Article 66(b)(3), UCMJ (2018), states: "A Court of Criminal Appeals shall have jurisdiction over a court-martial in which the *judgment entered into the record* under section 860(c) of this title (article 60c) includes a sentence of . . . a bad-conduct discharge" (emphasis added). Accordingly, the statute no longer requires convening authority action before appellate review. Instead, appellate review is linked to a military judge's "[e]ntry of judgment." Article 60c(a)(1)–(2), UCMJ, (2018). In other words, once the military judge completes the entry of judgment, the findings and sentence are officially entered into the record under Article 60c, UCMJ, providing a CCA with jurisdiction.

Appellant's case satisfies these requirements. The convening authority referred the charges against appellant on June 26, 2019, almost six months after the effective date of the new Article 66, UCMJ. (JA005). The military judge sentenced him to a bad-conduct discharge and thus triggered automatic appellate review. Article 66(b)(3), UCMJ; (JA011–16). The military judge entered a judgment that included a bad-conduct discharge on September 26, 2019. (JA020). Therefore, the requirements of Article 66(b)(3), UCMJ, were satisfied, which provided the Army Service Court with appellate jurisdiction.

Contrary to appellant's contention that a plain reading of EO 13,825 demonstrates that "[t]he convening authority's failure to take [action] broke a key link in the chain necessary for the Army Court to obtain jurisdiction," (Appellant's Br. 7), a plain reading of Article 66(b)(3), UCMJ, demonstrates the convening authority's decision to take "no action" did not impact the Army Service Court's jurisdiction. Article 66(b)(3), UCMJ, provides a CCA with jurisdiction upon entry of judgment that includes a bad-conduct discharge—it says nothing about convening authority action. *See United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (noting "[t]he courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute," and "this limited jurisdiction is spelled out in two statutes: Articles 66 and 69, UCMJ"). The statute requires an entry of judgment with a bad-conduct discharge, and the military judge in appellant's case entered judgment with a bad-conduct discharge. (JA020). This Court need not venture past the plain language of Article 66, UCMJ, to conclude the Army Service Court had jurisdiction to review appellant's case. *See Garcia v. United States*, 469 U.S. 70, 75 (1984) (noting that "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'") (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978)).

Appellant also argues that a CCA's jurisdiction should not be determined by what is written in the Judgment because there is a possibility that a military judge

would mistakenly include an incorrect sentence. (Appellant's Br. 9). Such speculation is nonsense because in this case, the STR and Judgment correctly reflected appellant's adjudged sentence. (JA012–16; JA020). Additionally, either party can file a post-trial motion if there are any errors or irregularities in the various documents that are prepared post-trial. R.C.M. 1104, UCMJ. For instance, if there was an administrative error reflected on the STR, as proposed by appellant in his brief, (Appellant's Br. 9), either party could file a post-trial motion regarding "[a]n allegation of error in the Statement of Trial Results." R.C.M. 1104(b)(1)(D).

Appellant's assertion that the mere possibility of "scrivener's error" would lead to an arbitrary and absurd result, (Appellant's Br. 9), completely ignores the fact that the trigger for the Army Court's jurisdiction under Article 66, UCMJ was appellant's entered judgment that included a bad-conduct discharge. Article 66(b)(3), UCMJ. "Even if the convening authority wanted to [disapprove the bad-conduct discharge]—and [there is] no evidence that he did—he lacked that power under the version of Article 60, UCMJ, in effect [when appellant committed his crimes]." *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, *11–12 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.). Indeed, it would be arbitrary and absurd if a CCA was deprived of jurisdiction where an express, automatic review was required simply because a convening authority took "no action" on a sentence he did not have any authority to modify. R.C.M. 1109(c)(1); Article

66(b)(3), UCMJ. Critically, appellant ignores the reality that if his crimes were committed after January 1, 2019, this is the exact framework the convening authority would have been required to follow. Article 66(b)(3), UCMJ (2018).

C. Even if the convening authority's decision in this case was a procedural error, appellant cannot demonstrate that the error was plain or obvious, or that he suffered any prejudice.

1. This court should review appellant's claim for plain error because he forfeited this claim by failing to raise it under R.C.M. 1104.

Rule for Courts-Martial 1104 (2019) outlines the process for post-trial motions and proceedings. Importantly, both parties have the opportunity to file post-trial motions alleging an error in the convening authority's action. R.C.M. 1104(b)(1)(F). If the military judge determines that relief is warranted, the proper remedy is to either "return the action to the convening authority for correction" or "correct the action of the convening authority in the entry of judgment."R.C.M. 1104(b)(2)(B).

Here, appellant did not allege error in the convening authority's action through a post-trial motion. He also "expressly" waived his right to seek clemency. (JA017). Consequently, this court should review his claim for plain error. *See Lopez*, 76 M.J. at 154 ("[W]hen 'an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error.'") (citation omitted); *see also Finco*, 2020 CCA LEXIS 246, at *15 (finding that "[a]ppellant's failure to

file a motion under R.C.M. 1104(b)(2)(B) forfeited his right to object to the accuracy of the convening authority's decision memorandum absent plain error."). Under a plain error review, it is appellant's burden to demonstrate: "(1) error that is; (2) clear or obvious and (3) results in material prejudice to his substantial rights." *Lopez*, 76 M.J. at 154 (citing *Knapp*, 73 M.J. 36). Here, even assuming there was a procedural error, appellant cannot satisfy the final two prongs he needs to show plain error. *Lopez*, 76 M.J. at 154.

2. Even if this Court finds it was error for the convening authority to take "no action," the conflicting decisions from the Courts of Criminal Appeals demonstrate that the error was not clear or obvious.

Appellant cannot meet his burden of showing the convening authority's decision to take "no action" is clear or obvious error. "While the terms clear[4] or obvious do not have any special definition, the Supreme Court has distinguished clear and obvious errors from errors that are 'subject to reasonable dispute.'" *United States v. Gonzales*, 78 M.J. 480, 486 (C.A.A.F. 2019) (quoting *United States v. Marcus*, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed.

[4] This Court used the terms "clear" and "plain" interchangeably in *Gonzalez*. 78 M.J. 480, 483 (providing that under plain error review, appellant has the burden to demonstrate, *inter alia*, that "the error was [clear] and obvious." *Id*. (alteration in original) (citing *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (providing that under plain error review, appellant has the burden to demonstrate, *inter alia*, that "the error was plain and obvious")).

2d 266 (2009)). When analyzing whether an error is clear or obvious, federal courts have viewed "divergent conclusions" among other courts on the issue as persuasive evidence that the error does not satisfy this prong of the plain error test. *See United States v. Salinas*, 480 F.3d 750, 759 (5th Cir. 2007) ("Because this circuit's law remains unsettled and the other federal circuits have reached divergent conclusions on this [relevant] issue . . . [appellant] cannot satisfy the second prong of the plain error test—that the error be clear under existing law."); *United States v. Thompson*, 82 F.3d 849, 856 (9th Cir. 1996) (finding no plain error "[b]ecause of the circuit split, the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of the issue").

Here, the CCAs have reached divergent conclusions on whether "no action" by the convening authority was error. The ACCA held the convening authority committed error when he took "no action" on the sentence, but the court concluded the error was neither jurisdictional nor prejudicial. *United States v. Coffman*, 79 M.J 820, 823–24 (Army Ct. Crim. App. 2020). The ACCA has been consistent in its holdings and reasoning regarding a convening authority's failure to take action. *See, e.g.*, *United States v. Ross*, ARMY 20190537, 2020 CCA LEXIS 353, at *2 n.3 (Army Ct. Crim. App. 20 Sep. 2020) (mem. op.); *United States v. Haygood*, ARMY 20190555, 2020 CCA LEXIS 354, at *2 n.3 (Army Ct. Crim. App. 30 Sep. 2020) (mem. op.).

In contrast, the United States Air Force Court of Criminal Appeals (AFCCA) has issued several opinions on this issue that reveal a fractured court. The AFCCA recently recognized the split among its judges:

> In *Aumont*,[5] a split, en banc, unpublished decision . . . *the court found no error in the convening authority's decision memorandum* because it met the legacy requirements of Article 60, UCMJ, but this opinion was only joined by two judges. *Id*. at *1, 24. One additional judge wrote separately *and concurred in the finding of no error but for different reasons*. *Id*. at *40–42 (Posch, S.J., concurring in part and in the result). On the other hand, six of the ten judges found taking no action in the case to be an error. *Id*. at 31 (Lewis, S.J., concurring in part and in the result); *id*. at *100 (J. Johnson, C.J., dissenting in part and in the result). Four of those six judges found the error to be a fundamental misstep requiring remand without testing for material prejudice. *Id*. at *104 (J. Johnson, C.J. dissenting in part and in the result). Two judges, who make up the majority of this panel, found the appellant in *Aumont* forfeited the issue and then conducted a plain error analysis and determined that the error was plain of obvious, but there was no colorable showing of possible prejudice because the convening authority explicitly denied the only clemency request made by the appellant in *Aumont*—a deferral of mandatory forfeitures. *Id*. at *32–37 (Lewis, S.J., concurring in part and in the result). The four opinions in *Aumont* demonstrate the extent of the split on this issue among the judges on our court.

United States v. Davis, No. ACM S32602, 2020 CCA LEXIS 434, *10–11 (A.F. Ct. Crim. App. 1 Dec. 2020) (unpub. op.) (emphasis added).[6]

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[5] *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (unpub. op.).

[6] *See also United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.); *United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439 (A.F. Ct.

These divergent conclusions between—and within—the CCAs demonstrate that the convening authority's action of no action, if error, was not plain and obvious. *Salinas*, 480 F.3d at 759. Consequently, appellant cannot satisfy his burden under this prong of the plain error test. *Gonzales*, 78 M.J. at 486.

3. Even if this Court finds it was clear and obvious error for the convening authority to take "no action," the error did not materially prejudice a substantial right.

Assuming arguendo the convening authority erred by taking no action, this error did not "material[ly] prejudice [appellant's] substantial rights." *Lopez*, 76 M.J. at 154. Appellant argues "[t]he Army Court [] erred in testing this error for prejudice," but does not attempt to argue that he was prejudiced by the convening authority's decision to take no action. (Appellant's Br. 3). This is because there was no prejudice.

Critically, appellant "expressly" waived his right to seek clemency the same day his sentence was announced. (JA017). Thus, he did not even ask the convening authority to reduce his sentence. Even without the waiver, the convening authority lacked authority to grant clemency for appellant's bad-conduct discharge. Article 60(c)(4)(A), UCMJ (2016). Further, although the convening authority could have theoretically granted clemency as to appellant's reduction in

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Crim. App. 8 Dec. 2020) (unpub. op.); *United States v. Mar*, No. ACM 39708, 2020 CCA LEXIS 441 (A.F. Ct. Crim. App. 10 Dec. 2020) (unpub. op.).

rank, this relief would have been meaningless because appellant's bad-conduct discharge required an automatic reduction to E-1 upon action. Article 58a, UCMJ (2016). Consequently, any action appellant avers the convening authority could have taken would have been meaningless.[7] (Appellant's Br. 7–8).

Moreover, the SJA correctly advised the convening authority that "the convening authority may not disapprove" the bad-conduct discharge. (JA018). These are the same reasons that persuaded the Army Service Court in *Coffman* to find that "the convening authority's non-compliance with the applicable version of Article 60 . . . was harmless." 79 M.J. at 824. It is likewise harmless in this case.

Furthermore, given the nature of appellant's crimes, clemency was not warranted. He assaulted numerous subordinates where he used his position as a superior and supervisor to inflict physical and emotional pain on them. (JA021–30). Among other things, he punched and kicked his subordinates, struck them with pipes, called them derogatory and homophobic names, and tightened a tourniquet around a subordinate's neck. (JA021–30). Appellant continued to maltreat his subordinates even after he received several warnings from "different [noncommissionedofficers]," and he "retaliated against his [soldiers] for reporting

[7] The government recognizes there may be some cases where the convening authority could offer some relief which could affect the analysis of whether the convening authority committed prejudicial error. *See, e.g.*, *Finco*, 2020 CCA LEXIS 246, at *16 (noting the convening authority could have granted a portion of appellant's clemency request regarding the written reprimand).

his conduct." (JA029) Despite all of this, appellant received a sentence of *no* confinement, reduction to E-1, and a bad-conduct discharge. (JA011). Given his fair sentence, appellant cannot show any prejudice.

As such, even if this Court determines the military judge erred, it should nevertheless find appellant failed to carry his burden under plain-error review. *Lopez*, 76 M.J. at 154 (citing *Knapp*, 73 M.J. at 36) (internal citations omitted).

D. If the convening authority failed to take action that he was required to take, the Army Service Court has the authority to correct the error.

It is well-established precedent that when a convening authority fails to take an intended action, the CCAs can "accomplish[] that action for him." *United States v. Cox*, 22 U.S.C.M.A. 69, 46 C.M.R. 69, 72 (1972). "Judicial economy dictate[s] that [CCAs] correct the error at [their] level rather than send the case back for a corrected action." *Coffman*, 79 M.J. at 822. "[I]t would be a classic waste of resources for an appellate court to remand the case for consideration of [a] clearly meritorious error, rather than simply to redress the wrong, right then and there." *Id*. (quoting *United States v. Welker*, 44 M.J. 85, 91 (C.A.A.F. 1996)).

In this case, it is clear the convening authority did not intend to provide any sentence relief to appellant. The staff judge advocate recommended that the convening authority "take no action on the findings and sentence," and the convening authority indicated on his Action Memo that he would take "[n]o [a]ction" on appellant's sentence. (JA018–19). The military judge entered

judgment on September 26, 2019 and noted the convening authority took "no action." (JA020). Therefore, in the interest of judicial economy, the Army Service Court should correct any error in the convening authority action at its level rather than return the case to the military judge or convening authority for correction. *Coffman*, 79 M.J. at 822. "Fairness and common sense, not technicalities, should rule the law." *Townes*, 52 M.J. at 277 (Sullivan, J., concurring).

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Court of Criminal Appeals.

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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 6,235 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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December 30, 2020

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 December 30, 2020.

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APPENDIX

United States v. Aumont

United States Air Force Court of Criminal Appeals

November 20, 2020, Decided

No. ACM 39673

Reporter
2020 CCA LEXIS 416 *; 2020 WL 6874370

UNITED STATES, Appellee v. James A. AUMONT, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Wesley A. Braun. Sentence: Sentence adjudged 15 January 2019 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 25 February 2019: Dishonorable discharge, confinement for 8 months, and reduction to E-1.

Core Terms

convening, sentence, no action, take action, effectuate, confinement, grant relief, post-trial, provisions, court-martial, memorandum, military, conditions, adjudged, clemency, legacy, unpub, cases, executive order, plain error, opinion of the court, inmate, Courts-Martial, declaration, earliest, prior version, toilet paper, approve, military justice, toiletries

Case Summary

Overview
HOLDINGS: [1]-Findings and sentence for specifications of attempting to commit lewd acts on persons believed to be a child under 16 years of age were affirmed because appellant failed to sustain his burden of establishing a culpable state of mind on the part of corrections officials amounting to deliberate indifference to his health and safety. Appellant confirmed that after he made his concerns about threats by another inmate known to corrections officers he was moved back to administrative segregation; [2]-Appellant failed to show that he exhausted the prisoner-grievance system and that he petitioned for relief under Unif. Code Mil. Justice art. 138 where there was no evidence appellant made any formal requests for toiletries and toilet paper with prison officials or his command, only that the multiple corrections officers he asked didn't provide them.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > ... > Courts

Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts
Martial > Sentences > Confinement

Military & Veterans Law > Military
Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN1 **Fundamental Rights, Cruel & Unusual Punishment**

An appellate court reviews de novo whether an appellant has been subjected to impermissible post-trial confinement conditions in violation of the Eighth Amendment or Unif. Code Mil. Justice art. 55. A service-member is entitled, both by statute and the Eighth Amendment, to protection against cruel and usual punishment. In general, courts apply the United States Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, except in circumstances where legislative intent to provide greater protections under Article 55 is apparent. The Eighth Amendment prohibits two types of punishments: (1) those incompatible with the evolving standards of decency that mark the progress of a maturing society or (2) those which involve the unnecessary and wanton infliction of pain.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN2 **Fundamental Rights, Cruel & Unusual Punishment**

The Eighth Amendment does not mandate comfortable prisons, but neither does it permit inhumane ones. Prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must take reasonable measures to guarantee the safety of the inmates. This includes protecting prisoners from violence committed by other prisoners.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN3 **Fundamental Rights, Cruel & Unusual Punishment**

A prison official violates the Eighth Amendment when two conditions are met. First, the deprivation alleged must be, objectively, sufficiently serious. A prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities. For a claim based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second condition is that the prison official must have a sufficiently culpable state of mind. In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts
Martial > Sentences > Confinement

Military & Veterans Law > ... > Courts
Martial > Sentences > Cruel & Unusual Punishment

HN4 **Fundamental Rights, Cruel & Unusual Punishment**

A violation of the Eighth Amendment is shown by demonstrating:(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to appellant's health and safety; and (3) that appellant has ex-hausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, 10 U.S.C.S. § 938.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN5 **Fundamental Rights, Cruel & Unusual Punishment**

A military prisoner's burden to show deliberate indifference requires him to show that officials knew of and disregarded an excessive risk to inmate health or safety; the officials must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and they must also draw the inference.

Military & Veterans Law > Military

Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Apprehension & Restraint of Civilians & Military Personnel, Circumstances Warranting Confinement & Restraint**

A prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions. This requirement promotes resolution of grievances at the lowest possible level and ensures that an adequate record has been developed to aid appellate review. Except under some unusual or egregious circumstance, an appellant must demonstrate he or she has exhausted the prisoner grievance process provided by the confinement facility and has petitioned for relief under Unif. Code Mil. Justice art. 138. The appellate court reviews the ultimate determination of whether an appellant has exhausted administrative remedies de novo, as a mixed question of law and fact.

HN7[] Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated.

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Exhaustion of Administrative Remedies

HN8[] **Prison Litigation Reform Act, Exhaustion of Administrative Remedies**

Exhaustion requires an appellant demonstrate that two paths of redress have been attempted, each without satisfactory result.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9[] **Judicial Review, Standards of Review**

Proper completion of post-trial processing is a question of law the appellate court reviews de novo. Interpretation of a statute and a R.C.M. provision are also questions of law that the appellate court reviews de novo.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN10[] **Posttrial Procedure, Actions by Convening Authority**

Appellate courts can use surrounding documentation to interpret an otherwise unclear convening authority action, including looking outside the four corners of the action's language.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN11[] **Procedural Due Process, Scope of Protection**

An appellate court reviews de novo whether an appellant has been denied the due process right to speedy appellate review. A presumption of unreasonable delay arises when appellate review is not completed and a decision rendered within 18 months of a case being docketed. A presumptively unreasonable delay triggers an analysis of the four factors laid out in: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review

and appeal; and (4) prejudice. A presumptively unreasonable delay satisfies the first factor, but the Government can rebut the presumption by showing the delay was not unreasonable. Assessing the fourth factor of prejudice, the appellate court considers the interests of prevention of oppressive incarceration; minimization of anxiety and concern of those convicted; and limitation of the possibility that grounds for appeal, and defenses might be impaired.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN12[] **Posttrial Procedure, Actions by Convening Authority**

A Court of Criminal Appeals has authority under Unif. Code Mil. Justice art. 66(c) to grant relief for excessive post-trial delay without a showing of actual prejudice within the meaning of Unif. Code Mil. Justice art. 59(a).

Counsel: For Appellant: Major Rodrigo M. Caruço, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Jessica L. Delaney, USAF; Mary Ellen Payne, Esquire.

Judges: Judge ANNEXSTAD delivered the opinion of the court, in which Judge RICHARDSON and Judge MEGINLEY joined. Senior Judge LEWIS filed a separate opinion concurring in part and in the result, in which Judge D. JOHNSON joined. Senior Judge POSCH filed a separate opinion concurring in part and in the result. Chief Judge J. JOHNSON filed a separate opinion concurring in part and dissenting in part, in which Senior Judge MINK, Judge KEY, and Judge CADOTTE joined.

Opinion by: ANNEXSTAD

Opinion

Before THE COURT EN BANC.

ANNEXSTAD, Judge:

A military judge sitting alone as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of one specification of attempting [*2] to commit a lewd act on a person he believed to be a child under 16 years of age by intentionally exposing his genitalia on divers occasions, and one specification of attempting to commit a lewd act on a person he believed to be a child under 16 years of age by intentionally communicating indecent language on divers occasions, both in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880.[1] Appellant was sentenced to a dishonorable discharge, confinement for eight months, and reduction to the grade of E-1. The PTA had no effect on the adjudged sentence.

On 8 February 2019, the convening authority signed a "Decision on Action" memorandum in Appellant's case. Paragraph 1 of the convening authority's decision memorandum states the convening authority takes "no action in the case of *United States v. [Senior Airman] James M. Aumont*." The convening authority's decision memorandum also noted that he consulted with his staff judge advocate and denied Appellant's request for a 30-day deferment of mandatory forfeitures under Rule for Courts-Martial (R.C.M.) 1103. On 14 February 2019, Appellant acknowledged receipt of the convening authority's [*3] decision. Appellant did not file a motion under R.C.M. 1104(b)(2)(B) that affords the Appellant

[1] Reference to the punitive article is to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*); all other references to the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

the opportunity to address any potential errors in the action of the convening authority.

On 25 February 2019, the military judge signed an entry of judgment (EoJ). The EoJ lists the sentence as a dishonorable discharge, confinement for eight months, and reduction to the grade of E-1. It further states that on 8 February 2019, the convening authority "took no action in this case." Additionally, the military judge noted in the EoJ that the findings and sentence reflect "all post-trial actions by the convening authority and all judicial post-trial rulings, orders or other determinations, are hereby entered into the record and reflect the judgment of this court-martial."

On 23 August 2019, Appellant raised one issue for appeal pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982): whether Appellant is entitled to sentence relief because of impermissible conditions of post-trial confinement in violation of Articles 12 and 55, UCMJ, 10 U.S.C. §§ 812, 855, and the Eighth Amendment to the United States Constitution.[2] We also consider two additional issues, not raised by Appellant, identified during this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d) review: whether the convening authority's decision memorandum contains error when the convening [*4] authority took "no action" on the sentence and Appellant was convicted of an offense committed prior to 1 January 2019; and whether Appellant is entitled to relief for facially unreasonable appellate delay in accordance with *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). We find Appellant's convictions both legally and factually sufficient, and no error materially prejudicial to the substantial rights of Appellant occurred. We affirm the findings and sentence.

I. BACKGROUND

On 6 January 2018, an Air Force Office of Special Investigations (AFOSI) Special Agent (SA) operated online in an undercover capacity as a 14-year-old female. The SA used a fictitious personality known as "Molly Turner," and placed an advertisement on the "Craigslist" advertising website in the "Casual Encounters — w4m"[3] section. In order to place the advertisement, the SA acknowledged that the person making the post was over 18 years old. On 6 January 2018, Appellant sent a response, via email, to the advertisement posted by the SA who was posing as the fictitious "Molly Turner." At some point on 6 January 2018, the conversation between Appellant and the SA moved to "Kik," a commercial messaging application. During the conversation the SA informed Appellant [*5] that he was a girl named "Molly" who was 14, almost 15 years old. On several occasions between 6 January 2018 and 7 January 2018, Appellant sent the person he believed to be "Molly" photographs of his exposed genitalia and two videos of him masturbating. Additionally, on several occasions between 6 January 2018 and 15 January 2018, Appellant communicated indecent language to the person he believed to be "Molly." These communications captured in email and via the "Kik" messaging application, to include the photographs and videos, formed the basis for the charge and specifications at trial.

After Appellant's trial on 15 January 2019, he was in-processed at the Okaloosa County Department of Corrections in Crestview, Florida. Appellant was confined at the Okaloosa County Department of Corrections from 15 January 2019 to 19 April 2019 at which time he was transferred to a military confinement facility.

On 23 January 2019, Appellant's trial defense counsel (TDC) submitted a petition for clemency to the convening authority requesting a "moderate amount of clemency." Specifically, TDC requested the convening authority defer the mandatory forfeitures of pay for a period of 30 days. Additionally, [*6] in this request TDC briefly mentioned that the conditions at the Okaloosa County Department of Corrections were "less than ideal—certainly far below the standards of any military corrections facility." No specific deficiencies of the confinement facility were raised and no specific relief was requested regarding Appellant's confinement. A personal statement from Appellant was included as part of the clemency request. In the personal statement, Appellant requested the convening authority approve a bad-conduct discharge instead of a dishonorable discharge. Appellant's personal statement did not raise any issue with the confinement facility.

II. DISCUSSION

A. Post-trial Confinement Conditions

[2] U.S. CONST. amend. VIII.

[3] In his guilty plea inquiry, Appellant testified that "w4m" is short for "woman for man."

1. Additional Background

On appeal, Appellant submitted a declaration to this court. In the declaration, Appellant contends the conditions of his confinement at the Okaloosa County Department of Corrections warrant relief. Appellant stated he spent approximately the first 12 days of his confinement in administrative segregation with one other inmate in his cell. He further stated he was then moved to general population where he was housed with two other inmates in the same cell. During his time in general [*7] population, Appellant stated he was threatened with physical violence by a fellow inmate. Appellant then stated he informed a guard that he feared for his life and was eventually moved back to administrative segregation before being placed in a smaller section of general population where the facility housed inmates convicted of felonies, including violent crimes. Finally, Appellant states that during his time in confinement he repeatedly asked corrections officers for toiletries and toilet paper and that no toiletries or toilet paper were ever provided.

Appellant contends that he is entitled to relief due to the fact that he was intentionally removed from segregation and placed in general population in immediate association with foreign nationals who were not members of the armed forces, in direct violation of Article 12, UCMJ.[4] Additionally, Appellant argues that he is entitled to relief because he was physically threatened with harm by another inmate, and that the detention staff willfully failed to provide basic necessities, specifically toiletries and toilet paper, in violation of the Eighth Amendment and Article 55, UCMJ. Finally, Appellant argues that even if he did not exhaust his administrative [*8] remedies that relief can still be provided in unusual or egregious circumstances.

In response to Appellant's assignment of error, the Government obtained a declaration from TM, the Inmate Program and Accreditation Manager for Oka-loosa County. In the declaration, TM advised that her management duties included the Okaloosa County Department of Corrections facility where Appellant was detained. TM confirmed that Appellant had notified the classification staff that another inmate had threatened him. TM also stated that as a standard protocol, Appellant was encouraged to identify the inmate making threats, but Appellant did not identify the inmate. TM further stated Appellant, due to his housing concerns, was moved in a "timely and proper manner" on his word to another housing section. TM stated that all personnel at the confinement facility followed proper procedures. Regarding Appellant's allegations that he was denied toiletries and toilet paper, TM explained that toiletries are routinely distributed twice per week and that corrections officers are instructed to provide toilet paper whenever an inmate asks, regardless of whether the request is formally submitted. TM stated [*9] that official records do not indicate that Appellant submitted any formal requests for toiletries or toilet paper and that any verbal requests he made to the confinement staff were handled as "swiftly as practicable."

The Government argues that Appellant's claim under the Eighth Amendment and Article 55, UCMJ, fails under *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006), and that Appellant's claim under Article 12, UCMJ, fails because Appellant produced no evidence that he was housed with foreign nationals who were not members of the armed services and that he failed to exhaust the administrative procedures available to him. Finally, the Government responds that Appellant has produced no evidence of unusual or compelling circumstances that warrant application of this court's authority to grant sentence relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

We agree with the Government that Appellant has provided no evidence that he was housed with foreign nationals or that the general population included foreign nationals.[5] Therefore, we find it unnecessary to discuss any purported violation of Article 12, UCMJ.

2. Law

[4] Appellant's *Grostefon* brief cites the version of Article 12 in the 2016 *MCM*. Because Appellant's confinement began in 2019, the version of Article 12 in the 2019 *MCM* is applicable in this case and states that "[n]o member of the armed forces may be placed in confinement in immediate association with—(1) enemy prisoners; or (2) other individuals—(A) who are detained under the law of war and are foreign nationals; and (B) who are not members of the armed forces."

[5] Appellant's counsel raised in the Appendix of its merits brief an argument that Appellant was placed in confinement in immediate association with foreign nationals who were not members of the armed forces. Appellant did not state this in his declaration and the record contains no evidence to support the fact that Appellant was housed with foreign nationals who were not members of the armed forces.

As an initial matter, we considered the declarations from both Appellant and TM to resolve Appellant's claims under the Eighth Amendment and Article 55, UCMJ. *See United States v. Jessie*, 79 M.J. 437, 444-45 (C.A.A.F. 2020). Additionally, [*10] because Appellant generally raised his conditions in confinement in his clemency matters, we also considered both declarations in determining whether we should exercise our Article 66(d), UCMJ, authority to provide "appropriate" sentence relief and whether Appellant's post-trial confinement conditions made his sentence "inappropriately severe." *See United States v. Cink*, No. ACM 39594, 2020 CCA LEXIS 208, at *18-20 (A.F. Ct. Crim. App. 12 Jun. 2020) (unpub. op.); *United States v. Macaluso*, No. ACM S32556, 2020 CCA LEXIS 171, at *8 (A.F. Ct. Crim. App. 27 May 2020) (unpub. op.).

To the extent there are contradictions between Appellant's declaration and TM's declaration, we considered whether a post-trial evidentiary hearing was required to resolve a factual dispute. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. Dubay*, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967) (per curiam). We are convinced such a hearing is unnecessary. Even if we resolve any contradictions in Appellant's favor, the alleged conditions would not result in our granting relief. *See Ginn*, 47 M.J. at 248.

HN1[↑] We review de novo whether an appellant has been subjected to impermissible post-trial confinement conditions in violation of the Eighth Amendment or Article 55, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). "A service-member is entitled, both by statute and the Eighth Amendment, to protection against cruel and usual punishment." *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000) (citations omitted). In general, we apply "the [United [*11] States] Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, except in circumstances where . . . legislative intent to provide greater protections under [Article 55]" is apparent. *Id.* (citation omitted). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *Lovett*, 63 M.J. at 215 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

HN2[↑] The Supreme Court has held that the Eighth Amendment "'does not mandate comfortable prisons,' . . . but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)). "[P]rison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Id.* at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)). This includes protecting prisoners from violence committed by other prisoners. *Id.* at 833 (citations omitted).

HN3[↑] The Supreme Court has held that a prison official violates the Eighth Amendment when two conditions are met. "First, the deprivation alleged must be, objectively, 'sufficiently serious.'" *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)). "A prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" [*12] *Id.* (quoting *Rhodes*, 452 U.S. at 347). For a claim such as Appellant's "based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* (citing *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)).

The second condition is that the prison official must have a "sufficiently culpable state of mind." *Id.* (quoting *Wilson*, 501 U.S. at 297). "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* (quoting *Wilson*, 501 U.S. at 302-03).

HN4[↑] The United States Court of Appeals for the Armed Forces (CAAF) has held that a violation of the Eighth Amendment is shown by demonstrating:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [Appellant's] health and safety; and (3) that [Appellant] "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938 [2000]."[6]

---

[6] Article 138, UCMJ, 10 U.S.C. § 938, provides that

> [a]ny member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to [*13] that commanding officer, is refused redress, may complain to any superior commissioned

Lovett, 63 M.J. at 215 (third and fourth alteration in original) (footnotes omitted) (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)). The burden to make this showing rests upon Appellant. *Id.* at 216.

HN5[] A military prisoner's "burden to show deliberate indifference requires him to show that 'official[s] [knew] of and disregard[ed] an excessive risk to inmate health or safety; the official[s] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference.'" *Id.* (alterations in original) (quoting *Farmer*, 511 U.S. at 837).

HN6[] The CAAF emphasized, "[a] prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *Wise*, 64 M.J. at 469 (citation omitted). "This requirement 'promot[es] resolution of grievances at the lowest possible level [and ensures] [*14] that an adequate record has been developed [to aid appellate review].'" *Id.* at 471 (alterations in original) (quoting *Miller*, 46 M.J. at 250). Except under some unusual or egregious circumstance, an appellant must demonstrate he or she has exhausted the prisoner grievance process provided by the confinement facility and has petitioned for relief under Article 138, UCMJ. *White*, 54 M.J. at 472 (citation omitted). This court reviews the "'ultimate determination' of whether an Appellant has exhausted administrative remedies de novo, as a mixed question of law and fact." *Wise*, 64 M.J. at 471 (citing *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)).

HN7[] As the CAAF noted in *Wise*, "[s]ince a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Id.* (citing *United States v. White*, No. ACM 33583, 1999 CCA LEXIS 220, at *4 (A.F. Ct. Crim. App. 23 Jul. 1999) (unpub. op.) ("holding that solely raising conditions of confinement complaints in post-release clemency submissions is inadequate to fulfill the requirement of exhausting administrative remedies and that 'after the appellant has been released from confinement . . . we have no remedy to provide'" (alteration in original)), *aff'd*, 54 M.J. at 475).

3. Analysis

We need not determine whether [*15] Appellant has met his burden under the first *Lovett* factor—an objectively, sufficiently serious act or omission resulting in the denial of necessities—as we find he cannot meet his burden on the second and third factors which we describe below.

Appellant failed to sustain his burden of establishing a culpable state of mind on the part of Okaloosa County Department of Corrections officials amounting to deliberate indifference to his health and safety. Appellant claims that when he was moved to a general population section, he was threatened by another inmate and feared for his life. However, in his own declaration, Appellant confirms that after he made his concerns known to corrections officers he was moved back to administrative segregation. This demonstrates the opposite of deliberate indifference and shows that corrections officials acted in a deliberate manner to protect Appellant's health and ensure his safety. Next, Appellant alleged that he repeatedly asked corrections officials for toiletries and toilet paper and that none were ever provided. TM's declaration states that toiletries were distributed twice a week, and that toilet paper was distributed on request whenever an inmate [*16] asks, regardless of whether the request is formally submitted. TM stated that any verbal requests Appellant made were handled as "swiftly as practicable" and that there is no record of any formal request for toiletries and toilet paper. Resolving the factual dispute in Appellant's favor, Appellant, and the record as a whole, does not establish that Appellant went without toilet paper for three months, or that he did not have toilet paper and toiletries, only that the "multiple corrections officers" he asked did not provide them. Furthermore, Appellant has not demonstrated that any formal requests for toiletries and toilet paper were ever submitted. We find Appellant has failed to demonstrate that prison officials were deliberately indifferent to any conditions that might have violated the Eighth Amendment and Article 55, UCMJ, and that Appellant has failed to meet this prong under *Lovett*.

Appellant has also failed to show that he exhausted the prisoner-grievance system and that he petitioned for relief under Article 138, UCMJ. The standard under *Lovett* is not "effectively" filing an Article 138, UCMJ,

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officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

complaint and prisoner grievance; it is actually exhausting those administrative remedies. ***HN8***[] Exhaustion [*17] requires Appellant demonstrate that two paths of redress have been attempted, each without satisfactory result. *See Wise*, 64 M.J. at 471. The first time Appellant complained to his command about his post-trial confinement conditions was in his clemency submission. In that submission, Appellant's counsel commented that the conditions of confinement were "less than ideal" and were "certainly far below the standards of any military correctional facility." Appellant did not ask for any relief from his command regarding his confinement conditions. Had he filed an Article 138, UCMJ, complaint and a prisoner grievance while in the civilian confinement facility, the record would reflect what action, if any, his command and prison officials took in response. Appellant failed to make his grievances known to his command and thus made it impossible for them to ameliorate, let alone record, those grievances. There is also no evidence Appellant made any formal requests for toiletries and toilet paper with prison officials or his command, only that the "multiple corrections officers" he asked didn't provide them. In the lone instance where Appellant felt physically threatened by another inmate and made prison officials [*18] aware of his safety concerns, he was moved to another section on his word to ensure his safety. We find Appellant has failed to exhaust his administrative remedies and thus fails to meet this prong under *Lovett*.

Finding that Appellant failed to meet his burden of establishing a culpable state of mind on the part of Okaloosa County Department of Corrections officials amounting to deliberate indifference to his health and that Appellant failed to exhaust his administrative remedies, Appellant is not entitled to relief under either the Eighth Amendment or Article 55, UCMJ.

We have also considered whether Appellant's assertions warrant sentence relief under our Article 66(d), UCMJ, authority in the absence of an Eighth Amendment or Article 55, UCMJ, violation. *See Gay*, 75 M.J. at 268. We find that they do not. Appellant's case did not involve a legal error such as the one present in *Gay*, where the appellant was unnecessarily kept in solitary confinement in a civilian facility at the request of an Air Force official. *Id.* at 268-69. The conditions Appellant describes do not constitute one of those very rare circumstances in which Appellant's sentence has been rendered inappropriate as a matter of law. *See Ferrando*, 77 M.J. at 517.

B. Convening Authority's Decision on Sentence

[*19] **1. Additional Background**

We next consider whether the convening authority's decision memorandum contained error when the convening authority took "no action" on the sentence and Appellant was convicted of an offense committed prior to 1 January 2019. On 29 July 2020, we ordered the Government to show cause as to why the record of trial should not be remanded for further action in accordance with Executive Order 13,825, § 6(b)(1), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018).

The Government submitted a timely response on 17 August 2020 and opined that we should review this case consistent with our decision *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), and apply a plain error standard of review in assessing whether Appellant was entitled to corrective action when the convening authority failed to take action in a case. The Government further opined that remand is unnecessary where Appellant suffered no prejudice as a result of the error, or in the alternative that this court correct the EoJ itself by removing the portion of the judgment which states the convening authority took no action. The Government acknowledged this court has the authority to order the correction [*20] of the EoJ.

2. Law

HN9[] Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a R.C.M. provision are also questions of law that we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, 10 U.S.C. § 860, "in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence. . . ." 83 Fed. Reg. at 9890. The version of Article 60, UCMJ, in effect on 6

January 2017, stated "[a]ction on the sentence of a court-martial shall be taken by the convening authority." 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)).

In *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.), our court recently found that a convening authority's decision to "take no action" was the equivalent of action. In coming to this conclusion, the court noted:

> Air Force Instruction [(AFI)] 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), correctly advises convening authorities to grant [*21] relief as circumscribed by the applicable version of Article 60, UCMJ. Additionally, it advises convening authorities to specify "no action" if not granting relief, which would include effecting "action" under the applicable version of Article 60, UCMJ.

Id. at *3-4.

HN10[] Appellate courts can use surrounding documentation to interpret an otherwise unclear convening authority action, including looking outside the four corners of the action's language. *See United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citing *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981)).

3. Analysis

Turning to the facts before us, we disagree with the Government that this case should be reviewed consistent with a three-judge panel's decision in *Finco*, where under similar facts, our court found error where the convening authority took "no action on the sentence," and found such error to be plain and obvious. To the contrary, we find no error, and "no indicia of confusion over, or objection to, this new way to effect an old rule." *Barrick*, unpub. op. at *4.

In the present case, the record demonstrates that Appellant submitted clemency matters to the convening authority on 23 January 2019. In his matters, Appellant asked the convening authority for a "moderate amount" of clemency—to defer the mandatory forfeitures of pay for 30 [*22] days. On 8 February 2019, the convening authority's decision to "take no action" was memorialized in his "Decision on Action" memorandum to the military judge. Consistent with the AFI 51-201, Section 13D, the convening authority expressed his decision to not grant relief as "no action." Additionally, the convening authority specifically denied Appellant's request for a 30-day deferment of mandatory forfeitures under R.C.M. 1103. We also note that the convening authority's ability to grant clemency for the portion of the sentence relating to the reduction in grade did not change with the amendment to Article 60; therefore, it is a leap to assume the convening authority misunderstood, or was confused about his ability to set aside or mitigate the adjudged reduction in grade. Finally, the convening authority could not affect the most serious portions of Appellant's sentence—confinement and the dishonorable discharge. On 25 February 2019, the military judge signed the EoJ, reflecting the sentence as adjudged and all post-trial actions by the convening authority.

We find that the convening authority's decision met the legacy requirements of Article 60, UCMJ (2016 *MCM*), requiring action. We also find the decision [*23] complied with the provisions of R.C.M. 1109 requiring convening authority action only when affecting the sentence. Here the convening authority's decision to provide no relief at action was "clear and unambiguous." *See Politte*, 63 M.J. at 25-26 (footnote omitted). There is no indication in the record that the military judge or the parties were confused as to the convening authority's decision to grant no relief as again, the sentence memorialized in the EoJ was the same as the sentence adjudged at trial and neither party moved for correction of the action or the EoJ. *See* R.C.M. 1104(b)(2)(B) and (C). Furthermore, this issue was not raised by Appellant as an assignment of error in his submissions to this court. For these reasons, we find no error in the convening authority's action.

C. Timeliness of Appellate Review

Additionally, we consider whether Appellant is entitled to relief for a facially unreasonable appellate delay. *Moreno*, 63 M.J. at 135 (citations omitted); *United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F. 2002). We decline to grant such relief.

1. Law

HN11[] We review de novo whether an appellant has been denied the due process right to speedy appellate review. *Moreno*, 63 M.J. at 135 (citations omitted). A presumption of unreasonable delay arises when appellate review is not completed and a decision

rendered within 18 months of a case being [*24] docketed. *Id.* at 142. A presumptively unreasonable delay triggers an analysis of the four factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citations omitted). A presumptively unreasonable delay satisfies the first factor, but the Government "can rebut the presumption by showing the delay was not unreasonable." *Id.* at 142. Assessing the fourth factor of prejudice, we consider the interests of "prevention of oppressive incarceration;" "minimization of anxiety and concern of those convicted;" and "limitation of the possibility that . . . grounds for appeal, and . . . defenses . . . might be impaired." *Id.* at 138-39 (citations omitted).

2. Analysis

Appellant's case was docketed with the court on 18 April 2019. The delay in rendering this decision after 18 October 2020 is presumptively unreasonable. The reasons for the delay include the time required for Appellant to file his brief on 23 August 2019, and the Government to file its answer 23 September 2019. Additionally, on 29 July 2020, we issued a show cause order to the Government, and the Government's timely response was filed on 17 August 2020. [*25] On 22 October 2020, this court voted to take this case *en banc* and the corresponding order was issued on 23 October 2020. Appellant was not confined, did not assert his right to timely appellate review, and has made no specific claim of prejudice. We find none.

Finding no *Barker* prejudice, we also find the one-month delay is not so egregious that it "adversely affects the public's perception of the fairness and integrity of the military justice system." *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). As a result, there is no due process violation. *See id.*

Regarding any relief under *Tardif*, in this case we determine that no such relief is warranted in the absence of a due process violation. *See Tardif*, 57 M.J. at 223-24; *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). ***HN12***[] In *Tardif*, the CAAF recognized that "a Court of Criminal Appeals has authority under Article 66(c) to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)." 57 M.J. at 224 (citation omitted). Furthermore, we as a service Court of Criminal Appeals are required by Article 66(d), UCMJ, to determine which findings of guilty and the sentence or part thereof "should be approved." 10 U.S.C. § 866(d); *see Tardif*, 57 M.J. at 224. Considering all the facts and circumstances of Appellant's case, we decline to exercise our [*26] Article 66(d), UCMJ, authority to grant relief for the delay in completing appellate review.

III. CONCLUSION

The findings and sentence entered are correct in law and fact, and no error materially prejudicial to the substantial rights of the Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d) (*Manual for Courts-Martial, United States* (2019 ed.)). Accordingly, the findings and sentence are **AFFIRMED**.[7]

Concur by: LEWIS (In Part); POSCH (In Part); J. JOHNSON (In Part)

Concur

LEWIS, Senior Judge (concurring in part and in the result), joined by Judge D. JOHNSON:

I concur with the opinion of the court to affirm the findings and the sentence in Appellant's case. However, I disagree with my esteemed colleagues on the path to this result and therefore write separately.

Beginning with the assignment of error, I agree that Appellant is not entitled to relief for the conditions of his post-trial confinement. Consistent with the opinion of the court, I considered the declarations submitted by

[7] Although not raised by Appellant, we note the EoJ fails to document Appellant's request for deferment of mandatory forfeitures for 30 days, and the convening authority's action on Appellant's request for deferment as required by R.C.M. 1111(b)(3)(A). Appellant has not claimed any prejudice as a result of this error, and we find none. We direct the military judge, through the Chief Trial Judge, Air Force Trial Judiciary, to have a detailed military judge correct the entry of judgment accordingly and prior to completion of the final order under R.C.M. 1209(b) and Air Force Instruction 51-201, *Administration of Military Justice*, Section 14J (18 Jan. 2019).

Appellant and TM—the Inmate Program and Accreditation Manager for Okaloosa County, Florida—which are attached to the record to resolve Appellant's claims under the Eighth Amendment,[1] and Articles 12 and 55, UCMJ, [*27] 10 U.S.C. §§ 812, 855.[2] *See United States v. Jessie*, 79 M.J. 437, 444-45 (C.A.A.F. 2020). Unlike the opinion of the court, I assumed without deciding that I could consider these same declarations in concluding that Appellant's sentence was not inappropriately severe. *See United States v. DeFalco*, No. ACM 39607, 2020 CCA LEXIS 164, at *16 n.9 (A.F. Ct. Crim. App. 21 May 2020) (unpub. op.); *United States v. McGriff*, No. ACM 39306, 2018 CCA LEXIS 567, at *24-25 (A.F. Ct. Crim. App. 11 Dec. 2018) (unpub. op.), *rev. denied*, 78 M.J. 487 (C.A.A.F. 2019).

Next, I also agree with the opinion of the court that Appellant is not entitled to relief for the facially unreasonable appellate delay. *See United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). Further, I agree with the opinion of the court in denying Appellant relief under *United States v. Tardif*. *See* 57 M.J. 219, 223-24 (C.A.A.F. 2002).

I must disagree with the opinion of the court that the convening authority's decision "met the legacy requirements" of Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)). Instead, I agree with the Government's show cause order response that Appellant's case should be reviewed for plain error as was done in *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.).

In *Finco*, a panel of our court found plain or obvious error because a convening authority "cannot simultaneously 'take no action on the sentence' and satisfy Exec. Order. 13,825, § 6(b)(1) [*28] , 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), which 'requires action by the convening authority on the sentence.'" *Id.* at *12. The conclusion of error in *Finco* was consistent with the earlier decision of our sister-service court in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020). The court in *Coffman* held that "indicating 'N/A' or stating 'No Action' does not constitute taking action in a case." *Id.* at 823.

Here, the convening authority's decision memorandum states that the convening authority took no action in this case. While this wording varies slightly from *Finco*, in my view, failing to take action on "the case" also means failing to take action on "the sentence" as required by Exec. Order. 13,825, § 6(b)(1). Therefore, I find error.

Appellant had an opportunity to address this error in the convening authority's decision memorandum with the military judge under Rule for Courts-Martial (R.C.M.) 1104(b)(2)(B). This rule provided Appellant a five-day window, after receipt, to assert the post-trial action by the convening authority was incomplete, irregular, or contained error. Appellant received the convening authority's decision memorandum on 14 February 2019. No post-trial motion was filed. The military judge signed the entry of judgment on 25 February 2019 which repeated that the convening authority [*29] took no action on the case.

More than a month after entry of judgment, on 28 March 2019, it was discovered that Appellant had not signed the 15 January 2019 submission of matters letter from the wing legal office. In response, Appellant's trial defense counsel signed a memorandum for "ALL REVIEWING AUTHORITIES" which noted the omitted signature but also stated: "On 23 January 2019, [Appellant] submitted [a] clemency request to the convening authority and requested that the convening authority defer the mandatory forfeitures of pay for a period of 30 days in his case. On 8 February 2019, the convening authority denied [Appellant]'s clemency request."

It is with this background that I assess whether Appellant waived or forfeited the error in the convening authority's decision memorandum which was repeated in the entry of judgment. The Government argues Appellant's failure to file a motion forfeited this error. I agree that forfeiture should be applied in this case. *See United States v. Lee*, No ACM. 39531, 2020 CCA LEXIS 61, at *17 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (holding a Court of Criminal Appeals has the discretion to determine whether to apply waiver or forfeiture in a particular case or to pierce waiver or forfeiture to correct [*30] a legal error). I acknowledge that Appellant's trial defense counsel received an additional opportunity to raise this error when the missing signature on Appellant's submission of matters letter was noticed. Still, trial defense counsel's memorandum does not mention the wording of the convening authority's decision to take no action in the case. Under these circumstances, I do not see an

[1] U.S. CONST. amend. VIII.

[2] Unless otherwise specified, all references to the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) in this opinion are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

intentional relinquishment or abandonment of a known right or privilege by Appellant in this case. *See United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (citation omitted). I find Appellant forfeited his right to object to the accuracy of the convening authority's decision memorandum absent plain error.

To prevail under a plain error analysis, an appellant must show "(1) there was an error; (2) [the error] was plain or obvious; and (3) the error materially prejudiced a substantial right." *See United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (en banc) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)). The Government argues that "lack of any recognition of this error by the parties and judge provides some evidence to this [c]ourt that, while there was error, such error was not plain or obvious." My esteemed colleague who also concurs in the result would not find plain error because the law has only become unsettled while Appellant's case [*31] was on appeal. *See* Posch, S.J., concurring in part and in the result, *infra*, at 42. However, I see the matter differently.

Exec. Order 13,825, § 6(b)(1), required action on the sentence by the convening authority under the prior version of Article 60, UCMJ. Action on the sentence under the prior version of Article 60, UCMJ, was not a new concept, but an old one. The words of the statute are specific; "Except as provided in paragraph (4) [of Article 60(c), UCMJ], the convening authority or another person authorized to act under this section may *approve, disapprove, commute, or suspend* the sentence of the court-martial in whole or in part." 10 U.S.C. § 860(c)(2)(B) (2016 *MCM*) (emphasis added). "Except as provided in subparagraph (B) or (C) [of Article 60(c)(4)], the convening authority or another person authorized to act under this section may not *disapprove, commute, or suspend* in whole or in part, an adjudged sentence of . . . [a] dishonorable discharge." 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*) (emphasis added).

"We begin statutory analysis by examining the plain language." *United States v. Stout*, 79 M.J. 168, 171 (C.A.A.F. 2019). "The plain language will control, unless use of the plain language will lead to an absurd result." *Id.* (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007)). In my view the plain language of the prior version of Article 60, UCMJ, gave the convening [*32] authority four choices when taking action on the sentence: approve, disapprove, commute, or suspend. In this applicable version of Article 60, UCMJ, Congress did not use words like "deny relief," "effectuate the sentence," or "take no action."

This record of trial contains several references that show, at times, it was understood that the convening authority's action would "approve" a sentence. These references are in (1) the pretrial agreement and its Appendix A; (2) the submission of matters letter to Appellant from the wing legal office; and (3) the post-trial rights advisement given to Appellant by his trial defense counsel. When the military judge reviewed Appendix A to the pretrial agreement prior to adjourning the court, he stated "So my understanding of the effect of the pretrial agreement on the sentence is that the *convening authority may approve the sentence*." (Emphasis added). The military judge asked whether counsel for both sides agreed with that interpretation. They did. This is not a situation where a long-standing precedent was suddenly reversed or called into question on appeal.

After considering the record of trial in this case, I conclude the failure to take action [*33] "in the case" was a plain or obvious error. I see little need to look beyond the plain language of the prior version of Article 60, UCMJ, to determine what a convening authority is required to do when taking action on the sentence under that statute. I observe no absurd result by requiring the convening authority to use the words in the statute rather than other ambiguous wording with questionable applicability.

I would also apply the threshold of "some colorable showing of possible prejudice" as the appropriate standard for an error impacting an appellant's request for clemency. *See LeBlanc*, 74 M.J. at 660 (quoting *Scalo*, 60 M.J. at 436). In applying this standard to this case, I would find no colorable showing of possible prejudice, in contrast to the result in *Finco*. The reasons are not complex. Appellant in this case was sentenced to a dishonorable discharge, confinement for eight months, and reduction to the grade of E-1. In his clemency request, the only thing that Appellant requested was a deferral of the mandatory forfeitures of pay for 30 days. There is no question that the convening authority denied this request explicitly in his decision memorandum. There is no question that Appellant's trial defense counsel understood [*34] the convening authority denied Appellant's clemency request as this was written in trial defense counsel's memorandum that was submitted after entry of judgment. In *Finco*, there was uncertainty on whether the convening authority made a decision on the clemency request. Unpub. op. at *16. There is no such uncertainty in this case.

Therefore, I concur in the result of affirming the findings and sentence reflected in the entry of judgment.

It is unnecessary to engage in a point-by-point exchange with my esteemed colleagues who hold different views of the law in this area than I do. Brief comments will suffice.

For the opinion of the court, I cannot join the conclusion that the convening authority's decision met the legacy requirements of the prior version of Article 60, UCMJ. This would require me to forget how a convening authority took action on the sentence under Article 60, UCMJ, by approving some or all of the sentence. I also cannot join the conclusion that the convening authority complied with R.C.M. 1109[3] in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). I cannot see a simple way to reconcile portions of this rule, which redefined what it meant to take action completely, [*35] with the specific direction Exec. Order 13,825, § 6(b)(1), provided to take action on the sentence under the prior version of Article 60, UCMJ. In my view, R.C.M. 1109 in the 2019 *MCM* requires some adjustment to address its applicability to cases where action is required on the sentence by law and that task is best left to the Joint Service Committee on Military Justice.

I now turn to the opinion of my esteemed colleague who also concurs in part and in the result, *infra*, which states that the convening authority took no action on the sentence but this decision "fully complied" with the President's implementation of the Military Justice Act of 2016. Posch, S.J., concurring in part and in the result, *infra*, at 43. I have considered the critiques of the analysis in *Finco* presented here and in the earlier concurring opinion in *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at *9-24 (A.F. Ct. Crim. App. 30 Sep. 2020) (Posch, S.J., concurring in the result) (unpub. op.). After fair consideration, I am unpersuaded that the convening authority fully complied with the law in this case.

For my esteemed colleagues who dissent in part and in the result, I have only one minor quibble with what I will describe as the "fundamental misstep" [*36] position. To me, it seems to give little meaning to the new post-trial motions process available under R.C.M. 1104(b)(2)(B) where an appellant can raise a concern to the military judge with any post-trial action by the convening authority that is incomplete, irregular, or contains error. This procedural mechanism—available to *Finco, Barrick*, and Appellant—was not a part of the system for cases with a traditional action referred before 1 January 2019. As I see it, the new post-trial motions process should be part of our analysis of our discretion to apply waiver or forfeiture. In those cases where we exercise our discretion to apply forfeiture, I would test for a colorable showing of possible prejudice.

POSCH, Senior Judge (concurring in part and in the result):

For the most part, I agree with my esteemed colleagues in their resolution of the issue that Appellant personally raises about the conditions of post-trial confinement at the Okaloosa County (Florida) Department of Corrections. Judge Annexstad, joined by a majority of the judges on this court, considers Appellant's outside-the-record declaration to determine that sentence relief is not warranted under this court's Article 66(d)(1), Uniform Code of [*37] Military Justice (UCMJ), 10 U.S.C. § 866(d)(1), mandate to approve only so much of a sentence that, "on the basis of the entire record, should be approved." Other than trial defense counsel's generalized statements as part of Appellant's clemency submission that the prison conditions were "less than ideal" and "far below the standards of any military corrections facility," Appellant claimed no specific deficiencies or relief from the convening authority. Because the record does not contain actionable information about the conditions, I would find that this court cannot consider new statements of fact in Appellant's declaration as part of our Article 66(d)(1), UCMJ, sentence appropriateness review. *See United States v. Jessie*, 79 M.J 437, 441-42 (C.A.A.F. 2020); *see also United States v. Willman*, No. ACM 39642, 2020 CCA LEXIS 300, at *21-26 (A.F. Ct. Crim. App. 2 Sep. 2020) (unpub. op.). Nonetheless, in harmony with those decisions and the opinion of the court, I agree that Appellant is not entitled to relief under Articles 12 and 55, UCMJ, 10 U.S.C. §§ 812, 855, and the Eighth Amendment,[1] or for the time it took this court to consider his appeal and conduct our statutory review. *See United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F. 2002).

I also agree with the opinion of the court that it was not error, much less plain error, for the convening authority

[3] The PTA's post-trial misconduct provision in this case cites R.C.M. 1109, apparently from the 2016 *MCM*, rather than R.C.M. 1108 in the 2019 *MCM*.

[1] U.S. CONST. amend. VIII.

to effectuate Appellant's adjudged sentence by taking "no action" [*38] in Appellant's case. However, I write separately because I cannot resolve how Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)), governed the convening authority's decision on action, and not Article 60, UCMJ, contained in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*),[2] even though we reach the same result. To be sure, if legacy provisions of Article 60 (2016 *MCM*) were operable to guide the convening authority here—as the opinion of the court finds, and as Chief Judge J. Johnson and Senior Judge Lewis conclude in their separate opinions that they do—then it would follow that "[a]ction on the sentence . . . shall be taken." Article 60(c)(2)(A), UCMJ, 10 U.S.C. § 860(c)(2)(A) (2016 *MCM*). "Action" on the sentence as that term is used in the 2016 *MCM* means to "approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part," Article 60(c)(2), 10 U.S.C. § 860(c)(2), and the convening authority indicated none of these when he took "no action" in Appellant's case.

Although Article 60, UCMJ (2019 *MCM*), is not the route taken by the opinion of the court or by the separate opinions in our decision, I conclude it [*39] is the path that the convening authority took and was the right path to follow in the post-trial processing of Appellant's case, and I harbor no doubt he dutifully adhered to this track without error.

A. Overview

Twenty-four days after Appellant pleaded guilty and was sentenced, the convening authority effectuated the sentence as adjudged. The convening authority did so by signing a "Decision on Action" memorandum taking "no action in the case."[3] His decision was in every respect consistent with Service policy in Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), which closely tracked implementation of the Military Justice Act of 2016 (MJA),[4] and guided "convening authorities to specify 'no action' if not granting relief," as found by this court's majority opinion in *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at *3-4 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.). Undoubtedly, the convening authority's "no action" decision was formalized with the assistance of the command's staff judge advocate (SJA) and her staff, whose advice conformed to Service policy and the President's implementation of the MJA on which it was based. *See* Rule for Courts-Martial (R.C.M.) 1109(d)(2)[5] ("In determining whether to [*40] take action, or to decline taking action under this rule, the convening authority shall consult with the staff judge advocate or legal advisor.").

Within five days after receiving the convening authority's decision, Appellant did not raise a motion with the military judge under R.C.M. 1104(b)(2)(B), which suggests that Appellant either had no reason to believe at the time that the convening authority's decision was "incomplete, irregular, or contain[ed] error" or that he suffered any prejudice. Even on appeal, Appellant identifies no error, plain or otherwise, that would rebut a presumption of regularity in the manner by which the convening authority effectuated Appellant's sentence after receiving the advice of his SJA. *See United States v. Wise*, 6 C.M.A. 472, 20 C.M.R. 188, 194 (C.M.A. 1955) ("[T]he presumption of regularity requires us to presume that [the convening authority] carried out the duties imposed upon him by the Code and the Manual."); *see also United States v. Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008) (applying a "presumption of regularity" to the convening authority's decision (internal quotation marks and citation omitted)).

After Appellant's case was submitted for our review, this court issued its decision in *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), on which [*41] my esteemed colleague, Senior Judge Lewis, relies in his separate opinion, *supra*. In that decision, a three-judge panel of this court found that the convening authority's decision to take no action on an appellant's sentence

[2] Unless otherwise noted in this opinion, all references to the convening authority's powers and responsibilities in "Article 60," UCMJ, in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), are to Articles 60a and 60b, UCMJ, 10 U.S.C. §§ 860a, 860b, as applicable.

[3] On the face of it, the convening authority's decision reached both the findings of guilty and the adjudged sentence. However, the opinion of the court and the separate opinions focus on the "no action" determination on the sentence as do I.

[4] *See* National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA), Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016).

[5] Unless otherwise noted, references to the Rules for Courts-Martial (R.C.M.) are to the 2019 *MCM*.

was a plain or obvious error and remanded. *Id.* at *15. The *Finco* court found "[i]n a case referred after 1 January 2019 where an accused is found guilty of a specification for an offense occurring before 1 January 2019" that the convening authority was required to apply Article 60 (2016 *MCM*), *id.* at *12, and not Article 60 in the 2019 *MCM*, and thereby failed to properly effectuate the sentence. *Id.* at *16 ("[Because] the convening authority failed to take action on the entire sentence—as his memorandum indicates he did—then we are unsure whether he made a decision on Appellant's clemency request."). The *Finco* court applied the standard for prejudice—"some colorable showing of possible prejudice," *id.* at *15-16—that our superior court, the United States Court of Appeals for the Armed Forces (CAAF), determined was appropriate for defects in a staff judge advocate's recommendation (SJAR), *see, e.g., United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (citing *United States v. Chatman*, 46 M.J. 321, 324 (C.A.A.F. 1997)), or the addendum to the SJAR, *see, e.g., Chatman*, 46 M.J. at 324, even though the supposed error in the decision memorandum was [*42] neither.[6]

In partial agreement with *Finco*, and in response to this court's order to show cause in Appellant's case, the Government concedes that the convening authority erred by taking "no action," but disagrees that the error was plain[7] or that Appellant was prejudiced. In its answer to the order the Government asserts the convening authority "should have approved the sentence" as was required by Article 60, UCMJ (2016 *MCM*). Chief Judge J. Johnson and Senior Judge Lewis agree with the Government's concession. Chief Judge J. Johnson and three of our colleagues who join his opinion find the convening authority's error was so serious as to be, in effect, structural,[8] and would remand without evaluating for prejudice because the convening authority's decision "was at best an ambiguous and defective execution of the requirement that he take action on the sentence."

I disagree with the Government's concession and the view of the majority of the judges on this court that the convening authority erred by taking "no action," and thereby failed to effectuate the sentence as adjudged. First, I explain why the convening authority's decision complied with the MJA, as [*43] implemented by the President effective on 1 January 2019 in Exec. Order 13,825, §§ 3(a), 5, and 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018). Second, and related, I again make clear a difference of opinion with this court's *Finco* decision that reached the opposite conclusion in a case similar to Appellant's and upon which Senior Judge Lewis again relies. *See Barrick*, unpub. op. at *11, 17-24 (Posch, S.J., concurring in the result). Third, I depart from the separate opinion of Senior Judge Lewis, concurring in part and in the result, *supra*, which, like this court's *Finco* decision, I find misapplies the plain error standard of review.

Resolution that the convening authority did not err turns on understanding several provisions of the President's implementation of Article 60, UCMJ, in the 2019 *MCM*, above all, Exec. Order 13,825, §§ 5 and 6(b), 83 Fed. Reg. at 9890. Because I conclude that the convening authority's decision memorandum was altogether in accordance with the President's implementation and the law, the convening authority did not err, much less commit plain error, by taking "no action" on the sentence that was adjudged in Appellant's case.

B. Amendment to Article 60, UCMJ, in the MJA

Appellant was convicted of offenses [*44] he committed after 24 June 2014, which is the effective date of Article

[6] Additionally, the convening authorities in *Chatman* and *Wheelus* were empowered with plenary discretion to affect both the findings and sentence by Article 60, UCMJ, that was germane for offenses committed before changes to Article 60 took effect on 24 June 2014, which greatly limited that power in later cases like *Finco*'s and Appellant's. *See* Pub. L. No. 113-66, § 1702, 127 Stat. 672, 958 (26 Dec. 2013) (National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA)). Our superior court has cited that "highly discretionary" power in pre-FY14 NDAA cases as the reason why there is material prejudice to the substantial rights of an appellant if there is an error in the staff judge advocate's recommendation or the addendum and the appellant makes some colorable showing of possible prejudice. *See, e.g., United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

[7] The Government's brief contends that "such error was not plain or obvious," but gives no reason for the conclusion.

[8] Chief Judge J. Johnson's opinion does not contend that the error was "structural," or even of a constitutional dimension, but the consequence is analogous. "Structural errors are those constitutional errors so affecting the framework within which the trial proceeds, that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011) (alterations, internal quotation marks, and citations omitted).

60, UCMJ, in the 2016 *MCM*.[9] In courts-martial for offenses occurring on and after this date, and before implementation of the MJA, a convening authority was required to take action to effectuate the sentence in every court-martial case.[10] *See* Article 60(c)(2)(A), UCMJ (2016 *MCM*) ("Action on the sentence of a court-martial shall be taken by the convening authority . . . .").

The MJA changed this requirement when Congress amended Article 60, UCMJ, as it appears in the 2019 *MCM*[11] to require "action" on the sentence if and only if a convening authority intends to grant relief by reducing, commuting, suspending, or in some cases, by disapproving a sentence, in whole or in part, as allowed for by law.[12] In accordance with the amended Article 60 in the 2019 *MCM*, a convening authority's formal refusal to act—that is, declination to act by taking "no action" on the sentence—effectuates the adjudged sentence in the same way that a convening authority once approved the sentence without modification under the former Article 60, UCMJ (2016 *MCM [*45]*). This change is perhaps most clearly stated in Article 60a(f)(2), UCMJ, in the 2019 *MCM* by the conditional language: "*If*, under this section, the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for such action." 10 U.S.C. § 860a(f)(2) (emphasis added).[13] After the convening authority's decision, the judgment of the court-martial consists of the adjudged sentence listed in the Statement of Trial Results as modified by "*any* post-trial action by the convening authority." Article 60c(a)(1)(B)(i), UCMJ, 10 U.S.C. § 860c(a)(1)(B)(i) (2019 *MCM*) (emphasis added).

For many years, military justice practitioners have been accustomed to thinking of "action" as effectuating the sentence—whether by granting relief or not—as this term appears in editions of the *Manual for Courts-Martial* before the 2019 *MCM*. This legacy and more comprehensive definition gave way to a more specific meaning in the MJA and the President's implementation of the Act. Although not expressly defined, taking "action" in the 2019 *MCM* reveals it to mean "granting relief" each and every time that a convening authority [*46] decides to take action on the sentence in a particular case. Conversely, in accordance with Article 60 in the 2019 *MCM*, a convening authority's "no action" decision on the sentence results in an entry of judgment (EoJ) that reflects the sentence adjudged by the court-martial without modification, as it did here.

In Appellant's case, the language of the convening authority decision to take "no action" on the adjudged sentence is synonymous with not granting relief. By deciding to take no action the convening authority followed the post-trial procedures that Congress directed in the MJA, notably Article 60 in the 2019 *MCM*, and not the legacy procedures in Article 60 in the 2016 *MCM*. As a result, the question of whether the convening authority's decision memorandum contains error turns on the post-trial procedures that Congress and the President intended the convening authority to follow. Answering this question requires review of the convening authority's decision in light of the President's implementation of the MJA. If taking "no action" complied with the implementation of the Act, as I conclude that it did, then there is no error to evaluate for harmlessness or to correct on appeal [*47] or by remand to the military judge.

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[9] *See* FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 958 (26 Dec. 2013) (establishing 24 June 2014 as the effective date for Article 60, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 860, as it appears in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)).

[10] Before the effective date of the Military Justice Act of 2016 (MJA), a convening authority was required to either approve the sentence of the court-martial, or, subject to limits on that authority as provided by law, disapprove, commute, or suspend the sentence, in whole or in part. *See, e.g.*, Article 60(c)(2) and (c)(4), UCMJ, 10 U.S.C. § 860(c)(2), (c)(4) (2016 *MCM*). Importantly, and as later discussed in this opinion, a convening authority has the statutory authority pursuant to Article 60 in the 2016 *MCM* to take action pursuant to the terms of a pre-trial agreement with an accused. *See, e.g.*, Article 60(c)(4)(C), UCMJ, 10 U.S.C. § 860(c)(4)(C) (2016 *MCM*). No similar power conferred on a convening authority is found in the 2019 *MCM*.

[11] The amendment to Article 60, UCMJ, was among the many changes that Congress directed in the MJA that were subsequently expanded to several articles and incorporated in the 2019 *MCM*.

[12] *See also* Articles 60a and 60b, UCMJ, 10 U.S.C. §§ 860a, 860b (2019 *MCM*). In certain cases the convening authority may also act to "disapprove" a sentence in whole or in part. *See* Article 60b(a)(1)(C)-(F), UCMJ, 10 U.S.C. § 860b(a)(1)(C)-(F) (2019 *MCM*).

[13] *See also* Article 60a(a)(1)(A), UCMJ, 10 U.S.C. § 860a(a)(1)(A) (2019 *MCM*) (subject to limitations, a convening authority "*may* act on the sentence of the court-martial" (emphasis added)).

C. Implementation of the MJA: Executive Order 13,825

In the MJA, Congress assigned to the President considerable discretion to set the effective date of the amendments to the UCMJ and to prescribe the regulations implementing those amendments.[14] However, that discretion was bounded by a date by which implementation must be completed. With few limitations, Congress directed that the implementation "shall take effect" no later than 1 January 2019, which included changes to Article 60, UCMJ (2019 *MCM*), in the manner by which a convening authority effectuates a sentence without modification (i.e., as adjudged).[15] The President then exercised this authority by issuing Executive Order 13,825 and new Rules for Courts-Martial that are listed in Annex 2 of the Executive Order and that were subsequently promulgated in Part II of the 2019 *MCM*. In accordance with the direction given by Congress to the President, Exec. Order 13,825, § 5, effected these rules for cases referred to trial by court-martial on and after 1 January 2019.[16] The new rules implement the amendments made by Congress in Article 60 in the 2019 *MCM*, as discussed, and include considerable revisions in [*48] the manner by which the convening authority effectuates an appellant's sentence after one has been adjudged.

Among the rules that took effect on 1 January 2019 for cases referred on and after that date are R.C.M. 1109 and 1110 that guide a convening authority's decision whether to take action on an adjudged sentence.[17] Following the new procedures in those rules, which implement and track the amendments that Congress made to Article 60 that were incorporated in the 2019 *MCM*, the convening authority does not effectuate a sentence by taking action unless the convening authority intends to reduce, commute, or suspend, or in some cases, disapprove, a sentence, in whole or in part. R.C.M. 1109(c)(5)(A), (g)(2); R.C.M. 1110(c), (e). Under these rules, a "convening authority is no longer required to take action on the results of every court-martial." *United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.) (citing R.C.M. 1109 and 1110 (2019 *MCM*)). Instead, a convening authority may decline to take action after consulting with the SJA and considering any clemency matters timely submitted by an accused. R.C.M. 1109(c), (d), (g); R.C.M. 1110(c)(1) ("action on the sentence is not required"); *see also Moody-Neukom*, unpub. op. at *3 [*49] .

D. Application of the MJA, as Implemented, to Appellant's Case

One turns then to consider the effect of the President's implementation of the MJA in Executive Order 13,825 on the post-trial procedures that are applicable to Appellant's case. Here, the charges and specifications were referred to trial by general court-martial on 4 January 2019. Thus, the convening authority was required to follow the procedural provisions in the 2019 *MCM* that went into effect on 1 January 2019, notably R.C.M. 1109 and 1110 that are germane to a convening authority's power and responsibility in post-trial processing. In accordance with these rules, unless the convening authority had determined to grant relief,[18] the

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[14] *See* FY17 NDAA, Pub. L. No. 114-328, § 5542; *see also* Article 36(a), UCMJ, 10 U.S.C. § 836(a), in the 2016 and 2019 *MCMs* (President may prescribe regulations for post-trial procedures); *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (the authority to prescribe regulations prevails "insofar as such regulations are not inconsistent with the UCMJ").

[15] The FY17 NDAA, including the MJA in Division E of the NDAA, was enacted on 23 December 2016. "Except as otherwise provided in this division, the amendments made by this division shall take effect on the date designated by the President, which date shall be not later than the first day of the first calendar month that begins two years after the date of the enactment of this Act." *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(a).

[16] *See* Exec. Order 13,825, § 5, 83 Fed. Reg. 9889, 9890 (8 Mar. 2018) (incorporating in the 2019 *MCM* new Rules for Courts-Martial among the amendments in Annex 2, that "shall take effect on January 1, 2019," subject to exceptions that are not applicable here); *see also* FY17 NDAA, Pub. L. No. 114-328, § 5542(c)(2) (stating MJA amendments to the UCMJ "shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments").

[17] *See* Exec. Order 13,825, § 5, 83 Fed. Reg. at 10040-43 (implementing R.C.M. 1109, *Reduction of sentence, general and special courts-martial*); 10043-44 (implementing R.C.M. 1110, *Action by convening authority in certain general and special courts-martial*).

[18] The convening authority had the power to reduce, commute, or suspend, in whole or in part, Appellant's reduction in grade only. *See* R.C.M. 1109(c)(5) (2019 *MCM*).

convening authority was under no obligation to act on the sentence after Appellant was tried and sentenced on 15 January 2019.

In compliance with R.C.M. 1109 and 1110, the convening authority took no action on the adjudged sentence when he signed the decision memorandum on 8 February 2019, thereby indicating a formal determination that sentencing relief was not warranted in [*50] Appellant's case. Subsequently, the military judge signed the EoJ faithfully reflecting the judgment of the court-martial. Consequently, the convening authority's "no action" decision in compliance with the President's implementation of the MJA, as made plain in R.C.M. 1109 and 1110, was not error. It follows that, in this regard, the judgment entered by the military judge in Appellant's case is correct.[19]

1. *United States v. Finco*

Nonetheless, this conclusion that the convening authority did not err because he followed Article 60, UCMJ, and R.C.M. 1109 and 1110 as implemented by the President in the 2019 *MCM*, parts ways with the opinion of the court here and in *Barrick*, which find that the convening authority's decision was not error because it met the requirements of Article 60, UCMJ (2016 *MCM); see Barrick*, unpub. op. at *3 ("The convening authority's decision met the requirements of Article 60, UCMJ, 10 U.S.C. § 860 (2016 *MCM*) inasmuch as it required 'action' in this case."). It also invites comparison to this court's decision in *Finco* that reached a different result on similar facts and on which Senior Judge Lewis relies in his separate opinion, *supra*.

Appellant, like the appellant in *Finco*, was convicted of offenses that were [*51] committed on or after 24 June 2014[20] and before 1 January 2019, and referred after that date. *See Finco*, unpub. op. at *3-4, 12. The military judge in *Finco* sentenced the appellant to a bad-conduct discharge, confinement for five months, reduction to the grade of E-1, and a reprimand. *Id.* at *1-2. After reviewing that appellant's clemency matters, the convening authority signed a decision memorandum that stated, "I take no action on the sentence of this case." *Id.* at *2. The same day that the convening authority signed his decision memorandum, the military judge signed the EoJ. *Id.* In *Finco*, this court determined that "the decision to take no action on the sentence was a plain or obvious error" and remanded the case to the Chief Trial Judge, Air Force Trial Judiciary, "to resolve a substantial issue with the convening authority's decision memorandum as no action was taken on Appellant's adjudged sentence as required by law." *Id.* at *15, 20-21.

This court's *Finco* decision did not rely on R.C.M. 1109 and 1110 in the 2019 *MCM*, or attach any significance to the President's implementation of these rules in Exec. Order 13,825, § 5. Instead, *Finco* singularly focused on § 6(b) of this same Executive Order. *Id.* at *8, 12. As applicable [*52] to cases like Appellant's and *Finco* where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, § 6(b) guides a convening authority to apply the legacy provisions of Article 60 in the 2016 *MCM*, in certain prescribed circumstances. Section 6(b) states in pertinent part:

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> (1) requires action by the convening authority on the sentence . . . .

Exec. Order 13,825, § 6(b), 83 Fed. Reg. at 9890 (8 Mar. 2018).

By the terms of § 6(b), the convening authority in *Finco* and in Appellant's case was required to follow Article 60 as it appears in the 2016 *MCM*, but only "to the extent that" Article 60 "*requires* action by the convening authority on the sentence." (Emphasis added). If effectuating a sentence does not *require* a convening authority to take action, then § 6(b)'s direction to a convening authority to follow "Article 60 of the UCMJ, as in effect on the date of the earliest offense [*53] of which the accused was found guilty," is inapposite.

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[19] I agree with the opinion of the court that the EoJ fails to document Appellant's request for deferment of mandatory forfeitures and the convening authority's decision on Appellant's request as required by R.C.M. 1111(b)(3)(A).

[20] Because the court's opinion referenced Article 60, UCMJ, in the 2016 *MCM, see United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *8 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), which was effective on 24 June 2014, FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 958 (2013), we can presume that the appellant in *Finco* committed the charged offenses no earlier than on or after that date.

Finco looked to the language in Article 60 in the 2016 *MCM*, and found the necessary words of obligation in Article 60(c)(2)(A), UCMJ, that it determined bound the convening authority to effectuate the sentence whether granting relief or not. This provision states without qualification that "[a]ction on the sentence of a court-martial shall be taken by the convening authority."[21] *See Finco*, unpub. op. at *8. By looking to Article 60(c)(2)(A) in the 2016 *MCM* to understand § 6(b) of the Executive Order, a convening authority would have to disregard the President's implementation of R.C.M. 1109 and 1110 that went into effect on 1 January 2019 in every case where there is a conviction for at least one offense committed before, and referred on or after, that date. Paradoxically, effective on the same date that the President's implementation of these rules went into effect, *Finco*'s reasoning found them inapplicable and would nullify their application in cases in which a convening authority determines that granting sentencing relief is not authorized or warranted. It does so despite any indication of such intent in the text of the Executive Order.

Without question, a convening authority cannot "take no action on the sentence" in compliance with R.C.M. 1109 and 1110 in the 2019 *MCM*, and at the same time satisfy the language in Article 60(c)(2)(A), UCMJ, in the 2016 *MCM*. Thus, I cannot agree with the opinion of the court that, unlike this court's opinion in *Finco*, does not explain how it reached its conclusion. However, *Finco* made an assumption that a convening authority was bound by Article 60(c)(2)(A), finding that "the convening authority cannot simultaneously 'take no action on the sentence'" and satisfy the *Finco* court's *interpretation* of the language of the President's implementation in § 6(b). The *Finco* court concluded, "[W]e need look no further than the plain language of the decision memorandum and determine that the convening authority erred when he purported to take no action on the sentence when Exec. Order 13,825, § 6(b)(1), required him to do so." *Finco*, unpub. op. at *12. Although unstated in its decision, it is apparent that the *Finco* court found the language of § 6(b) plain as well to reach the conclusion that the convening authority's error was so clear as to be plain and obvious.

The *Finco* decision did not address what in my mind is [*55] an unmistakable contradiction between the President's implementation of R.C.M. 1109 and 1110 in Exec. Order 13,825, § 5, on the one hand, and the *Finco* court's reading of Exec. Order 13,825, § 6(b), on the other. In the case before us as in *Finco*, the convening authority cannot abide by the President's implementation of the specific provisions of R.C.M. 1109 and 1110 in § 5 by taking no action on the sentence and at the same time have a duty to act in every case so as to effectuate a sentence, which the *Finco* court found by its reading of § 6(b) that looked to Article 60(c)(2)(A) in the 2016 *MCM*. The *Finco* decision also failed to explain how its interpretation complied with Congress' direction to the President to implement the MJA by 1 January 2019, notably the post-trial procedures that Congress directed convening authorities to follow to effectuate a sentence.

In reaching the conclusion that the convening authority was required to take action on the sentence, *Finco* interpreted one part of the President's implementation so as to render another part, § 5, inconsequential in cases, like Appellant's, where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, and the convening [*56] authority determines no sentencing relief is warranted. By taking "no action" in compliance with R.C.M. 1109 and 1110 in the 2019 *MCM* as the President intended in Exec. Order, § 5, the *Finco* court would find error in an essential and recurring post-trial responsibility that was directed by Congress in the MJA: the manner by which convening authorities effectuate sentences for convictions for pre-1 January 2019 offenses that are referred on and after that date.

Of greater significance, the assignment by Congress to the President to designate the effective date of the MJA amendments was not without limitation. As previously noted, Congress directed that the President's implementation of the Act "shall take effect" not later than 1 January 2019.[22] The amendments to the UCMJ include changes Congress made to the procedural provisions in Article 60 whereby a convening authority may take no action to effectuate a sentence. But the *Finco* court's interpretation of Exec. Order 13,825, §

[21] The *Finco* court found solidarity with a decision by our sister-service court in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020), in which a convening authority took no action by indicating "N/A" to denote "action on the findings and/or sentence." *Finco*, unpub. op. at *12-13 (quoting *Coffman*, 79 M.J. at 821); *see [*54] also id.* at *13 (agreeing with the *Coffman* court's finding that "the convening authority 'erred in his noncompliance' with the earlier version of Article 60, UCMJ, . . . that required action on the sentence" (quoting *Coffman*, 79 M.J. at 822)).

[22] *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(a).

6(b)(1), would require a convening authority to continue to take action on a sentence in accordance with the legacy provisions of Article 60 until the date of the earliest conviction is on or after 1 January 2019. Thus, if the *Finco* court's [*57] interpretation of Exec. Order 13,825, § 6(b), was correct, it would operate to delay implementation of a key MJA provision well past 1 January 2019.[23] With few exceptions, notably Exec. Order 13,825, §§ 6(a), 9, and 10, the President's implementation of the MJA applies to offenses committed or alleged before 1 January 2019. 83 Fed. Reg. at 9890-91. However, the provisions implemented by exception in §§ 6(a), 9, and 10 relate to important substantive rights of an accused that go beyond the form by which Congress intended a convening authority to effectuate a sentence as is the case here. The President may well have intended these few exceptions were necessary so that an accused would get the benefit of significant legacy provisions in the UCMJ that protect important substantive rights and at the same time comply with the implementation timeline that Congress directed.

Importantly, if the President had intended the changes to the manner by which a convening authority effectuates a sentence in Article 60 in the 2019 *MCM* to begin on or after 1 January 2019, one might reasonably conclude that the President would have done so expressly instead of—as the *Finco* court's interpretation would require—by implication. Thus, [*58] a delayed implementation in the manner by which a sentence is effectuated in the 2019 *MCM* would raise questions not just about the responsibility of a convening authority under the President's implementation of the MJA, but also, and more fundamental, whether the President's implementation schedule was in compliance with Congress' direction that the President shall implement the Act not later than 1 January 2019.

2. Executive Order 13,825

Executive agencies "must always 'give effect to the unambiguously expressed intent of Congress.'" *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)). The CAAF has similarly cautioned that it "has no license . . . to construe statutes in a way that 'undercut[s] the clearly expressed intent of Congress.'" *United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014) (quoting *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (alteration in original)).

The CAAF has recognized that ordinary rules of statutory construction are helpful "when analyzing a rule promulgated by the President," which would seemingly embrace analysis of an executive order like the one here. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) ("[I]n determining the scope of a statute, we look first to its language" and "apply the same interpretive process when analyzing a rule promulgated by the President." (internal quotation marks omitted)); *see also United States v. Fetrow*, 76 M.J. 181, 185-86 (C.A.A.F. 2017) (rules of statutory construction [*59] are helpful in analyzing provisions of the *Manual for Courts-Martial*). It follows then that judicial review of the President's Executive Order implementing the MJA is not unlike review of an agency's construction of a statute.

When two provisions "initially appear to be in tension," the provisions should be interpreted in a way that render them compatible, not contradictory.[24] *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2008) ("[T]his Court typically seeks to harmonize independent provisions of a statute." (citing *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)). "It is a fundamental canon of statutory construction that the words of a statute must

[23] Notably, it is incongruent that, effective 1 January 2019, Congress would eliminate in the MJA the requirement that a convening authority consider the written recommendation of a staff judge advocate before acting on the sentence in a general court-martial or any special court-martial case that includes a bad-conduct discharge, as required by legacy provisions of Article 60, *see, e.g.*, Article 60(e), UCMJ, 10 U.S.C. § 860(e) (2016 *MCM*), but still require a convening authority to take action to effectuate all sentences.

[24] There may be essential differences between application of some interpretive canons to executive and legislative action. For example, the President's implementation of a rule in one provision of Exec. Order 13,825 (§ 5), and a statute on which the same rule depends in another provision (§ 6(b)) would not obviously trigger the "'hierarchical sources of rights' in the military justice system" whereby the highest source of authority is generally paramount. *See United States v. Czeschin*, 56 MJ 346, 348 (C.A.A.F. 2002). In the absence of language making it clear that the President's implementation of the statute controls over implementation of the rule, one cannot assume that the President intended that the former controls the latter in the same executive order promulgated under the same implementation authority assigned by Congress.

be read in their context and with a view to their place in the overall statutory scheme." *Kelly*, 77 M.J. at 406-07 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (internal quotation marks omitted)). "As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text." *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (citation omitted). Thus, when an interpretation of the text of one provision in an executive order works against another provision or an act of Congress, there is good reason to reject that interpretation and look for another.

The place to begin is with the text of the President's implementation. Sections 5 and 6(b) of the Executive Order initially appear to be in tension, so each provision will be examined [*60] in turn. The language of § 5 plainly implements the R.C.M. and the text is not subject to more than one possible meaning. It states that "[t]he amendments in Annex 2 [of Executive Order 13,825] . . . shall take effect on January 1, 2019." 83 Fed. Reg. at 9890. As previously discussed, Annex 2 includes the President's implementation of R.C.M. 1109 and 1110 in the 2019 *MCM* that went into effect for cases referred to trial by court-martial on and after 1 January 2019. The fact that § 5 enumerates three inapposite exceptions to the application of these amendments suggests that there are no other exceptions, lending further validity to the conclusion that the convening authority did not err when he followed R.C.M. 1109 and 1110 in effectuating the sentence adjudged in Appellant's case.

Whereas § 5 requires looking no further than that provision to determine its meaning and application, § 6(b), in contrast, directs practitioners to first look to the legacy provisions of Article 60, UCMJ, to resolve which version of Article 60 may apply to a particular case, and also, to what extent. This is so because § 6(b) states that "Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening [*61] authority . . . *to the extent that Article 60 . . . requires action by the convening authority on the sentence . . . ." Id.* (emphasis added). The phrase "to the extent that" is one of limitation that precludes blanket application of legacy provisions of Article 60. It plainly encompasses conditions in which no legacy provision of Article 60 will apply. This qualifying language makes clear that individual provisions of Article 60 in the 2019 *MCM* will bind a convening authority unless any one of several conditions is present in Article 60, UCMJ, as was in effect on the date of the earliest offense. First among these conditions is if a legacy provision of an earlier version of Article 60 "requires action by the convening authority on the sentence." Exec. Order 13,825, § 6(b)(1), 83 Fed. Reg. at 9890.

Taking "action," as discussed earlier, has a precise, specialized meaning in the 2019 *MCM* that differs from its more comprehensive meaning to effectuate a sentence in all cases before the MJA's implementation. Thus, a full understanding of the applicability of § 6(b) to Appellant's case entails an examination of Article 60 in the 2016 *MCM* for a circumstance in which a convening authority is required to grant relief (i.e., [*62] take action) on the sentence. If such a circumstance was present in a case like Appellant's—where at least one offense was committed on or after 24 June 2014 and before 1 January 2019, that was referred on or after that date—then a convening authority might be required to take action on the sentence by following one or more provisions of Article 60 in the 2016 *MCM*. Such a circumstance would be within the meaning of the President's implementation in § 6(b).

One such circumstance that protects a critical right of an accused is the convening authority's legal duty to honor and effectuate a pretrial agreement (PTA). A convening authority has no statutory or regulatory authority under any specific provision in the 2019 *MCM* to effectuate a sentence limitation of a PTA, known as a "plea agreement" in the MJA. Instead, such agreements have binding effect upon their acceptance by a military judge.[25] An accused automatically gets the benefit of the agreement without the convening authority having to take action or approve a sentence to comply with the agreement. However, this novel approach to the manner by which agreed-upon sentence limitations are enforced in the MJA takes effect only in cases unlike [*63] Appellant's "in which all specifications allege offenses committed on or after January 1, 2019." *See* Exec. Order 13,825, § 10, 83 Fed. Reg. at 9890-91. Conversely, in cases like Appellant's where there is a conviction for at least one offense committed after 24 June 2014 and before 1 January 2019 that was referred on or after that date, a PTA may be consequential and the convening authority would be required to follow the legacy provisions of Article 60 (2016 *MCM*), and take action to both honor and effectuate a sentence as agreed to in the PTA. This is perhaps best illustrated by

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[25] *Compare* Article 53a(d), UCMJ, 10 U.S.C. § 853a(d) (2019 *MCM*), *and* R.C.M. 1002(a)(2) (2019 *MCM*), *and* R.C.M. 1005, Discussion (2019 *MCM*), *with* Article 60(c)(4)(C), UCMJ (2016 *MCM*), *and* R.C.M. 1107(d)(1)(C)(ii) (2016 *MCM*).

two examples that show the different applications of Article 60. The first example closely tracks Appellant's case in which the convening authority properly applied Article 60 and R.C.M. 1109 and 1110 from the 2019 *MCM*. The second example reveals when a convening authority would be required to apply Article 60 and R.C.M. 1107[26] from the 2016 *MCM* if Appellant's sentence had been different.

Here, Appellant was convicted of offenses committed before 1 January 2019 that were referred after that date. Appellant's adjudged sentence that included confinement for eight months was less than the one-year limitation on confinement in Appellant's PTA. It follows then that granting sentencing relief (i.e., taking action) was not *required* under Article 60 in the 2016 *MCM* that was in effect on the date of Appellant's earliest offense. Because the convening authority was not compelled to follow any legacy provisions of Article 60 that predate implementation of Article 60 in the 2019 *MCM*, the convening authority could effectuate Appellant's sentence, as he did, by taking no action in accordance with Article 60 and R.C.M. 1109 and 1110 as incorporated in the 2019 *MCM*.

Conversely, if Appellant's adjudged sentence exceeded this one-year limitation (e.g., 15 months), then the convening authority would have been *required* to follow Article 60 and R.C.M. 1107 in the 2016 *MCM* "to the extent that Article 60 . . . *requires action by the convening authority on the sentence*" as directed by Exec. Order, § 6(b)(1) [*65] . (Emphasis added). This is so because there is no legal authorization in the 2019 *MCM* for the convening authority to honor the agreement and effectuate the sentence—as there is in the 2016 *MCM*—by either granting clemency[27] or enforcing a sentence limitation in a PTA.[28] In such a case the convening authority would be *required* to grant relief (i.e., take action) on the sentence by following Article 60 in effect on the date of the earliest offense.[29] Without the legacy provision in Article 60 that allows the convening authority to take the required action on the sentence,[30] the convening authority would be in breach of the PTA if Article 60 (2019 *MCM*) was the only legal authority the convening authority had to effectuate a sentence.

In cases that are referred to trial on or after 1 January 2019, there can [*66] be no mistaking Congress' intent that a convening authority's taking "no action" on the sentence effectuates the adjudged sentence in the same way that a convening authority once approved the sentence without modification under the former Article 60 (2016 *MCM*). And, there is no mistaking Congress' assigning to the President the authority to implement the MJA, consistent with this intent, no later than 1 January 2019. Significantly, perhaps, the CAAF has looked to dates of legislative enactment when it "harmonize[s] independent provisions of a statute." *Christian*, 63 M.J. at 208 ("It is a well-established principle of statutory construction that, absent a clear direction of Congress to the contrary, a law takes effect on the date of its

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[26] R.C.M. 1107 implements Article 60 in the 2016 *MCM*. R.C.M. 1107(d)(1)(C)(ii) guides a convening authority to act on a sentence limitation in a PTA. It states,

> *Pretrial agreement*. If a pretrial agreement has been entered into by the convening authority and the accused, as authorized by R.C.M. 705, the convening authority or another person authorized to act under this rule shall have the authority to [*64] approve, disapprove, commute, or suspend a sentence, in whole or in part, pursuant to the terms of the pretrial agreement.

[27] In cases like Appellant's, a convening authority has no authority in the 2019 *MCM* to reduce or commute a sentence of confinement, if the total period of confinement imposed for all offenses is greater than six months. *See* Article 60a(b)(1)(A), 10 U.S.C. § 860a(b)(1)(A), and R.C.M. 1109(c)(5)(A) (2019 *MCM*) (permitting a convening authority to "reduce, commute, or suspend, in whole or in part" the confinement portion of a sentence that is *six months or less*).

[28] In cases like Appellant's, there is no provision in the 2019 *MCM* that is similar to Article 60(c)(4)(C), UCMJ (2016 *MCM*), that would authorize a convening authority to honor and effectuate an agreed-upon sentencing limitation in a PTA:

> If a pre-trial agreement has been entered into by the convening authority and the accused, as authorized by Rule for Courts-Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pretrial agreement . . . .

Article 60(c)(4)(C), UCMJ (2016 *MCM*). Notably, Appellant's PTA provided that the convening authority "agrees to, if adjudged, approve no sentence of confinement in excess of one (1) year, in accordance with R.C.M. 1107(d)(1)(C)(ii)," which implements Article 60(c)(4)(C) (2016 *MCM*), and was the correct authority to cite.

[29] Of note, nothing in the MJA or the President's implementation of the Act operate to repeal the R.C.M. that applied Article 60 in effect before 1 January 2019.

[30] *See, e.g.*, Article 60(c)(4)(C), UCMJ (2016 *MCM*).

enactment." (citations omitted)). Additionally, our superior court has "continually reiterated that the Uniform Code of Military Justice controls when an executive order conflicts with part of that Code." *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *United States v. Gonzalez*, 42 M.J. 469, 474 (1995); *United States v. Mance*, 26 M.J. 244, 252 (1988)).

Here, there is no conflict between the President's implementation of the MJA in Executive Order 13,825 and Article 60 (2019 *MCM*) so long as Exec. Order, §§ 5 and 6(b), are each given "full force and effect," *Kelly*, 77 M.J. at 407, on 1 January 2019. Under Exec. Order, § 6(b)(1), a convening authority [*67] looks to the legacy provisions of Article 60 to the extent that a convening authority may be required to take action on the sentence. Because taking "action" in the 2019 *MCM* means "granting relief," practitioners accustomed to "action" being synonymous with effectuating the results of a court-martial in a pre-2019 *MCM* provision may best relate to the contemporary meaning of "action" if § 6(b)(1) is restated thusly,

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> (1) requires [granting relief] by the convening authority on the sentence[31]
>
> . . . .

Exec. Order 13,825, 83 Fed. Reg. at 9890.

This reading of § 6(b)(1) affords "action" its new meaning that is narrower than its legacy use in prior editions of the *Manual*. *See United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (questions of interpretation should begin and end with the text, "giving each word its ordinary, contemporary, and common meaning" (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 (2017))). "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their [*68] ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019) (alteration in original) (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (2018)). And sometimes, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999) (citation omitted). Giving "action" a contemporary meaning is not only coherent with the new use of the term in Article 60, UCMJ, and R.C.M. 1109 and R.C.M. 1110 in the 2019 *MCM*, it is also consistent with the use of the term where it appears again in Exec. Order 13,825, § 6(b)(2), which authorizes a convening authority to follow a legacy provision of Article 60 to the extent that it "*permits* action by the convening authority on the findings." 83 Fed. Reg. at 9890 (emphasis added). A contemporary understanding of "action" as synonymous with granting relief renders § 6(b)(2) to mean that it "permits a convening authority to disapprove a finding of guilty or approve a finding of guilty only of a lesser offense" in cases in which a legacy provision of Article 60 grants an accused this right.[32]

Most significantly, a contemporary reading avoids a de facto nullification of the President's implementation of R.C.M. 1109 and 1110 in every case where there is a conviction for at least one offense committed before, and referred on or after 1 January 2019, and a convening authority determines action on the sentence is not warranted. It makes little sense for the President to implement Articles 60a and 60b, UCMJ, 10 U.S.C. §§ 860a, 860b, and R.C.M. 1109 and 1110 effective on 1 January 2019, and then hold their application in abeyance without some positive statement of intent to that effect in the implementation, as was the case for other articles of the UCMJ and Rules for

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[31] Or, to rephrase grammatically, ". . . requires the convening authority to grant relief on the sentence."

[32] *See, e.g.*, Article 60(c)(3), UCMJ, 10 U.S.C. § 860(c)(3), as it appears in the *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*), which gives plenary authority to a convening authority to approve or disapprove the findings of a court-martial:

> Action on the findings of a court-martial by the convening authority or other person acting on the sentence [*69] is not required. However, such person, in his sole discretion, may—(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Courts-Martial.[33] Moreover, this reading of § 6(b)(1) affords an accused a substantive right to have a convening authority honor a PTA—and not merely specifying the manner by which a convening authority effectuates a sentence—that is in harmony [*70] with other substantive provisions of § 6(b) that also protect an accused's rights under legacy provisions of Article 60.[34],[35]

Finally, affording "action" a contemporary meaning in the President's Executive Order reveals that the *Finco* court's reliance on Article 60(c)(2)(A), UCMJ (2016 *MCM*), to understand when a convening authority's action on the sentence may be required is inapt. As noted previously, this provision states without qualification that "[a]ction on the sentence of a court-martial shall be taken by the convening authority." Because taking "action" in the 2019 *MCM* means "granting relief," application of a contemporary meaning to this legacy provision of Article 60 (2016 *MCM*) would require a convening authority to grant relief in every case, which is an unreasonable result that the President [*71] could not have intended when he issued Exec. Order 13,825. *See United States v. Ortiz*, 76 M.J. 189, 192 (C.A.A.F. 2017) ("From the earliest times, we have held to the 'plain meaning' method of statutory interpretation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result."), *aff'd*, 138 S. Ct. 2165, 201 L. Ed. 2d 601 (2018).

In summary, in cases like Appellant's where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, a convening authority follows Article 60 (2019 *MCM*) and R.C.M. 1109 and 1110 that implement the new Article 60 unless an appellant benefits from the discretion that Congress conferred on a convening authority in a prior version of Article 60 that was in effect when an appellant committed the earliest offense. If the convening authority determines that granting sentencing relief (i.e., action) is not required under that earlier version of Article 60, for example, to enforce a limitation on sentence in a PTA, or that relief that a convening authority has the power to grant is not warranted upon consideration of an appellant's clemency submission and other matters, then the convening authority follows Article 60 and R.C.M. 1109 and [*72] 1110 in the 2019 *MCM* to effectuate the sentence. If, however, the convening authority determines that action on the sentence is required under the version of Article 60 in effect on the date of the earliest offense because granting relief is required to effectuate the sentence—as may be the case with a sentence limitation in a PTA—then the convening authority is required to follow a provision in an earlier version of Article 60 and the corresponding R.C.M. that give effect to the convening

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[33] *See* Exec. Order, § 10(b) stating that new Rules for Courts-Martial implementing new articles that change sentencing procedures apply "only to cases in which all specifications allege offenses committed on or after January 1, 2019." *See also*, Exec. Order, § 6(a), "The amendments to Articles 2, 56(d), 58a, and 63 of the UCMJ enacted by sections 5102, 5301, 5303, and 5327 of the MJA apply only to cases in which all specifications allege offenses committed on or after January 1, 2019." Notably, Articles 60a and 60b, UCMJ (2019 *MCM*), are not among the UCMJ provisions that the President implemented effective 1 January 2019, and then expressly held their application in abeyance until all findings of guilty are to offenses that an appellant commits on or after the date of implementation.

[34] The guidance in Exec. Order, § 6(b), addresses an accused's substantive rights in regard to the findings (Subsection (2)), the adjudged sentence (Subsections (1) and (5)), both the finding and the sentence (Subsection (3)), and a proceeding in revision or a rehearing (Subsection (4)) under prior versions of Article 60 that were in effect on the date of an earlier offense. *See* Exec. Order 13,825, § 6(b)(1)-(5), 83 Fed. Reg. at 9890.

[35] Although questions about the meaning and applicability of the President's implementation of the MJA can be resolved without looking beyond the text of each, it is instructive that Congress intended an accused to benefit from previous amendments to Article 60, UCMJ (2012 *MCM*). When Congress substantially limited a convening authority's ability to approve findings and sentences under Article 60, UCMJ (2016 *MCM*), in the FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 956-57 (26 Dec. 2013), it directed the change to be applied prospectively "with respect to an offense . . . committed on or after" the effective date. In the next fiscal year's NDAA, Congress addressed the applicability of Article 60 (2016 *MCM*) when offenses straddled the FY14 NDAA's effective date:

> With respect to the findings and sentence of a court-martial that includes both a conviction for an offense committed before [24 June 2014] and a conviction for an offense committed on or after that effective date, the convening authority shall have the same authority to take action on such findings and sentence as was in effect on the day before such effective date[.]

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3365 (19 Dec. 2014).

authority's statutory responsibility to act on the sentence.

E. Plain Error Standard of Review as Applied to Appellant's Case

As a final matter, I also depart from Senior Judge Lewis' separate opinion concurring in part and in the result, *supra*, which, like this court's *Finco* decision, I find misapplies the plain error standard of review, and that would remand an appellant's record to the Chief Trial Judge, Air Force Trial Judiciary, upon a *sua sponte* finding of some colorable showing of possible prejudice.[36]

Seven months before this court decided *Finco*, but still after the convening authority effectuated Appellant's sentence, a panel consisting of three different judges of this court than the judges empaneled [*73] to decide *Finco* issued its decision in *Moody-Neukom*. In that case, the convening authority "elected to take no action with respect to the findings or sentence," and thereby effectuated a sentence that consisted of a bad-conduct discharge, confinement for one month, and reduction to the grade of E-1. *Moody-Neukom*, unpub. op. at *1. Like the appellants in *Finco* and *Barrick*, and Appellant's case, the appellant in *Moody-Neukom* was found guilty of offenses he committed before 1 January 2019 that were referred after that date. *Id.* at *2. *Moody-Neukom* was submitted to this court for review on its merits without any assignments of error. *Id.* at *1.

In conducting our review of *Moody-Neukom*,[37] we looked favorably on the decision of the convening authority to apply the procedural provisions of R.C.M. 1109 and 1110 in the 2019 *MCM* to effectuate the sentence by taking "no action." *Id.* at *8. In concluding that the findings and sentence as entered by the military judge were correct in law and fact, and that no error materially prejudicial to the appellant's substantial rights occurred, *id.*, we observed the following:

> Under the new procedures, the convening authority is no longer required to take action on the results of every court-martial. [*74] *See* R.C.M. 1109; R.C.M. 1110. Instead, as in this case, the convening authority may, after consulting with the staff judge advocate or legal advisor and considering any matters timely submitted by the accused or a crime victim, decline to take action on the sentence. R.C.M. 1109(c), (d), (g).

Id. at *3.

In the case before us, the convening authority did not have the benefit of this court's conflicting decisions in *Moody-Neukom, Finco*, and *Barrick* when he consulted with his SJA before issuing his Decision on Action. Before this court issued its *Finco* decision, no opinion of this court or our superior court had addressed the duty and responsibility of a convening authority to effectuate a sentence in accordance with the President's implementation of the MJA. Under a presumption of regularity, the convening authority and the SJA on which he relied for advice would have looked for guidance in AFI 51-201, Section 13D, which instructed "convening authorities to specify 'no action' if not granting relief," as found by this court's majority opinion in *Barrick*, unpub. op. at *3-4. As the opinion of the court sensibly suggests in the case before us, the convening authority likely relied on this guidance and then "expressed his decision [*75] to not grant relief as 'no action.'" I agree and reach the same conclusion, and harbor doubt that this court can properly reconcile presumption of regularity with a finding of plain error on a matter that was not an issue in any appellate court when the convening authority effectuated Appellant's sentence after he consulted with his SJA in February 2019.

After the conclusion of his court-martial, Appellant did not raise a motion under R.C.M. 1104(b)(2)(B) to challenge the form or legality of the convening authority's decision on action. Under like circumstances, this court's *Finco* decision found plain error as to the decision to take no action on the sentence. *See Finco*, unpub. op. at *15. To establish plain error, an appellant must show: "(1) error that is (2) clear or obvious and (3)

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[36] Senior Judge Lewis concludes there was no prejudice to Appellant because there was no uncertainty whether or not the convening authority made a decision on Appellant's clemency request to defer mandatory forfeiture. It is only because the convening authority denied that request in writing as required by R.C.M. 1103(d)(2), that the separate opinion found no prejudice. Based on this rubric, prejudice would be evident unless a convening authority grants clemency relief or denies a deferment when effectuating a sentence, or perhaps if an appellant waives clemency.

[37] Like the Appellant in the case before us, the appellant in *Moody-Neukom* did not raise the issue of the applicability of Article 60, UCMJ (2019 *MCM*) and R.C.M. 1109 and 1110 (2019 *MCM*) with this court. However, unlike the detailed analysis in the case under consideration here, our opinion concluded that the convening authority properly followed these new provisions to effectuate an appellant's sentence.

results in material prejudice to his substantial rights." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (citation omitted). In assessing plain error, the CAAF will "consider whether the error is obvious at the time of appeal, not whether it was obvious at the time of the court-martial," *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008), or more to the point in the case before us, at the time the convening authority effectuated Appellant's sentence.

To determine whether error is "clear and obvious" at the time of appeal, [*76] the CAAF will consider, among other circumstances, whether Courts of Criminal Appeals have "reached conflicting conclusions on the question" that is in issue. *United States v. Gonzales*, 78 M.J. 480, 486-87 (C.A.A.F. 2019). It stands to reason that error premised on a conclusion of law by one panel of a Court of Criminal Appeals that directly conflicts with another is neither clear nor obvious.

Before today, this court issued three unpublished opinions, *Moody-Neukom, Finco*, and *Barrick*, which, as Chief Judge J. Johnson observes as to the latter two, "came to very different conclusions." Of the three, *Finco* is the outlier in finding plain error. Our sister-service court in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020), reached a decision that was similar to *Finco* in finding error. I am not aware of any opinion of our superior court or other opinion of our sister courts that address how a convening authority effectuates a sentence under the President's implementation of the MJA. Because of the conflict in this court's decisions it is noteworthy that my esteemed colleagues call upon the Joint Service Committee on Military Justice (Senior Judge Lewis' opinion, *supra*) or our superior court to help our court in "settling the law in this area," (according to Chief Judge J. Johnson, *infra*), respectively. [*77] Entreaties such as these are hardly grounds upon which to set a course for plain error.

Because the convening authority correctly applied existing law as reflected in AFI 51-201 that guides convening authorities to specify "no action" if not granting relief, it would seem that the law became unsettled in our jurisdiction when this court issued its *Finco* decision while Appellant's case was on appeal. I would find, then, that Appellant cannot satisfy the second prong of the plain error test—that the error be clear or obvious under existing law. Thus, remand of the record to the Chief Trial Judge, Air Force Trial Judiciary, is not appropriate. This is so even if there was error to correct on appeal as is the view of a majority of the judges on this court.

F. Conclusion

Although the path taken by the opinion of the court is different from my own, I concur in the result that the convening authority did not commit error when he effectuated Appellant's sentence by taking "no action in the case." There is no tension, much less contradiction, with Exec. Order 13,825, § 5, or other provisions of the President's implementation of the MJA, so long as taking "action" on the sentence is given its contemporary [*78] meaning, "granting relief," where the term "action" appears in Exec. Order 13,825, § 6(b)(1). In the case before us, the convening authority granted no relief so he took no action.

I do not reach the question of prejudice, however. In many if not all cases referred on and after 1 January 2019, it may not matter if it is determined whether or not a convening authority erred in cases like Appellant's where no action is taken, or conversely, a case where a convening authority approves the sentence even though the applicable provision of Article 60 does not require action to effectuate the sentence. What matters is that a convening authority makes clear whether sentencing relief has been granted an appellant and to what extent. So long as the sentence that the convening authority intended to effectuate is apparent from the decision memorandum,[38] an appellant may not be prejudiced even if a convening authority's compliance with Executive Order 13,825 may be interpreted differently by Courts of Criminal Appeals or within such Courts.

Unlike the view of the majority of my esteemed colleagues, I find that the convening authority fully complied with the President's implementation of the MJA, [*79] and did not err by taking "no action" on the sentence that was adjudged after Appellant's trial, and that the military judge correctly entered as the judgment of the court-martial.

Dissent by: J. JOHNSON (In Part)

Dissent

[38] *See, e.g., United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (requiring a "clear and unambiguous convening authority action").

J. JOHNSON, Chief Judge (concurring in part and dissenting in part), joined by Senior Judge MINK, Judge KEY, and Judge CADOTTE:

I concur with the opinion of the court with respect to the conclusion that Appellant is not entitled to relief for the conditions of his post-trial confinement or facially unreasonable appellate delay. However, I cannot agree with the conclusion that there was "no error" when the convening authority purported to "take no action" in Appellant's case.

Article 60a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 860a, which went into effect on 1 January 2019, does not require the convening authority to take action on the sentence of a court-martial. *See also* R.C.M. 1109(g) (explaining procedures depending on whether or not the convening authority "decides to act on the sentence" in certain courts-martial); R.C.M. 1110(e) (explaining procedures depending on whether or not the convening authority decides to take action on the findings or sentence in certain courts-martial).[1] The convening authority "may act [*80] on the sentence" only as provided in subsections (b), (c), or (d) of Article 60a, UCMJ, which control the extent to which the convening authority may reduce, commute, or suspend the sentence. 10 U.S.C. § 860a(a)(1)(A). Under current law, the convening authority is required to make a decision whether to act, which must be provided to the military judge, accused, and victim of any offense. 10 U.S.C. § 860a(f)(1).

However, as the opinion of the court describes, the version of Article 60, UCMJ, 10 U.S.C. § 860, in effect prior to 1 January 2019 did require the convening authority to take action on the sentence of a court-martial in every case, regardless of whether the convening authority intended to modify the sentence or not. *See* 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*) ("Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section.") Furthermore, Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, in effect on the earliest date of any offense of which the accused was convicted "shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on [*81] the sentence. . . ." *See* 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018).

In the instant case, the earliest date of an offense of which Appellant was convicted is 6 January 2018. Therefore, in accordance with the Executive Order, the version of Article 60, UCMJ, in effect prior to 1 January 2019 applied to the convening authority to the extent that it required him to take action. Before 1 January 2019, Article 60, UCMJ, required the convening authority to take action in every case. Yet in this case, the convening authority signed a "Decision on Action"—as if he were operating under the post-1 January 2019 Article 60a, UCMJ—in which he affirmatively stated "I hereby take no action" in Appellant's case.

Appellant's is not the first case in which this court has addressed such a situation. *See, e.g., United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.). Our prior decisions have produced three interpretations of a convening authority's stated decision to take "no action" where at least one offense predates 1 January 2019. Those three interpretations are reflected in the opinion of the court and [*82] the two opinions concurring in the result in the instant case.

On one end of the spectrum is the majority opinion in *Barrick*, which concluded the convening authority's decision to take no action was "the equivalent of action," and "met the requirements of Article 60, UCMJ . . . inasmuch as it required 'action' in this case." *Barrick*, unpub. op. at *4. *Barrick* further found that the convening authority's decision "also complied with the provisions of R.C.M. 1109, requiring convening authority action only when affecting the sentence," as well as Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), which "advises convening authorities to specify 'no action' if not granting relief" under the applicable version of Article 60. *Id.* In *Barrick*, the majority concluded "[t]he convening authority's action to provide no relief was 'clear and unambiguous,'" and there was no error to correct. *Id.* at *5 (citing *United States v. Politte*, 63 M.J. 24, 25-26 (C.A.A.F. 2006)). In other words, the Executive Order and its reference to the prior version of Article 60, UCMJ, simply required the convening authority to make a clear and unambiguous decision regarding whether to grant sentence relief; the convening authority's decision not to grant relief, [*83] expressed as a decision to take "no action," was legally

[1] References in this opinion to the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

sufficient under Article 60, UCMJ, as well as consistent with the current versions of R.C.M. 1109 and AFI 51-201. The opinion of the court in the instant case adopts a similar analysis and conclusion.

Senior Judge Posch's opinion concurring in the result in *Barrick*, which he restates here in Appellant's case, espoused a different interpretation. *Barrick*, unpub. op. at *11-44 (Posch, S.J., concurring in the result). Like the majority opinion, the concurring opinion found no error by the convening authority. *Id.* at *43-44. Unlike the majority opinion, it found the convening authority's determination not to take action was not "action" within the meaning of the prior version of Article 60, UCMJ. *Id.* at *21. However, it determined this was proper, because it discerned the intent of the Executive Order was not to require action in every case where an offense occurred prior to 1 January 2019. *Id.* at *25-33. Instead, the Executive Order's direction that the prior Article 60, UCMJ, applies "*to the extent that [it] requires action* by the convening authority on the sentence" (emphasis added) meant, in the context of other provisions of the Executive Order and the current Rules for Courts-Martial, [*84] action was required only when the convening authority was "required to grant relief (i.e., take action) on the sentence." *Id.* at *34. In *Barrick*, the pretrial agreement had no effect on the sentence the convening authority could approve; therefore:

> Because the convening authority was not compelled to follow any legacy provisions of Article 60 that predate implementation of Article 60 in the 2019 MCM, the convening authority could effectuate the sentence, as he did, by taking no action in accordance with Article 60 and R.C.M. 1109 and 1110 as codified in the 2019 MCM.

Id. at *36.[2]

In *Finco*, a different panel of this court came to very different conclusions. *See Finco*, unpub. op. at *11-17. Unlike the majority opinion in *Barrick*, but like the concurring opinion in *Barrick, Finco* found that the convening authority's statement "I take no action on the sentence of this case" was not taking "action" within the meaning of the prior version of Article 60, UCMJ. *Id.* at *2, *12-13; *see also United States v. Coffman*, 79 M.J. 820, 823 (A. Ct. Crim. App. 2020) ("[S]tating 'No Action' does not constitute taking action in a case.") However, unlike the concurring opinion in *Barrick, Finco* held that this failure to take action was error. *Finco*, unpub. op. at *12-13. Noting that the appellant had not challenged the [*85] convening authority's decision as "incomplete, irregular, or contain[ing] error" pursuant to R.C.M. 1104(b)(2)(B), *Finco* analyzed the convening authority's failure to act for plain error under the "colorable showing of possible prejudice" standard. *Id.* at *13-16 (quoting *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (additional citation omitted)). The court found such a colorable showing under the circumstances in *Finco*, reasoning: "If the convening authority failed to take action on the entire sentence—as his memorandum indicates he did—then we are unsure whether he made a decision on [the appellant's] clemency request which was within the convening authority's power to grant." *Id.* at *16.[3] Senior Judge Lewis's opinion concurring in the result in the instant case applies *Finco's* plain error analysis to the record before us, but unlike *Finco* finds no plain error in Appellant's case.

My own view differs from each of these three opinions, although it is closest to *Finco*. Like *Finco* (and *Coffman*), and unlike the majority opinion in *Barrick*, I conclude that a convening authority's statement that he or she takes "no action" on the results of a court-martial is not "action" within the meaning of the Executive Order or prior version of Article 60, UCMJ. Giving effect to the [*86] plain meaning of the convening authority's words, he made a decision not to take action on the sentence despite the requirement to do so. It appears to me Appellant's case was processed in accordance with the rules and procedures applicable to the post-1 January 2019 version of Article 60a, UCMJ—which does not require the convening authority to take action on the sentence—without taking into account the application of the prior version of Article 60, UCMJ, as the Executive Order requires.

Like *Finco* (and *Coffman*), and unlike Senior Judge Posch's concurring opinion in *Barrick* and in this case, I further conclude that the convening authority's failure to

[2] The opinion states that "[u]nless otherwise noted . . . all references to the convening authority's powers and responsibilities in Article 60, UCMJ, in the 2019 MCM are to Articles 60, 60a, 60b, and 60c, UCMJ, 10 U.S.C. §§ 860, 860a, 860b, 860c, collectively." *Barrick*, unpub. op. at *8 n.4 (Posch, S.J., concurring in the result).

[3] As the opinion of the court notes, this court's decision in *Finco* evidently guided the Government's response to our show cause order in the instant case, in which the Government conceded error but argued corrective action was not required under a plain error standard of review.

take action was an error. The concurring opinion in *Barrick* attempts at some length to reconcile the Executive Order's direction to apply the prior Article 60, UCMJ, "to the extent that" it requires action by the convening authority, with the current Rules for Courts-Martial and AFI 51-201, created in light of the post-1 January 2019 process under Article 60a, UCMJ, which does not require convening authority action. *See Barrick*, unpub. op. at *11-44 (Posch, S.J., concurring in the result). Yet, giving effect to the plain meaning of the [*87] words of the statute, the prior version of Article 60, UCMJ, requires action by the convening authority in every case. *See* 10 U.S.C. § 860(c)(2)(A) (2016 *MCM*) ("Action on the sentence of a court-martial shall be taken by the convening authority . . . ."); *see also United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (internal quotation marks and citations omitted) ("[C]ourts must give effect to the clear meaning of statutes as written and questions of statutory interpretation should begin and end . . . with [statutory] text, giving each word its ordinary, contemporary, and common meaning.").

However, unlike *Finco*, I do not believe testing for prejudice is the appropriate paradigm for resolving such errors. This court's mandate under Article 66(d)(1), UCMJ,[4] is to approve "only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact *and determines, on the basis of the entire record, should be approved*." (Emphasis added). As the CAAF has made clear, our responsibility to determine whether the results of a court-martial "should be approved" is not simply a question of prejudice. *See, e.g., United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted) (holding a Court of Criminal Appeals has authority under Article 66, UCMJ, to grant relief [*88] without a showing of actual prejudice if it deems relief appropriate under the circumstances). Moreover, "[i]n some cases, maintaining the integrity of the military justice system enacted by Congress may require this court to take action that is not requested by any party." *United States v. Ramirez*, No. ACM S32538, 2020 CCA LEXIS 20, at *17 (A.F. Ct. Crim. App. 24 Jan. 2020) (unpub. op.) (citing *United States v. Montesinos*, 28 M.J. 38, 47 (C.M.A. 1989) (affirming Court of Criminal Re-view's decision vacating convening authority's *ultra vires* set aside of findings previously affirmed by the appellate court and rejecting the appellant's attempt to withdraw the case from appellate review)).

The convening authority's action is required to be "clear and unambiguous." *Politte*, 63 M.J. at 26. In the past, this court has repeatedly returned records of trial for remand to the convening authority to correct actions that were incomplete or defective, without analyzing whether the error had prejudiced the appellant. *See, e.g., Ramirez*, unpub. op. at *16-17 (convening authority's action granting deferment without request by appellant was ultra vires); *United States v. Smith*, No. ACM 39463, 2019 CCA LEXIS 307, at *7-8 (A.F. Ct. Crim. App. 12 Jul. 2019) (unpub. op.) (action failed to include illegal pretrial confinement credit), *rev. denied*, 80 M.J. 63 (C.A.A.F. 2020); *United States v. Del Toro*, No. ACM 39225, 2018 CCA LEXIS 219, at *2 (A.F. Ct. Crim. App. 27 Apr. 2018) [*89] (unpub. op.) (per curiam) (action undated); *United States v. Duran*, No. ACM S32407, 2017 CCA LEXIS 381, at *1-2 (A.F. Ct. Crim. App. 31 May 2017) (un-pub. op.) (per curiam) (action failed to include deferment of reduction in grade); *United States v. Perea*, No. ACM S32408, 2017 CCA LEXIS 353, at *4-5 (A.F. Ct. Crim. App. 24 May 2017) (unpub. op.) (action failed to include deferment of reduction in grade). In the instant case, the convening authority's declaration that he "take[s] no action" was at best an ambiguous and defective execution of the requirement that he take action on the sentence in accordance with the Executive Order and Article 60, UCMJ; more likely, given the language used, the convening authority did not intend to take action at all because the requirement to do so was overlooked, and the case was erroneously processed entirely under the new statute and rules. The essential question is not whether the convening authority's intention to deny clemency was clear, or whether the error was obvious, or whether Appellant was prejudiced by the error. I do not believe we are required to, nor should we, tolerate such a fundamental misstep in military justice procedure. Accordingly, I would remand the record to [*90] the Chief Trial Judge, Air Force Trial Judiciary, to resolve the error.

One further point: these are new legal questions brought on by the changes in the law that went into effect on 1 January 2019. As described above, these questions have resulted in a diversity of opinions on the court. If, at some point, the CAAF were to address these questions, our superior court's guidance could go a long way toward settling the law in this area.

End of Document

[4] Formerly under Article 66(c), UCMJ. *See* 2016 *MCM*.

United States v. Barrick

United States Air Force Court of Criminal Appeals

September 30, 2020, Decided

No. ACM S32579

Reporter
2020 CCA LEXIS 346 *

UNITED STATES, Appellee v. John T. BARRICK, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Steven J. Grocki. Sentence: Sentence adjudged 26 February 2019 by SpCM convened at Nellis Air Force Base, Nevada. Sentence entered by military judge on 19 March 2019: Bad-conduct discharge, confinement for 45 days, forfeiture of $1,120.00 pay per month for 2 months, and reduction to E-1.

Core Terms

convening, sentence, no action, effectuate, military, court-martial, take action, adjudged, grant relief, post-trial, legacy, cases, provisions, executive order, memorandum, provision of an article, earliest, commission of the offense, specification, find guilty, Courts-Martial, offenses, rights, implemented, omission, compliance, determines, clemency, complied, appears

Case Summary

Overview
HOLDINGS: [1]-A military judge properly convicted and sentenced a servicemember because, inter alia, the convening authority's decision to "take no action" on the findings or sentence was memorialized in his memorandum to the military judge, the judge's subsequent entry of judgment reflected "all post-trial actions by the convening authority," including the de facto approval of the sentence, neither party moved for correction of the decision on action or entry of judgment under R.C.M. 1104(b)(2)(B), (C), Manual Courts-Martial, while the statement of trial results omitted the command that convened the court-martial, it did not render the entry of judgment invalid where it was corrected one day before it was signed, and the record was substantially complete under Unif. Code Mil. Justice art. 54(c)(2), 10 U.S.C.S. § 854(c)(2).

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN1[] **Posttrial Procedure, Actions by Convening Authority**

Air Force Instruction 51-201, § 13D (18 Jan. 2019), Administration of Military Justice, advises convening authorities to grant relief as circumscribed by the applicable version of Article 60, UCMJ. Additionally, it advises convening authorities to specify "no action" if not granting relief, which would include effecting "action" under the applicable version of Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN2 **Trial Procedures, Deliberations & Voting**

R.C.M. 1101(a)(3), (6), Manual Courts-Martial, lists required contents of a statement of trial results, including the command by which the court-martial was convened and any additional information required under regulations prescribed by the Secretary concerned.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

HN3 **Sentences, Deliberations, Instructions & Voting**

An entry of judgment entered under R.C.M. 1101, Manual Courts-Martial, should provide a complete statement of the findings and the sentence reflecting the effect of any post-trial modifications.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > ... > Courts Martial > Sentences > Punitive Discharge

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

HN4 **Trial Procedures, Appeal by United States**

Whether a record of trial is complete is a question of law that appellate courts review de novo. Unif. Code Mil. Justice art. 54(c)(2), 10 U.S.C.S. § 854(c)(2), requires a complete record of the proceedings and testimony to be prepared for any court-martial resulting in a punitive discharge. The implementing rule states the record of trial shall include, inter alia, any appellate exhibits. R.C.M. 1112(b)(6), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

HN5 **Posttrial Procedure, Record**

In the context of a courts-martial, in determining whether a record of trial is complete, the threshold question is whether the omitted material was substantial, either qualitatively or quantitatively. Each case is analyzed individually to decide whether an omission is substantial. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. A record may be substantially complete even if an exhibit is missing.

Counsel: For Appellant: Lieutenant Colonel R. Davis Younts, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Jessica L. Delaney, USAF; Mary Ellen Payne, Esquire.

Judges: Before POSCH, RICHARDSON, and MEGINLEY, Appellate Military Judges. Judge RICHARDSON delivered the opinion of the court, in which Judge MEGINLEY joined. Senior Judge POSCH filed a separate opinion concurring in the result.

Opinion by: RICHARDSON

Opinion

RICHARDSON, Judge:

A special court-martial composed of a military judge alone convicted Appellant, in accordance with his pleas pursuant to a pretrial agreement (PTA), of one specification of going from his appointed place of duty, in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886; one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907; and one specification each of wrongfully using [*2] psilocybin mushrooms, cocaine, marijuana, and 3,4-methylenedioxymethamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1],[2] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 45 days, forfeiture of $1,120.00 pay per month for two months, and reduction to the grade of E-1. The PTA did not impact the convening authority's ability to effectuate the sentence as adjudged; he provided no relief at action with respect to the findings or sentence.

Appellant raises three assignments of error relating to the post-trial processing in his case. We consider whether (1) issuance of a corrected copy of the Statement of Trial Results (STR) invalidates the entry of judgment (EoJ), (2) failure to identify the command of the convening authority in the STR invalidates the EoJ, and (3) a missing appellate exhibit from the record of trial entitles Appellant to sentence appropriateness relief. We also consider the convening authority's action with respect to the sentence. We find no error materially prejudicial to a substantial right of Appellant and affirm the findings and sentence.

I. Background

The [*3] offenses for which Appellant was found guilty and sentenced occurred between on or about 1 May 2018 and on or about 9 November 2018. The convening authority referred the charges and specifications for trial by special court-martial on 15 January 2019. Accordingly, Appellant's court-martial was generally subject to the substantive provisions of the UCMJ and sentencing procedures in effect before 1 January 2019, and procedural provisions of the Rules for Courts-Martial (R.C.M.) in the 2019 version of the *Manual for Courts-Martial*, including rules for post-trial processing. *See also* Exec. Order 13,825, 83 Fed. Reg. 9889, 9890 (8 Mar. 2018).

II. Discussion

A. Decision on Action

Appellant notes in his assignment of error brief, "Here the convening authority took no action and it is reasonable to consider the convening authority's decision not to act as the equivalent of action." We agree. The convening authority's decision met the requirements of Article 60, UCMJ, 10 U.S.C. § 860 (2016 *MCM*) inasmuch as it required "action" in this case. We find this decision also complied with the provisions of R.C.M. 1109, requiring convening authority action only when affecting the sentence. In coming to these conclusions, we note ***HN1***[⬆] Air Force Instruction [*4] 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), correctly advises convening authorities to grant relief as circumscribed by the applicable version of Article 60, UCMJ. Additionally, it advises convening authorities to specify "no action" if not granting relief, which would include effecting "action" under the applicable version of Article 60, UCMJ.

In the record, we see no indicia of confusion over, or objection to, this new way to effect an old rule. The convening authority's decision to "take no action" on the

[1] Unless otherwise noted, references to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM). Unless otherwise noted, all other references to the UCMJ and to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The uses of cocaine and marijuana were on divers occasions.

findings or sentence is memorialized in his memorandum to the military judge. The military judge's subsequent EoJ reflects "all post-trial actions by the convening authority," including the de facto approval of the sentence. Neither party moved for correction of the decision on action or EoJ. *See* R.C.M. 1104(b)(2)(B), (C). The convening authority's action to provide no relief was "clear and unambiguous." *See United States v. Politte*, 63 M.J. 24, 25-26 (C.A.A.F. 2006). We disagree with our esteemed colleagues' opinion in *United States v. Finco*, 2020 CCA LEXIS 246, at *15 (A.F. Ct. Crim. App. 2020), which, under similar facts, found error where the convening authority *did* "take no action on the sentence," and found such error to be plain and obvious. We find neither error nor cause to return the case to the military judge [*5] to resolve "[a]n allegation of error in the convening authority's action." R.C.M. 1104(b)(1)(F).

B. Statement of Trial Results

1. Additional Background

The same day Appellant's trial concluded on 26 February 2019, the military judge signed an STR in accordance with R.C.M. 1101(a). The STR was provided to Appellant, his defense counsel, and the convening authority during post-trial processing. The Defense submitted clemency matters to the convening authority on 5 March 2019. The court reporter certified the record of trial on 11 March 2019. The convening authority issued his decision on action on 13 March 2019. The military judge signed a corrected copy of the STR, dated 18 March 2019, adding to the summary under "Arraigned Offenses" of the Specification of Charge II: "and was then known by the said AIRMAN FIRST CLASS JOHN T. BARRICK to be so false."[3] On the same day, the court reporter certified a verbatim transcript of the proceedings. On 19 March 2019, the military judge signed the EoJ.[4] He attached to it the original STR, the convening authority's decision on action, and the corrected STR. Neither the original STR nor the corrected STR identifies the convening authority. The record was docketed with this court on 1 April [*6] 2019.

2. Law

HN2[] Rule for Courts-Martial 1101(a) lists required contents of an STR, including "the command by which [the court-martial] was convened" and "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(3), (6).

HN3[] The EoJ—the judgment of the court-martial entered into the record of trial—shall include, *inter alia*, the STR. R.C.M. 1111(b)(4). "The judgment of the court entered under this rule should provide a complete statement of the findings and the sentence reflecting the effect of any post-trial modifications." *Id.*, Discussion.

3. Analysis

The STR in this case included most of the required contents, and it indicated the squadron and major command to which Appellant was assigned, but it omitted the command that convened the court-martial. *See United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.). We disagree with Appellant that this omission renders the EoJ invalid. We find no colorable showing of possible prejudice from this minor omission, *see United States v. Scalo*, 60 M.J. 435, 436-37 (C.A.A.F. 2005) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)), and find it unnecessary to direct corrective action as we are authorized to do by R.C.M. 1112(d)(2).

Appellant argues that the original STR in this case formed the basis for the EoJ, which rendered the [*7] EoJ defective and invalid. This argument has no basis in fact. The STR was corrected on 18 March 2019, one day *before* the EoJ was signed. The EoJ includes as attachments both the original and corrected STR.

Related to this argument, Appellant avers simply, "Further, the Appellant and his counsel were not provided a new opportunity to submit matters after the issuance of a 'corrected copy' of the STR in this case." Appellant cites no basis in law for error and articulates no prejudice. Ourselves finding none, we decline to grant relief. Appellant also urges us to provide relief for an incorrect Defense Incident-Based Reporting System code on the EoJ. Like our sister court, we find no basis

[3] These words were in the charged specification. Although the Government concedes error in the original STR, we need not decide that issue to complete our review.

[4] While the first page of the EoJ indicates the date "15 March 2019," on the second page the military judge specifically states he signed the EoJ on 19 March 2019.

in law to provide relief for this alleged administrative error. *See United States v. Baratta*, 77 M.J. 691, 695 (N.M. Ct. Crim. App. 2018).

C. Missing Appellate Exhibit

1. Additional Background

The military judge ascertained trial defense counsel provided Appellant his post-trial and appellate rights orally and in writing, "including the rights contained in Rule for Courts-Martial 1010."[5] Appellant and trial defense counsel affirmed their signatures were on the document. The military judge ensured Appellant understood his rights and had no questions. He directed the written rights advisement be marked [*8] Appellate Exhibit V; trial defense counsel complied, handing the ten-page original document to the court reporter and a working copy to the military judge. The record of trial does not contain this written advisement of post-trial and appellate rights.

2. Law

HN4[] Whether a record of trial is complete is a question of law we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted). Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2), requires a "complete record of the proceedings and testimony" to be prepared for any court-martial resulting in a punitive discharge. The implementing rule states the record of trial shall include, *inter alia*, any appellate exhibits. R.C.M. 1112(b)(6).

HN5[] "[T]he threshold question is 'whether the omitted material was substantial,' either qualitatively or quantitatively." *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)) (additional citation omitted). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981)) (additional citations omitted). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* A record may [*9] be "substantially complete" even if an exhibit is missing. *See, e.g., United States v. Lovely*, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014) (missing videos played by defense in sentencing proceedings did not render record incomplete).

3. Analysis

The omission of Appellate Exhibit V from the record of trial in this case is insubstantial. Thus, we conclude the record is substantially complete. Article 54(c)(2), UCMJ. Furthermore, Appellant has not articulated prejudice from the omission, and we find none. In light of our determination that the record is complete, we are not persuaded by Appellant's novel argument that the action-to-docketing deadline requires that we grant prospective relief under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), premised as it is on the supposition that the record is not "complete" as a matter of law until the missing appellate exhibit is included.

III. Conclusion

The findings and sentence entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

Concur by: POSCH

Concur

POSCH, Senior Judge (concurring in the result):

I agree with my esteemed colleagues in their resolution of Appellant's assignments of error in regard to the issues Appellant raises [*10] about the post-trial processing of his case. The convening authority granted no relief to Appellant when he signed his decision memorandum on 13 March 2019, taking no action on the adjudged sentence. Still, Appellant intimates in his

[5] "The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and defense counsel and inserted in the record of trial as an appellate exhibit." R.C.M. 1010.

brief to this court that the convening authority may have erred when he stated in his decision memorandum, "I take no action on the sentence in this case." Implicit to Appellant's concern is that the convening authority may have been required by Article 60, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 860, as it appears in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM)*, to "approve" the sentence, and that failure to take action to approve his sentence was error. Even so, Appellant in some measure concedes that "it is reasonable to consider the convening authority's decision not to act as the equivalent of action" when a convening authority determines sentencing relief is not warranted.

I write separately for two reasons. First, to explain that the convening authority's decision to take "no action" on Appellant's adjudged sentence fully complied with the Military Justice Act of 2016 (MJA),[1] as implemented by the President effective on 1 January [*11] 2019 in Exec. Order 13,825, §§ 3(a), 5, and 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018). Second, and related, I make clear a difference of opinion with a recent decision by this court, *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), that reached the opposite conclusion in a case similar to Appellant's.

Resolution that the convening authority's decision was correct in law turns on understanding several provisions of the President's implementation of Article 60, UCMJ, 10 U.S.C. § 860, in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), above all, Exec. Order 13,825, §§ 5 and 6(b), 83 Fed. Reg. at 9890. Because the convening authority's decision memorandum was altogether in accordance with the President's implementation and the law, the convening authority did not err by taking "no action" on the sentence that was adjudged in Appellant's case.

A. Amendment to Article 60, UCMJ, in the MJA

Appellant was convicted of offenses he committed after 24 June 2014, which is the effective date of Article 60, UCMJ, in the 2016 *MCM*.[2] In courts-martial for offenses occurring on and after this date, and before implementation of the MJA, a convening authority was required to take action to effectuate [*12] the sentence in every case.[3] *See* Article 60(c)(2)(A), 10 U.S.C. § 860(c)(2)(A) (2016 *MCM*) ("Action on the sentence of a court-martial shall be taken by the convening authority . . . .").

The MJA changed this requirement when Congress amended Article 60, UCMJ, as it appears in the 2019 *MCM*[4] to require "action" on the sentence if and only if a convening authority intends to grant relief by reducing, commuting, suspending, or in some cases, by disapproving a sentence, in whole or in part, as allowed for by law.[5] In accordance with the amended Article 60 in the 2019 *MCM*, a convening authority's formal refusal to act, that is, declination to act by taking "no action" on the sentence, effectuates the adjudged sentence in the same way that a convening authority once approved the sentence without modification under the former Article

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[1] *See* National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA), Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016).

[2] *See* National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Pub. L. No. 113-66, § 1702, 127 Stat. 672, 958 (26 Dec. 2013) (establishing 24 June 2014 as the effective date for Article 60, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 860, as it appears in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)).

[3] Before the effective date of the Military Justice Act of 2016 (MJA), a convening authority was required to either approve the sentence of the court-martial, or, subject to limits on that authority as provided by law, disapprove, commute, or suspend the sentence, in whole or in part. *See, e.g.*, Article 60(c)(2) and (c)(4), UCMJ, 10 U.S.C. § 860(c)(2), (c)(4) (2016 *MCM*). Importantly, and as later discussed in this opinion, a convening authority has the statutory authority pursuant to Article 60 in the 2016 *MCM* to take action pursuant to the terms of a pre-trial agreement with an accused. *See, e.g.*, Article 60(c)(4)(C), UCMJ, 10 U.S.C. § 860(c)(4)(C) (2016 *MCM*). No similar power conferred on a convening authority is found in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[4] The amendment to Article 60, UCMJ, was among the many changes to the UCMJ that Congress directed in the MJA that were subsequently expanded to four articles and codified in the 2019 *MCM*. Unless otherwise noted in this opinion, all references to the convening authority's powers and responsibilities in Article 60, UCMJ, in the 2019 *MCM* are to Articles 60, 60a, 60b, 60c, UCMJ, 10 U.S.C. §§ 860, 860a, 860b, 860c, collectively.

[5] *See* Articles 60a and 60b, UCMJ, 10 U.S.C. §§ 860a, 860b (2019 *MCM*). In certain cases the convening authority may also act to "disapprove" a sentence in whole or in part. *See* Article 60b(a)(1)(C)-(F), UCMJ, 10 U.S.C. § 860b(a)(1)(C)-(F) (2019 *MCM*).

60 (2016 *MCM*). This change is perhaps most clearly stated in Article 60a(f)(2), UCMJ, in the 2019 *MCM* by the conditional language: "*If*, under this section, the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority [*13] shall include a written explanation of the reasons for such action."[6] 10 U.S.C. § 860a(f)(2) (emphasis added). After the convening authority's decision, the judgment of the court-martial consists of the adjudged sentence listed in the Statement of Trial Results as modified by "*any* post-trial action by the convening authority." Article 60c(a)(1)(B)(i), 10 U.S.C. § 860c(a)(1)(B)(i) (2019 *MCM*) (emphasis added).

For many years, military justice practitioners have been accustomed to thinking of "action" as effectuating the sentence—whether by granting relief *or not*—as this term appears in editions of the *Manual for Courts-Martial* before the 2019 *MCM*. This legacy and more comprehensive definition gave way to a more specific meaning in the MJA and the President's implementation of the Act. Although undefined, usage of the term "action" in the 2019 *MCM* reveals it to mean "granting relief" in each and every case that a convening authority decides to take action on the sentence in a particular case. Conversely, in accordance with Article 60 in the 2019 *MCM*, a convening authority's "no action" decision on the sentence results in an entry of judgment (EoJ) that reflects the sentence adjudged by [*14] the court-martial without modification, as it did here.

In Appellant's case, the language of the convening authority decision to take "no action" on the adjudged sentence is synonymous with not granting relief. By deciding to take no action the convening authority followed the post-trial procedures that Congress directed in the MJA, notably Article 60 in the 2019 *MCM*, and not the legacy procedures in Article 60 in the 2016 *MCM*. As a result, the question of whether the convening authority's decision memorandum contains error turns on the post-trial procedures that Congress and the President intended the convening authority to follow. Answering this question requires review of the convening authority's decision in light of the President's implementation of the MJA. If taking "no action" complied with the implementation of the Act, as I conclude that it did, then there is no error to evaluate for harmlessness or to correct on appeal or by remand to the military judge.

B. Implementation of the MJA: Executive Order 13,825

In the MJA, Congress assigned to the President considerable discretion to set the effective date of the amendments to the UCMJ and to prescribe the regulations implementing [*15] those amendments.[7] However, that discretion was bounded by a date by which implementation must be completed. With few limitations, Congress directed that the implementation "shall take effect" no later than 1 January 2019.[8] The President then exercised this authority by issuing Executive Order 13,825 and new Rules for Courts-Martial (R.C.M.) that are listed in Annex 2 of the Executive Order and that were subsequently promulgated in Part II of the 2019 *MCM*. In accordance with the direction given by Congress to the President, Exec. Order 13,825, § 5, effected these rules for cases referred to trial by court-martial on and after 1 January 2019.[9] The new rules implement the amendments made by Congress in Article 60 in the 2019 *MCM*, as discussed, and include considerable revisions in the manner by which the convening authority effectuates an

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[6] *See also* Article 60a(a)(1)(A), UCMJ, 10 U.S.C. § 860a(a)(1)(A) (2019 *MCM*) (subject to limitations, a convening authority "*may* act on the sentence of the court-martial" (emphasis added)).

[7] *See* FY17 NDAA, Pub. L. No. 114-328, § 5542; *see also* Article 36(a), UCMJ, 10 U.S.C. § 836(a), in the 2016 and 2019 *MCMs* (President may prescribe regulations for post-trial procedures); *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (the authority to prescribe regulations prevails "insofar as such regulations are not inconsistent with the UCMJ").

[8] The FY17 NDAA, including the MJA that was codified in Division E of the NDAA, was enacted on 23 December 2016. "Except as otherwise provided in this division, the amendments made by this division shall take effect on the date designated by the President, which date shall be not later than the first day of the first calendar month that begins two years after the date of the enactment of this Act." *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(a).

[9] *See* Exec. Order 13,825, § 5, 83 Fed. Reg. 9889, 9890 (8 Mar. 2018) (codifying in the 2019 *MCM* new Rules for Courts-Martial (R.C.M.) among the amendments in Annex 2, that "shall take effect on January 1, 2019," subject to exceptions that are not applicable here); *see also* FY17 NDAA, Pub. L. No. 114-328, § 5542(c)(2) (stating MJA amendments to the UCMJ "shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments").

appellant's sentence after one has been adjudged.

Among the rules that took effect on 1 January 2019 for cases referred on and after that date are R.C.M. 1109 and 1110 that guide a convening authority's decision whether to take action on an adjudged sentence.[10] Following the new procedures in those rules, which implement and track the amendments [*16] that Congress made to Article 60 as promulgated in the 2019 *MCM*, no action is required unless a convening authority intends to reduce, commute, or suspend, or in some cases, disapprove, a sentence, in whole or in part. R.C.M. 1109(c)(5)(A), (g)(2); R.C.M. 1110(c), (e). Under these rules, a "convening authority is no longer required to take action on the results of every court-martial." *United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *3 (A.F. Ct. Crim. App. 16 Dec. 2019) (unpub. op.) (citing R.C.M. 1109 and 1110 (2019 *MCM*)). Instead, a convening authority may decline to take action after consulting with the staff judge advocate and considering any clemency matters timely submitted by an accused. R.C.M. 1109(c), (d), (g); R.C.M. 1110(c)(1) ("action on the sentence is not required"); *see also Moody-Neukom*, unpub. op. at *3.

C. Application of the MJA, as Implemented, to Appellant's Case

One turns then to consider the effect of the President's implementation of the MJA in Executive Order 13,825 on the post-trial procedures that are applicable to Appellant's case. Here, the charges and specifications were referred to trial by special court-martial on 15 [*17] January 2019. Thus, the convening authority was required to follow the procedural provisions in the 2019 *MCM* that went into effect on 1 January 2019, notably R.C.M. 1109 and 1110 that are germane to a convening authority's power and responsibility in post-trial processing. In accordance with these rules, unless the convening authority had determined to grant relief,[11] the convening authority was under no obligation to act on the sentence after Appellant was tried and sentenced on 26 February 2019.

In compliance with R.C.M. 1109 and 1110, the convening authority took no action on the adjudged sentence when he signed the decision memorandum on 13 March 2019, thereby indicating a formal determination that sentencing relief was not warranted in Appellant's case. Subsequently, the military judge signed the EoJ faithfully reflecting the judgment of the court-martial. Consequently, the convening authority's "no action" decision in compliance with the President's implementation of the MJA, as made plain in R.C.M. 1109 and 1110, was not error. It follows that the judgment entered by the military judge in Appellant's case is correct in fact and law.

1. United States v. Finco

Nonetheless, this conclusion that the convening authority did [*18] not err because he followed Article 60, UCMJ, and R.C.M. 1109 and 1110 as implemented by the President in the 2019 *MCM*, invites comparison to a recent decision by this court that reached a different result on similar facts. Appellant, like the appellant in *United States v Finco*, was convicted of offenses that were committed on or after 24 June 2014[12] and before 1 January 2019, that were referred after that date. *See Finco*, unpub. op. at *1-3, 12. The military judge in *Finco* sentenced the appellant to a bad-conduct discharge, confinement for five months, reduction to the grade of E-1, and a reprimand. *Id.* at *1-2. After reviewing that appellant's clemency matters, the convening authority signed a decision memorandum that stated, "I take no action on the sentence of this case." *Id.* at *2. The same day that the convening authority signed his decision memorandum, the military judge signed the EoJ. *Id.* In *Finco*, this court determined that "the decision to take no action on the sentence was a plain or obvious error" and remanded the case to the Chief Trial Judge, Air Force Trial Judiciary, "to resolve a substantial issue with the convening authority's decision memorandum as no action was taken on Appellant's adjudged sentence [*19] as required by law." *Id.* at *15, 20-21.

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[10] *See* Exec. Order 13,825, § 5, 83 Fed. Reg. at 10040-43 (implementing R.C.M. 1109, *Reduction of sentence, general and special courts-martial*); 10043-44 (implementing R.C.M. 1110, *Action by convening authority in certain general and special courts-martial*).

[11] The convening authority had the power to reduce, commute, or suspend, in whole or in part, Appellant's adjudged confinement, forfeiture of pay, and reduction in grade. *See* R.C.M. 1109(c)(5) (2019 *MCM*).

[12] Because the court's opinion referenced Article 60, UCMJ, in the 2016 *MCM, see United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *8 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), which was effective on 24 June 2014, FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 958 (2013), we can presume that the appellant in *Finco* committed the charged offenses no earlier than on or after that date.

This court's *Finco* decision did not rely on R.C.M. 1109 and 1110 in the 2019 *MCM*, or attach any significance to, much less acknowledge, the President's implementation of these rules in Exec. Order 13,825, § 5. Instead, *Finco* singularly focused on § 6(b) of this same Executive Order. As applicable to cases like Appellant's and *Finco* where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, § 6(b) guides a convening authority to apply the legacy provisions of Article 60 in the 2016 *MCM*, or earlier, on the one hand, or the amended Article 60 in the MJA that appears in the 2019 *MCM*, on the other. *Id.* at *8-9, 11-12. Section 6(b) states in pertinent part:

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> (1) requires action by the convening authority on the sentence
>
> . . . .

Exec. Order 13,825, § 6(b), 83 Fed. Reg. at 9890 (8 Mar. 2018).

By the terms of § 6(b), the convening authority in *Finco* and in Appellant's [*20] case was required to follow Article 60 as it appears in the 2016 *MCM*, but only "to the extent that" Article 60 "*requires* action by the convening authority on the sentence." (Emphasis added). If effectuating a sentence does not *require* a convening authority to take action, then § 6(b)'s direction to a convening authority to follow "Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty," is inapposite.

Finco looked to the language in Article 60 in the 2016 *MCM*, and found the necessary words of obligation in Article 60(c)(2)(A), UCMJ, that it determined bound the convening authority to take action. This provision states without qualification that "[a]ction on the sentence of a court-martial shall be taken by the convening authority."[13] *See Finco*, unpub. op. at *8. By looking to Article 60(c)(2)(A) in the 2016 *MCM* to understand § 6(b) of the Executive Order, a convening authority would have to disregard the President's implementation of R.C.M. 1109 and 1110 that went into effect on 1 January 2019 in every case where there is a conviction for at least one offense committed before, and referred on or after, that date. Paradoxically, effective on the same date that [*21] the President's implementation of these rules went into effect, *Finco* nullified their application in cases when a convening authority determines that granting sentencing relief is not authorized or warranted.

Without question, a convening authority cannot "take no action on the sentence" in compliance with R.C.M. 1109 and 1110 in the 2019 *MCM*, and at the same time satisfy the language in Article 60(c)(2)(A), UCMJ, in the 2016 *MCM*. However, *Finco* made an assumption that a convening authority was bound by Article 60(c)(2)(A), finding that "the convening authority cannot simultaneously 'take no action on the sentence'" and satisfy the *Finco* court's *interpretation* of the language of the President's implementation in § 6(b). The *Finco* court concluded, "[W]e need look no further than the plain language of the decision memorandum and determine that the convening authority erred when he purported to take no action on the sentence when Exec. Order 13,825, § 6(b)(1), required him to do so." *Id.* Although unstated in its decision, it is apparent that the *Finco* court found the language of § 6(b) plain as well to reach the conclusion that it did.

What the decision in *Finco* did not do is address an unmistakable [*22] contradiction between the President's implementation of R.C.M. 1109 and 1110 in Exec. Order, § 5, on the one hand, and the *Finco* court's reading of Exec. Order, § 6(b), on the other. In the case before us as in *Finco*, the convening authority cannot abide by the President's implementation of the specific provisions of R.C.M. 1109 and 1110 in § 5 by taking no action on the sentence, and at the same time have a duty to act that the *Finco* court found by its reading of § 6(b) that looked to Article 60(c)(2)(A) in the 2016 *MCM*. The *Finco* decision also failed to explain how its interpretation complied with Congress' direction to the President to implement the MJA by 1 January 2019, notably the post-trial procedures that Congress directed

[13] The *Finco* court found solidarity with a decision by our sister-service court in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020), in which a convening authority took no action by indicating "N/A" to denote "action on the findings and/or sentence." *Finco*, unpub. op. at *12-13 (quoting *Coffman*, 79 M.J. at 821); *see also id.* at *13 (agreeing with the *Coffman* court's finding that the convening authority "erred in his noncompliance" with the earlier version of Article 60, UCMJ, that required action on the sentence (quoting *Coffman*, 79 M.J. at 822)).

convening authorities to follow to effectuate a sentence.

In reaching the conclusion that the convening authority was required to take action on the sentence, *Finco* interpreted one part of the President's implementation so as to render another part, § 5, meaningless in cases, like Appellant's, where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, and the convening authority determines no sentencing relief is warranted. By taking "no action" [*23] in compliance with R.C.M. 1109 and 1110 in the 2019 *MCM* as the President intended in Exec. Order, § 5, the *Finco* court would find error in an essential and recurring post-trial responsibility that was directed by Congress in the MJA: the manner by which convening authorities effectuate sentences for convictions for pre-1 January 2019 offenses that are referred on and after that date.

Of greater significance, the assignment by Congress to the President to designate the effective date of the MJA amendments, was not without limitation. As previously noted, Congress directed that the President's implementation of the Act "shall take effect" not later than 1 January 2019.[14] The amendments to the UCMJ include changes Congress made to the procedural provisions in Article 60 whereby a convening authority may take no action to effectuate a sentence. But the *Finco* court's interpretation of Exec. Order 13,825, § 6(b)(1), would require a convening authority to continue to take action on a sentence in accordance with the legacy provisions of Article 60 until the date of the earliest offense of which the accused was found guilty was on or after 1 January 2019. Thus, if the *Finco* court's interpretation of Exec. Order 13,825, [*24] § 6(b), was correct, it would operate to delay implementation of a key MJA provision well past 1 January 2019.[15] With few exceptions, notably Exec. Order 13,825, §§ 6(a), 9, 10, the President's implementation of the MJA applies to offenses committed or alleged before 1 January 2019. The provisions implemented by exception in §§ 6(a), 9, 10 relate to substantive rights of an accused. Had the President intended the changes to the manner by which a convening authority effectuates a sentence in Article 60 in the 2019 *MCM* to begin on or after 1 January 2019, one might reasonably conclude that the President would have done so expressly instead of—as the *Finco* court's interpretation would require—by implication. Thus, a delayed implementation in the manner by which a sentence is effectuated in the 2019 *MCM* would raise questions not just about the responsibility of a convening authority under the President's implementation of the MJA, but also, and more fundamental, whether the President's implementation schedule was in compliance with Congress' direction that the President shall implement the Act not later than 1 January 2019.

2. Executive Order 13,825

Executive agencies "must always 'give effect [*25] to the unambiguously expressed intent of Congress.'" *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)). The United States Court of Appeals for the Armed Forces (CAAF) has similarly cautioned that it "has no license . . . to construe statutes in a way that 'undercut[s] the clearly expressed intent of Congress.'" *United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014) (quoting *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (alteration in original)).

The CAAF has recognized that ordinary rules of statutory construction are helpful "when analyzing a rule promulgated by the President," which would seemingly embrace analysis of an executive order. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) ("[I]n determining the scope of a statute, we look first to its language" and "apply the same interpretive process when analyzing a rule promulgated by the President." (internal quotation marks omitted)); *see also United States v. Fetrow*, 76 M.J. 181, 185-86 (C.A.A.F. 2017) (rules of statutory construction are helpful in analyzing provisions of the *Manual for Courts-Martial*). It follows then that judicial review of the President's Executive Order implementing the MJA is not unlike review of an agency's construction of a statute.

When two provisions "initially appear to be in tension," the provisions should be interpreted in a way that render

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[14] *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(a).

[15] Notably, it is incongruent that, effective 1 January 2019, Congress would eliminate in the MJA the requirement that a convening authority consider the written recommendation of a staff judge advocate before taking action in a general court-martial or any special court-martial case that includes a bad-conduct discharge, as required by legacy provisions of Article 60, *see, e.g.*, Article 60(e), UCMJ, 10 U.S.C. § 860(e) (2016 *MCM*), but still require a convening authority to take action to effectuate all sentences.

them compatible, not contradictory.[16] *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2008) ("[T]his Court typically seeks to harmonize independent provisions [*26] of a statute." (citing *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)). "It is a fundamental canon of statutory 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." *Kelly*, 77 M.J. at 406-07 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (internal quotation marks omitted)). "As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text." *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (citation omitted). Thus, when an interpretation of the text of one provision in an executive order works against another provision or an act of Congress, there is good reason to reject that interpretation and look for another.

The place to begin is with the text of the President's implementation. Sections 5 and 6(b) of the Executive Order initially appear to be in tension, so each provision will be examined in turn. The language of § 5 plainly implements the R.C.M. and the text is not subject to more than one possible meaning. It states that "[t]he amendments in Annex 2 [of Executive Order 13,825] . . . shall take effect on January 1, 2019." 83 Fed. Reg. at 9890. As previously discussed, Annex 2 includes the President's implementation of R.C.M. 1109 and 1110 in the 2019 *MCM* that went into effect for cases referred to trial by court-martial on and after 1 January 2019. The fact that [*27] § 5 enumerates three inapposite exceptions to the application of these amendments suggests that there are no other exceptions, lending further validity to the conclusion that the convening authority did not err when he followed R.C.M. 1109 and 1110 in effectuating the sentence adjudged in Appellant's case.

Whereas § 5 requires looking no further than that provision to determine its meaning and application, § 6(b), in contrast, directs practitioners to first look to the legacy provisions of Article 60, UCMJ, to resolve which version of Article 60 may apply to a particular case, and also, to what extent. This is so because § 6(b) states that "Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . *to the extent that Article 60 . . . requires action by the convening authority on the sentence* . . . ." *Id.* (emphasis added). The phrase "to the extent that" is one of limitation that precludes blanket application of legacy provisions of Article 60. This qualifying language makes clear that individual provisions of Article 60 in the 2019 *MCM* will bind a convening authority unless any one of several conditions is present in Article [*28] 60, UCMJ, as was in effect on the date of the earliest offense. First among those conditions is if a legacy provision of an earlier version of Article 60 "requires action by the convening authority on the sentence." Exec. Order 13,825, § 6(b)(1), 83 Fed. Reg. at 9890.

The term "action," as discussed earlier, has a precise, specialized meaning in the 2019 *MCM* that differs from its more comprehensive meaning to effectuate a sentence before the MJA's implementation. Thus, a full understanding of the applicability of § 6(b) to Appellant's case entails an examination of Article 60 in the 2016 *MCM* for a circumstance in which a convening authority is required to grant relief (i.e. take action) on the sentence. If such a circumstance was present in a case like Appellant's—where at least one offense was committed on or after 24 June 2014 and before 1 January 2019, that was referred on or after that date—then the convening authority might indeed be required to take action on the sentence by following one or more provisions of Article 60 in the 2016 *MCM*. Such a circumstance would be within the meaning of the President's implementation in § 6(b).

One such circumstance that protects a critical right of an accused, is the convening authority's [*29] legal duty to honor and effectuate a pretrial agreement (PTA) with an accused. As a matter of law, a convening authority has no power under any specific provision in the 2019 *MCM* to enforce a sentence limitation of a PTA, known as a "plea agreement" in the MJA. Instead, such agreements have binding effect upon their acceptance by a military

[16] There may be essential differences between application of some interpretive canons to executive and legislative action. For example, the President's implementation of a rule in one provision of Exec. Order 13,825 (§ 5), and a statute on which the same rule depends in another provision (§ 6(b)) would not obviously trigger the "'hierarchical sources of rights' in the military justice system" whereby the highest source of authority is generally paramount. *See United States v. Czeschin*, 56 MJ 346, 348 (C.A.A.F. 2002). In the absence of language making it clear that the President's implementation of the statute controls over implementation of the rule, one cannot assume that the President intended that the former controls the latter in the same executive order promulgated under the same implementation authority assigned by Congress.

judge.[17] An accused automatically gets the benefit of the agreement without the convening authority having to take action or approve a sentence to comply with the agreement. However, this novel approach to the manner by which agreed-upon sentence limitations are enforced in the MJA takes effect only in cases unlike Appellant's "in which all specifications allege offenses committed on or after January 1, 2019." *See* Exec. Order 13,825, § 10, 83 Fed. Reg. at 9890-91. Conversely, in cases like Appellant's where there is a conviction for at least one offense committed after 24 June 2014 and before 1 January 2019 that was referred on or after that date, a PTA may be consequential and the convening authority would be required to follow the legacy provisions of Article 60 (2016 *MCM*), and take action to both honor and effectuate a sentence as agreed to in the PTA. This is perhaps best [*30] illustrated by two examples that show the different applications of Article 60. The first example closely tracks Appellant's case in which the convening authority properly applied Article 60 and R.C.M. 1109 and 1110 from the 2019 *MCM*. The second example reveals when a convening authority would be required to apply Article 60 and R.C.M. 1107 from the 2016 *MCM* if the sentence and the terms of Appellant's PTA had been different.

Here, Appellant was convicted of offenses committed before 1 January 2019 that were referred after that date, and the adjudged sentence did not exceed a limitation on sentence in Appellant's PTA with the convening authority. It follows then that granting sentencing relief (action) was not *required* under Article 60 in the 2016 *MCM* that was in effect on the date of Appellant's earliest offense. Because the convening authority was not compelled to follow any legacy provisions of Article 60 that predate implementation of Article 60 in the 2019 *MCM*, the convening authority could effectuate the sentence, as he did, by taking no action in accordance with Article 60 and R.C.M. 1109 and 1110 as codified in the 2019 *MCM*.

Conversely, if Appellant's PTA with the convening authority had capped confinement [*31] at greater than six months (e.g., eight months), and the sentence adjudged by the court-martial exceeded this limitation (e.g., ten months), then the convening authority would have been *required* to follow Article 60 and R.C.M. 1107 in the 2016 *MCM "to the extent that Article 60 . . . requires action by the convening authority on the sentence*" as directed by Exec. Order, § 6(b)(1). (Emphasis added). This is so because there is no legal authorization in the 2019 *MCM* for the convening authority to honor the agreement and effectuate the sentence—as there is in the 2016 *MCM*—by either granting clemency[18] or enforcing a sentence limitation in a PTA.[19] In such a case the convening authority, quite literally, would be *required* to grant relief (i.e., take action) on the sentence by following Article 60 in effect on the date of the earliest offense.[20] Without the legacy provision in Article 60 that allows the convening authority to take the required action on the sentence,[21] the convening authority would be in breach of the PTA if Article 60 (2019 *MCM*) was the only legal authority the convening authority had to effectuate a sentence.

In cases that are referred to trial on or after 1 January 2019, there can be no mistaking Congress' intent that a convening authority's taking "no action" on the sentence effectuates the adjudged sentence in the same way that a convening authority once approved the sentence without modification under the former Article 60 (2016 *MCM*). And, there is no mistaking Congress' assigning to the President the authority to implement the MJA,

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[17] *See* Article 53a(d), UCMJ, 10 U.S.C. § 853a(d) (2019 *MCM*).

[18] In cases like Appellant's, a convening authority has no authority in the 2019 *MCM* to reduce or commute a sentence of confinement, if the total period of confinement imposed for all offenses is greater than six months. *See* Article 60a(b)(1)(A), 10 U.S.C. § 860a(b)(1)(A), and R.C.M. 1109(c)(5)(A) (2019 *MCM*) (permitting a convening authority to "reduce, commute, or suspend, in whole or in part" the confinement portion of a sentence that is *six months or less*).

[19] In cases like Appellant's, there is no provision similar to Article 60(c)(4)(C), UCMJ (2016 *MCM*), in the 2019 *MCM* that would authorize a convening authority to honor and effectuate an agreed-upon sentencing limitation in a PTA:

> If a pre-trial agreement has been entered into by the convening [*32] authority and the accused, as authorized by Rule for Courts-Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pretrial agreement . . . .

Article 60(c)(4)(C), UCMJ (2016 *MCM*).

[20] R.C.M. 1107 implements Article 60 to the 2016 *MCM*. Of note, nothing in the MJA or the President's implementation of the Act operate to repeal the R.C.M. that applied Article 60 in effect before 1 January 2019.

[21] *See, e.g.*, Article 60(c)(4)(C), UCMJ (2016 *MCM*).

consistent with this intent, no later than 1 January 2019. Our superior court has "continually reiterated that the Uniform Code of Military Justice controls when an executive order conflicts with part of that Code." *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *United States v. Gonzalez*, 42 M.J. 469, 474 (1995); *United States v. Mance*, 26 M.J. 244, 252 (1988)).

Here, there is no conflict between the President's implementation of the MJA in Executive Order 13,825 and Article 60 (2019 *MCM*) so long as Exec. Order §§ 5 and 6(b), are each given "full force and effect," *Kelly*, 77 M.J. at 407, on 1 January 2019. Under Exec. Order, [*33] § 6(b)(1), a convening authority looks to the legacy provisions of Article 60 to the extent that a convening authority may be required to take action on the sentence. Because "action" in the 2019 *MCM* means "granting relief," practitioners accustomed to "action" being synonymous with effectuating the results of a court-martial in a pre-2019 *MCM* provision may best relate to the contemporary meaning of "action" if § 6(b)(1) is restated thusly,

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> (1) requires [granting relief] by the convening authority on the sentence[22]
>
> . . . .

Exec. Order 13,825, 83 Fed. Reg. at 9890.

This reading of § 6(b) affords "action" its contemporary meaning that is narrower than its legacy use in prior editions of the *Manual*. *See United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (questions of interpretation should begin and end with the text, "giving each word its ordinary, contemporary, and common meaning" (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 (2017))). It also avoids a nullification of the President's implementation of R.C.M. 1109 and 1110 in every case [*34] where there is a conviction for at least one offense committed before, and referred on or after, 1 January 2019, and a convening authority determines action on the sentence is not warranted. Moreover, this reading of § 6(b) affords an accused a substantive right to have a convening authority honor a PTA—and not merely specifying the manner by which a convening authority effectuates a sentence—that is in harmony with other substantive provisions of § 6(b) that also protect an accused's rights under legacy provisions of Article 60.[23]

In summary, in cases, like Appellant's, where there is a conviction for at least one offense committed before 1 January 2019 that was referred after that date and sentencing relief is not authorized or warranted as determined by the limits of the convening authority's clemency power and consideration of an appellant's clemency submission, then the convening authority first looks to Article 60 and the corresponding R.C.M. that were in effect on the date of the earliest offense. If the convening authority determines that granting relief (i.e. action) is not required under that version of Article 60, for example, to enforce a limitation on sentence in a PTA, then the convening [*35] authority follows Article 60 and R.C.M. 1109 and 1110 in the 2019 *MCM* to effectuate the sentence. If, however, the convening authority determines that action on the sentence is required under the version of Article 60 in effect on the date of the earliest offense because granting relief is required to effectuate the sentence—as may be the case with a sentence limitation in a PTA—then the convening authority is required to follow a provision in an earlier version of Article 60 and the corresponding R.C.M. that give effect to the convening authority's statutory responsibility to act on the sentence.

D. Conclusion

There is no tension, much less contradiction, with Exec. Order 13,825, § 5, or other provisions of the President's implementation of the MJA, so long as "action" on the sentence is given its contemporary meaning, "granting relief," where the term "action" appears in Exec. Order 13,825, § 6(b)(1).

Even so, in many if not all cases referred on and after 1 January 2019, a convening authority's decision not to act may be the equivalent of taking action to effectuate

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[22] Or, to rephrase grammatically, ". . . requires the convening authority to grant relief on the sentence."

[23] The guidance in Exec. Order, § 6(b), addresses an accused's substantive rights in regard to the findings (Subsection (2)), the adjudged sentence (Subsections (1) and (5)), both the finding and the sentence (Subsection (3)), and a proceeding in revision or a rehearing (Subsection (4)). *See* Exec. Order 13,825, § 6(b)(1)-(5), 83 Fed. Reg. at 9890.

a sentence (in a legacy sense) as Appellant suggests that it was in his case. Ultimately, it may not matter if it is determined whether or not a [*36] convening authority erred in cases like Appellant's where no action is taken, or conversely, a case where a convening authority approves the sentence even though the applicable provision of Article 60 does not require action to effectuate the sentence. What matters most is that a convening authority makes clear whether sentencing relief has been granted an appellant and to what extent. So long as the sentence that the convening authority intended to effectuate is apparent from the decision memorandum,[24] an appellant may not be prejudiced even if a convening authority's compliance with Executive Order 13,825 may be interpreted differently by Courts of Criminal Appeals or even by different panels.

I do not reach the question of prejudice, however, because I find that the convening authority fully complied with the President's implementation of the MJA, and did not err by taking "no action" on the sentence that was adjudged after Appellant's trial, and that the military judge correctly entered as the judgment of the court-martial.

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[24] *See, e.g., United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (requiring a "clear and unambiguous convening authority action").

United States v. Cruspero

United States Air Force Court of Criminal Appeals

November 24, 2020, Decided

No. ACM S32595

Reporter
2020 CCA LEXIS 427 *; 2020 WL 6938016

UNITED STATES, Appellee v. Kristofer J. CRUSPERO, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Christina M. Jimenez. Sentence: Sentence adjudged on 2 April 2019 by SpCM convened at McConnell Air Force Base, Kansas. Sentence entered by military judge on 1 May 2019: Bad-conduct discharge, confinement for 4 months, forfeiture of $1,000.00 pay per month for 4 months, and reduction to E-1.

Core Terms

convening, sentence, military, memorandum, no action, post-trial, take action, forfeiture, substantial issue, plain language, confinement, clemency, matters, court-martial, bad-conduct, proceedings, disapprove, cocaine, unpub

Case Summary

Overview
HOLDINGS: [1]-Pursuant to 10 U.S.C.S. § 860, the convening authority's decision to take no action on the sentence was a plain or obvious error because the threshold of "some colorable showing of possible prejudice" was the appropriate standard for an error impacting an appellant's request for clemency. If the convening authority failed to take action on the entire sentence—as his memorandum indicated he failed to do—then the court was unclear whether he made a decision on appellant's clemency request; the court found a colorable showing of possible prejudice; [2]-The new statutory remand authority of Unif. Code Mil. Justice art. 66(f)(3), 10 U.S.C.S. 866(f)(3), permitted the court to order a hearing as necessary to address a substantial issue; a substantial issue existed when the convening authority purported to take no action on the sentence when the law required it.

Outcome
Matter remanded.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

HN1 **Courts Martial, Court-Martial Member Panel**

R.C.M. 1101(a)(3), Manual Courts-Martial, lists a number of required contents of the Statement of Trial Results, including inter alia the command by which the court-martial was convened.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Posttrial Procedure, Posttrial Sessions**

Proper completion of post-trial processing is a question of law the United States Air Force Court of Criminal Appeals reviews de novo. Interpretation of a statute and a Rules of Courts-Martial provision are also questions of law that the court reviews de novo.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN3 **Posttrial Procedure, Actions by Convening Authority**

Exec. Order No. 13,825, § 6(b), requires the version of Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860, in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority to the extent that Article 60: (1) requires action by the convening authority on the sentence. 2018 Amendments to the Manual for Courts-Martial, United States, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018).

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN4 **Jurisdiction & Venue, Jurisdiction**

The United States Air Force Court of Criminal Appeals is a court of limited jurisdiction defined wholly by statute.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5 **Plain Error, Definition of Plain Error**

Under a plain error analysis, an appellant must show (1) there was an error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. Whether an error is plain is a question of law the United States Air Force Court of Criminal Appeals reviews de novo.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN6 **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals begins statutory analysis by examining the plain language. The plain language will control, unless use of the plain language will lead to an absurd result.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Matters Submitted by Accused

HN7 **Postconviction Proceedings, Clemency**

The threshold of some colorable showing of possible prejudice is still the appropriate standard for an error impacting an appellant's request for clemency.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8[] **Judicial Review, Courts of Criminal Appeals**

In those cases where the United States Air Force Court of Criminal Appeals exercises its discretion to apply forfeiture, it tests for a colorable showing of possible prejudice.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN9[] **Trial Procedures, Appeal by United States**

The plain language of Unif. Code Mil. Justice art. 66(f)(3), 10 U.S.C.S. § 866, permits the United States Air Force Court of Criminal Appeals to order a hearing as may be necessary to address a substantial issue.

Military & Veterans Law > Military Justice > Judicial Review

HN10[] **Military Justice, Judicial Review**

R.C.M. 810(f), Manual Courts-Martial, cautions that a remand should not be used for matters which could have been investigated or considered at trial through a party's exercise of reasonable diligence.

Counsel: For Appellant: Major Stuart J. Anderson, USAF.

For Appellee: Major Zachary T. West, USAF; Mary Ellen Payne, Esquire.

Judges: Before LEWIS, D. JOHNSON, and CADOTTE Appellate Military Judges. Judge D. JOHNSON delivered the opinion of the court, in which Senior Judge LEWIS joined. Judge CADOTTE filed a separate opinion concur-ring in the result.

Opinion by: D. JOHNSON

Opinion

D. JOHNSON, Judge:

Appellant was convicted, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of three specifications of wrongful use of cocaine, 3,4-methylenedioxymethamphetamine (commonly referred to as ecstasy), and lysergic acid diethylamide (commonly referred to as LSD), all in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.[1],[2]

A military judge sitting alone sentenced [*2] Appellant to a bad-conduct discharge, confinement for four months, forfeiture of $1,000.00 pay per month for four months, and reduction to the grade of E-1. The adjudged confinement was the same amount as the PTA's confinement cap. The military judge signed the Statement of Trial Results (STR) the same day that court adjourned.[3] After reviewing Appellant's clemency

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[1] References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise noted, all other references to the UCMJ and to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant pleaded and was found guilty of divers uses of all three substances.

[3] The STR was inserted into the record of trial in accordance with R.C.M. 1101(a). ***HN1***[] This rule lists a number of required contents, including *inter alia* "the command by which [the court-martial] was convened." R.C.M. 1101(a)(3). The STR in this case included most of the required contents, and it indicated the squadron and major command to which Appellant was assigned, but it omitted the command which convened the court-martial. *See United States v. Moody-*

matters, the convening authority signed a decision memorandum on 17 April 2019 which stated, "I take no action on the sentence of this case."

On 1 May 2019, the military judge signed the entry of judgment (EoJ). *See* Rule for Courts-Martial (R.C.M.) 1111(b). The signed EoJ contains the following information on the sentence: "Punitive Discharge: Bad Conduct Discharge;" "Total Confinement: 4 months;" "Forfeitures of Pay and/or Allowances: $1,000.00 pay per month for 4 months;" and "Reduction in Pay Grade: E-1." The convening authority's decision memorandum was included as Attachment 2 to the EoJ. On 8 April 2019, Appellant submitted clemency matters through his defense counsel requesting reduction of his confinement term and forfeitures "that extend beyond 8 June 2019."

Appellant raises one assignment of error on appeal: whether [*3] his sentence is inappropriately severe. Additionally, we consider whether the convening authority's decision memorandum contains error when the convening authority states "I hereby take no action on the sentence" and Appellant was convicted of an offense committed prior to 1 January 2019.[4]

We find the convening authority's decision memorandum contains error and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. Given our remand, we do not reach Appellant's assignment of error, sentence severity.

I. Background

While assigned to McConnell Air Force Base (AFB), Kansas, Appellant lived off base with three roommates, two of whom were Senior Airman (SrA) EK and SrA KB.[5]

On 10 October 2018, special agents (SA) from the Air Force Office of Special Investigations (AFOSI) notified Appellant that he was under investigation for wrongful use of a controlled substance in violation of Article 112a, UCMJ. As part of its investigation, AFSOI obtained cellular phone text message conversations involving, and between, the Appellant and his roommates, SrA EK, SrA KB, and HVF. AFOSI also obtained text messages involving, and between, the Appellant and his drug dealer, KD. In the [*4] text messages, SrA EK and HVF inquired about and discussed acquiring cocaine, LSD, and ecstasy for their and Appellant's use. Appellant also inquired about buying a "40," which according to the evidence at trial means $40.00 worth of cocaine.

AFOSI agents also seized a handwritten note addressed to SrA EK where Appellant expressed his concerns about their drug use, and after clarifying that he did not intend to stop, he stated he needed to "cut back." Appellant also felt something "big [was] about to go down" and that he thought they had been "playing a dangerous game for a long time." Finally, Appellant explained that he felt he should say something before "anything got out of hand."

Between May 2017 and October 2018,[6] on multiple occasions, Appellant consumed cocaine, ecstasy, and LSD in various locations to include a bar in Wichita, Kansas; at another Airman's residence; Appellant's residence; and while attending shows and festivals throughout the continental United States. During this period Appellant used cocaine approximately 25 times, ecstasy about 20 times, and LSD about 15 times.

II. Discussion

A. Law

HN2[] Proper completion of post-trial processing is a question of law this court reviews [*5] de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim.

Neukom, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.). We permit correction of the STR in our decretal paragraph.

[4] We did not order the Government to show cause as to why this case should not be remanded. Each of us is familiar with the recent responses submitted by the Government on this issue in prior and pending cases. This decision was made for judicial economy.

[5] The majority of these facts are from the stipulation of fact signed by Appellant and counsel, and admitted into evidence without objection.

[6] Although the stipulation of fact used the dates "May 2017 and October 2018," the specifications for which Appellant was found guilty included: wrongful use of cocaine on divers occasions from on or about 1 January 2017 to on or about 10 October 2018; wrongful use of ecstasy on divers occasions from on or about 15 May 2017 to on or about 10 October 2018; and wrongful use of LSD on divers occasions from on or about 1 June 2017 to on or about 10 October 2018.

App. 2004) (citation omitted). Interpretation of a statute and an R.C.M. provision are also questions of law that we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2007) (citation omitted).

HN3[] Executive Order 13,825, § 6(b), requires the version of Article 60, UCMJ, 10 U.S.C. § 860, "in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence. . . ." *See* 2018 Amendments to the Manual for Courts-Martial, United States, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018). The version of Article 60, UCMJ, in effect on 1 January 2017, stated "[a]ction on the sentence of a court-martial shall be taken by the convening authority." 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States* (2016 ed.) (*MCM*)). "Except as provided in paragraph (4) [of Article 60(c), UCMJ], the convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part." 10 U.S.C. § 860(c)(2)(B) (*MCM*). "Except as provided in subparagraph (B) or (C) [of Article 60(c)(4)(A), UCMJ], the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part, an adjudged sentence of . . [*6] . [a] bad conduct discharge." 10 U.S.C. § 860(c)(4)(A) (*MCM*).

R.C.M. 1104(b)(2)(B) states:

> A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action. If any post-trial action by the convening authority is incomplete, irregular, or contains error, the military judge shall—(i) return the action to the convening authority for correction; or (ii) with the agreement of the parties, correct the action of the convening authority in the entry of judgment.

"Under regulations prescribed by the Secretary concerned, the military judge of a general or special court-martial shall enter into the record of trial the judgment of the court." R.C.M. 1111(a)(1). "The judgment reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders. The [EoJ] terminates the trial proceedings and initiates the appellate process." R.C.M. 1111(a)(2).

"If the Court of Criminal Appeals determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the [P]resident may prescribe." Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3). "A Court [*7] of Criminal Appeals may order a remand for additional fact finding, or for other reasons, in order to address a substantial issue on appeal." R.C.M. 810(f). "A remand under this subsection is generally not appropriate to determine facts or investigate matters which could, through a party's exercise of reasonable diligence, have been investigated or considered at trial." *Id.* "Such orders shall be directed to the Chief Trial Judge." *Id.*

"The Judge Advocate General, the Court of Criminal Appeals, and the [United States] Court of Appeals for the Armed Forces may modify a judgment in the performance of their duties and responsibilities." R.C.M. 1111(c)(2). "If a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand." R.C.M. 1111(c)(3).

B. Analysis

1. Jurisdiction

HN4[] We briefly address our jurisdiction. We are a court of limited jurisdiction defined wholly by statute. *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). In this case, we derive our jurisdiction from Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3), which says "[a] Court of Criminal Appeals shall have jurisdiction over a court-martial in which the judgment entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c] of this title includes a sentence of . . . [a] bad-conduct discharge." 10 U.S.C. § 866(b)(3). In [*8] this case, the EoJ accurately lists a bad-conduct discharge so we are satisfied that we have jurisdiction even if the convening authority failed to take action on the entire sentence as required by law. The convening authority's decision memorandum does not show any attempt to disapprove the bad-conduct discharge.[7] Even if the convening authority wanted to take such an action on the sentence—and we have no evidence that he

[7] The convening authority directed Appellant to take leave pending completion of appellate review under Article 76a, UCMJ, 10 U.S.C. § 876a. This direction is consistent with Appellant having an unsuspended bad-conduct discharge.

did—he lacked that power under the version of Article 60, UCMJ, in effect on 1 January 2017, the earliest date for which Appellant was convicted. *See* 10 U.S.C. § 860 (*MCM*). We are satisfied that we have jurisdiction under Article 66(b)(3), UCMJ. *See United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *11 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.).

2. Convening Authority Decision Memorandum

As an initial matter, we recognize that other panels of our esteemed colleagues on this court have addressed this issue differently than we do below; however, we respectfully are not persuaded by the other approaches. A review of our recent decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op) makes clear that four distinct positions exists among the judges on this court, two of which are [*9] reflected in this case. *See also United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.).

In a case referred after 1 January 2019 where an accused is found guilty of a specification for an offense occurring before 1 January 2019, we find the convening authority cannot simultaneously "take no action on the sentence" and satisfy Exec. Order 13,825, § 6(b)(1), which "requires action by the convening authority on the sentence." *Finco*, 2020 CCA LEXIS 246 at *8. We need look no further than the plain language of the decision memorandum and determine that the convening authority erred when he took no action on the sentence when Exec. Order 13,825, § 6(b)(1), required him to do so. *Id.*

In *Finco*, a panel of our court found plain or obvious error because a convening authority "cannot simultaneously 'take no action on the sentence' and satisfy Exec. Order. 13,825, § 6(b)(1), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), which 'requires action by the convening authority on the sentence.'" *Id.* at *12. The conclusion of error in *Finco* was consistent with the earlier decision of our sister-service court in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020). The court in *Coffman* held that "indicating 'N/A' or stating 'No Action' does not constitute taking action in [*10] a case." *Id.* at 823.

In the case before us, Appellant submitted clemency matters requesting reduction of his confinement and forfeitures that extended beyond 8 June 2019. The convening authority was under no obligation to do this under the PTA's terms. We acknowledge the convening authority's decision memorandum made clear the clemency matters were considered. This provides some support for an argument that the convening authority implicitly approved this portion of the sentence. On the other hand, the language used in the decision memorandum indicates no action was taken on the sentence which can easily be read as a decision was never made. Therefore, we continue our analysis.

The convening authority's decision memorandum stated that he consulted with his staff judge advocate (SJA). There is no information in the record of trial regarding the substance of the SJA's advice to the convening authority or what the convening authority understood the law required on taking action on the sentence. It is possible the SJA gave accurate advice to the convening authority that he had to take action on the sentence given the date of the earliest offense and the date of referral. We find it more probable that [*11] if the SJA gave advice it would have been consistent with the convening authority decision memorandum—that the law did not require the convening authority to take action on the sentence anymore—which would reflect a clearly erroneous view of the law applicable to Appellant's case. As Appellant had an opportunity to address this error with the military judge after the convening authority signed the decision memorandum, we must determine if Appellant waived or forfeited this issue.

Appellant did not raise a motion under R.C.M. 1104(b)(2)(B) alleging that the convening authority's action was incomplete, irregular, or contained error within the rule's five-day prescribed timeframe. Under the prior version of Article 66, UCMJ, we had the discretion to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. 10 U.S.C. § 866 (*MCM*); s*ee United States v. Lee*, No. ACM 39531, 2020 CCA LEXIS 61, at *17 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (citations omitted). We find that our discretion on this matter has not changed despite congressional modifications to the version of Article 66, UCMJ, which applies to this case. *See Finco*, 2020 CCA LEXIS 246, [slip op.] at *15. Exercising that discretion, we find that Appellant's failure [*12] to file a motion under R.C.M. 1104(b)(2)(B) forfeited his right to object to the accuracy of the convening authority's decision memorandum absent plain error. *See id.*

HN5[] Under a plain error analysis, an appellant must

show "(1) there was an error; (2) [the error] was plain or obvious; and (3) the error materially prejudiced a substantial right." *See United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (en banc) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)). Whether an error is "plain" is a question of law we review de novo. *See United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019).

HN6[⬆] "We begin statutory analysis by examining the plain language." *United States v. Stout*, 79 M.J. 168, 171 (C.A.A.F. 2019). "The plain language will control, unless use of the plain language will lead to an absurd result." *Id.* (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007)). The plain language of the prior version of Article 60, UCMJ, gave the convening authority four choices when taking action on the sentence: approve, disapprove, commute, or suspend. In this applicable version of Article 60, UCMJ, Congress did not use words "deny relief," "effectuate the sentence," or "take no action."

We find the decision to take no action on the sentence was a plain or obvious error. ***HN7***[⬆] We find the threshold of "some colorable showing of possible prejudice" is still the appropriate standard for an error impacting an appellant's request for clemency. *See LeBlanc*, 74 M.J. at 660 (quoting *Scalo*, 60 M.J. at 437). While Appellant [*13] has not made a specific claim of prejudice, we find the low standard of some colorable showing of possible prejudice to be apparent. Part of the reasoning behind the low threshold is to "avoid undue speculation as to how certain information might impact the convening authority's broad discretion." *Scalo*, 60 M.J. at 437. Certainly, the convening authority in this case had less discretion than was present in *Scalo* because this convening authority could not disapprove, commute, or suspend the bad-conduct discharge; however, he retained the power to take those actions with the remainder of the sentence. If the convening authority failed to take action on the entire sentence—as his memorandum indicates he failed to do—then we are unsure whether he made a decision on Appellant's clemency request which was within the convening authority's power to grant. Under these circumstances, we find a colorable showing of possible prejudice and that a remand is the best method to remedy this error.

We find a remand in this case to be necessary before we can determine whether the sentence is correct in law and should be approved. *See Finco*, 2020 CCA LEXIS 246, [slip op.] at *16.

For our esteemed colleague who concurs in the result of this opinion, [*14] as we have said before, we have only one minor quibble with the "fundamental misstep" position. *Aumont*, 2020 CCA LEXIS 416 at *35 (Lewis, S.J., concurring in part and in the result). As we see it, the position seems to give little meaning to the new post-trial motions process available under R.C.M. 1104(b)(2)(B) where an appellant can raise a concern to the military judge with any post-trial action by the convening authority that is incomplete, irregular, or contains error. This procedural mechanism—available to *Finco, Barrick, Aumont*, and Appellant—was not a part of the system for cases with a traditional action referred before 1 January 2019. As we see it, the new post-trial motions process should be part of the analysis of our discretion to apply waiver or forfeiture. ***HN8***[⬆] In those cases where we exercise our discretion to apply forfeiture, we test for a colorable showing of possible prejudice.

C. Remand

To address the issue raised by the convening authority's decision memorandum, we use the new statutory remand authority of Article 66(f)(3), UCMJ. The Military Justice Review Group's report recommended this new statutory provision to "expressly provide the authority for the court to remand a case for additional proceedings [*15] that may be necessary to address a substantial issue" and "would incorporate current practice (i.e., '*DuBay*'[8] hearings) and could include orders to either a convening authority or Chief Trial Judge for delegation to a military judge." *See Finco*, 2020 CCA LEXIS 246 at *19-20; Office of the General Counsel, Dep't of Defense, *Report of the Military Justice Review Group Part I: UCMJ Recommendations*, at 611 (22 Dec. 2015), https://www.jag.navy.mil/documents/NJS/MJRG_Report_PartI_22Dec15.pdf.

HN9[⬆] The plain language of Article 66(f)(3), UCMJ, permits us to order a hearing as may be necessary to address a substantial issue. We find a substantial issue existed when the convening authority purported to take no action on the sentence when the law required it. ***HN10***[⬆] R.C.M. 810(f) cautions that a remand should not be used for matters which could have been investigated or considered at trial through a party's

[8] *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

exercise of reasonable diligence. In this case, we see no single party failing to exercise reasonable diligence as both parties failed to raise a post-trial motion in this case. We also would have expected the military judge to wait to sign the EoJ until action was taken on the sentence.

We mention one final source that applies to remands, the Joint Rules for Appellate Procedure for Courts of Criminal [*16] Appeals (JRAP). The JRAP apply to cases docketed with our court on or after 1 January 2019, including Appellant's case, and are signed by The Judge Advocate General of the Air Force and his counterparts in the Army, Navy, and Coast Guard. JRAP Rule 29, *Article 66(f) Proceedings*, provides further explanations of our remand procedures. JT. CT. CRIM. APP. R. 29. For example, Rule 29(b) addresses whether our court retains jurisdiction on remand or dismisses the appellate proceeding and returns jurisdiction over the case to the military judge. Rule 29(b)(2) elaborates that one of the circumstances when terminating appellate jurisdiction may be appropriate is when the case requires corrective action by the trial court to the judgment. Rule 29(d)(3) also instructs that when we return jurisdiction of a case to the military judge and dismiss the appellate proceeding, the rules applicable to the conduct of a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session shall apply. These provisions guide our decretal paragraph as we describe the scope of our remand and the procedures available to the military judge.

III. CONCLUSION

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening [*17] authority's decision memorandum as no action was taken on Appellant's adjudged sentence as required by law.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

(1) Correct the Statement of Trial Results;
(2) Return the record of trial to the convening authority or his successor to take action on the sentence;
(3) Conduct one or more Article 66(f)(3), UCMJ, proceedings using the procedural rules for post-trial Article 39(a), UCMJ, sessions; and/or
(4) Modify the Entry of Judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

Concur by: CADOTTE

Concur

CADOTTE, Judge (concurring in the result):

I agree with the conclusion of the court with respect to remanding this case to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum as no action was taken on Appellant's adjudged sentence as required by law. However, I find the convening authority's "take [*18] no action on sentence" to be a "fundamental misstep in military justice procedure" as articulated by Chief Judge J. Johnson in his separate opinion in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416, at *92-105 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (J. Johnson, C.J., concurring in part and dissenting in part) (unpub. op.), which I joined. As such, I do not agree with the majority in conducting a plain error analysis. The convening authority's action must be "clear and unambiguous," and in this case it is not. *See United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citing *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981)). I disagree with the majority's decision to test for prejudice.

Accordingly, I would find error and remand regardless of whether the Appellant was prejudiced.

End of Document

United States v. Davis

United States Air Force Court of Criminal Appeals

December 1, 2020, Decided

No. ACM S32602

Reporter
2020 CCA LEXIS 434 *; 2020 WL 7056286

UNITED STATES, Appellee v. Michael O. DAVIS, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: John C. Degnan. Sentence: Sentence adjudged on 1 May 2019 by SpCM convened at Joint Base Lewis-McChord, Washington. Sentence entered by military judge on 24 May 2019: Bad-conduct discharge, confinement for 2 months, forfeiture of $1,000.00 pay per month for 2 months, and reduction to E-1.

Core Terms

convening, sentence, military, tab, memorandum, no action, take action, adjudged, confinement, post-trial, colorable, approve, effects, possible prejudice, specification, marijuana, witnesses, unpub, guilty plea, clemency, friends, on-base

Case Summary

Overview
HOLDINGS: [1]-Court found that its discretion to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error, had not changed despite congressional modifications to the version of UCMJ art. 66, 10 U.S.C.S. § 866 that applied to this case; [2]-Exercising that discretion, the court found that appellant's failure to file a motion under R.C.M. 1104(b)(2)(B), Manual Courts-Martial forfeited his right to object to the accuracy of the convening authority's decision memorandum absent plain error; [3]-Decision to take no action on the sentence and the declination to take action in the case were plain or obvious errors and remand was required to remedy this error before the court could complete its review.

Outcome
The case was remanded and the appeal was dismissed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

Proper completion of post-trial processing is a question of law that a military court of criminal appeals reviews de novo. Interpretation of a statute and a Rule for Courts-Martial provision are also questions of law that the court reviews de novo.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN2 **Posttrial Procedure, Actions by Convening Authority**

Exec. Order No. 13,825, § 6(b), requires that the version of Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860, in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority to the extent that Article 60: (1) requires action by the convening authority on the sentence.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN3 **Posttrial Procedure, Actions by Convening Authority**

R.C.M. 1109(d)(2), Manual Courts-Martial, only requires the convening authority to consult with the staff judge advocate (SJA). This rule does not explicitly require the SJA to give any particular advice during this consultation, let alone provide written advice on the applicable law.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Judicial Review, Courts of Criminal Appeals**

Under the 2016 version of Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866, a military court of criminal appeals had the discretion to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. The United States Air Force Court of Criminal Appeals finds that its discretion on this matter has not changed despite congressional modifications to UCMJ art. 66.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN5 **Plain Error, Definition of Plain Error**

Under a plain error analysis, an appellant must show (1) there was an error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Matters Submitted by Accused

HN6[] **Posttrial Procedure, Actions by Convening Authority**

The threshold of some colorable showing of possible prejudice is still the appropriate standard for an error impacting an appellant's request for clemency. Part of the reasoning behind the low threshold is to avoid undue speculation as to how certain information might impact the convening authority's broad discretion.

Counsel: For Appellant: Major Patrick J. Hughes, USAF.

For Appellee: Mary Ellen Payne, Esquire.

Judges: Before LEWIS, D. JOHNSON, and CADOTTE, Appellate Military Judges. Senior Judge LEWIS delivered the opinion of the court, in which Judge D. JOHNSON joined. Judge CADOTTE filed a separate opinion concurring in the result.

Opinion by: LEWIS

Opinion

LEWIS, Senior Judge:

A special court-martial composed of a military judge convicted Appellant, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of one specification of wrongful possession of lysergic acid diethylamide (LSD), and one specification of wrongful use of marijuana, both in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.[1],[2] In addition, the military judge convicted Appellant, contrary to his pleas, of one specification of wrongful use of LSD on divers occasions, also a violation [*2] of Article 112a, UCMJ.[3] The military judge sentenced Appellant to a bad-conduct discharge, confinement for two months, forfeiture of $1,000.00 pay per month for two months, and reduction to the grade of E-1.

On the same day that trial adjourned, the military judge signed a statement of trial results.[4] A week later, on 8 May 2019, Appellant submitted his clemency request to the convening authority asking that his two months of adjudged confinement be reduced to one month of hard labor without confinement and restriction to the installation. On 16 May 2019, after consulting with the staff judge advocate (SJA), the convening authority signed a decision on action memorandum which included the following statements: (1) "I take no action on the sentence;" and (2) "Before declining to take action in this case, I considered matters timely submitted by the accused under [Rule for Courts-Martial

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[1] References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*). Unless otherwise specified, all other references to the UCMJ and all references to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.) (2019 *MCM*).

[2] In the PTA, Appellant and the convening authority agreed that Appellant would plead not guilty to the words "on divers occasions" in the marijuana use specification. The Government attempted to prove that Appellant used marijuana one additional time but the military judge found Appellant not guilty of the words "on divers occasions." An additional PTA term required the convening authority to dismiss with prejudice one specification of wrongful possession of marijuana, an alleged violation of Article 112a, UCMJ.

[3] In the PTA, Appellant and the convening authority agreed that Appellant would plead not guilty to the words "on divers occasions" in the LSD use specification. The Government attempted to prove Appellant used LSD additional times. The military judge convicted Appellant of this specification as charged.

[4] The statement of trial results failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3). Appellant has not claimed prejudice and we find none. *See United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.).

(R.C.M.)] 1106." The convening authority's decision memorandum does not specifically indicate whether any portion of the sentence was approved. All of Appellant's convictions are for offenses that occurred prior to 1 January 2019[5] and the charge and specifications [*3] were referred to trial on 8 March 2019.

Appellant did not submit any post-trial motions to the military judge under R.C.M. 1104(b)(2)(B) alleging the post-trial action by the convening authority was incomplete, irregular, or contained error. On 24 May 2019, the military judge signed the entry of judgment.

Appellant submitted his case to us without an assignment of error. In conducting our review under Article 66, UCMJ, 10 U.S.C. § 866, we analyzed the language used in the convening authority's decision on action memorandum to determine whether it was erroneous.[6] For the reasons outlined below, we determine that a plain or obvious error exists and there is a colorable showing of possible prejudice such that a remand of Appellant's case to the Chief Trial Judge of the Air Force is warranted.

We are mindful that other judges on our court see the law differently than we do. A review of our recent decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.) makes clear that four distinct positions exist among the judges on this court, two of which are reflected in this case.[7]

I. BACKGROUND

Appellant pleaded guilty to using marijuana on one occasion in September of 2017 while on a beach [*4] in the state of Washington with two other Airmen and a civilian female. In the providence inquiry and the stipulation of fact, Appellant admitted smoking marijuana out of a glass pipe by drawing the smoke into his mouth and throat. Appellant began coughing immediately afterwards. In the providence inquiry, Appellant denied feeling any effects from using marijuana but was confident that he ingested marijuana when he smoked it.

Appellant also pleaded guilty to using LSD one time. Sometime in August 2018, Appellant attended a party hosted by a senior airman at his house in Tacoma, Washington. While at the party, Appellant used a tab of LSD with several of his friends. Appellant's friends and later roommates, A1C JC and civilian KC—who were married to each other—provided the LSD for the group. Appellant chose one tab of LSD and placed it on his tongue where it remained for 15-20 minutes. Appellant then went to the bathroom and spit the tab out and flushed it down the toilet. In his providence inquiry, Appellant admitted his use of LSD was intentional and wrongful and he used it because he was weak-minded, wanted to fit in, and wanted his friends to approve of his actions. Appellant agreed [*5] with the military judge that he was one hundred percent confident that he ingested the LSD when it was on his tongue even though he stated he felt no effects after ingestion. Appellant described the effects the others experienced from using their LSD tabs and noted that his tab had come from that same sheet of LSD tabs. Appellant did not tell the others that he spit out his tab and admitted to the military judge that he "pretended to be high" to maintain appearances and to "not arouse [the] suspicion of [his] friends." To explain how he pretended to be high, Appellant stated that he initiated and participated in several activities such as building a fort out of cardboard boxes and using the liquid inside of glow sticks to paint the inside of the boxes.

Appellant also pleaded guilty to wrongfully possessing LSD one time. Specifically, on 25 December 2018, Appellant possessed LSD while at the off-base house in Olympia, Washington that he shared with A1C JC and KC. Again, A1C JC and KC supplied the LSD and others were present to use LSD. This time, as the group prepared to take their LSD tabs, Appellant hid his LSD tab in a fold in his shirt before faking that he took it. Appellant then [*6] went to his room to get his cellphone off its charger and left the LSD tab in his room. Upon his return to the group, Appellant pretended to be under the influence of LSD by looking at his phone screen and talking about the "the pretty colors" he saw. Later, Appellant grew tired of "putting on the charade" and went upstairs to his room to watch Netflix alone. Appellant admitted that he knew he possessed LSD

[5] Three of the specifications were referred to trial with the end date of "on or about 29 January 2019." The day before trial started, the charged time was shortened so the ending date for these three specifications was "on or about 31 December 2018."

[6] We did not order the Government to show cause as to why this case should not be remanded. We are familiar with the recent responses submitted by the Government on this issue in prior and pending cases. This decision was made for judicial economy.

[7] There was not a call for a vote to hear Appellant's case en banc.

because he accepted the LSD tab and held onto it until he placed it in his room.

To prove that Appellant used LSD on divers occasions, the Government called four witnesses who provided immunized testimony. One of the Government witnesses was A1C JC, the co-supplier of the LSD that Appellant pleaded guilty to possessing and using. The other three Government witnesses had been present at either the marijuana or the LSD incidents described above. Together, the four witnesses testified to three or more additional uses of LSD by Appellant prior to 25 December 2018. Two of the additional uses occurred in the on-base dormitories and the third additional use was at a surprise birthday party for an Airman who lived on-base. The witnesses recalled Appellant telling them he felt the effects [*7] from using LSD and displaying physical manifestations of such use. A1C JC and an additional Government witness testified they saw Appellant with LSD on his tongue during one of the contested uses.

In his defense to the additional LSD uses, Appellant testified that he faked using LSD two times in the on-base dormitories by hiding the tab between his fingers and later discarding the tab. Appellant testified he faked the effects of using LSD for hours afterwards in an attempt to fit in with his friends. Regarding the surprise birthday party on-base, Appellant testified that he was preparing to use an LSD tab but when it was handed to him it was dropped on the ground. Appellant testified he searched for the tab in the dark but did not remember finding it or using it. Appellant agreed it was possible that he used LSD this time and he agreed he did not fake the effects of using LSD.

Regarding the on-base surprise party, there was conflicting testimony from witnesses for both sides as to whether Appellant was just drunk or was displaying physical effects consistent with using LSD. Some witnesses recalled that Appellant admitted using LSD. After considering the evidence before him, the military [*8] judge convicted Appellant of using LSD on divers occasions.[8]

After the sentencing proceedings closed and the military judge announced the adjudged sentence, he inquired with the parties regarding the PTA's effect on the adjudged sentence. The military judge commented that Appendix A to the PTA stated that the convening authority "will undertake . . . [t]o not approve any confinement adjudged in excess of 90 days." The military judge then stated that he interpreted the effect of the PTA as "the convening authority may approve the sentence as adjudged." The parties agreed with the military judge's interpretation. Shortly thereafter, Appellant's court-martial was adjourned.

The PTA and Appendix A are appellate exhibits in the record of trial. Both are signed by the SJA and the convening authority. Paragraph 2 of the PTA states that Appellant offered to plead guilty "in consideration of the agreement by the convening authority to approve a sentence in accordance with the limitations set forth in Appendix A." Paragraph 6 of the PTA describes the possibility of a R.C.M. 1109 hearing, apparently under the 2016 version of the *Manual for Courts-Martial*, if Appellant committed a UCMJ offense between the [*9] announcement of sentence and "the [c]onvening [a]uthority's approval of any sentence."[9]

The post-trial rights advisement provided to Appellant by his trial defense counsel is also an appellate exhibit. Paragraph 11 addresses the convening authority's action and includes the following advice to Appellant: "Subject to the limitations set out in Article 60, UCMJ, and explained in the paragraph below, the [c]onvening [a]uthority may take action on the findings and/or approve all, some, or none of the sentence in his or her sole discretion."[10] Paragraph 12 of the post-trial rights advisement explains the limits of Article 60, UCMJ, and the circumstances under which the convening authority "lacks the authority to grant relief."[11]

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[8] Prior to findings deliberations, trial counsel notified the military judge that the Government was considering asking for special findings under R.C.M. 918(b) if the military judge found Appellant guilty of divers use of LSD "to specify which uses, if we were to get that point." After discussing several cases, neither side requested specific findings and the military judge determined he could enter a general verdict of guilty to the words "on divers occasions" if the Government proved Appellant's guilt beyond a reasonable doubt. *See United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008); *United States v. Walters*, 58 M.J. 391, 396 (C.A.A.F. 2003).

[9] This current provision is found in R.C.M. 1108 of the 2019 *MCM*.

[10] Trial defense counsel did not specify which version of Article 60, UCMJ, was being referenced.

[11] The submission of matters letter from the wing legal office to Appellant contained two statements about the convening authority taking action. The first statement described Appellant's right to submit matters "before the convening authority decides what, *if any*, action the convening authority will take on your case." (Emphasis added) In isolation, this

II. Post-Trial Processing

A. Law

HN1[] Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a R.C.M. provision are also questions of law that we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

HN2[] Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, 10 U.S.C. § 860, "in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the [*10] convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence." *See* 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. 9889, 9890 (8 Mar. 2018). The version of Article 60, UCMJ, in effect between the dates of the earliest charged offense in this case, 1 May 2017, stated "[a]ction on the sentence of a court-martial shall be taken by the convening authority." 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States* (2016 ed.)).

In *Aumont*, a split, en banc, unpublished decision, our court affirmed the findings and sentence when the convening authority took no action in a case referred on or after 1 January 2019 with a convicted offense prior to 1 January 2019. Unpub. op. at *20, 28. The opinion of the court found no error in the convening authority's decision memorandum because it met the legacy requirements of Article 60, UCMJ, but this opinion was only joined by two judges. *Id.* at *1, 24. One additional judge wrote separately and concurred in the finding of no error but for different reasons. *Id.* at *40-42 (Posch, S.J., concurring in part and in the result). On the other hand, six of the ten judges found taking no action in the case to be an error. *Id.* at *31 (Lewis, S.J., concurring in part and in the result); *id.* at *100 (J. Johnson, C.J., dissenting [*11] in part and in the result). Four of those six judges found the error to be a fundamental misstep requiring remand without testing for material prejudice. *Id.* at *104 (J. Johnson, C.J. dissenting in part and in the result). Two judges, who make up the majority in this panel, found the appellant in *Aumont* forfeited the issue and then conducted a plain error analysis and determined that the error was plain or obvious, but there was no colorable showing of possible prejudice because the convening authority explicitly denied the only clemency request made by the appellant in *Aumont*—a deferral of mandatory forfeitures. *Id.* at *32-37 (Lewis, S.J., concurring in part and in the result). The four opinions in *Aumont* demonstrate the extent of the split on this issue among the judges on our court.

B. Analysis

We follow the same approach we did in the concurring opinion from *Aumont* but with a different result. *See id.* at *28-39 (Lewis, S.J., concurring in part and in the result). We find Appellant forfeited the issue of a plain or obvious error in the convening authority's decision memorandum. Contrary to our conclusion in *Aumont*, we find a colorable showing of possible prejudice to be apparent in a similar fashion to *United States [*12] v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427, at *15 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.) and *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.). Our esteemed colleague who concurs in the result here finds the same fundamental misstep that he did in *Aumont* and *Cruspero* and therefore would not test for prejudice. *See Cruspero*, unpub. op. at *20 (Cadotte, J., concurring in the result); *Aumont*, unpub. op. at *89 (J. Johnson, C.J., concurring in part and dissenting in part).

We begin with whether Appellant waived or forfeited the issue of error in the convening authority's decision memorandum which included the statements: "I take no action on the sentence" and "Before declining to take action in the case . . ." Upon receipt of the convening authority's decision memorandum, Appellant and his trial defense counsel had an opportunity under R.C.M. 1104(b)(2)(B) to file a motion alleging that the convening authority's action was incomplete, irregular, or contained error. No such motion was filed. The record of trial contains no information on whether the failure to file such a motion was an intentional relinquishment of a known right or merely an oversight by Appellant and his

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statement provides some support for the view that the wing legal office understood action on the sentence was not required by the law. However, the second statement uses different language when explaining that clemency matters submitted might "affect the convening authority's decision to approve or disapprove the findings of guilt or part of the sentence in your case as permitted by law."

trial defense [*13] counsel. There is no information in the record of trial regarding the substance of the SJA's advice[12] to the convening authority or what the convening authority understood the law required on taking action on the sentence. Certain parts of the record of trial indicate the parties and the military judge, at least at one point, expected the convening authority would approve some[13] or all of the sentence adjudged when he took action on the sentence.

HN4[] Under the prior version of Article 66, UCMJ, we had the discretion to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. 10 U.S.C. § 866 (2016 *MCM*); *see United States v. Lee*, No. ACM 39531, 2020 CCA LEXIS 61, at *17 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (citations omitted). We find that our discretion on this matter has not changed despite congressional modifications to the version of Article 66, UCMJ, which applies to this case. Exercising that discretion, we find that Appellant's failure to file a motion under R.C.M. 1104(b)(2)(B) forfeited his right to object to the accuracy of the convening authority's decision memorandum absent plain error. ***HN5***[] Under a plain error analysis, an appellant must show "(1) there was an error; (2) [the error] [*14] was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (en banc) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

We find the decision to take no action on the sentence and the declination to take action in the case were plain or obvious errors. In a case like this, where the charge and specifications were referred on or after 1 January 2019 and Appellant was found guilty of a specification for an offense occurring before 1 January 2019, we find the convening authority cannot simultaneously "take no action on the sentence" and decline to take action in the case while satisfying Exec. Order 13,825, § 6(b)(1), which "requires action by the convening authority on the sentence." As the convening authority failed to approve any part of the sentence, we find plain or obvious error in the convening authority's decision memorandum. Our conclusion of error is consistent with our sister-service court's decision in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020). The court in *Coffman* held "indicating 'N/A' or stating 'No Action' does not constitute taking action in a case." *Id.* at 823.

HN6[] We find the threshold of "some colorable showing of possible prejudice" is still the appropriate standard for an error impacting an appellant's request for clemency. *See LeBlanc*, 74 M.J. at 660 (quoting *Scalo*, 60 M.J. at 437). Appellant [*15] has made no claim of prejudice and his appellate defense counsel did not annotate his awareness of the issue in the convening authority's decision in his merits brief.[14] Still, we find the low standard of some colorable showing of possible prejudice to be apparent from the record of trial. Part of the reasoning behind the low threshold is to "avoid undue speculation as to how certain information might impact the convening authority's broad discretion." *Scalo*, 60 M.J. at 437 (citation omitted). The convening authority could have disapproved, suspended, or commuted Appellant's adjudged two months of confinement. Appellant requested specific relief in his clemency submission to be released from confinement and perform a month of hard labor without confinement while being restricted to the installation's limits. If the convening authority failed to take action on the sentence and in the case—as his memorandum indicates—then we are unsure whether he made a decision on Appellant's clemency request which was within the convening authority's power to grant. Under these circumstances, we find a colorable showing of possible prejudice to be apparent and that a remand to the Chief Trial Judge of the Air Force is the [*16] best method to remedy this error before we complete our review under Article 66, UCMJ.

III. Conclusion

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum as no action was taken on Appellant's adjudged sentence and

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[12] ***HN3***[] R.C.M. 1109(d)(2) only requires the convening authority to "consult" with the SJA. This rule does not explicitly require the SJA to give any particular advice during this consultation, let alone provide written advice on the applicable law.

[13] The convening authority could not disapprove, commute, or suspend Appellant's bad-conduct discharge. 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*).

[14] *Cf. United States v. Barrick*, No ACM. S32579, 2020 CCA LEXIS 346, at *3 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.) (explaining the assignment of error brief stated it was reasonable to consider the convening authority's decision not to act as the equivalent of action).

in the case as required by law.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

(1) Correct the Statement of Trial Results;

(2) Return the record of trial to the convening authority or his successor to take action on the sentence;

(3) Conduct one or more Article 66(f)(3), UCMJ, proceedings using the procedural rules for post-trial Article 39(a), UCMJ, sessions; and/or

(4) Modify the Entry of Judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

Concur by: CADOTTE

Concur

CADOTTE, Judge (concurring in the result):

I agree with the conclusion of the court with respect to remanding [*17] this case to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum as no action was taken on Appellant's adjudged sentence as required by law. However, as I did in *United States v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427, at *19-20 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.) (Cadotte, J., concurring in the result), I find the convening authority's decision to "take no action on the sentence" to be a "fundamental misstep in military justice procedure" as articulated by Chief Judge J. Johnson in his opinion, concurring in part and dissenting in part, in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416, at *92-105 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.) (J. Johnson, C.J., dissenting in part and in the result), which I joined. As such, I do not agree with the majority in conducting a plain error analysis. The convening authority's action must be "clear and unambiguous," and in this case it is not. *See United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citing *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981)). I disagree with my esteemed colleagues' decision to test for prejudice. Accordingly, I would find error and remand regardless of whether Appellant was prejudiced.

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United States v. Finco

United States Air Force Court of Criminal Appeals

July 27, 2020, Decided

No. ACM S32603

Reporter
2020 CCA LEXIS 246 *

UNITED STATES, Appellee v. Christopher P. FINCO, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Christopher M. Schumann. Sentence: Sentence adjudged on 7 June 2019 by SpCM convened at Nel-lis Air Force Base, Nevada. Sentence entered by military judge on 26 June 2019: Bad-conduct discharge, confinement for 5 months, reduction to E-1, and a reprimand.

Core Terms

convening, sentence, memorandum, military, reprimand, marijuana, modify, no action, post-trial, court-martial, take action, substantial issue, bad-conduct, disapprove, adjudged, specification, confinement, proceedings, dispensary, clemency, matters, smoking

Counsel: For Appellant: Major Stuart J. Anderson, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Anne M. Delmare, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, LEWIS, and D. JOHNSON, Appellate Military Judges. Senior Judge LEWIS delivered the opinion of the court, in which Senior Judge MINK and Judge D. JOHNSON joined.

Opinion by: LEWIS

Opinion

LEWIS, Senior Judge:

Appellant was convicted, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of one specification of signing a false official document, one specification of making a false official statement, one specification of wrongful use of marijuana, and one specification of wrongful possession of marijuana, in violation of Articles 107 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 907, 912a.[1],[2]

A military judge sitting alone sentenced [*2] Appellant to a bad-conduct discharge, confinement for five months, reduction to the grade of E-1, and a reprimand. The adjudged confinement was the same amount as the

[1] Unless otherwise noted, references to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*). Unless otherwise noted, all other references to the UCMJ and to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Per the PTA, the convening authority withdrew and dismissed, with prejudice, one specification of wrongful distribution of marijuana, an alleged violation of Article 112a, UCMJ.

PTA's confinement cap. The military judge signed the Statement of Trial Results (STR) the same day that court adjourned.[3] After reviewing Appellant's clemency matters, the convening authority signed a decision memorandum which stated, "I take no action on the sentence of this case." Following this statement, the decision memorandum included a reprimand of Appellant by the convening authority.[4] *See* Rule for Courts-Martial (R.C.M.) 1003(b)(1).

The same day the convening authority signed his decision memorandum, the military judge signed the entry of judgment (EoJ).[5] *See* R.C.M. 1111(b). The signed EoJ contains the following information on the sentence: "Punitive Discharge: Bad Conduct [*3] Discharge;" "Total Confinement: 5 months;" "Reduction in Pay Grade: E-1;" and "Reprimand: Yes." The EoJ does not include the language of the reprimand from the convening authority's decision memorandum, but the decision memorandum is included as Attachment 2 to the EoJ.

Appellant raises two assignments of error on appeal: (1) whether the military judge's failure to include the text of the reprimand in the EoJ requires disapproval of a portion of the sentence; and (2) whether his sentence to a bad-conduct discharge is an inappropriately severe sentence.[6] Additionally, we consider whether the convening authority's decision memorandum contains error when the convening authority purported to take no action on the sentence and Appellant was convicted of an offense committed prior to 1 January 2019.

We find the convening authority's decision memorandum contains error and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate.[7] Given our remand, we do not reach Appellant's second assignment of error, sentence severity.

I. BACKGROUND

Appellant purchased marijuana and marijuana edible products more than 50 times from a local Las Vegas dispensary over an eight-month [*4] period of time which began on 1 November 2017. His total purchases exceeded $2,500.00. Appellant smoked most of the marijuana and consumed most of the edibles that he purchased from this dispensary.

In July 2018, Appellant's good friend, Airman First Class (A1C) JJ, was interviewed by agents from the Air Force Office of Special Investigations (AFOSI) and confessed to smoking marijuana with Appellant. A1C JJ told the AFOSI agents that he and Appellant both obtained the marijuana from this particular dispensary. Later A1C JJ told Appellant that AFOSI may want to speak to Appellant. Upon learning this information, Appellant disposed of his marijuana pipe and the marijuana he still had in his possession. Appellant's hiatus from marijuana lasted only a few weeks. By 8 August 2018, Appellant

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[3] The STR was inserted into the record of trial in accordance with R.C.M. 1101(a). This rule lists a number of required contents, including *inter alia* "the command by which [the court-martial] was convened." R.C.M. 1101(a)(3). The STR in this case included most of the required contents, and it indicated the squadron and major command to which Appellant was assigned, but it omitted the command which convened the court-martial. *See United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (unpub. op.). We permit correction of the STR in our decretal paragraph.

[4] The text of the reprimand was

> You are hereby reprimanded! Using and possessing drugs while representing the Air Force is inexcusable and disgraceful. Integrity first is an Air Force standard and a moral standard you have failed to live by when you made a false official statement and signed a document in which you made another false official statement. Your behavior has no place in the military.

[5] The EoJ is incorrectly dated 7 June 2019. The military judge's electronic signature shows he entered judgment on 26 June 2019.

[6] Appellant personally asserts the second issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[7] We also considered whether the original record of trial required a certificate of correction under R.C.M. 1112(d)(2) to correct potential defects. These potential defects include (1) a character statement of Master Sergeant CM which is contained in the defense exhibits even though it was not offered or admitted into evidence; (2) no defense exhibits were properly marked; (3) one appellate exhibit is not properly marked; and (4) the court reporter's index of exhibits does not list all the appellate exhibits. We are satisfied the record of trial is complete under Article 54, UCMJ, 10 U.S.C. § 854, and R.C.M. 1112(b). Although defects may be ordered corrected, this process is not mandatory as a "superior competent authority *may* return a record of trial to the military judge for correction under this rule." *See* R.C.M. 1112(d)(2) (emphasis added). We decline to order a certificate of correction.

found a new dispensary, made online purchases of several marijuana products, and resumed smoking marijuana.

On 14 August 2018, two AFOSI agents interviewed Appellant. Appellant waived his right to counsel and his right to remain silent, and agreed to answer the agents' questions.[8] During the interview, Appellant made several oral false statements. He denied smoking marijuana, a statement he knew was false [*5] when he made it. He also denied using marijuana with A1C JJ, another statement that he knew was false at the time he made it.

After his face-to-face interview with the agents, Appellant agreed to make a written statement. He wrote: "I have purchased for others but have not smoked." This statement was false because Appellant had actually used marijuana "more than a few dozen times." After taking an oath, Appellant signed his written statement, which contained the above false statement.

AFOSI agents conducted searches of Appellant's cellphone, vehicle, and residence. In those searches, the AFOSI agents found pre-rolled marijuana cigarettes, marijuana paraphernalia, and marijuana dispensary receipts. Appellant provided a urine sample which tested positive for tetrahydrocannabinol (THC), the metabolite of marijuana, at a level of 60 nanograms per milliliter (ng/mL), above the Department of Defense cutoff level of 15 ng/mL.

II. DISCUSSION

There are two post-trial issues to address. We take them up in this order: (1) the convening authority decision memorandum which purported to take no action on the sentence; and (2) the EoJ's missing reprimand language.

A. Additional Background

1. Convening [*6] Authority Decision Memorandum

On 30 April 2020, we ordered the Government to show cause as to why the record of trial should not be returned to The Judge Advocate General for remand to the convening authority to take action on the sentence and for a military judge to modify the EoJ consistent with the purposes of the remand.

The Government submitted a timely response on 30 May 2020 and argued a remand was not required and urged us to resolve the issue ourselves.[9] The Government emphasized several points: (1) our court has jurisdiction; (2) the convening authority's decision to take "no action" can reasonably be interpreted as the convening authority granting no relief and implicitly approving the remainder of the sentence; and (3) the inclusion of the reprimand language supports the implicit approval of the sentence. The Government acknowledges we may disagree with their implicit approval argument but suggests that we should still modify the EoJ ourselves under R.C.M. 1111(c)(2). If we decline to modify the EoJ ourselves, the Government argues that our remand should go to the military judge and not the convening authority. The Government asserts the military judge may then use the post-trial motion process [*7] outlined in R.C.M. 1104(b)(2)(B) and modify the EoJ accordingly.

2. Missing Reprimand Language

In his first assignment of error, Appellant argues "[t]he [EoJ] must contain the reprimand adjudged" under R.C.M. 1111(b)(3)(D). He urges us to decline to affirm the reprimand under our Article 66, UCMJ, 10 U.S.C. § 866, authority because the Government "has already had two chances to comply with the rule" because it "drafted a deficient judgment and then failed to check its work." Appellant argues that if we permit correction of the error we "would only en courage inattentiveness in post-trial processing without ensuring any significant interest of justice." In Appellant's view, the reprimand "provides little of the overall rehabilitation, retribution, or deterrence that might have resulted from the sentence adjudged."

The Government's response is that the reprimand is contained in the EoJ because the specific language is

[8] At trial, Appellant explained to the military judge that he "originally requested" counsel, but then "waived it." The military judge confirmed with Appellant that he "ultimately waived" his right to have a lawyer present and agreed to answer questions.

[9] Appellant was not required to submit a response to our show-cause order or to answer the Government's response. Appellate defense counsel did not file any motions with the court for leave to file a response or an answer before we issued our opinion.

"in Attachment 2" to the EoJ, the convening authority's decision memorandum. The Government acknowledges that we may not adopt their position that an attachment to the EoJ is sufficient. As a first alternative, the Government prefers our court to modify the EoJ in the performance of our official duties under R.C.M. 1111(c)(2). As a second alter [*8] native, the Government argues that we could require modification of the EoJ without additional post-trial processing, like we have done with corrections to errors in court-martial promulgating orders used in cases referred before 1 January 2019.

B. Law

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a R.C.M. provision are also questions of law that we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2007) (citation omitted).

Executive Order 13,825, § 6(b), mandates the version of Article 60, UCMJ, 10 U.S.C. § 860, "as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the ex tent that Article 60: (1) requires action by the convening authority on the sentence. . . ." *See* 2018 Amendments to the Manual for Courts-Martial, United States, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018). The version of Article 60, UCMJ, in effect on 1 November 2017, stated "[a]ction on the sentence of a court-martial shall be taken by the convening authority." 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States*, (2016 ed.) (2016 *MCM))*. "Except as provided in paragraph (4) [of Article 60(c), UCMJ], the convening authority or an other person authorized to act under this section may approve, [*9] disapprove, commute, or suspend the sentence of the court-martial in whole or in part." 10 U.S.C. § 860(c)(2)(B) (2016 *MCM*). "Except as provided in subparagraph (B) or (C) [of Article 60(c)(4)], the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part, an adjudged sentence of . . . [a] bad conduct discharge." 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*).

R.C.M. 1104(b)(2)(B) states:

> A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action. If any post-trial action by the convening authority is incomplete, irregular, or contains error, the military judge shall—(i) return the action to the convening authority for correction; or (ii) with the agreement of the parties, correct the action of the convening authority in the entry of judgment.

A reprimand is an authorized punishment in a court-martial under R.C.M. 1003(b)(1). "A court-martial shall not specify the terms or wording of a reprimand." R.C.M. 1003(b)(1). "A reprimand, if approved, shall be issued, in writing, by the convening authority." *Id.*

"Under regulations prescribed by the Secretary concerned, the military judge of a general or special court-martial shall [*10] enter into the record of trial the judgment of the court." R.C.M. 1111(a)(1). "The judgment reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders. The entry of judgment terminates the trial proceedings and initiates the appellate process." R.C.M. 1111(a)(2). "If the sentence included a reprimand, the judgment *shall contain the reprimand issued* by the convening authority." R.C.M. 1111(b)(3)(D) (emphasis added).

"If the Court of Criminal Appeals determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the [P]resident may prescribe." Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3). "A Court of Criminal Appeals may order a remand for additional fact finding, or for other reasons, in order to address a substantial issue on appeal." R.C.M. 810(f). "A remand under this subsection is generally not appropriate to determine facts or investigate matters which could, through a party's exercise of reasonable diligence, have been investigated or considered at trial." *Id.* "Such orders shall be directed to the Chief Trial Judge." *Id.*

"The Judge Advocate General, the Court of Criminal [*11] Appeals, and the [United States] Court of Appeals for the Armed Forces may modify a judgment in the performance of their duties and responsibilities." R.C.M. 1111(c)(2). "If a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand." R.C.M. 1111(c)(3).

C. Analysis

1. Convening Authority Decision Memorandum

We briefly address our jurisdiction as the Government analyzed it in their response to our show-cause order. We are a court of limited jurisdiction defined wholly by statute. *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). In this case, we derive our jurisdiction from Article 66(b)(3), UCMJ, which says "[a] Court of Criminal Appeals shall have jurisdiction over a court-martial in which the judgment entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c] of this title includes a sentence of . . . [a] bad-conduct discharge." 10 U.S.C. § 866(b)(3). In this case, the EoJ accurately lists a bad-conduct discharge so we are satisfied that we have jurisdiction even if the convening authority failed to take action on the sentence as required by law. The convening authority's decision memorandum does not show any attempt to disapprove the bad-conduct discharge.[10] Even if the convening authority wanted to take such an action on the [*12] sentence—and we have no evidence that he did—he lacked that power under the version of Article 60, UCMJ, in effect on 1 November 2017. 10 U.S.C. § 860 (2016 *MCM*). We are satisfied that we have jurisdiction under Article 66(b)(3), UCMJ.

In a case referred after 1 January 2019 where an accused is found guilty of a specification for an offense occurring before 1 January 2019, we find the convening authority cannot simultaneously "take no action on the sentence" and satisfy Exec. Order 13,825, § 6(b)(1), which "requires action by the convening authority on the sentence." We decline the Government's invitation to find the convening authority intended to implicitly approve the entire sentence ad judged. Instead, we need look no further than the plain language of the decision memorandum and determine that the convening authority erred when he purported to take no action on the sentence when Exec. Order 13,825, § 6(b)(1), required him to do so.

We also disagree with the Government that this court should exercise its authority to modify the EoJ. The Government relies heavily on our sister-service court's decision in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020), which involved a similar issue to the one before us. In *Coffman*, the convening authority indicated "N/A" on the [*13] section of the "convening authority action form" for "action on the findings and/or sentence." *Id.* at 821. As the earliest offense conviction date in *Coffman* was 2 September 2018, and his case was referred to trial on 26 April 2019, the court found the convening authority "erred in his noncompliance" with the earlier version of Article 60, UCMJ, in effect on 2 September 2018 that required action on the sentence. *Id.* at 822. We agree with this portion of the decision and its rationale that "indicating 'N/A' or stating 'No Action' does not constitute taking action in a case." *Id.* at 823. We also agree with the portion of the decision and its rationale which rejected a challenge to the Army Court of Criminal Appeals' Article 66(b)(3) jurisdiction. *Id.* at 822-23. We choose a different path than our sister-service court for resolving the convening authority's error.[11]

In the case before us, Appellant submitted clemency matters which re quested his confinement term be further reduced. The convening authority was under no obligation to do this under the PTA's terms. We acknowledge the convening authority's decision memorandum made clear the clemency matters were considered. This provides some support for the Government's [*14] position on implicit approval of this portion of the sentence. On the other hand, the language used in the decision memorandum indicates no action was taken on the sentence which can easily be read as a decision was never made. Therefore, we continue our analysis.

The convening authority's decision memorandum stated that he consulted with his staff judge advocate (SJA). We do not know anything about this consultation or whether the SJA gave legal advice during it. It is possible the SJA gave accurate advice to the convening authority that he had to take action on the sentence given the date of the earliest offense and the date of referral. We find it more probable that if the SJA gave

[10] The convening authority directed Appellant to take leave pending completion of appellate review under Article 76a, UCMJ, 10 U.S.C. § 876a. This direction is consistent with Appellant having an unsuspended bad-conduct discharge.

[11] Our sister-service court found the convening authority's error was harmless and did not materially prejudice "appellant's substantial right to seek clemency." *Coffman*, 79 M.J. at 823. They took corrective action to ensure compliance with a PTA term that required a reduction in the confinement term. *Id.* In determining harmlessness, the court noted *inter alia* that the appellant waived clemency and the convening authority received proper legal advice related to his ability to provide clemency. *Id.*

advice it would have been consistent with the convening authority decision memorandum—that the law did not re quire the convening authority to take action on the sentence anymore—which would reflect a clearly erroneous view of the law applicable to Appellant's case. As Appellant had an opportunity to address this error with the military judge after the convening authority signed the decision memorandum, we must determine if Appellant waived or forfeited this issue.

Appellant did not raise a motion under [*15] R.C.M. 1104(b)(2)(B) and its five-day prescribed timeframe alleging the convening authority's action was incomplete, irregular, or contained error. Under the prior version of Article 66, UCMJ, we had the discretion to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. 10 U.S.C. § 860 (2016 *MCM*); s*ee United States v. Lee*, No. ACM 39531, 2020 CCA LEXIS 61, at *17 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (citations omitted). We find that our discretion on this matter has not changed despite congressional modifications to the version of Article 66, UCMJ, which applies to this case. Exercising that discretion, we find that Appellant's failure to file a motion under R.C.M. 1104(b)(2)(B) forfeited his right to object to the accuracy of the convening authority's decision memorandum absent plain error.

To prevail under a plain error analysis, an appellant must show "(1) there was an error; (2) [the error] was plain or obvious; and (3) the error materially prejudiced a substantial right." *See United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (en banc) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)). We find the decision to take no action on the sentence was a plain or obvious error. We find the threshold of "some colorable showing of possible prejudice" is still the appropriate standard for an error [*16] impacting an appellant's request for clemency. *See id.* (quoting *Scalo*, 60 M.J. at 437). While Appellant has not made a specific claim of prejudice, we find the low standard of some colorable showing of possible prejudice to be apparent. Part of the reasoning behind the low threshold is to "avoid undue speculation as to how certain information might impact the convening authority's broad discretion." *Scalo*, 60 M.J. at 437. Certainly, the convening authority in this case had less discretion than was present in *Scalo* because this convening authority could not disapprove, commute, or suspend the bad-conduct discharge; however, he retained the power to take those actions with the remainder of the sentence. If the convening authority failed to take action on the entire sentence—as his memorandum indicates he did—then we are unsure whether he made a decision on Appellant's clemency request which was within the convening authority's power to grant. Under these circumstances, we find a colorable showing of possible prejudice and that a remand is the best method to remedy this error.

We agree with the Government that the remand should be to a military judge, rather than to the convening authority. It is clear to us that R.C.M. 1104(b)(2)(B) envisioned the [*17] military judge overseeing the process of incomplete, irregular, or erroneous post-trial actions by the convening authority when discovered immediately after trial. We see no reason why that procedure could not be used as a framework by a military judge during a remand. We find a remand in this case to be necessary before we can determine whether the sentence is correct in law and should be approved.

2. Missing Reprimand Language

We disagree with the Government's first assertion that the EoJ is complete because the convening authority's decision memorandum was attached to the EoJ. The plain language of R.C.M. 1111(b)(3)(D) states that the "judgment shall contain the reprimand issued by the convening authority." In this case, the word "Yes" is what is contained on the EoJ. This one word does not appear in the reprimand contained in the convening authority's decision memorandum and so we find the EoJ requires modification to address the missing reprimand language.

We certainly understand the Government's second point that R.C.M. 1112(c)(2)'s plain language permits us to modify an EoJ in the performance of our duties and responsibilities. We will not attempt to predict all the future circumstances where we might exercise our [*18] discretionary authority to modify an EoJ. For now, we only decline to exercise that authority in this case.

We also decline the Government's third option that we should complete our review under Article 66, UCMJ, affirm the findings and sentence, and permit correction of the EoJ after the fact. Given our resolution of the error in the convening authority decision memorandum, we find this third option inappropriate.

Finally, turning to Appellant's requested relief—disapproval of the reprimand—we also find this not to be the correct remedy. The military judge ad judged a reprimand even though the trial counsel did not argue

for one to be part of the adjudged sentence. We also know the convening authority included a reprimand in his decision memorandum. Under these circumstances, modification of the EoJ by a military judge is more appropriate than disapproval of the reprimand by our court.

D. Remand

To address the issue raised by the convening authority's decision memorandum, we use the new statutory remand authority of Article 66(f)(3), UCMJ. The Military Justice Review Group's report recommended this new statutory provision to "expressly provide the authority for the court to remand a case [*19] for additional proceedings that may be necessary to address a substantial issue" and "would incorporate current practice (i.e., '*Dubay*'[12] hearings) and could include orders to either a convening authority or Chief Trial Judge for delegation to a military judge." *See* Office of the General Counsel, Dep't of Defense, *Report of the Military Justice Review Group Part I: UCMJ Recommendations*, at 611 (22 Dec. 2015), https://www.jag.navy.mil/documents/NJS/MJRG_Report_PartI_22Dec15.pdf.

The plain language of Article 66(f)(3), UCMJ, permits us to order a hearing as may be necessary to address a substantial issue. We find a substantial issue existed when the convening authority purported to take no action on the sentence when the law required it. R.C.M. 810(f) cautions that a remand should not be used for matters which could have been investigated or considered at trial through a party's exercise of reasonable diligence. In this case, we see no single party failing to exercise reasonable diligence as both parties failed to raise a post-trial motion in this case. We also would have expected the military judge to wait to sign the EoJ until action was taken on the sentence.

We mention one final source that applies to remands, the Joint Rules for Appellate Procedure for Courts of Criminal Appeals [*20] (JRAP). The JRAP apply to cases docketed with our court on or after 1 January 2019, including Appellant's case, and are signed by The Judge Advocate General of the Air Force and his counterparts in the Army, Navy, and Coast Guard. JRAP Rule 29, *Article 66(f) Proceedings*, provides further explanations of our remand procedures. JT. CT. CRIM. APP. R. 29. For example, Rule 29(b) addresses whether our court retains jurisdiction on remand or dismisses the appellate proceeding and returns jurisdiction over the case to the military judge. Rule 29(b)(2) elaborates that one of the circumstances when terminating appellate jurisdiction may be appropriate is when the case requires corrective action by the trial court to the judgment. Rule 29(d)(3) also instructs that when we return jurisdiction of a case to the military judge and dismiss the appellate proceeding, the rules applicable to the conduct of a post-trial Article 39(a), UCMJ, session shall apply. These provisions guide our decretal paragraph as we describe the scope of our remand and the procedures available to the military judge.

III. CONCLUSION

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's [*21] decision memorandum as no action was taken on Appellant's adjudged sentence as required by law.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

(1) Correct the Statement of Trial Results;
(2) Return the record of trial to the convening authority or his successor to take action on the sentence;
(3) Conduct one or more Article 66(f)(3), UCMJ, proceedings using the procedural rules for post-trial Article 39(a), UCMJ, sessions; and/or
(4) Modify the Entry of Judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

End of Document

[12] *United States v. Dubay*, 37 C.M.R. 411 (1967).

United States v. Haygood

United States Army Court of Criminal Appeals

September 30, 2020, Decided

ARMY 20190555

Reporter
2020 CCA LEXIS 354 *; 2020 WL 5846422

UNITED STATES, Appellee v. Private E1 MARK A. HAYGOOD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, National Training Center and Fort Irwin. Mark A. Bridges and Joseph A. Keeler, Military Judges, Lieutenant Colonel Philip M. Staten, Staff Judge Advocate.

Core Terms

military, Specification, willfully, disobeyed, noncommissioned officer, guilty plea, sentence, stipulation of facts, lawful order, willful disobedience, accepting, defiance, finding of guilt, factual basis, questioning, door, obey, inspection, reassess, willful

Case Summary

Overview
HOLDINGS: [1]-Under the facts, there was a substantial question as to whether appellant's actions were willful. Therefore, the military judge abused his discretion by accepting appellant's plea to Specification 5 of Charge IV (willfully disobeying a lawful order from a noncommissioned officer) without establishing he possessed the required mens rea; [2]-Appellant was provident to the remaining elements of the offense. Accordingly, the court affirmed a finding of guilty to the lesser-included offense of failure to obey other lawful order, in violation of Unif. Code Mil. Justice art. 92, 10 U.S.C.S. § 892, which shared all the same elements except willful disobedience; [3]-Appellant's challenge to Specification 8 of Charge IV, however, was without merit. There was not a "mere possibility" that his conduct in disobeying the order was anything other than willful.

Outcome
Reassessing the sentence based on the noted error and the remaining findings of guilty, the court affirmed the sentence as adjudged.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Guilty Pleas

HN1[] **Standards of Review, Abuse of Discretion**

The court reviews a military judge's acceptance of a guilty plea for an abuse of discretion, and questions of law arising from the guilty plea de novo.

Military & Veterans Law > Military Offenses > Disrespect Offenses > Disrespect Toward Superior Commissioned Officers

Military & Veterans Law > Military Offenses > Disobedience Offenses > Failure to Obey

HN2[] **Disrespect Offenses, Disrespect Toward Superior Commissioned Officers**

The elements of willfully disobeying the lawful order of a noncommissioned officer in violation of Unif. Code Mil. Justice art. 91, 10 U.S.C.S. § 891, are: (1) the accused was an enlisted service member; (2) the accused received a certain lawful order from a noncommissioned officer; (3) the accused knew that the person who gave the order was a noncommissioned officer; (4) the accused had a duty to obey the order; and (5) the accused willfully disobeyed the order.

Criminal Law & Procedure > ... > Entry of Pleas > Role of Court > Factual Basis

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN3[] **Role of Court, Factual Basis**

When an appellant has pleaded guilty, the validity of the conviction must be analyzed in terms of the providence of his plea, not sufficiency of the evidence. The military judge is responsible for determining whether there is an adequate basis in law and fact to support a guilty plea. To that end, a providence inquiry must establish not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea. It is not sufficient to merely obtain the accused's consent to the elements as defined, rather, the military judge must question the accused about what he did or did not do, and what he intended in order to establish the providence of his plea. A military judge abuses this discretion where he fails to obtain an adequate factual basis to support the plea.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Pleas, Providence Inquiries**

In reviewing a military judge's acceptance of a plea, the court applies a substantial basis test: Does the record as a whole show "a substantial basis" in law and fact for questioning the guilty plea. Put another way, once the military judge accepts the plea and enters a finding, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record, to include the stipulation of fact. In determining whether a guilty plea is provident, the military judge may consider the facts contained in the stipulation of fact along with the inquiry of appellant on the record. Finally, the "mere possibility" of such a conflict between the plea and appellant's statements is not a sufficient basis to overturn the trial results.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Military & Veterans Law > Military Offenses > Disobedience Offenses > Failure to Obey

HN5[] **Mens Rea, Willfulness**

The willful element of the offense (willfully disobeying the lawful order of a noncommissioned officer) requires an intentional defiance of authority.

Counsel: For Appellant: Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain Thomas J. Travers, JA (on brief); Colonel Michael C. Freiss, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain Thomas J. Travers, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Major Austin 1. Price, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and ARGUELLES[1], Appellate Military Judges. Chief Judge KRIMBILL concurs. Judge ARGUELLES, concurring in part and dissenting in part.

Opinion by: BROOKHART

Opinion

MEMORANDUM OPINION

BROOKHART, Senior Judge:

A military judge sitting as a general court martial convicted appellant, pursuant to his pleas, of eight specifications of failing to go at the time prescribed to his appointed place of duty; two specifications of leaving his appointed place of duty without authority; one specification of disrespect toward a superior commissioned officer; two specifications of willfully [*2] disobeying a superior commissioned officer; three specifications of willfully disrespecting a noncommissioned officer; five specifications of willfully disobeying a noncommissioned officer; two specifications of failing to obey a lawful order; one specification of wrongfully damaging property other than military property amounting to less than $1,000.00; and one specification of disorderly conduct, in violation of Articles 86, 89, 90, 91, 92, 109, and 134, Uniform. Code of Military Justice, 10 U.S.C. §§ 886, 889, 890, 891, 892, 909, and 934 [UCMJ].[2]

The military judge sentenced appellant to a bad-conduct discharge, confinement for 288 days, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.[3]

This case is before the court for review pursuant to Article 66, UCMJ. Appellant's sole assignment of error is that there was not an adequate basis in law and fact to support his guilty plea to two of the Article 91, UCMJ specifications. For the reasons that follow, as to one of the specifications at issue, Specification 5 of Charge **IV**, we agree and provide relief in our decretal paragraph.[4]

BACKGROUND

The offenses in this case occurred on Fort Irwin, California between December 2018 [*3] and May 2019. At issue here are Specifications 5 and 8 of Charge IV, in which appellant pleaded guilty to two violations of willfully disobeying a noncommissioned officer, in violation of Article 91, UCMJ.

Specification 5 alleged:

> In that Private E-1 Mark A. Haygood, U.S. Army, having received a lawful order from Sgt Justin Sarmiento, a Noncommissioned Officer, then known by said Private E2 [sic] Mark A. Haygood to be a Noncommissioned Officer, to stand by your door at 0600 hours for inspection, an order which it was his duty to obey, did, at or near Fort Irwin, California, on or about 18 February 2019, willfully disobey the same.

Specification 8 alleged:

> In that Private E-1 Mark A. Haygood, U.S. Army, having received a lawful order from SSG Samantha Jo Licon, a Noncommissioned Officer, then known by said Private E2 [sic] Mark A. Haygood to be a Noncommissioned Officer, to be outside of your barracks room at 1700 hours for the Command Sergeant Major walkthrough, an order which it was

[1] Judge Arguelles decided this case while on active duty.

[2] As part of the plea agreement, the government agreed to dismiss one specification of assault consummated by battery and one specification of burglary in violation of Articles 128 and 129, UCMJ.

[3] Although this case was referred on 5 July 2019 and 8 August 2019, per the convening authority's action the sentence was both "approved" and "executed." For cases referred after 1 January 2019, the convening authority is no longer required to "execute" the sentence. Rule for Courts-Martial [R.C.M.] 1102. To the extent this was error, however, it was neither jurisdictional nor prejudicial to appellant's right to seek clemency. *Cf. United States v. Coffman*, 79 M.J. 820 (Army Ct. Crim. App. 2020).

[4] We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

his duty to obey, did, at or near Fort Irwin, California, on or about 19 March 2019, willfully disobey the same.

Prior to discussing the two specifications at issue, the military judge thoroughly explained [*4] the ramifications of appellant's guilty plea and the rights he was forfeiting by virtue of his plea. The military judge also explained the meaning and purpose of the stipulation of fact, ensuring that appellant fully understood and agreed to it. The military judge continually confirmed appellant's understanding of the process and its consequences.

As part of the providence inquiry, the military judge explained that "willful disobedience" means "an intentional defiance of authority." When asked why he was guilty of the offense alleged in Specification 5 of Charge IV, appellant stated that he knew of the order to be outside his barracks door at 0600 and failed to show up as ordered. He told the military judge, "I was still asleep and I failed to open the door." During follow-up questioning from the military judge, appellant reiterated that he "willfully disobeyed the order" and that medication was not to blame. He stated, "I just didn't wake up." Similarly, in his stipulation of fact, appellant admitted to willfully disobeying Sergeant Sarmiento's order "by being absent for this inspection."

As it pertains to Specification 8 of Charge IV, appellant admitted that he knew of the order to [*5] be outside of his barracks at 1700 hours and that he "did not show up." Although he did not remember specifically what he was doing at the time, appellant stated that he was not following orders to be somewhere else, but rather, "I just didn't go." Appellant subsequently confirmed that he "willfully disobeyed the order." In his stipulation of fact appellant admitted that "[d]espite having knowledge of this lawful order [to be at his door at 1700], I willfully disobeyed it."

LAW AND DISCUSSION

HN1[] We review a military judge's acceptance of a guilty plea for an abuse of discretion, and questions of law arising from the guilty plea de novo. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

HN2[] The elements of willfully disobeying the lawful order of a noncommissioned officer in violation of Article 91, UCMJ, are: (1) the accused was an enlisted service member; (2) the accused received a certain lawful order from a noncommissioned officer; (3) the accused knew that the person who gave the order was a noncommissioned officer; (4) the accused had a duty to obey the order; and (5) the accused willfully disobeyed the order. *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 17.b.(2). Appellant does not dispute the first four elements. [*6] Rather, he asserts that the military judge failed to establish a sufficient factual basis that his failure to show up for either inspection was "willful."

HN3[] When an appellant has pleaded guilty, the validity of the conviction "must be analyzed in terms of the providence of his plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). The military judge is responsible for determining whether there is an adequate basis in law and fact to support a guilty plea. *Inabinette*, 66 M.J. at 322 (citation omitted). To that end, a providence inquiry must establish "not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). It is not sufficient to merely obtain the accused's consent to the elements as defined, rather, the military judge must question the accused "about what he did or did not do, and what he intended" in order to establish the providence of his plea. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 253 (1969). A military judge abuses this discretion where he fails to obtain an adequate factual basis to support the plea. *Inabinette*, 66 M.J. at 322.

HN4[] In reviewing a military judge's acceptance of a plea, we apply a substantial basis test: "Does the record as a whole show `a substantial basis' in law [*7] and fact for questioning the guilty plea." *Id.* (citations omitted). Put another way, once the military judge accepts the plea and enters a finding, "an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record," to include the stipulation of fact. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996); *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995) (in determining whether a guilty plea is provident, the military judge may consider "the facts contained in the stipulation [of fact] along with the inquiry of appellant on the record"). Finally, the "mere possibility" of such a conflict between the plea and appellant's statements is not a sufficient basis to overturn the trial results. *Garcia*,

44 M.J. at 498 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Specification 5

With respect to Specification 5 of Charge IV, appellant argues that the military judge erred by failing to establish an adequate factual basis for his plea. Specifically, appellant argues that the factual inquiry does not demonstrate he possessed the required *mens rea* for the offense of willfully disobeying a lawful order from a noncommissioned officer. We agree.

HN5[] The willful element of the offense, as defined by the military judge, requires "an intentional defiance [*8] of authority." *United States v. Henderson*, 44 M.J. 232, 233 (C.A.A.F. 1996) (per curiam) (citing *United States v. Nixon*, 21 C.M.A. 480, 45 C.M.R. 254, 260 (1972) (Darden, C.J., dissenting); *United States v. Bratcher*, 18 C.M.A. 125, 19 C.M.A. 125, 39 C.M.R. 125, 128 (1969)). While appellant admitted directly to the military judge, and also in the stipulation of fact, that he willfully disobeyed the order, those statements were conclusory and were not ultimately supported by the factual basis provided to the military judge. When questioned about the underlying facts, appellant admitted only that he "just didn't wake up" and was "still asleep" at the time prescribed in the order. Those facts alone do not demonstrate an intentional defiance of authority, but rather suggest negligence or some lesser *mens rea. See, e.g., United States v. Bush*, 2007 CCA LEXIS 259, at *3-4 (A.F. Ct. Crim. App. 13 June 2007) (per curiam) (finding the appellant's testimony that he "just kind of nodded off' inconsistent with his plea to willful dereliction for sleeping on duty). Although we normally accord military judges significant deference in finding an adequate factual basis for a plea, under these facts, we find there is a substantial question as to whether appellant's actions were willful. Therefore, we agree with appellant that the military judge abused his discretion by accepting appellant's plea to Specification 5 of Charge IV without establishing appellant [*9] possessed the required *mens rea*.

We do find that appellant was provident to the remaining elements of the offense of willful disobedience of a noncommissioned officer. Accordingly, we affirm a finding of guilty to the lesser-included offense of failure to obey other lawful order, in violation of Article 92, UCMJ, which shares all the same elements except willful disobedience. *MCM*, pt. IV, ¶ 18.b.(2); *see* UCMJ art. 59(b); *see also United States v. Jones*, ARMY 20110974, 2015 CCA LEXIS 132, at *7 (Army Ct. Crim. App. 3 Mar. 2015) (summ. disp.) (citing *United States v. Ranney*, 67 M.J. 297, 298-99 (C.A.A.F. 2009)). We reassess appellant's sentence in our decretal paragraph.

Specification 8

Appellant's challenge to Specification 8 of Charge IV, however, is without merit. In response to the military judge's questioning, he stated that he knew of Staff Sergeant Licon's order and willfully disobeyed it by not appearing for the inspection. The military judge also established that appellant had no lawful excuse or justification for his absence, but rather voluntarily chose to be elsewhere. Given that there are no specifications alleging that appellant struck or was disrespectful to a noncommissioned officer, appellant's claim that "[t]here were no additional details about any confrontation with a noncommissioned officer, [*10] subversive comments, or defiant deportment" misses the mark entirely. Unlike Specification 5 of Charge IV, based on this record, there is not a "mere possibility" that appellant's conduct in disobeying the order was anything other than willful.

Finally, the cases that appellant cites are easily distinguishable. In *United States v. Henderson*, our superior court held that the relevant factors in determining whether there is a violation of Article 91, UCMJ, include the nature and source of the order, and whether or not there was an intentional defiance of authority. 44 M.J. 232, 233 (C.A.A.F. 1996) (per curiam). The order at issue in *Henderson* was nothing more than "a reminder to get dressed quickly or he would miss formation," and there was no evidence that the appellant openly defied it. *Id.* at 234. In contrast, the order at issue in Specification 8 did *not* merely pertain to "standing order" formations and, more significantly, appellant intentionally defied it.

In *United States v. Thompkins*, our superior court held that willful disobedience is intentional defiance and not merely "failure to comply with an order through heedlessness, remissness, or forgetfulness." 58 M.J. 43, 45 (C.A.A.F. 2003) (citation omitted). For the reasons set forth above, appellant's [*11] failure to appear at the 1700 inspection was not the result of heedlessness or forgetfulness; rather, it resulted from his act of intentional defiance.

CONCLUSION

The finding of guilty to Specification 5 of Charge IV is SET ASIDE. A finding of guilty to the lesser-included offense of failure to obey other lawful order, in violation of Article 92, UCMJ, is AFFIRMED. The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). We find no dramatic change in the penalty landscape that might cause us pause in reassessing appellant's sentence. A military judge tried and sentenced appellant. Further, the nature of the remaining offenses still captures the gravamen of the original offenses and the circumstances surrounding appellant's conduct. Finally, based on our experience, we are familiar with the remaining offenses so that we may reliably determine what sentence would have been imposed at trial. We are confident that based on the entire record and appellant's course of conduct, [*12] the military judge sitting alone as a general court-martial, would have imposed a sentence of at least that which was adjudged.

Reassessing the sentence based on the noted error and the remaining findings of guilty, we AFFIRM the sentence as adjudged[5]. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Chief Judge KRIMBILL concurs.

Concur by: ARGUELLES (In Part)

Dissent by: ARGUELLES (In Part)

Dissent

Judge ARGUELLES, concurring in part and dissenting in part:

I concur with the majority's judgment as to Specification 8 of Charge IV but I respectfully disagree with the majority's determination that the military judge abused his discretion in accepting appellant's guilty plea to Specification 5 of Charge IV. I find a sufficient factual basis in the record to sustain appellant's guilty plea to Specification 5 of Charge IV.

The issue on review is not whether in hindsight the military judge *could* have asked additional follow-up questions, but is rather whether the military judge abused his discretion in accepting the plea on [*13] the basis that the colloquy and stipulation of fact sufficiently established willful disobedience. *See United States v. Wear*, ARMY 20160508, 2018 CCA LEXIS 212, *6 (Army Ct. Crim. App. 27 Apr. 2018) (summ. disp.) (noting the substantial discretion afforded to military judges in determining when additional inquiry is warranted).

As noted above, after acknowledging that he understood the term "willful disobedience" to mean an "intentional defiance of authority," appellant admitted that he willfully disobeyed the order by sleeping in. When offered the chance to explain if medication was the cause for his conduct, appellant reiterated that he "just didn't wake up." If appellant's failure to get up was negligent instead of intentional, *i.e.* he forgot to set an alarm, his battle buddy failed to wake him up, etc., he was afforded the opportunity to say so when asked about the medication. Instead, two questions later appellant again reiterated that in failing to be outside his door at 0600 he "willfully disobeyed" SGT Sarmiento's order. *See Inabinette*, 66 M.J. at 322 ("There exist strong arguments in favor of giving broad discretion to military judges in accepting pleas, not least because facts are by definition undeveloped in such cases."). Likewise, in his stipulation of fact, [*14] appellant again acknowledged that he "willfully disobeyed" the order. *See United States v. Forbes*, 78 M.J. 279, 282 (C.A.A.F. 2019) ("Appellant agreed he understood each element and definition and agreed that they accurately described the conduct as charged.").

Based on this record and given our mandate to afford substantial deference to the military judge's determination as to whether to conduct additional inquiry, there is no "substantial conflict" between the plea and the accused's statements. Put another way, there was nothing in either appellant's providence

[5] The Judgment of the Court dated 16 September 2019, is modified to reflect that appellant was credited with 117 days credit against his sentence to confinement, as noted in the convening authority action.

inquiry or his stipulation of fact that should have caused the military judge to be concerned that appellant's failure to be outside his door at 0600 was anything other than willful disobedience. *Cf. Bush*, 2007 CCA LEXIS 259, at *3 (finding the military judge erred in accepting the appellant's guilty plea where the appellant stated during providence that he did not willfully fail to stay awake but was rather tired and just kind of nodded off").

To the contrary, as was the case in *Forbes*, the military judge in this case "conducted a more than adequate plea inquiry—clarifying concepts, defining terms, summarizing the law, and repeatedly pausing to ensure [a]ppellant's understanding." 78 M.J. at 282. In so doing, the military judge [*15] determined that "there was an adequate basis in law and fact to accept [the] pleas," and did not abuse his discretion in accepting them. *Id.* Consequently, I disagree with my colleagues and would affirm the finding of guilty to Specification 5 of Charge IV.

End of Document

United States v. Lopez

United States Air Force Court of Criminal Appeals

December 8, 2020, Decided

No. ACM S32597

Reporter
2020 CCA LEXIS 439 *; 2020 WL 7233070

UNITED STATES, Appellee v. Catarino L. LOPEZ, Jr., Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 30.4.

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: John C. Degnan. Sentence: Sentence adjudged on 16 April 2019 by SpCM convened at Joint Base Lewis-McChord, Washington. Sentence entered by military judge on 24 May 2019: Bad-conduct discharge, confinement for 50 days, reduction to E-1, and forfeiture of $1,000.00 pay per month for 3 months.

Case Summary

Overview
HOLDINGS: [1]-The convening authority's failure to take action on the entire sentence failed to satisfy former Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860, because, prior to 1 January 2019, the convening authority was required to explicitly state his approval or disapproval of the sentence, and the convening authority's "Decision on Action" memorandum indicated that he took action specifically to reduce appellant's term of confinement, but it did not indicate any further action to approve, disapprove, commute, or suspend the other elements of the sentence. The convening authority's action was incomplete and ambiguous at best, and therefore deficient.

Outcome
Case remanded. Appellate proceeding dismissed.

Core Terms

convening, sentence, effectuate, take action, legacy, provisions, confinement, no action, military, court-martial, memorandum, adjudged, earliest, grant relief, cases, executive order, Courts-Martial, disapprove, commute, opinion of the court, post-trial, approve, authorizes, commission of the offense, specifications, find guilty, implemented, modified, sentence suspension, take effect

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Posttrial Procedure, Posttrial Sessions**

Proper completion of post-trial processing is a question of law a U.S. military court of appeals reviews de novo.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] **Judicial Review, Standards of Review**

Interpretation of a statute and a Rule for Courts-Martial are questions of law that a U.S. military court of appeals reviews de novo.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

HN3[] **Posttrial Procedure, Actions by Convening Authority**

Exec. Order No. 13,825, § 6(b), requires that the version of Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860, in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority to the extent that Article 60: (1) requires action by the convening authority on the sentence; or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Special Courts-Martial

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

HN4[] **Posttrial Procedure, Actions by Convening Authority**

In the context of a special court-martial, the convening authority's action is required to be clear and unambiguous.

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Special Courts-Martial

HN5[] **Types of Courts-Martial, Special Courts-Martial**

In the context of a special court-martial, if only part of the sentence is approved, the action shall state which parts are approved.

Counsel: For Appellant: Major Benjamin H. DeYoung, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, POSCH, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Judge KEY joined. Senior Judge POSCH filed a separate dissenting opinion.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

A special court-martial composed of a military judge alone convicted Appellant, in accordance with his pleas pursuant to a pretrial agreement (PTA), of two specifications of failure to obey a lawful general regulation by wrongfully using an intoxicating substance on divers occasions, one specification of wrongful use of marijuana on divers occasions, and one specification of wrongful use of lysergic acid diethylamide (LSD), in violation of [*2] Articles 92 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a.[1],[2] The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of $1,000.00 pay per month for three months, and reduction to the grade of E-1. The convening authority signed a "Decision on Action" memorandum which stated Appellant's term of confinement "is reduced from three months to 50 days." Thereafter, the military judge signed an entry of judgment (EoJ) stating the final sentence, as modified by the convening authority's action, as a bad-conduct discharge, confinement for 50 days, forfeiture of $1,000.00 pay per month for three months, and reduction to the grade of E-1.

Appellant raises three issues on appeal: (1) whether the convening authority erred by taking action prior to allowing trial defense counsel to raise and advocate additional clemency options upon trial counsel's completion of a substantial assistance memorandum; (2) whether the Statement of Trial Results (STR) and EoJ signed by the military judge failed to accurately record the pleadings and findings of the court; and (3) whether [*3] the conditions of Appellant's post-trial confinement were cruel and unusual in violation of the Eighth Amendment[3] and Article 55, UCMJ, 10 U.S.C. § 855, or rendered his sentence inappropriately severe.[4] However, we do not reach these issues[5] and instead address an issue not raised by the parties: whether the convening authority failed to take action on the sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860 *(Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)).[6]

We find the convening authority failed to take action on the entire sentence as he was required to do, and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. Accordingly, we defer addressing Appellant's assignments of error until the record is returned to this court for completion of our Article 66, UCMJ, review.

I. Background

A. Factual Background

Appellant entered active duty with the Air Force in January 2016. His first permanent duty station was Joint Base Lewis-McChord (JBLM), Washington. According to Appellant, at JBLM he began to feel anxious and depressed. He began to regularly abuse alcohol, and in the spring and summer of 2018, Appellant began to abuse several [*4] other substances as well.

On multiple occasions between April and September 2018, Appellant abused muscle relaxants with two other Airmen by taking the relaxants with alcohol, contrary to directions, with the specific intent to alter his mood or function.[7] Appellant explained to the military judge that

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[1] References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise specified, all other references to the UCMJ and all references to the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant pleaded guilty and was found guilty of the specification of wrongful use of LSD by exception, excepting the language "on divers occasions."

[3] U.S. Const. amend. VIII.

[4] Appellant personally raises Issue (3) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[5] Although we do not address the issues Appellant has raised, with respect to issue (2) we note the Government concedes the STR and EoJ "do not accurately reflect the findings," in that they do not reflect Appellant was found not guilty of the excepted words "on divers occasions" in the specification alleging wrongful use of LSD.

[6] We did not order the Government to show cause as to why this case should not be remanded. We are familiar with the recent responses submitted by the Government on this issue in other cases. This decision was made for judicial economy.

[7] Appellant explained to the military judge that on the first occasion, in April 2018, he obtained a pill from another Airman

he used the drug with alcohol because he knew it would make him "more intoxicated."

In June 2018, Appellant used LSD on one occasion with several other Airmen in Appellant's dormitory. Appellant had been "drinking heavily" that day, but despite being intoxicated he understood what he was doing and he wanted to use the LSD, for which he paid $10.00.

In approximately June or July 2018, Appellant used marijuana with two civilian women after he helped them move into an off-base residence in Tacoma, Washington. One of the women offered the marijuana to Appellant despite knowing he was an active duty Airman, and he accepted. In December 2018, Appellant smoked marijuana again while on leave in Texas when a friend offered it to him.

In July 2018, Appellant and two other Airmen bought kratom[8] at an off-base store near JBLM. Appellant consumed the kratom at his dormitory room on JBLM by mixing the powder [*5] with coffee and drinking it. Appellant explained to the military judge that the kratom had a calming effect on him. Appellant used kratom approximately seven times during 2018.

At trial, Appellant told the military judge through his unsworn statements that he used drugs, like alcohol, to "self-medicate" for anxiety and depression.

B. Procedural History

On 8 March 2019, the charges and specifications were referred for trial by special court-martial. Before trial, the convening authority and Appellant entered into a PTA whereby, *inter alia*, the convening authority agreed not to approve any sentence to confinement in excess of 60 days if a bad-conduct discharge was approved, or any sentence to confinement in excess of 100 days if no bad-conduct discharge was approved.

Appellant's court-martial was held on 16 April 2019, and the military judge signed the STR the same day.[9] Trial defense counsel submitted Appellant's clemency request on 9 May 2019, and requested the convening authority reduce the term of confinement and set aside the adjudged forfeitures. Also on 9 May 2019, trial counsel signed a memorandum for the convening authority that "recommend[ed]" Appellant "be recognized for his substantial [*6] assistance" in the prosecution of one Airman and in the investigation of another Airman.

On 16 May 2019, after considering Appellant's clemency request and consulting with the staff judge advocate, the convening authority signed a "Decision on Action" memorandum. In pertinent part, this memorandum stated:

> 1. I take no action on the findings in this case.
> 2. I take the following action on the sentence in this case:
> a. The confinement is reduced from three months to 50 days.
> 3. The adjudged sentence is reduced from three months to 60 days per the pretrial agreement. I am further reducing the period of confinement an additional 10 days based on the substantial assistance [Appellant] provided in the investigation and prosecution of other persons.

The memorandum contained no further indication as to whether any other element of the sentence was approved, disapproved, commuted, or suspended. On 24 May 2019, the military judge signed the EoJ reflecting the findings and the sentence, as modified by the convening authority's 16 May 2019 memorandum.

II. Discussion

A. Law

HN1[] Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation [*7] omitted). ***HN2***[] Interpretation of a statute and a Rule for Courts-Martial (R.C.M.) are also questions of law that we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008)

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who had a prescription for muscle relaxants at the time. In May 2018, Appellant obtained his own prescription for muscle relaxants.

[8] Appellant explained to the military judge that kratom is "a root from a plant," sold in powder form to be mixed with liquids and ingested, and that it is a depressant that "mainly relaxes you and calms you down."

[9] The STR failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3). Appellant has not claimed prejudice and we find none. *See United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.).

(citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

HN3[] Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, 10 U.S.C. § 860

> in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

See 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. at 9890. The version of Article 60, UCMJ, in effect on the date of the earliest charged offense for which Appellant was found guilty, 1 May 2017,[10] stated "[a]ction on the sentence of a court-martial *shall* be taken by the convening authority or by another person authorized to act under this section." 10 U.S.C. § 860(c)(2)(A) (2016 *MCM*) (emphasis added); *see also United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) ("[T]he convening authority is required to take action on the sentence . . . .").[11] Article 60(c)(2)(B), UCMJ, further stated: "Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial [*8] in whole or in part." 10 U.S.C. § 860(c)(2)(B) (2016 *MCM*).

HN4[] The convening authority's action is required to be "clear and unambiguous." *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citation omitted).

B. Analysis

The charges and specifications were referred for trial after 1 January 2019; therefore, the R.C.M.s that went into effect on 1 January 2019 were generally applicable to the post-trial processing of Appellant's case. *See* Executive Order 13,825, § 2, 83 Fed. Reg. at 9889. However, the earliest date of an offense of which Appellant was convicted is 1 May 2017. Therefore, in accordance with Executive Order 13,825 § 6, the version of Article 60, UCMJ, in effect prior to 1 January 2019 applied to the convening authority to the extent that it required him to take action on the sentence. 83 Fed. Reg. at 9890. Before 1 January 2019, Article 60, UCMJ, required the convening authority to take action on the sentence in every case. The convening authority's "Decision on Action" memorandum indicated that he took action specifically to reduce Appellant's term of confinement; but it did not indicate any further action to approve, disapprove, commute, or suspend the other elements of the sentence.

This court addressed a similar, although not identical, situation in its recent en banc decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. [*9] Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.). In *Aumont*, the convening authority signed a memorandum stating that he took "no action" on the findings or sentence, where the charges had been referred after 1 January 2019 but the earliest offense date was before 1 January 2019. *Id.* at *19. *Aumont* resulted in four separate opinions, reflecting four distinct positions among the judges on this court as to whether the convening authority's statement that he took no action was erroneous and, if so, whether remand for correction was required. *Id.* (*passim*). A majority of the judges concluded the convening authority erred, but only a minority of the judges found the error required remand for corrective action. *Id.* (*passim*). The two judges in the majority in the instant case adhered to the dissenting opinion in *Aumont*, and would have held that the convening authority's action was, at a minimum, ambiguous, and should have been returned for correction. *Id.* at *79-90 (J. Johnson, C.J., dissenting in part and in the result). We recognize that panels of this court composed of other judges have applied different reasoning in other cases, before and after *Aumont* was issued. *See, e.g., United States v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427 (A.F. Ct. Crim. App. 24 Nov. 2020) [*10] (unpub. op.); *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.); *cf. United States v. Coffman*, 79 M.J. 820, 824 (A. Ct. Crim. App. 2020) (finding convening authority's failure to take action was harmless error). Nevertheless, we continue to adhere to

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[10] The specification of wrongful use of marijuana alleged Appellant used the drug on divers occasions between on or about 1 May 2017 and on or about 31 December 2018.

[11] In contrast, Article 60a, UCMJ, 10 U.S.C. § 860a, which went into effect on 1 January 2019, does not require the convening authority to take action on the sentence of every court-martial. *See also* R.C.M. 1109(g) (explaining procedures depending on whether or not the convening authority "decides to act on the sentence" in certain courts-martial); R.C.M. 1110(e) (explaining procedures depending on whether or not the convening authority decides to take action on the findings or sentence in certain courts-martial).

the same general view expressed in the dissenting opinion in *Aumont* in situations where the convening authority fails to take action on the sentence as required by Executive Order 13,825 and the pre-1 January 2019 version of Article 60, UCMJ.

However, Appellant's case is different from *Aumont* in a notable respect. Whereas the convening authority in *Aumont* affirmatively stated that he took "no action" on the case, *Aumont*, unpub. op. at *2, the convening authority in the instant case did take an action on the sentence—specifically, he reduced the term of confinement from three months to 50 days. Therefore, the instant case raises a question not raised in *Aumont*: whether the convening authority's action with respect to one element of the sentence satisfies the pre-1 January 2019 requirement under Article 60, UCMJ, that the convening [*11] authority take action on the sentence.

We conclude the convening authority's failure to take action on the entire sentence fails to satisfy the Article 60, UCMJ (2016 *MCM*), requirement. Prior to 1 January 2019, the convening authority was required to explicitly state his approval or disapproval of the sentence. *See United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007) (citing R.C.M. 1107(d)(1)). ***HN5***[] "If only part of the sentence is approved, the action shall state which parts are approved." *Id.* (quoting R.C.M. 1107(f)(4)(A)). In this case, the convening authority's action was incomplete and ambiguous at best, and therefore deficient. *See Politte*, 63 M.J. at 26. Moreover, as in *Aumont*, the convening authority's memorandum suggests the requirement to take action on the entire sentence was overlooked, and Appellant's case was processed entirely under the new Article 60 and Article 60a, UCMJ, and R.C.M.s. In either case, for the reasons set forth in the dissenting opinion in *Aumont*, we find the record should be remanded to the Chief Trial Judge, Air Force Trial Judiciary, to resolve the error. *See* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3).

III. CONCLUSION

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum as the action [*12] taken on Appellant's adjudged sentence was ambiguous and incomplete.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

(1) Correct the Statement of Trial Results;
(2) Return the record of trial to the convening authority or his successor to take action on the sentence;
(3) Conduct one or more Article 66(f)(3), UCMJ, proceedings using the procedural rules for post-trial Article 39(a), UCMJ, sessions; and/or
(4) Correct or modify the Entry of Judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

Dissent by: POSCH

Dissent

POSCH, Senior Judge (dissenting):

I disagree that the convening authority failed to effectuate a sentence that he determined was appropriate for Appellant and that was in accordance with the limitation on sentence in the pretrial agreement (PTA).[1] I dissent because I conclude that the convening authority's decision closely tracked his obligations under the Military Justice Act of 2016 (MJA),[2] as implemented [*13] by the President effective on 1 January 2019 in Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018). The convening authority did not err because Article 60a, UCMJ, 10 U.S.C. § 860a, contained in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), governed the convening authority's decision on action, and not Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)), as found by the opinion of the court. In this regard, I adhere to the view

[1] The convening authority agreed that Appellant's sentence would not exceed 60 days if a bad-conduct discharge was adjudged, or 100 days if no bad-conduct discharge was adjudged. Because Appellant's sentence included a bad-conduct discharge, this opinion refers to the pretrial agreement (PTA) as having a 60-day limitation on confinement.

[2] *See* National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA), Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016).

expressed in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416, at *36-79 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.) (Posch, S.J., concurring in part and in the result), and *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at *9-36 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.) (Posch, S.J., concurring in the result).

Within five days after receiving the convening authority's "Decision on Action" memorandum, Appellant did not raise a motion with the military judge under Rule for Courts-Martial (R.C.M.)[3] 1104(b)(2)(B), which suggests that Appellant either had no reason to believe that the convening authority's decision on any component of his sentence was "incomplete, irregular, or contain[ed] error" or that he suffered any prejudice. Even on appeal, Appellant identifies no error, plain or otherwise, that would rebut a presumption of regularity [*14] in the manner by which the convening authority effectuated Appellant's sentence after the convening authority received the advice of his staff judge advocate (SJA).[4] *See United States v. Wise*, 6 C.M.A. 472, 20 C.M.R. 188, 194 (C.M.A. 1955) ("[T]he presumption of regularity requires us to presume that [the convening authority] carried out the duties imposed upon him by the Code and the Manual."); *see also United States v. Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008) (applying a "presumption of regularity" to the convening authority's decision (internal quotation marks and citation omitted)).

To be sure, if legacy provisions of Article 60 (2016 *MCM*) were operable to guide the convening authority here, as the opinion of the court finds, *sua sponte*, that they were, then it would follow that "[a]ction on the sentence . . . shall be taken." Article 60(c)(2)(A), UCMJ, 10 U.S.C. § 860(c)(2)(A) (2016 *MCM*). "Action" on the sentence as that term is used in the 2016 *MCM* means to "approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part." Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2). One month after Appellant pleaded guilty and was sentenced, the convening authority indicated none of these options in regard to the adjudged bad-conduct discharge, reduction to E-1, and forfeiture of $1,000.00 per month for three months. The convening authority reduced the confinement from three months to 50 days, but otherwise effectuated the entire sentence by taking no action on the other components.[5] Eight days later, the military judge who presided over Appellant's court-martial signed an entry of judgment reflecting the findings and the sentence, as modified by the convening authority.

Resolution that the convening authority did not err in effectuating the entire sentence turns on understanding several provisions of the President's implementation of Article 60a, UCMJ, in the 2019 *MCM*, above all, Exec. Order 13,825, §§ 3(a), 5, and 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018). Because the convening authority's decision memorandum was altogether in accordance with the President's implementation and the law, I conclude that the convening authority did not err when he took no action on three of the four components of Appellant's sentence.

A. Article 60a, UCMJ (2019 *MCM*)

Appellant was convicted of offenses he committed after 24 June 2014, which is the effective date of Article 60, UCMJ, in the 2016 *MCM*.[6] In courts-martial for offenses occurring on and after this date, and before implementation of the MJA, [*16] a convening authority was required to take action to effectuate the sentence in every court-martial case.[7] *See* Article 60(c)(2)(A), UCMJ

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[3] Unless otherwise noted, references to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[4] *See* R.C.M. 1109(d)(2) ("In determining whether to take action, or to decline taking action under this rule, the convening authority shall consult with the staff judge advocate or legal advisor.").

[5] On the face of it, the convening authority's decision memorandum reached both the findings of guilty and the adjudged sentence. However, the opinion of the court focuses on the convening authority's determination of Appellant's sentence as do I.

[6] *See* FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 958 (26 Dec. 2013) (establishing 24 June 2014 as the effective date for Article 60, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 860, as it appears in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)).

[7] Before the effective date of the Military Justice Act of 2016 (MJA), a convening authority was required to either approve the sentence of the court-martial, or—subject to limits on that authority as provided by law—disapprove, commute, or suspend the sentence, in whole or in part. *See, e.g.*, Article 60(c)(2) and (c)(4), UCMJ, 10 U.S.C. § 860(c)(2), (c)(4) (2016 *MCM*). Importantly, and as later discussed in this opinion, a convening authority has the statutory authority pursuant to Article 60 in the 2016 *MCM* to take action pursuant to the terms of a pretrial agreement with an accused. *See* Article

(2016 *MCM*) ("Action on the sentence of a court-martial shall be taken by the convening authority . . . .").

The MJA changed this requirement when Congress amended Article 60a, UCMJ, as it appears in the 2019 *MCM*[8] to require that a convening authority take "action" on the sentence if and only if a convening authority intends to grant relief by reducing, commuting, suspending, or in some cases, by disapproving a sentence, in whole or in part, as allowed for by law.[9] In accordance with the amended Article 60a in the 2019 *MCM*, a convening authority's formal refusal to act—that is, declination to act by taking no action on a component of an adjudged sentence—effectuates that part of the sentence in the same way that a convening authority once approved the component without modification under the former Article 60, UCMJ (2016 *MCM*). This change is perhaps most clearly stated in Article 60a(f)(2), UCMJ, in the 2019 *MCM* by the conditional language: "*If*, under this section, the [*17] convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for such action." 10 U.S.C. § 860a(f)(2) (emphasis added).[10] After the convening authority's decision, the judgment of the court-martial consists of the adjudged sentence listed in the Statement of Trial Results as modified by "*any* post-trial action by the convening authority." Article 60c(a)(1)(B)(i), UCMJ, 10 U.S.C. § 860c(a)(1)(B)(i) (2019 *MCM*) (emphasis added).

For many years, military justice practitioners have been accustomed to thinking of "action" as effectuating the sentence—whether by granting relief or not—as this term appears in editions of the *Manual for Courts-Martial* before the 2019 *MCM*. This legacy and more comprehensive definition gave way to a more specific meaning in the MJA and the President's implementation of the Act. Although not expressly defined, taking "action" in the 2019 *MCM* reveals it to mean "granting relief" each and every time that a convening authority decides to take action on the sentence in a particular case. Conversely, in accordance with Article 60a in the 2019 *MCM*, a convening authority's "no [*18] action" decision on a component of an adjudged sentence results in an entry of judgment that reflects the sentence adjudged for that component without modification, as it did here.

In Appellant's case, the language of the convening authority decision to take no action on the punitive discharge, reduction in grade, and forfeiture of pay is synonymous with not granting relief on these sentence components. By deciding to take no action, the convening authority followed the post-trial procedures that Congress directed in the MJA, notably Article 60a in the 2019 *MCM*, and not the legacy procedures in Article 60 in the 2016 *MCM*. As a result, the question of whether the convening authority's decision memorandum contains error turns on the post-trial procedures that Congress and the President intended the convening authority to follow. Answering this question requires review of the convening authority's decision in light of the President's implementation of the MJA. If taking no action on these components complied with the implementation of the Act, as I conclude that it did, then there is no error to evaluate for harmlessness or to correct on appeal or by remand to the military judge.

B. Implementation [*19] **of the MJA: Executive Order 13,825**

In the MJA, Congress assigned to the President considerable discretion to set the effective date of the amendments to the UCMJ and to prescribe the regulations implementing those amendments.[11] However, that discretion was bounded by a date by which implementation must be completed. With few

60(c)(4)(C), UCMJ, 10 U.S.C. § 860(c)(4)(C) (2016 *MCM*). No similar power conferred on a convening authority is found in the 2019 *MCM*.

[8] The changes made to Article 60, UCMJ (2016 *MCM*), as now reflected in Article 60a, UCMJ, and in other articles that were subsequently incorporated in the 2019 *MCM*, were among the many changes that Congress directed in the MJA.

[9] *See* Articles 60a and 60b, UCMJ, 10 U.S.C. §§ 860a, 860b (2019 *MCM*). In certain cases the convening authority may also act to "disapprove" a sentence in whole or in part. *See* Article 60b(a)(1)(C)-(F), UCMJ, 10 U.S.C. § 860b(a)(1)(C)-(F) (2019 *MCM*).

[10] *See also* Article 60a(a)(1)(A), UCMJ, 10 U.S.C. § 860a(a)(1)(A) (2019 *MCM*) (subject to limitations, a convening authority "*may* act on the sentence of the court-martial" (emphasis added)).

[11] *See* FY17 NDAA, Pub. L. No. 114-328, § 5542; *see also* Article 36(a), UCMJ, 10 U.S.C. § 836(a), in the 2016 and 2019 *MCMs* (President may prescribe regulations for post-trial procedures); *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (the authority to prescribe regulations prevails "insofar as such regulations are not inconsistent with the UCMJ").

limitations, Congress directed that the implementation "shall take effect" not later than 1 January 2019.[12] The President then exercised this authority by issuing Executive Order 13,825 and new Rules for Courts-Martial that are listed in Annex 2 of the Executive Order and that were subsequently promulgated in Part II of the 2019 *MCM*.

In accordance with the direction given by Congress, the President implemented Article 60a, UCMJ (2019 *MCM*), which directs changes in the manner by which a convening authority effectuates a sentence without modification (i.e., as adjudged). Exec. Order 13,825, § 3(a), made the changes to Article 60a (2019 *MCM*) effective on 1 January 2019, unless otherwise provided by exception. *See* 83 Fed. Reg. 9889 (8 Mar. 2018) ("[E]xcept as otherwise provided by the MJA or this order, the MJA shall take effect on January 1, 2019."). Reciprocally, Exec. Order 13,825, § 5, [*20] effected new Rules for Courts-Martial for cases referred to trial by court-martial on and after 1 January 2019.[13] The new rules implement the amendments made by Congress in Article 60a in the 2019 *MCM*, and include considerable revisions in the manner by which the convening authority effectuates an appellant's sentence after one has been adjudged.

Among the rules that took effect on 1 January 2019 for cases referred on and after that date are R.C.M. 1109 and 1110 that guide a convening authority's decision whether to take action on an adjudged sentence.[14] Following the new procedures in those rules, which implement and track the amendments that Congress made to Article 60a that were incorporated in the 2019 *MCM*, the convening authority does not effectuate a sentence by taking action unless the convening authority intends to reduce, commute, or suspend, or in some cases, disapprove, a sentence, in whole or in part. R.C.M. 1109(c)(5)(A), (g)(2); R.C.M. 1110(c), (e). Under these rules, a "convening authority is no longer required to take action on the results of every court-martial." *United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.) (citing R.C.M. 1109 and 1110 (2019 *MCM*)). Instead, [*21] a convening authority may decline to take action after consulting with the SJA and considering any clemency matters timely submitted by an accused. R.C.M. 1109(c), (d), (g); R.C.M. 1110(c)(1) ("action on the sentence is not required"); *see also Moody-Neukom*, 2019 CCA LEXIS 521 at *3.

C. Application of the MJA, as Implemented, to Appellant's Case

One turns then to consider the effect of the President's implementation of the MJA in Executive Order 13,825 on the post-trial procedures that are applicable to Appellant's case. Here, the charges and specifications were referred to trial by general court-martial on 8 March 2019. Thus, the convening authority was required to follow the procedural provisions in the 2019 *MCM* that went into effect on 1 January 2019, notably R.C.M. 1109 and 1110, as applicable, that are germane to a convening authority's power and responsibility in post-trial processing. In accordance with these rules, unless the convening authority had determined to grant relief,[15] or was required to grant relief, the convening authority

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[12] The FY17 NDAA, including the MJA in Division E of the NDAA, was enacted on 23 December 2016. "Except as otherwise provided in this division, the amendments made by this division shall take effect on the date designated by the President, which date shall be not later than the first day of the first calendar month that begins two years after the date of the enactment of this Act." *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(a).

[13] *See* Exec. Order 13,825, § 5, 83 Fed. Reg. at 9890 (incorporating in the 2019 *MCM* new Rules for Courts-Martial among the amendments in Annex 2, that "shall take effect on January 1, 2019," subject to exceptions that are not applicable here); *see also* FY17 NDAA, Pub. L. No. 114-328, § 5542(c)(2) (stating MJA amendments to the UCMJ "shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments").

[14] *See* Exec. Order 13,825, § 5, 83 Fed. Reg. at 10040-43 (implementing R.C.M. 1109, *Reduction of sentence, general and special courts-martial*); 10043-44 (implementing R.C.M. 1110, *Action by convening authority in certain general and special courts-martial*).

[15] The convening authority had the power to reduce, commute, or suspend, in whole or in part, Appellant's confinement, reduction in grade, and forfeiture of pay, *see* R.C.M. 1109(c)(5), and was authorized to modify the bad-conduct discharge if Appellant met the conditions for providing substantial assistance in the criminal investigation or prosecution of another person upon recommendation by trial counsel, *see* R.C.M. 1109(c)(1); R.C.M. 1109(e). This is because Appellant was convicted of at least one offense for which the maximum authorized sentence to confinement is more than two years and, also, because the adjudged sentenced included a bad-conduct discharge. *See* R.C.M. 1109(a).

was under no obligation to act on the sentence after Appellant was tried [*22] and sentenced on 16 April 2019.

The convening authority took action to reduce Appellant's confinement from three months to 50 days. In compliance with R.C.M. 1109,[16] the convening authority took no action on three of the four components of Appellant's adjudged sentence when he signed the decision memorandum on 16 May 2019, thereby indicating a formal determination that sentencing relief was not warranted on these components. Subsequently, the military judge signed the entry of judgment reflecting the judgment of the court-martial. Consequently, the convening authority's no action decision on these components in compliance with the President's implementation of the MJA, as made plain in R.C.M. 1109, was not error. It follows that the judgment entered by the military judge, in that regard, is correct.[17]

Nonetheless, this conclusion that the convening authority did not err because he followed Article 60a, UCMJ, and R.C.M. 1109 as implemented by the President in the 2019 *MCM*, parts ways with the opinion of the court here, which finds that the convening authority's decision was error because it failed to meet the requirements of Article 60, UCMJ (2016 *MCM*). This court's decision does not rely on R.C.M. 1109 in the 2019 [*23] *MCM*, or attach any significance to the President's implementation of this rule in Exec. Order 13,825, § 5. Instead, the opinion focuses on § 6(b) of this same Executive Order. As applicable to cases like Appellant's where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, § 6(b) guides a convening authority to apply the legacy provisions of Article 60 in the 2016 *MCM*, in certain prescribed circumstances. Section 6(b) states in pertinent part:

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
> (1) requires action by the convening authority on the sentence
>
> . . . .

Exec. Order 13,825, § 6(b), 83 Fed. Reg. at 9890 (8 Mar. 2018).

By the terms of § 6(b), the convening authority was required to follow Article 60 as it appears in the 2016 *MCM*, but only "to the extent that" Article 60 "*requires* action by the convening authority on the sentence." (Emphasis added). If effectuating a sentence does not *require* a convening authority to [*24] take action, then § 6(b)'s direction to a convening authority to follow "Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty," is inapposite.

The opinion of the court looks to the language in Article 60 in the 2016 *MCM*, and finds the necessary words of obligation in Article 60(c)(2)(A), UCMJ. This provision states without qualification that "[a]ction on the sentence of a court-martial shall be taken by the convening authority." By looking to Article 60(c)(2)(A) in the 2016 *MCM* to understand § 6(b) of the Executive Order, a convening authority would be required to take action (in the legacy sense) in every case, until all of an appellant's convictions are for offenses committed on or after 1 January 2019. By this reasoning, a convening authority would have to disregard the President's implementation of R.C.M. 1109 that went into effect on 1 January 2019 in every case where there is a conviction for at least one offense committed before, and referred on or after, that date. Paradoxically, effective on the same date that the President's implementation of R.C.M. 1109 went into effect, the opinion of the court finds it inapplicable and would nullify its application [*25] in cases in which a convening authority determines that granting sentencing relief is not authorized or warranted. It does so despite any indication of such intent in the text of the Executive Order.

Without question, a convening authority cannot take no action on a component of a sentence in compliance with R.C.M. 1109 in the 2019 *MCM*, and at the same time

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[16] In Appellant's case, R.C.M. 1109 governed the convening authority's discretion, and not R.C.M. 1110, because of the maximum authorized sentence to confinement that applied to Appellant's case without considering the jurisdictional maximum of a special court-martial, and, also, because the adjudged sentenced included a bad-conduct discharge. *See* R.C.M. 1109(a); *see also* R.C.M. 1110(a) (applying rule "to the post-trial actions of the convening authority in any general or special court-martial not specified in R.C.M. 1109(a)").

[17] I agree with the opinion of the court and the Government's concession that the Statement of Trial Results and the entry of judgment do not accurately reflect the findings because Appellant was found not guilty of the excepted words "on divers occasions" in the specification alleging wrongful use of LSD.

satisfy the language in Article 60(c)(2)(A), UCMJ, in the 2016 *MCM*. However, the opinion of the court does not address what in my mind is an unmistakable contradiction between the President's implementation of R.C.M. 1109 in Exec. Order 13,825, § 5, on the one hand, and its understanding of Exec. Order 13,825, § 6(b), on the other. In the case before us, the convening authority cannot abide by the President's implementation of the specific provisions of R.C.M. 1109 in § 5 by taking no action on a component of Appellant's sentence and at the same time have a duty to act in every case so as to effectuate a sentence, which the opinion of the court finds by its reading of § 6(b) that looks to Article 60(c)(2)(A) in the 2016 *MCM*. The decision also fails to explain how its interpretation complied with Congress' direction to the President to implement the MJA by 1 January 2019, notably [*26] the post-trial procedures that Congress directed convening authorities to follow to effectuate a sentence.

In reaching the conclusion that the convening authority was required to take action (in the legacy sense) on each of the four components of Appellant's sentence, the opinion of the court interprets one part of the President's implementation so as to render another part, § 5, inconsequential in cases, like Appellant's, where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, and the convening authority determines no sentencing relief is warranted. By taking "no action" in compliance with R.C.M. 1109 in the 2019 *MCM* as the President intended in Exec. Order, § 5, the majority would find error in an essential and recurring post-trial responsibility that was directed by Congress in the MJA: the manner by which convening authorities effectuate sentences for convictions for pre-1 January 2019 offenses that are referred on and after that date.

Of greater significance, the assignment by Congress to the President to designate the effective date of the MJA amendments was not without limitation. As previously noted, Congress directed that [*27] the President's implementation of the Act "shall take effect" not later than 1 January 2019.[18] The amendments to the UCMJ include changes Congress made to the procedural provisions in Article 60 whereby a convening authority may take no action to effectuate a sentence. But the majority opinion's interpretation of Exec. Order 13,825, § 6(b)(1), would require a convening authority to continue to take action on a sentence in accordance with the legacy provisions of Article 60 until the date of the earliest conviction is on or after 1 January 2019. Thus, if the majority opinion's interpretation of Exec. Order 13,825, § 6(b), was correct, it would operate to delay implementation of a key MJA provision well past 1 January 2019.[19] With few exceptions, notably Exec. Order 13,825, §§ 6(a), 9, and 10, the President's implementation of the MJA applies to offenses committed or alleged before 1 January 2019. 83 Fed. Reg. at 9890-91. However, the provisions implemented by exception in §§ 6(a), 9, and 10 relate to important substantive rights of an accused that go beyond the form by which Congress intended a convening authority to effectuate a sentence as is the case here. The President may well have intended these few exceptions were necessary so that an accused [*28] would get the benefit of significant legacy provisions in the UCMJ that protect important substantive rights and at the same time comply with the implementation timeline that Congress directed.

Importantly, if the President had intended the changes to the manner by which a convening authority effectuates a sentence in Article 60a in the 2019 *MCM* to begin on or after 1 January 2019, one might reasonably conclude that the President would have done so expressly instead of by implication. Thus, a delayed implementation in the manner by which a sentence is effectuated in the 2019 *MCM* would raise questions not just about the responsibility of a convening authority under the President's implementation of the MJA, but also, and more fundamental, whether the President's implementation schedule was in compliance with Congress' direction that the President shall implement the Act not later than 1 January 2019.

1. Executive Order 13,825

Executive agencies "must always 'give effect to the

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[18] *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(a).

[19] Notably, it is incongruent that, effective 1 January 2019, Congress would eliminate in the MJA the *substantive* requirement that a convening authority consider the written recommendation of a staff judge advocate before determining the sentence in a general court-martial or any special court-martial case that includes a bad-conduct discharge, as required by a legacy provision of Article 60, *see, e.g.*, Article 60(e), UCMJ, 10 U.S.C. § 860(e) (2016 *MCM*), but still require a convening authority to follow a legacy provision that specifies the language a convening authority uses to effectuate a sentence.

unambiguously expressed intent of Congress.'" *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)). The CAAF has similarly cautioned that it "has no license . . . to construe statutes in a way that 'undercut[s] the clearly [*29] expressed intent of Congress.'" *United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014) (quoting *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (alteration in original)).

The CAAF has recognized that ordinary rules of statutory construction are helpful "when analyzing a rule promulgated by the President," which would seemingly embrace analysis of an executive order like the one here. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) ("[I]n determining the scope of a statute, we look first to its language" and "apply the same interpretive process when analyzing a rule promulgated by the President." (internal quotation marks omitted)); *see also United States v. Fetrow*, 76 M.J. 181, 185-86 (C.A.A.F. 2017) (rules of statutory construction are helpful in analyzing provisions of the *Manual for Courts-Martial*). It follows then that judicial review of the President's Executive Order implementing the MJA is not unlike review of an agency's construction of a statute.

When two provisions "initially appear to be in tension," the provisions should be interpreted in a way that renders them compatible, not contradictory. *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2008) ("[T]his Court typically seeks to harmonize independent provisions of a statute." (citing *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)). "It is a fundamental canon of statutory 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." *Kelly*, 77 M.J. at 406-07 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (internal [*30] quotation marks omitted)). "As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text." *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (citation omitted). Thus, when an interpretation of the text of one provision in an executive order works against another provision or an act of Congress, there is good reason to reject that interpretation and look for another.

2. Analysis

The place to begin is with the text of the President's implementation. Sections 5 and 6(b) of the Executive Order initially appear to be in tension, so each provision will be examined in turn. The language of § 5 plainly implements the new Rules for Courts-Martial and the text is not subject to more than one possible meaning. It states that "[t]he amendments in Annex 2 [of Executive Order 13,825] . . . shall take effect on January 1, 2019." 83 Fed. Reg. at 9890. As previously discussed, Annex 2 includes the President's implementation of R.C.M. 1109 in the 2019 *MCM* that went into effect for cases referred to trial by court-martial on and after 1 January 2019. The fact that § 5 enumerates three inapposite exceptions to the application of these amendments suggests that there are no other exceptions, lending further validity to the conclusion that the convening authority [*31] did not err when he followed R.C.M. 1109 in effectuating the sentence adjudged in Appellant's case.

Whereas § 5 requires looking no further than that provision to determine its meaning and application, § 6(b), in contrast, directs practitioners to first look to the legacy provisions of Article 60, UCMJ, to resolve which version of Article 60 may apply to a particular case, and also, to what extent. This is so because § 6(b) states that "Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . *to the extent that Article 60* . . . requires action by the convening authority on the sentence . . . ." 83 Fed. Reg. at 9890 (emphasis added). The phrase "to the extent that" is one of limitation that precludes blanket application of legacy provisions of Article 60. It plainly encompasses conditions in which no legacy provision of Article 60 will apply. This qualifying language makes clear that individual provisions of Article 60a in the 2019 *MCM* will bind a convening authority unless any one of several conditions is present in Article 60, UCMJ, as was in effect on the date of the earliest offense. First among these conditions is if a legacy [*32] provision of an earlier version of Article 60 "requires action by the convening authority on the sentence." Exec. Order 13,825, § 6(b)(1), 83 Fed. Reg. at 9890.

Taking "action," as discussed earlier, has a precise, specialized meaning in the 2019 *MCM* that differs from its more comprehensive meaning to effectuate a sentence in all cases before the MJA's implementation. Thus, a full understanding of the applicability of § 6(b) to Appellant's case entails an examination of Article 60 in the 2016 *MCM* for a circumstance in which a convening authority is required to grant relief (i.e., take action) on the sentence. If such a circumstance was present in a

case like Appellant's—where at least one offense was committed on or after 24 June 2014 and before 1 January 2019, that was referred on or after that date—then a convening authority might be required to take action on the sentence by following one or more provisions of Article 60 in the 2016 *MCM*. Such a circumstance would be within the meaning of the President's implementation in § 6(b).

One such circumstance that protects a critical right of an accused is the convening authority's legal duty to honor and effectuate a PTA. A convening authority has no statutory or regulatory authority [*33] under any specific provision in the 2019 *MCM* to effectuate a sentence limitation of a PTA, known as a "plea agreement" in the MJA. Instead, such agreements have a binding effect upon their acceptance by a military judge.[20] An accused automatically gets the benefit of the agreement without the convening authority having to take action or approve a sentence to comply with the agreement. However, this novel approach to the manner by which agreed-upon sentence limitations are enforced in the MJA takes effect only in cases unlike Appellant's "in which all specifications allege offenses committed on or after January 1, 2019." *See* Exec. Order 13,825, § 10, 83 Fed. Reg. at 9890-91. Conversely, in cases like Appellant's where there is a conviction for at least one offense committed after 24 June 2014 and before 1 January 2019 that was referred on or after that date, a PTA may be consequential and the convening authority would be required to follow the legacy provisions of Article 60 (2016 *MCM*), and take action to both honor and effectuate a sentence as agreed to in the PTA. This is perhaps best illustrated by two examples that show the different applications of Article 60. The first example closely tracks Appellant's [*34] case in which the convening authority properly applied Article 60a and R.C.M. 1109 from the 2019 *MCM*. The second example reveals when a convening authority would be required to apply Article 60 and R.C.M. 1107[21] from the 2016 *MCM* if Appellant's sentence had been different.

Here, Appellant was convicted of offenses he committed before 1 January 2019 that were referred after that date. Appellant's adjudged sentence included confinement for three months, which exceeded the 60-day limitation on confinement in Appellant's PTA. It follows then that the convening authority was obligated to modify the sentence to comply with the PTA. However, the convening authority could do so by looking to Article 60a in the 2019 *MCM* and without following the guidance of Article 60 in the 2016 *MCM*. Specifically, and because Appellant's sentence [*35] of confinement did not exceed six months, the convening authority had the power to "reduce" Appellant's adjudged sentence. This included the power to grant sentencing relief, as he did, by taking action to reduce Appellant's confinement to comply with the limitation in the PTA. *See* Article 60a(b)(2), UCMJ (2019 *MCM*) ("convening authority may reduce, commute, or suspend any sentence not specified in paragraph (1)").[22] The convening authority could look again to Article 60a in the 2019 *MCM* for the power to further reduce Appellant's sentence, as he did, by an additional ten days because of the assistance Appellant provided in the investigation and prosecution of other persons. The convening authority could do so as a matter of his clemency power under Article 60a(b)(2), UCMJ (2019 *MCM*). Because the convening authority could grant sentencing relief (i.e., take action) with the power conferred by Article 60a and R.C.M. 1109 in the 2019 *MCM*, he was not *required* to follow any legacy provisions of Article 60 in the 2016 *MCM* that were in effect on the date of Appellant's earliest offense. Consequently, the convening authority could effectuate Appellant's sentence, as he did, by taking no action on the punitive discharge, [*36] reduction in grade, and forfeiture of pay and by reducing Appellant's three months of confinement to 50 days in accordance with Article 60a and R.C.M. 1109 in the 2019 *MCM*.

Conversely, if Appellant's adjudged sentence had included eight months of confinement (and not three months) and the limitation on confinement in the PTA

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[20] *Compare* Article 53a(d), UCMJ, 10 U.S.C. § 853a(d) (2019 *MCM*), *and* R.C.M. 1002(a)(2), *and* R.C.M. 1005, Discussion, *with* Article 60(c)(4)(C), UCMJ (2016 *MCM*), *and* R.C.M. 1107(d)(1)(C)(ii) (2016 *MCM*).

[21] R.C.M. 1107 implements Article 60 in the 2016 *MCM*. R.C.M. 1107(d)(1)(C)(ii) guides a convening authority to act on a sentence limitation in a PTA. It states,

> *Pretrial agreement*. If a pretrial agreement has been entered into by the convening authority and the accused, as authorized by R.C.M. 705, the convening authority or another person authorized to act under this rule shall have the authority to approve, disapprove, commute, or suspend a sentence, in whole or in part, pursuant to the terms of the pretrial agreement.

[22] The convening authority had this power because Appellant was convicted of at least one offense for which the maximum authorized sentence to confinement is more than two years and, also, because the adjudged sentenced included a bad-conduct discharge. *See* Article 60a(b)(1) (2019 *MCM*).

remained 60 days, then the convening authority would have been *required* to follow Article 60 and R.C.M. 1107 in the 2016 *MCM* "to the extent that Article 60 . . . *requires action by the convening authority on the sentence*" as directed by Exec. Order, § 6(b)(1). (Emphasis added). This is so because there is no legal authorization in the 2019 *MCM* for the convening authority to honor the agreement and effectuate the confinement cap—as there is in the 2016 *MCM*—by either granting clemency[23] or enforcing a sentence limitation in a PTA.[24] In such a case the convening authority would be *required* to grant relief (i.e., take action) on the sentence by following Article 60 in effect on the date of the earliest offense.[25] Without the legacy provision in Article 60 that allows the convening authority to take the required action on the sentence, the convening authority would be in breach of the PTA if Article [*37] 60a (2019 *MCM*) was the only legal authority the convening authority had to effectuate a sentence.

In cases that are referred to trial on or after 1 January 2019, there can be no mistaking Congress' intent that a convening authority's taking "no action" on the sentence effectuates the adjudged sentence in the same way that a convening authority once approved the sentence without modification under the former Article 60 (2016 *MCM*). And, there is no mistaking Congress' assigning to the President the authority to implement the MJA, consistent with this intent, not later than 1 January 2019. Significantly, perhaps, the CAAF has looked to dates of legislative enactment when it "harmonize[s] independent provisions of a statute." *Christian*, 63 M.J. at 208 ("It is a well-established principle of statutory construction that, absent [*38] a clear direction of Congress to the contrary, a law takes effect on the date of its enactment." (citations omitted)). Additionally, our superior court has "continually reiterated that the Uniform Code of Military Justice controls when an executive order conflicts with part of that Code." *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *United States v. Gonzalez*, 42 M.J. 469, 474 (1995); *United States v. Mance*, 26 M.J. 244, 252 (1988)).

Here, there is no conflict between the President's implementation of the MJA in Executive Order 13,825 and Article 60a (2019 *MCM*) so long as Exec. Order 13,825, §§ 3(a), 5, and 6(b), are each given "full force and effect," *Kelly*, 77 M.J. at 407, on 1 January 2019. Under Exec. Order 13,825, § 6(b)(1), a convening authority looks to the legacy provisions of Article 60 to the extent that a convening authority may be required to take action on the sentence. Because taking "action" in the 2019 *MCM* means "granting relief," practitioners accustomed to "action" being synonymous with effectuating the results of a court-martial in a pre-2019 *MCM* provision may best relate to the contemporary meaning of "action" if § 6(b)(1) is restated thusly,

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the [*39] accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires [granting relief] by the convening authority on the sentence[26]
>
> . . . .

Exec. Order 13,825, 83 Fed. Reg. at 9890.

This reading of § 6(b)(1) affords "action" its new meaning that is narrower than its legacy use in prior editions of the *Manual*. *See United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (questions of

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[23] In cases like Appellant's, a convening authority has no authority in the 2019 *MCM* to reduce or commute a sentence of confinement, if the total period of confinement imposed for all offenses is greater than six months. *See* Article 60a(b)(1)(A), UCMJ, 10 U.S.C. § 860a(b)(1)(A) (2019 *MCM*), and R.C.M. 1109(c)(5)(A) (permitting a convening authority to "reduce, commute, or suspend, in whole or in part" the confinement portion of a sentence that is *six months or less*).

[24] In cases like Appellant's, there is no provision in the 2019 *MCM* that is similar to Article 60(c)(4)(C), UCMJ (2016 *MCM*), that would authorize a convening authority to honor and effectuate an agreed-upon sentencing limitation in a PTA:

> If a pre-trial agreement has been entered into by the convening authority and the accused, as authorized by Rule for Courts-Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pretrial agreement . . . .

Article 60(c)(4)(C), UCMJ (2016 *MCM*).

[25] The example assumes the convening authority cannot, or decides not to, apply Article 60a(d), 10 U.S.C. § 860a(d) (2019 *MCM*) (reduction of sentence for substantial assistance by accused).

[26] Or, to rephrase grammatically, ". . . requires the convening authority to grant relief on the sentence."

interpretation should begin and end with the text, "giving each word its ordinary, contemporary, and common meaning" (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 (2017))). "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019) (alteration in original) (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (2018)). And sometimes, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999) (citation omitted). Giving "action" a contemporary meaning is not only coherent with the new use of the term in Article 60a, UCMJ, and R.C.M. 1109 and R.C.M. 1110 in the 2019 *MCM*, it is also consistent with the use of the term where it appears again in Exec. Order 13,825, § 6(b)(2), which authorizes a convening authority to follow a legacy [*40] provision of Article 60 to the extent that it "*permits* action by the convening authority on the findings." 83 Fed. Reg. at 9890 (emphasis added). A contemporary understanding of "action" as synonymous with granting relief renders § 6(b)(2) to mean that it "permits a convening authority to disapprove a finding of guilty or approve a finding of guilty only of a lesser offense" in cases in which a legacy provision of Article 60 grants an accused this right.[27]

Most significantly, a contemporary reading avoids a de facto nullification of the President's implementation of R.C.M. 1109 and 1110 in every case where there is a conviction for at least one offense committed before, and referred on or after 1 January 2019, and a convening authority determines [*41] action on the sentence is not warranted. It is incongruous that the President would implement Articles 60a and 60b, UCMJ, 10 U.S.C. §§ 860a, 860b, and R.C.M. 1109 and 1110 effective on 1 January 2019, and then hold their application in abeyance without some positive statement of intent to that effect in the implementation, as was the case for other articles of the UCMJ and Rules for Courts-Martial.[28]

Moreover, this reading of § 6(b)(1) affords an accused a substantive right to have a convening authority honor a PTA—and not merely specifying the manner by which a convening authority effectuates a sentence—that is in harmony with other substantive provisions of § 6(b), that also protect an accused's rights under legacy provisions of Article 60.[29] To illustrate, § 6(b)(5), which the opinion of the court cites and is a matter of first impression, states that Article 60 in effect on the date of earliest conviction "shall apply to the convening authority" to the extent that it "*authorizes* the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part." Exec. Order 13,825, § 6(b)(5), 83 Fed. Reg. at 9890. (Emphasis added). Unlike § 6(b)(1), which "requires" a convening authority to look to a legacy provision of Article 60 to take action [*42] by granting relief on the sentence as discussed, § 6(b)(5) is

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[27] *See, e.g.*, Article 60(c)(3), UCMJ, 10 U.S.C. § 860(c)(3), as it appears in the *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*), which gives plenary authority to a convening authority to approve or disapprove the findings of a court-martial:

> Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

[28] *See, e.g.*, Exec. Order 13,825, § 10(b), stating that new Rules for Courts-Martial implementing new articles that change sentencing procedures apply "only to cases in which all specifications allege offenses committed on or after January 1, 2019." *See also* Exec. Order 13,825, § 6(a), "The amendments to Articles 2, 56(d), 58a, and 63 of the UCMJ enacted by sections 5102, 5301, 5303, and 5327 of the MJA apply only to cases in which all specifications allege offenses committed on or after January 1, 2019." Notably, Articles 60a and 60b, UCMJ (2019 *MCM*), that were enacted by sections 5322 and 5323 of the MJA, are not among the new code provisions that the President implemented effective 1 January 2019, and then expressly held in abeyance until all findings of guilty are to offenses that an appellant commits on or after the date of implementation.

[29] The guidance in Exec. Order 13,825, § 6(b), addresses an accused's substantive rights in regard to the findings (Subsection (2)), the adjudged sentence (Subsections (1) and (5)), both the finding and the sentence (Subsection (3)), and a proceeding in revision or a rehearing (Subsection (4)) under prior versions of Article 60 that were in effect on the date of the earliest offense. *See* Exec. Order 13,825, § 6(b)(1)-(5), 83 Fed. Reg. at 9890.

more deferential.[30] It "authorizes" a convening authority to look to a legacy provision of Article 60 "to approve, disapprove, commute, or suspend a sentence in whole or in part," but does not require a convening authority to do any of these things unlike § 6(b)(1). The same is true of § 6(b)(3), which "authorizes" a convening authority to look to a legacy provision of Article 60 to "modify the . . . sentence of a court-martial." Not insignificantly, the President's direction to convening authorities with respect to legacy provisions of Article 60 is not that "the convening authority shall apply" such provisions, but that such provisions "shall apply to the convening authority," which like the distinction between "authorizes" and "requires" is more deferential in that §§ 6(b)(3) and 6(b)(5) grant authority but do not compel its use. As applied to the case before us, §§ 6(b)(3) and 6(b)(5) do not preclude a convening authority from applying Article 60a (2019 *MCM*) when Article 60 (2016 *MCM*) was in effect on the date of Appellant's earliest conviction. But, in instances in which a convening authority has plenary authority to effect a sentence, for example, as is the case with provisions [*43] of Article 60 in the *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*), the convening authority is authorized by §§ 6(b)(3) and 6(b)(5) "in his sole discretion," to modify the sentence and to "approve, disapprove, commute, or suspend the sentence in whole or in part." *See* Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2) (2012 *MCM*).[31]

Finally, affording "action" a contemporary meaning in the President's Executive Order reveals that the reliance by the opinion of the court on Article 60(c)(2)(A), UCMJ (2016 *MCM*), to understand when a convening authority's action on the sentence may be required is inapt. As noted previously, this provision states without qualification that "[a]ction on the sentence of a court-martial shall be taken by the convening authority." Because taking "action" in the 2019 *MCM* means "granting relief," application of a contemporary meaning to this legacy provision of Article 60 (2016 *MCM*) would require a convening authority to grant relief in every case, which is an unreasonable result that the President could not have intended when he issued Executive Order 13,825. *See United States v. Ortiz*, 76 M.J. 189, 192 (C.A.A.F. 2017) ("From the earliest times, we have held to the 'plain meaning' method of statutory interpretation. Under [*44] that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result."), *aff'd*, 138 S. Ct. 2165, 201 L. Ed. 2d 601 (2018).

In summary, in cases like Appellant's where there is a conviction for at least one offense committed before 1 January 2019 that was referred on or after that date, a convening authority follows Articles 60a and 60b (2019 *MCM*) and R.C.M. 1109 and 1110, as applicable, that implement the new articles of the UCMJ unless an appellant benefits from the discretion that Congress conferred on a convening authority in a version of Article 60 that was in effect when an appellant committed the earliest offense. If the convening authority determines that granting sentencing relief (i.e., action) is not required under a legacy version of Article 60, for example, to enforce a limitation on sentence in a PTA, or that relief that a convening authority has the power to grant is not warranted upon consideration of an appellant's clemency submission and other matters, then the convening authority follows Articles 60a and 60b, and R.C.M. 1109 and 1110, as applicable, in the 2019 *MCM* to effectuate the sentence. If, however, the convening authority determines that action on the sentence [*45] is required under the version of Article 60 in effect on the date of the earliest offense because granting relief is required to effectuate the sentence—as may be the case with a sentence limitation in a PTA—then the convening authority is required to follow a provision in an earlier version of Article 60 and the corresponding R.C.M. that give effect to the convening authority's statutory responsibility to effectuate the sentence.

D. Conclusion

There is no tension, much less contradiction, with Exec. Order 13,825, §§ 3(a), 5, and 6(b), or other provisions of the President's implementation of the MJA, so long as taking "action" on the sentence is given its contemporary meaning, "granting relief," where "action" appears in Exec. Order 13,825, § 6(b)(1). In the case before us, the convening authority granted no relief on the punitive discharge, reduction in grade, and forfeiture of pay so he took no action other than to reduce Appellant's confinement from three months to 50 days.

[30] Exec. Order 13,825, § 6(b)(3) and (4), each "authorizes" a convening authority to look to a legacy provision of Article 60, and are similarly deferential. Neither "requires" the convening authority to do anything unlike § 6(b)(1).

[31] *See also* Article 60(c)(1), UCMJ, 10 U.S.C. § 860(c)(1) (2012 *MCM*) (authority "to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority").

The convening authority had no obligation under the President's implementation of the MJA to "approve" the components of Appellant's sentence on which he took no action.

I find the convening authority fully complied with the President's [*46] implementation of the MJA and that he did not err in the manner by which he effectuated the sentence he determined was appropriate after Appellant's trial, and that the military judge correctly entered as the judgment of the court-martial. The convening authority's decision memorandum was neither ambiguous nor incomplete as found by the opinion of the court. Accordingly, I find no substantial issue with the convening authority's decision memorandum and would not defer addressing Appellant's assignments of error by remanding the case.

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United States v. Mar

United States Air Force Court of Criminal Appeals

December 10, 2020, Decided

No. ACM 39708

Reporter
2020 CCA LEXIS 441 *; 2020 WL 7310934

UNITED STATES, Appellee v. Mamadou S. MAR, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jennifer E. Powell. Sentence: Sentence adjudged 25 April 2019 by GCM convened at Nellis Air Force Base, Nevada. Sentence entered by military judge on 19 May 2019: Bad-conduct discharge, confinement for 12 months, and reduction to the grade of E-1.

Core Terms

convening, sentence, specification, take action, military, no action, court-martial

Case Summary

Overview
HOLDINGS: [1]-Exec. Order No. 13,825, § 6(b), required that the version of UCMJ art. 60, 10 U.S.C.S. § 860, in effect on the date of the earliest offense of which the accused was found guilty should apply; [2]-Convening authority's failure to take action on the entire sentence failed to satisfy the requirement of the applicable UCMJ art. 60 because prior to 1 January 2019, the convening authority was required to explicitly state his approval or disapproval of the sentence, and the convening authority's failure to do so rendered the action incomplete and ambiguous and therefore deficient; [2]-Because the court identified an ambiguity in the convening authority's action, it had to return the case to resolve the error.

Outcome
The case was remanded.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Judicial Review, Courts of Criminal Appeals**

Proper completion of post-trial processing is a question of law that a military court of criminal appeals reviews de novo. Interpretation of a statute and a Rule for Courts-Martial are also questions of law that the court reviews de novo.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

HN2 **Posttrial Procedure, Actions by Convening Authority**

Exec. Order No. 13,825, § 6(b)(1) and (5) requires that the version of Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860, in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority to the extent that Article 60: requires action by the convening authority on the sentence; authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN3 **Posttrial Procedure, Actions by Convening Authority**

The convening authority's action is required to be clear and unambiguous.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN4 **Posttrial Procedure, Actions by Convening Authority**

If only part of the sentence is approved, the action shall state which parts are approved. R.C.M. 1107(f)(4)(A), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN5 **Posttrial Procedure, Actions by Convening Authority**

The United States Court of Appeals for the Armed Forces (CAAF) has mandated that when a military court of criminal appeals identifies an ambiguity in an action, the court must return the case to the convening authority. In requiring the deficient action to be returned to the convening authority, the CAAF did not evaluate the deficiency for prejudice; the deficiency in the action ipso facto required its return.

Counsel: For Appellant: Major Rodrigo M. Caruço, USAF; Major David A. Schiavone, USAF.

For Appellee: Major Anne M. Delmare, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, KEY, and MERRIAM, Appellate Military Judges.

Opinion

PER CURIAM:

A general court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas and a pretrial agreement (PTA), of one specification of dereliction of duty, two specifications of wrongful use of marijuana, two specifications of wrongful use of cocaine, one specification of wrongful use of psilocybin mushrooms, one specification of wrongful use of 3, 4-meth-ylenedioxymethamphetamine (Ecstasy), one specification of wrongful distribution of marijuana, one specification of wrongful possession of marijuana, one specification of solicitation, and one specification of breaking restriction, in violation of Articles 92, 112a, and [*2] 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a, 934.[1] The military judge sentenced Appellant to a badconduct discharge, confinement for 16 months, and reduction to the grade of E-1. Pursuant to the PTA, the convening authority reduced the period of confinement to 12 months.

Appellant originally submitted the case to this court on its merits, without assignment of error. We subsequently specified two issues for briefing by counsel for both parties.[2] However, we do not reach the specified issues here, but instead address an error in post-trial processing of Appellant's court-martial: whether the convening authority failed to take action on the sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860.

We find the convening authority failed to take action on the entire sentence as he was required to do, and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. Accordingly, we defer addressing the specified issues until the record is returned to this court for completion of our Article 66, UCMJ, review.

I. Background

On 3 May 2019, Appellant requested clemency with respect to the adjudged reduction in grade. On 13 May 2019, the convening authority issued a "Convening Authority Decision on Action" (Decision on Action) to the military judge. In the Decision on Action, the convening authority stated "I take no action on the findings." He also asserted that "[t]he period of confinement is reduced from sixteen months to twelve months," in

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[1] Unless otherwise noted, all references in this opinion to the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] The specified issues were as follows:

> I.
>
> IN LIGHT OF RULE FOR COURTS-MARTIAL (R.C.M.) 705(c)(1)(B), DID THE MILITARY JUDGE ERR WHEN SHE:
>
> a. FAILED TO ADVISE APPELLANT THAT HIS AGREEMENT TO "WAIVE ALL WAIVABLE MOTIONS" COULD NOT BE ENFORCED TO PREVENT HIM FROM RAISING AN R.C.M. 707 SPEEDY TRIAL MOTION;
>
> b. IMPLIED THAT "IN ORDER TO GET THE BENEFIT" OF HIS PRETRIAL AGREEMENT, APPELLANT HAD TO "GIVE UP MAKING THESE MOTIONS," WHICH INCLUDED AN R.C.M. 707 SPEEDY TRIAL MOTION; AND
>
> c. ADVISED APPELLANT THAT HIS FAILURE [*3] TO "WAIVE ALL WAIVABLE MOTIONS," IMPLICITLY INCLUDING HIS R.C.M. 707 SPEEDY TRIAL MOTION, WOULD RESULT IN THE CANCELATION OF HIS PRETRIAL AGREEMENT?
>
> IF SO, IS APPELLANT ENTITLED TO RELIEF?
>
> II.
>
> DID APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO SEEK RELIEF FOR A POTENTIAL VIOLATION OF APPELLANT'S RIGHT TO SPEEDY TRIAL UNDER RULE FOR COURTS-MARTIAL 707? IF SO, IS APPELLANT ENTITLED TO RELIEF?

accordance with the limitation contained [*4] in the PTA. The Decision on Action also indicated Appellant would be required to take appellate leave under Article 76a, UCMJ, 10 U.S.C. § 876a. The Decision on Action did not comment further on Appellant's sentence. Specifically, the Decision on Action contained no further indication as to whether any other element of the sentence was approved, disapproved, commuted, or suspended.

On 19 May 2019, the military judge signed the entry of judgment (EoJ) accompanied by two attachments: (1) Statement of Trial Results (STR) dated 25 April 2019, and (2) the Decision on Action. We note the STR and EoJ in this case erroneously indicate that Charge I constituted a violation of Article 86, UCMJ, 10 U.S.C. § 886 when Charge I, and its two specifications, as reflected on the charge sheet, alleged a violation of Article 92, UCMJ, 10 U.S.C. § 892.

II. Discussion

HN1[] Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a Rule for Courts-Martial (R.C.M.) are also questions of law we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

HN2[] Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, 10 U.S.C. § 860

> in effect on the date of the earliest offense of which [*5] the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

See 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. at 9890. The version of Article 60, UCMJ, in effect on the date of the earliest charged offense for which Appellant was found guilty, 1 December 2017, stated "[a]ction on the sentence of a court-martial *shall* be taken by the convening authority or by another person authorized to act under this section." 10 U.S.C. § 860(c)(2)(A) (emphasis added); *see also United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) ("[T]he convening authority is required to take action on the sentence . . . ."). Article 60(c)(2)(B), UCMJ, further stated: "Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part." 10 U.S.C. § 860(c)(2)(B). ***HN3***[] The convening authority's action is required to be "clear and unambiguous." *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citation omitted).

Several panels of our esteemed colleagues on this court have addressed the effect of a convening authority's failure to take complete action on a sentence where at least one [*6] offense predates 1 January 2019, but the court-martial and post-trial processing occur after 1 January 2019. *See, e.g., United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439, 2020 WL 7233070, at *5 (A.F. Ct. Crim. App. 8 Dec. 2020) (unpub op.) (holding "failure to take action on the entire sentence fails to satisfy the Article 60, UCMJ (2016 MCM), requirement" and therefore "the record should be remanded"); *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at *3 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.) (holding convening authority's decision to take no action was the equivalent of action); and *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *15 (A.F. Ct. Crim. App. 27 Jul. 2020) (holding convening authority failure to take action on sentence was plain and obvious error, but not prejudicial to appellant).

This court's recent en banc decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.), reveals four distinct positions among the judges of this court. In *Aumont*, no single legal rationale regarding the effect of a convening authority taking "no action" was adopted by a majority of this court. Four judges held in two separate opinions that the convening authority's decision to "take no action" on sentence was not error. *Id.* at *4; *id.* at *38-40 [*7] (Posch, S.J., concurring in part and in the result). Two judges found error, but concluded the appellant in that case was not prejudiced by the error. *Id.* at *36 (Lewis, S.J., concurring in part and in the result). Finally, four judges found a convening authority taking no action on sentence to be error, and would have remanded without testing for prejudice. *Id.* at *90 (J. Johnson, C.J., concurring in part and dissenting in part).

We conclude the convening authority's failure to take action on the entire sentence fails to satisfy the

requirement of the applicable Article 60, UCMJ. Prior to 1 January 2019, the convening authority was required to explicitly state his approval or disapproval of the sentence. *See United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007) (citing R.C.M. 1107(d)(1)). ***HN4***[⬆] "If only part of the sentence is approved, the action shall state which parts are approved." *Id.* (quoting R.C.M. 1107(f)(4)(A)). In this case, the convening authority's action on sentence reduced total confinement, implicitly referenced the possibility of a punitive discharge through mentioning appellate leave, and failed altogether to mention the reduction in grade, the only part of the sentence for which Appellant requested clemency. The convening authority's action was incomplete and ambiguous, and therefore deficient. *See Politte*, 63 M.J. at 26.[3]

HN5[⬆] Our superior court has mandated that when a Court of Criminal Appeals identifies an ambiguity in an action, we must return the case to the convening authority. *Politte*, 63 M.J. at 27 (applying [*8] the earlier versions of Articles 60 and 66, 10 U.S.C. §§ 860, 866 (2000)). In requiring the deficient action to be returned to the convening authority, our superior court did not evaluate the deficiency for prejudice; the deficiency in the action *ipso facto* required its return. *Id., see also United States v. Scott*, 49 M.J. 160, 160 (C.A.A.F. 1998). For the reasons set forth by the majority in *Lopez* and in the dissenting opinion in *Aumont*, we find the record should be remanded to the Chief Trial Judge, Air Force Trial Judiciary, to resolve the error. *See* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (*Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

III. Conclusion

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum as the action taken on Appellant's adjudged sentence was ambiguous and incomplete.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

(1) Correct the Statement of Trial Results;

(2) Return the record of trial to the convening authority [*9] or his successor to take action on the sentence;

(3) Conduct one or more Article 66(f)(3), UCMJ (2019 *MCM*), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, sessions; and/or

(4) Correct or modify the Entry of Judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

End of Document

[3] As in *Aumont*, the convening authority's memorandum suggests the requirement to take action on the entire sentence was overlooked, further suggesting Appellant's case was processed entirely under the new Article 60 and Article 60a, UCMJ, and associated R.C.M.s. *Aumont*, unpub. op. at *88.

United States v. Ross

United States Army Court of Criminal Appeals

September 30, 2020, Decided

ARMY 20190537

Reporter
2020 CCA LEXIS 353 *; 2020 WL 5846624

UNITED STATES, Appellee v. Sergeant First Class ALAN D. ROSS United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, United States Army Training Center and Fort Jackson. Charles L. Pritchard, Jr., Military Judge. Colonel Scott E. Linger, Staff Judge Advocate.

Core Terms

military, conversation, witnesses, kissing, night, credibility, encounter, proffer, happened, reasons, started, substantially outweighed, probative value, sexual assault, cross-examination, remember, sexual, sex

Case Summary

Overview
HOLDINGS: [1]-The military judge did not err in admitting and considering the actual testimony of the staff sergeant under Mil. R. Evid. 403, Manual Courts-Martial because, although his testimony might not have been as robust as proffered, its probative value was still not substantially outweighed by the danger of confusing the military judge. Even taking into account the variations between the proffer and the actual evidence, the testimony of the staff sergeant did not distort rather than aid accurate fact finding.

Outcome
The findings of guilty and the sentence are affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

In pertinent part, Unif. Code Mil. Justice art. 66(d)(1), 10 U.S.C.S. § 866(d)(1), provides that the appellate court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. In doing so, the appellate court is required to undertake a de novo fresh impartial look at the evidence, and need not give deference to the findings of the trial court. On the other hand, the appellate court's

ability to conduct such a factual sufficiency review is not completely unfettered. Rather, § 866(d)(1) mandates that in conducting such an assessment, it must recognize that the trial court saw and heard the witnesses. As such, the test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate court is convinced of the accused's guilt beyond a reasonable doubt. The degree to which the appellate court recognizes or gives deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN2 **Judicial Review, Courts of Criminal Appeals**

The expansive authority given to us under Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866 should serve as a safety valve of last resort. As such, the authority under § 866 is in no way limited to discrete issues, on a practical level the exercise of this unique power is more likely to be found in certain military circumstances born from uniquely military origins.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN3 **Province of Court & Jury, Credibility of Witnesses**

In military justice cases, questions of legal sufficiency are reviewed de novo. In conducting this review, the relevant question an appellate court must consider is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Such a limited inquiry reflects the intent to give full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

Military & Veterans Law > ... > Courts Martial > Evidence > Relevance

HN4 **Evidence, Preliminary Questions**

Mil. R. Evid. 401, Manual Courts-Martial provides that evidence is logically relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Materiality factors include the importance of the issue for which the evidence was offered in relation to other issues in the case, the extent to which the issue is in dispute, and the nature of the other evidence in the case pertaining to the issue.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN5 **Relevance, Confusion, Prejudice & Waste of Time**

Under Mil. R. Evid. 403, Manual Courts-Martial, the military judge may exclude logically relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. The overriding concern of Rule 403 is that the evidence will be used in a way that distorts rather than aids accurate fact finding.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN6[] **Relevance, Confusion, Prejudice & Waste of Time**

A military judge's decision to admit or exclude evidence is reviewed for abuse of discretion. But, where the military judge fails to conduct a Mil. R. Evid. 403, Manual Courts-Martial analysis, the appellate court gives no deference to his ruling and must instead conduct the Rule 403 balancing test itself.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN7[] **Judges, Challenges to Judges**

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN8[] **Relevance, Confusion, Prejudice & Waste of Time**

When a military judge abuses his discretion in the Mil. R. Evid. 403, Manual Courts-Martial balancing analysis, the error is nonconstitutional, such that the government must demonstrate that the error did not have a substantial influence on the findings. In assessing potential prejudice, the appellate court weighs the strength of the prosecution's case, the strength of the defense case, the materiality of the evidence in question, and the quality of the evidence.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA (on brief); Colonel Michael C. Friess, JA; Major Kyle C. Sprague (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Major Jonathan S. Reiner, JA; Captain Anthony A. Contrada, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and ARGUELLES[1] Appellate Military Judges. Chief Judge KRIMBILL and Senior Judge BROOKHART concur.

Opinion by: ARGUELLES

Opinion

MEMORANDUM OPINION

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ].[2] The alleged misconduct occurred in 2017. The court-martial sentenced appellant to a dishonorable discharge, confinement for thirty days, and reduction to the grade of E-5. The convening authority elected to take no action on appellant's sentence and the military judge entered final judgment on 10 October 2019.

The case is [*2] before the court for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error, two of which we will address. First, he argues that the evidence is legally and factually insufficient. Second, he claims that the military judge abused his discretion in allowing the testimony of a corroborating witness. For

[1] Judge Arguelles decided this case while on active duty.

[2] The military judge acquitted appellant of adultery in violation of Article 134, UCMJ.

the reasons that follow, we disagree and affirm.[3]

BACKGROUND

A. Victim's Testimony

In June of 2017, Sergeant (SGT) AK met appellant during her first drill weekend with her new reserve unit. Appellant, a Sergeant First Class working in the S-1 personnel section, helped process her into the unit. Although SGT AK filled out paperwork listing her personal cell phone number, she did not give that information directly to appellant or otherwise ask him to call her.

After her second drill in July, in which she had minimal contact with appellant, SGT AK received a text late on a Tuesday night from a number she did not recognize. After she responded to the text on Wednesday morning, appellant informed her that he was the sender. The two continued to exchange texts that week, including messages where appellant asked SGT AK to send him "sexy-type" pictures. Sergeant AK responded [*3] by sending him a few work pictures in which she was fully clothed. Continuing to text during the week, the two made plans to get together that Friday night at SGT AK's apartment to watch movies, eat, and drink.

Shortly after appellant arrived, SGT AK poured alcoholic drinks for them both. While SGT AK was standing on a stool and reaching for the alcohol, appellant started kissing her. Per SGT AK, although she did not want to kiss appellant, she could not push him away or get off the stool without being unsure of her footing.

After being kissed by appellant, SGT AK was uncomfortable for "[t]he entire night after that point." After she made the drinks and they both sat down, appellant directed the conversation towards SGT AK's physicality (to include whether her breasts were real), past relationships, and sexual preferences. Sergeant AK attempted to deflect these questions by changing the topic of conversation. Shortly after ordering food around 1930 and not wanting to have this "awkward, dismissive conversation for the rest of the night," SGT AK "very directly" told appellant that she did not want a physical relationship with him. When appellant asked her why not, SGT AK explained that [*4] he had access to all of her records, could influence her career, and that she "didn't want him to be attached to my future success."

Rejecting her reasons, appellant instead moved closer, grabbed her hand, and walked her over to the bed that was ten feet away in the living room.[4] When asked what was going through her mind at that point, SGT AK testified:

> At that time, I had spent an hour and half trying to defend, deflect, and dismiss whatever he was trying to make happen. Like I said, at that point it seemed inevitable. I tried giving him lots of reasons that I didn't want it to happen, and they're the right reasons, according to the Army—rank and influence and all that stuff—and he dismissed all of them. I was trying to find anything else that I could do to prevent it from happening.
>
> When he stood up and initiated the physical contact, in my mind, I just had to let whatever was about to happen happen, and just survive until it was done.

After laying her on her back on the bed, appellant undressed them both and started having vaginal sex with her while standing between her legs. Sergeant AK "laid as still as possible to give no indication that [she] wanted it to happen," and subsequently [*5] started crying.

At one point during the intercourse, appellant asked "you don't want this do you?" Although SGT AK shook her head no, appellant nevertheless said something to the effect of "I'm sorry, I can't stop," and continued to have sex with her. After appellant paused a short time later, SGT AK opened her eyes and saw him holding his penis in his left hand. When appellant noticed her looking at him he digitally penetrated her. Wanting it to

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[3] Appellant's other assignment of error is that this court lacks jurisdiction because the convening authority elected to take no action on the sentence for a specification alleging the commission of an offense before 1 January 2019. Though erroneous, the convening authority's failure to act on appellant's sentence as required by the applicable version of Article 60, UCMJ, was neither jurisdictional nor prejudicial to appellant's substantial right to seek clemency from the convening authority. *See United States v. Coffman*, 79 M.J. 820 (Army Ct. Crim. App. 2020). We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

[4] Sergeant AK testified that she set up her apartment in a "studio" style, with the bed in the living room next to the kitchen and the bedroom used for storage.

be over, SGT AK started "participating," thinking that it would help him to perform and finish.

After he finished appellant went to the bathroom, and SGT AK immediately got dressed. When appellant came out of the bathroom, SGT AK left to get the food she had previously ordered. Finding the restaurant closed, SGT AK called appellant and they agreed to get take-out from another establishment. When asked why she returned home instead of just leaving, SGT AK stated that she did not want to leave appellant in her apartment for an extended period of time, and that she had to be at work the next day at 0600.

After SGT AK returned with the food, appellant tried to resume the previous conversation, but she rebuffed him with very short and dismissive answers, [*6] to include telling him "I fed you. I fucked you. What else do you want from me?" After finishing her meal, SGT AK lied down on the bed and fell asleep while appellant continued to eat and watch the movie. Sergeant AK woke up to appellant leaving and asked him to turn off the lights, which he did.

Recognizing that she would continue to see him at drill, and needing to "find a path forward with him," on the following Sunday, SGT AK invited appellant to meet her at Paris Mountain State Park. After appellant tried to kiss her at a picnic table, SGT AK again told him that she did not want a physical relationship, "didn't want [it] to happen the night when it did, and I didn't want it to happen going forward."

Sergeant AK reported the incident to her chain of command in September 2017 after she learned a bit more about the appellant and "it clicked to me that perhaps he was a bit more predatorial [sic] and he sought me out with those intentions from the beginning."

On cross-examination SGT AK admitted that the sex was not forceful and that she never said "stop" or "no." She did, however, qualify her response by saying "I had very directly said no for about 10 minutes before this was happening. [*7] Saying no one more time didn't seem like it was going to help." When asked about a later text message in which she stated that she liked the kissing on the night of the incident, SGT AK stated that she did not specifically remember liking or not liking his kisses, "but any greater hit on his ego would've had further repercussions for me."

B. Appellant's Testimony[5]

The relationship between appellant and SGT AK started off as a cordial friendship that included texting. After they agreed to meet on the night in question, appellant arrived at her apartment, and he and SGT AK started drinking and talking, which led to kissing and touching. They ended up on the mattress where there was more mutual kissing and touching, to include appellant putting his finger in SGT AK's vagina. But, per appellant, "[a]ll of a sudden it was just a lull" wherein SGT AK paused, stopped engaging, and was "frozen" with her eyes closed. After he asked if she was good but got no response, appellant kissed her and went to the bathroom. Per appellant, there was no penile penetration. At no point did SGT AK say "no" or stop, nor did she resist.

Although SGT AK was a little distant while they were eating and conversing, [*8] appellant attributed that to her being tired and needing to work the next day. After SGT AK went to sleep on the mattress, appellant finished watching the movie and let himself out.

On cross-examination, appellant admitted that he got SGT AK's phone number from her in-processing paperwork, and that she never asked him to call or text her. Appellant did not recall any discussion about things like relationship status when they met up on the night in question, nor did he remember SGT AK saying anything about not wanting to be in a relationship. When they met up at the park the following Sunday, they had a "real brief' discussion about what happened on Friday night, and more specifically the "pause," but appellant could not recall any of the specifics of the conversation.

C. Testimony of Staff Sergeant (SSG) Rice

When the government announced that it was calling SSG Rice as a witness, the defense objected on both relevance and Military Rule of Evidence (Mil. R. Evid.) 403 grounds. Specifically, counsel asserted that "even if relevant and probative, the probative value [of SSG Rice's testimony] is substantially outweighed by confusion of the issues and a waste of time." In response, trial [*9] counsel asserted that SSG Rice would testify to a "statement the accused made to them [sic] regarding a sexual encounter, where the accused

[5] Appellant did not actually testify at trial, but rather counsel admitted and played his prior testimony from the Article 32, UCMJ, preliminary hearing.

stated that he continued to have sex with a female over her objections . that [] happened two years ago, roughly around the same time of the incident with [SGT AK]." The military judge overruled the objection without engaging in a balancing analysis or otherwise providing any basis for his ruling.

On direct examination, SSG Rice testified to a conversation that he had with appellant approximately two years earlier, in which appellant described how he had a "girl" over to his house the past weekend and "was killing her out" while she was saying "No, Papi, no."[6] At first he did not think anything of it, but after later speaking with another noncommissioned officer (NCO) and learning of the charges brought in this ease, SSG Rice realized that appellant may have been describing his encounter with SGT AK.

On cross-examination SSG Rice admitted that this conversation happened "maybe around 2 years ago," and could have occurred either before or after 14 July 2017. He also stated that he understood the term "killing her out" to refer to moaning during a consensual [*10] sexual act. Likewise, SSG Rice explained that "No, Papi, no" was a Hispanic term that he believed appellant was describing in relation to a consensual encounter.[7] Staff Sergeant Rice reiterated that the "girl" in the story went to appellant's house, and that appellant never told him her name. Finally, SSG Rice testified that SGT AK was not Hispanic.

LAW AND DISCUSSION

A. Factual Sufficiency

HN1[] In pertinent part, Article 66(d)(1), UCMJ, provides that this court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." In doing so, we are required to undertake a de novo "fresh impartial look at the evidence," and need not give deference to the findings of the trial court. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). On the other hand, our ability to conduct such a "factual sufficiency" review is not completely unfettered.

Rather, Article 66(d)(1), UCMJ, mandates that in conducting such an assessment, we must recognize "that the trial court saw and heard the witnesses." As such, the test for factual sufficiency is "whether, after weighing the evidence in the record of trial and *making allowances for not having personally observed the witnesses*," we are "convinced of the accused's guilt [*11] beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (emphasis added). In *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, *11-12 (Army Ct. Crim. App. 29 Feb. 2019 (mem. op.), we further explained:

> The deference given to the trial court's ability to see and hear the witnesses and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds.

Likewise, in *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015), *aff'd on other grounds* 76 M.J. 224 (C.A.A.F. 2017), we held that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue."

HN2[] On a more general level, in *United States v. Conley*, 78 M.J. 747, 752 (Army Ct. Crim. App. 2019), we held that the expansive authority given to us under Article 66, UCMJ, should serve as a "safety valve of last resort." As such, while our authority under [*12] Article 66, UCMJ, is in no way limited to discrete issues, "on a practical level the exercise of this unique power is more likely to be found in certain military circumstances ... born from uniquely military origins." *Id.*

As is often the situation in disputes over sexual assault, this case essentially comes down to a credibility determination between appellant and SGT AK. Contrary

[6] Staff Sergeant Rice testified on 6 August 2019, and the date of the alleged assault was 14 July 2017. Staff Sergeant Rice first testified that the conversation was "well over two years ago," but then clarified that it was "roughly" two years ago, although he did not remember what time of year it was.

[7] The defense did not, however, follow up or cross-examine SSG Rice regarding his testimony that his initial impression of the conversation changed after he learned of the charges in this case and spoke with another NCO.

to what appellant now suggests, however, the mere fact that he testified to a different or exculpatory version of the incident does not necessarily mean that there is a "fair and rational hypothesis other than guilt." If this were the law, not many sexual assault convictions would survive appellate review.

Here, appellant did *not* testify at his court-martial, but rather counsel played his relatively brief preliminary hearing testimony. Although he denied penile penetration, appellant admitted that there was a "sudden lull" during their encounter and that SGT AK did not answer when he asked if she was "good." Appellant also did not remember any conversations about relationship status, nor could he remember any of the details of his subsequent conversation with SGT AK about what had happened between them and [*13] why she suddenly froze up.

On the other hand, the military judge was able to observe SGT AK as she testified. Although she was not able to remember all of the details of the sexual encounter, in contrast to appellant's perfunctory and somewhat evasive preliminary hearing testimony, for the most part SGT AK provided comprehensive, detailed, and logical answers to questions on both direct and cross-examination.

In sum, and in recognition of the trial court's superior position in making credibility determinations, especially in a case like this one, where the outcome in large measure depends on "the degree to which the credibility of the witnesses is at issue," *Davis*, 75 M.J. at 546, we agree with the military judge's implicit conclusion that SGT AK was the more credible witness. Accordingly, we find appellant's conviction factually sufficient. *See also United States v. Crowder*, ARMY 20150728, 2017 CCA LEXIS 624, *6 (Army Ct. Crim. App. 26 Sep. 2017) (summ. disp.) ("Here this case turned on the relative credibility of the witnesses. After taking into account that the trial court saw and heard the witness, we find the evidence factually sufficient.").[8]

[8] Appellant also argues that because the bed in question was an air mattress on the floor, it would have been physically impossible for him to have sex with SGT AK while standing up as she described. Although at various points in her testimony SGT AK estimated that that the air mattress was anywhere between eighteen inches to three-feet high, she also testified that it was a "*regular* bed height, like a standard box spring with the other mattress, like a *normal* bed height would be."

B. Legal Sufficiency

HN3[↑] We also review questions of legal sufficiency de novo. *Washington*, 57 M.J. at 399. In conducting this review, "'the [*14] relevant question' an appellate court must consider is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). "Such a limited inquiry reflects our intent to give full play to *the responsibility of the trier of fact* fairly to resolve conflicts in the testimony, to weigh the evidence, *and to draw reasonable inferences* from basic facts to ultimate facts." *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *United States v. Hart*, 25 M.J. 143, 146 (C.M.A. 1987)) (emphasis in original) (internal quotations and citations omitted).

Given the relatively low threshold for establishing legal sufficiency, and for all of the reasons discussed above, a reasonable factfinder could have found all of the essential elements of the sexual assault offense at issue beyond a reasonable doubt. Accordingly, we find appellant's conviction legally sufficient.[9]

C. Testimony of SSG Rice

As described above, the defense objected to the testimony of SSG Rice on both relevance and Mil R. Evid. 403 grounds.

HN4[↑] Military Rule of Evidence 401 provides that evidence is logically relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of [*15] consequence in determining the action. *See United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983)

[9] Appellant also claims since SGT AK did not resist when he walked her over to the bed, he was at a minimum reasonably mistaken in his belief that she consented. First, SGT AK's repeated insistence prior to the encounter that she did not want a physical relationship with appellant should have put him on notice that she did not want to have sex with him. In any event, SGT AK settled the issue in the middle of the encounter by shaking her head "no" in response to appellant's question about "wanting to do this." *See United States v. Rouse*, 78 M.J. 793, 796 (Army Ct. Crim. App. 2019) (noting there is an absolute right to withdraw consent in the middle of a sexual act that started off as consensual).

(materiality factors include the importance of the issue for which the evidence was offered in relation to other issues in the case, the extent to which the issue is in dispute, and the nature of the other evidence in the case pertaining to the issue).

HN5[] Under Mil. R. Evid. 403, the military judge may exclude logically relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." *See also United States v. Stephens*, 67 M.J. 233, 236 (C.A.A.F. 2009) ("The overriding concern of M.R.E. 403 is that the evidence will be used in a way that distorts rather than aids accurate fact finding.") (citation and internal quotation marks omitted).

1. The military judge did not abuse his discretion.

HN6[] We review a military judge's decision to admit or exclude evidence for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129-30 (C.A.A.F. 2000). But, where the military judge fails to conduct a Mil. R. Evid. 403 analysis, as is the case here, we give no deference to his ruling and must instead conduct the Mil. R. Evid. 403 balancing test ourselves. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). As we recently reiterated, "[n]otwithstanding this court's well-established guidance to military [*16] judges to place their Mil. R. Evid. 403 analyses on the record ... the military judge failed to conduct a Mil. R. Evid. 403 analysis, let alone place that analysis on the record for our review." *United States v. Butler*, ARMY 20180385, 2020 CCA LEXIS 188, *11 n.8 (Army Ct. Crim. App. 29 May 2020) (mem. op.) (internal citation omitted).

As noted above, when the government called SSG Rice, the defense objected on both logical and legal relevance. With respect to the Mil. R. Evid. 403 objection, the defense argued that even if relevant, the probative value of SSG Rice's testimony was substantially outweighed by confusion of the issues and a "waste of time." In response, the government submitted that SSG Rice would testify that roughly around the time of the charged assault, appellant described a sexual encounter wherein he continued to have sex with a female over her objections.

As proffered, this evidence was relevant under Mil. R. Evid. 401 as it: (1) had "any tendency" to support a finding that appellant committed the charged assault and; (2) was offered in relation to the central issue in dispute in the case. Likewise, the probative value of this evidence was not substantially outweighed by the danger that it would confuse the military judge, distort the fact-finding process, or consume an undue amount of time.

Appellant [*17] further asserts, however, that SSG Rice's *actual* testimony (which differed from the proffer) was not relevant or admissible under Mil. R. Evid. 403. Among other things, appellant highlights that the proffer failed to account for the fact that SSG Rice was uncertain of when exactly the conversation occurred, that the incident in question occurred at appellant's residence, and that it likely involved a Hispanic female. Although appellant did not renew his objection or move to strike SSG Rice's testimony, he now contends that his initial Mil. R. Evid. 403 objection to the proffer preserved his right to raise the issue on appeal. While appellant cites no authority in support of his position, we agree that for appellate purposes his Mil. R. Evid. 403 objection to the proffer preserved the same objection with respect to the actual testimony of SSG Rice. *See* Mil. R. Evid. 103(b) ("Once the military judge rules definitively on record admitting or excluding evidence ... a party need not renew an objection or offer of proof to preserve a claim of error for appeal"); *cf. United States v. McElmurry*, 776 F.3d 1061, 1066 (9th Cir. 2015) ("Arguing and losing on the 403 objection sufficed to preserve it.").[10]

Nevertheless, although it is a somewhat closer call, the military judge did not err in admitting and considering the *actual [*18]* testimony of SSG Rice. Although SSG Rice's testimony may not have been as robust as proffered, its probative value was still not substantially outweighed by the danger of confusing the military judge. Nor did it consume an undue amount of time. The core of SSG Rice's testimony, that his initial impression of the conversation changed and that he believed that appellant might have been referring to the assault in this case, was not challenged or otherwise undermined on cross-examination. To the extent there were discrepancies about when the conversation took place,

[10] Given our ruling *infra*, we leave for another day the issue of whether the military judge had a sua sponte duty to revisit the Mil. R. Evid. 403 objection at the conclusion of SSG Rice's testimony. Regardless of whether such a duty exists, however, a military judge seeking deference to his or her Mil. R. Evid. 403 rulings might consider it prudent to reassess and restate the balancing test when a witness's actual testimony does not match the proffer.

where the encounter occurred, and whether the female may have been Hispanic, those inconsistencies go more to the evidentiary weight of the testimony rather than to its admissibility. Put another way, even taking into account the variations between the proffer and the actual evidence, the testimony of SSG Rice did not "distort[] rather than aid[] accurate fact finding." *Stephens*, 67 M.J. at 236.

Finally, to the extent appellant is claiming that the government used the testimony of SSG Rice to "smuggle" in similar sexual assault propensity evidence without the proper notice and safeguards of Mil. R. Evid. 413, we are confident that the military judge did not consider [*19] the evidence for this purpose. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)) ***HN7***[] ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.").

2. Even if the military judge erred, appellant suffered no prejudice.

Assuming arguendo the military judge erred in overruling appellant's objection and allowing SSG Rice's testimony, we conclude appellant suffered no prejudice. ***HN8***[] As our superior court held in *United States v. Solomon*, 72 M.J. 176, 182 (C.A.A.F. 2013), "[w]hen a military judge abuses his discretion in the M.R.E. 403 balancing analysis, the error is nonconstitutional," such that the government must "demonstrate that the error did not have a substantial influence on the findings." In assessing potential prejudice, we weigh the strength of the prosecution's case, the strength of the defense case, the materiality of the evidence in question, and the quality of the evidence. *United States v. Barnett*, 63 M.J. 388, 397 (C.A.A.F. 2006).

Here, for all of the reasons set forth in our factual sufficiency review, because SGT AK was more credible than appellant, the government had the stronger case. Moreover, given all of the discrepancies in SSG Rice's testimony pointed out by appellant, even if erroneously admitted, SSG Rice's brief testimony was marginal at best and likely had little, if any, impact on the military [*20] judge's findings. As such, the admission of SSG Rice's testimony was not prejudicial because it did not substantially influence the findings.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge KRIMBILL and Senior Judge BROOKHART concur.

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