IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	GOVERNMENT FINAL BRIEF
v.	)	
	)	Crim. App. Dkt. No. 20230048
Private First Class (E-3) **JAHEEMEE J. WILLIAMS,** United States Army, Appellant	)	USCA Dkt. No. 24-0015/AR

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

Issues Presented

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS JURISDICTION TO REVIEW THE MODIFICATION TO THE JUDGMENT OF THE COURT MADE BY THE ARMY COURT IN CHANGING BLOCK 32 (HAS THE ACCUSED BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE (18 U.S.C. § 922(g)(9)?) FROM "NO" AS ENTERED BY THE MILITARY JUDGE IN THE JUDGMENT OF THE COURT BACK TO THE ORIGINAL "YES" IN THE STATEMENT OF TRIAL RESULTS.

II. WHETHER THE ARMY COURT ERRED BY ASSERTING THAT APPELLANT HAS A QUALIFYING CONVICTION UNDER 18 U.S.C. § 922(g)(9).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this

matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866 (2021). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 30 January 2023, a military judge alone sitting as a special court-martial convicted appellant, in accordance with his pleas, of one specification of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. (JA 17). The military judge sentenced appellant to a bad conduct discharge. (JA 17). On 23 February 2023, the convening authority took no action on the findings and approved the adjudged sentence. (JA 17). The military judge entered judgment on the same day. (JA 18).

The Army Court affirmed the findings and sentence. [1] (JA 02, 06–07). This court granted appellant's Petition for Review on the above stated issues on 24 January 2024. (JA 01).

Statement of Facts

In November 2022, appellant's commander issued a Military Protective Order (MPO) following various incidents between appellant and his wife, including an assault in July 2022. (JA 39, 41). The MPO ordered appellant into

[1] The Army Court also amended the military judge's modification to block 32 of the STR but did not provide their reasoning.

the barracks and required him to stay away from, and not contact, his wife and son. (JA 28–32, 39, 48).

Less than three weeks later, appellant violated the MPO via texts and calls to his wife, wherein he threatened to come to their house and "take" their son. (JA 26, 32–33, 39). Appellant claimed he wanted to scare his wife into putting food and clothes outside their house for him to retrieve. (JA 25–27).

Thereafter, appellant agreed to plead guilty to violating the MPO. (JA 52). During the providence inquiry and in Rule for Courts-Martial [R.C.M.] 802 conferences, the parties discussed whether appellant's conviction triggered the Lautenberg Amendment. (JA 31–35). The miliary judge noted differences between sections 921 and 922 of Title 18 of the U.S. Code with Department of Defense Instruction (DODI) 6400.06.[2] (JA 33–34). The sole concern for the court was whether appellant was pleading guilty to the offenses and knowingly and voluntarily waiving his specific constitutional rights. (JA 32). The military judge further stated the "collateral consequences that he may face outside the Department of Defense are of concern to the court . . . not what he will face inside the

[2] Department of Defense Instruction 6400.06 proscribes policies to prevent and respond to domestic abuse. (SJA 03). For purposes of this instruction, a qualifying conviction includes any special court-martial conviction for a violation or attempted violation of Section 928b, Title 10 of the U.S. Code. (SJA 04, 08). It further defines "domestic violence" as "the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person who is in a specified relationship. (SJA 05–06)

Department of Defense[.] (JA 34). The military judge ultimately concluded "on its face the Lautenberg Amendment would not apply by its own terms. The DOD Instruction may apply, so I leave it to counsel to have the conversation with his client." (JA 34–35).

Appellant understood that if his conviction triggered Lautenberg, he would not be able to own or possess any firearm. (JA 32). He felt fully advised of the possible consequences of his plea of guilty both inside and outside of the DOD, confident he had enough time to consider its possible consequences, and felt prepared to proceed. (JA 32, 35). The military judge accepted his plea of guilty and adjudged a Bad Conduct Discharge, as required by his plea agreement. (JA 08, 36, 53).

The military judge signed the STR on the same day as the guilty plea. (JA 08). Under the header "Notifications," block 32 asked, "Has the accused been convicted of a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9))?" (JA 08). The annotation read, "Yes." (JA 08). Subsequently, the military judge incorporated the STR by reference into the judgment and modified the block 32 annotation to "No." (JA 13). He further provided, "Any ruling, order or other determination of the military judge that affects a plea, a finding, or the sentence: None." (JA 13).

The Army Court received the record of trial pursuant to Article 66(b)(3),

UCMJ. (SJA 01). Appellant submitted the case to the Army Court with no specific assignment of error and noted the military judge's modification. (JA 55). The Army Court affirmed the findings and sentence but amended the military judge's modification in a footnote, stating: "Block 32 of the Statement of [Trial] Results correctly states 'Yes.'" (JA 02).[3]

Granted Issue I

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS JURISDICTION TO REVIEW THE MODIFICATION TO THE JUDGMENT OF THE COURT MADE BY THE ARMY COURT IN CHANGING BLOCK 32 (HAS THE ACCUSED BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE (18 U.S.C. § 922(g)(9)?) FROM "NO" AS ENTERED BY THE MILITARY JUDGE IN THE JUDGMENT OF THE COURT BACK TO THE ORIGINAL "YES" IN THE STATEMENT OF TRIAL RESULTS.

Summary of Argument

The accuracy of block 32's annotation is intertwined with the knowing nature of appellant's plea. Under the facts of this case, the Army Court's amendment was an act with respect to the findings it affirmed. Thus, this Court has the authority to review the Army Court's determination that appellant's conviction qualified as a misdemeanor crime of domestic violence under 18 U.S.C.

[3] The Army Court did not provide their reasoning when they amended the military judge's modification to Block 32.

§ 922(g)(A), pursuant to article 67(c)(1)(A), UCMJ review.

Standard of Review

This Court considers whether it has subject-matter jurisdiction de novo. *M.W. v. United States*, 83 M.J. 361, 363 (C.A.A.F. 2023); *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017). It has an independent obligation to do so even in the absence of a challenge from any party. *Id.* (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, (2006)).

Law

A. Article 66 and 67, UCMJ.

This Court's jurisdiction is predicated on the jurisdiction of a Service Court of Criminal Appeals (CCA). *United States v. Arness*, 74 M.J. 441, 443 (C.A.A.F. 2015). As relevant to this case, article 66(b)(1)(D), UCMJ confers a CCA jurisdiction over a timely appeal from the judgment of a court-martial in a case in which the accused filed an application for review and the application has been granted by the Court. In turn, article 67(a)(3), UCMJ, confers this Court with jurisdiction in all cases reviewed by a CCA in which, upon petition of the accused and on good cause shown, this Court has granted a review. *M.W.* 83 M.J. at 364.

The actions this Court can take when it reviews cases under article 67(a), UCMJ are also predicated on those of the CCA. In an article 66, UCMJ review, the CCA may act only with respect to the findings and sentence as entered into the

record under Article 60c, UCMJ. Article 66(d)(1)(A), UCMJ. Accordingly, this Court may act only with respect to the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the CCA. Article 67(c)(1), UCMJ. Additionally, this Court shall take action only with respect to matters of law. Article 67(c)(4), UCMJ.

B. Collateral Consequences.

This Court and the CCAs have jurisdiction to consider collateral consequences in the context of an issue subject to the court's review. *See*, *e.g.*, *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) (citing *Padilla v. Kentucky*, 599 U.S.C. 356 (2010) (obligation to advise about sex offender registration); *Denedo v. United States*, 66 M.J. 114, 117, 127 (C.A.A.F. 2008) (collateral review under the All Writs Act of a plea relating to deportation consequences); *United States v. Brown*, NMCCA 201300181, 2016 CCA LEXIS 205, *14–19 (N-M. Ct. Crim. App. Mar. 31, 2016) (finding the military judge obtained an adequate factual basis to support Lautenberg Amendment violations as an article 134, UCMJ offense); *United States v. Groomes*, ACM 383860, 2014 CCA LEXIS 752, *18 (A.F. Ct. Crim. App. Oct. 2, 2014) (mem. op.) (finding no ineffective assistance of counsel or improvident plea to an article 134, UCMJ offense); *see generally United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982) (permitting a guilty plea be withdrawn when "collateral consequences are major

and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.").

This does not extend to review of collateral consequences that are wholly administrative in nature. *See, e.g.*, *United States v. Stanton*, 80 M.J. 415, 418 (C.A.A.F. 2021) (citing *Clinton v. Goldsmith*, 526 U.S. 529 (1999)) (administrative discharge); *United States v. Sumrall*, 45 M.J. 207, 210 (C.A.A.F. 1996) (retirement benefits); *United States v. Buford*, 77 M.J. 562, 565 (A.F. Ct. Crim. App. 2017) (finance or personnel matters); *United States v. Vance*, ARMY 20180011, 2020 CCA LEXIS 112 (A. Ct. Crim. App. Apr 8, 2020) (resignation for the good of the service); *United States v. Finco*, ACM S32603, 2021 CCA LEXIS 603 (A.F. Crim. App. Nov. 16, 2021) (criminal indexing).

C. Authority to Modify a Judgment.

In performing its respective duties and responsibilities, this Court and the CCA may modify a judgment. R.C.M. 1111(c)(2). This discretionary authority is neither limited to nor exclusive of computational or clerical errors. *Cf.* R.C.M. 1111(c)(1), (3). However, pursuant to an article 66 and 67 review, its scope is limited to the findings and sentence.

The record under Article 60c, UCMJ, includes the judgment of the court.

The judgment of the court consists of the STR and any modifications thereof that results "by reason of . . . any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence." Art. 60, 60c(a)(1)(A)–(B), UCMJ; R.C.M. 1111.

As relevant to this case, the STR consists of findings, sentence, plea agreements, and "any additional information required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(1)–(2), (4), (6); *see also* Art. 60(a)(1)(C), UCMJ. The Secretary of the Army through Army Regulation requires the STR to contain information relating to certain collateral consequences, namely: an "indication whether any offense for which the accused was convicted is a misdemeanor crime of domestic violence (see 18 USC 922 (g)(9))." Army Reg. 27–10, para. 5–42b(5).

D. Authority to Correct Errors.

In their discretion, military appellate courts have directed corrections of *de minimis* errors taking into consideration judicial economy and efficiency.[4] *See Dixon*, 50 C.M.R. at 415 ("This Court spends most unprofitably too much of its available time correcting or compensating for technical errors resulting from reviewer negligence."); *see generally United States v. McCullah*, 11 M.J. 234, 237

[4] While the government does not consider block 32's annotation to be a *de minimis* error in this case, the government will address this alternative argument. *See* discussion *infra* Issue I.B.

(C.M.A. 1981) ("[T]he Government bears responsibility for preparing the record of trial."). *De minimis* errors include clerical, scriveners, technical, and similar clear errors.[5] [6]

The Army Court routinely directs corrections to annotations in the STR. *See, e.g.*, *United States v. Wilson*, ARMY 20230052, 2024 CCA LEXIS ___, at n* (A. Ct. Crim. App. Feb. 7, 2024) (amending block 29 concerning DNA processing in accordance with DODI 5505.14 on the STR to say "yes"); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164, at n* (A. Ct. Crim. App. Mar. 17, 2022) (correcting block 31 concerning 18 U.S.C. § 922(g)(1) on the STR in appellant's favor pursuant to the government's request). Relevant to this case, the Army Court has directed corrections to the Lautenberg annotation on the STR to ensure records accurately reflect trial proceedings. *See, e.g.*, *United States v. Alhadi*, ARMY 20190825, 2022 CCA LEXIS 173 (A. Ct. Crim. App. 16 Mar.

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[5] *See, e.g.*, *United States v. Castro*, ARMY 20220560, 2024 CCA LEXIS ___, at n* (A. Ct. Crim. App. Mar. 13, 2024) (amending the date of the STR); *United States v. Charland*, ARMY 20220512, 2024 CCA LEXIS 50, at n* (A. Ct. Crim. App. Jan. 31, 2024) (correcting dates and language in the findings worksheet); *United States v. Pennington*, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. Mar. 2, 2021) (directing corrections of dates, rank, and other words in the findings and sentence); *United States v. Malone*, NMCM 200101164, 2022 CCA LEXIS 90 (N-M. Ct. Crim. App. Apr. 24, 2002) (directing correction of citations to a different court-martial in a Convening Authority Action). *But see Finco*, 2021 CCA LEXIS 603 at *n.4 (noting but not directing correction of a missing signature in a Staff Judge Advocate Memo).

[6] *See also United States v. Lemire*, 82 M.J. 263 n* (C.A.A.F. 2022) (removing a sex offender annotation in a promulgating order).

2022); *United States v. Satterfield*, ARMY 20180125, 2019 CCA LEXIS 448 (A. Ct. Crim. App. 30 Oct. 2019).

Similar to the Army Court, the Navy-Marine Corps CCA in *United States v. Crumpley*, held an appellant was "entitled to have [their] official records correctly reflect the content of the proceeding." 49 M.J. 538 (N-M. Ct. Crim. App. 1998) (removing a deserter status annotation on a staff judge advocate recommendation pursuant to a motion to correct error).

However, twenty years later, the court articulated a limit to this authority in *United States v. Barratta*, when it declined to correct a Defense Incident-Based Reporting System (DIBRS) code on a Record Result of Trial (RRT). 77 M.J. 691, 695 (N-M. Ct. Crim. 2018) (citing *Center for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013)). Though neither party had raised a jurisdictional challenge, the *Barratta* court reasoned, "Our authority to correct any error, including an error in official records, is limited to our statutory jurisdiction." Thus, the DIBRS code as a reporting system outside the UCMJ or MCM was not an action "with respect to the findings or sentence." *Id.*

Relying upon the reasoning in *Baratta*, the Air Force CCA held in *United States v. Lepore*, that it lacked article 66, UCMJ jurisdiction to act with respect to the Lautenberg Amendment annotation on a court-martial order because the

annotation related to a reporting mechanism external to the UCMJ and MCM.[7] 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), *overruling in part United States v. Dawson*, 65 M.J. 848 (A.F. Ct. Crim. App. 2007) (citing R.C.M. (2016 ed.)) ("[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ."). It clarified however, that it does not hold it lacked authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority. *Id.* at 762–63.

Evidently, both *Barratta* and *Lepore* differ from how the Army Court treats error corrections.[8]

Argument

A. This Court has jurisdiction under article 67(c)(1)(A), UCMJ.

The Army Court's amendment of block 32 (1) is a matter of law; (2) is an act with respect to the findings as affirmed by the Army Court; and (3) was made in accordance with R.C.M. 1111(c)(2).

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[7] *See* 18 U.S.C. § 922(g)(9); *see also* discussion *infra* Granted Issue II.

[8] In *United States v. Macias*, the Navy-Marine Corps CCA relied on *Crumpley* to direct correction of a Lautenberg annotation in an appellant's favor. No. 202200005, 2022 CCA LEXIS 580, at *2–3 (N-M. Ct. Crim. App. 13 Oct. 2022). The government conceded error in this case. While decided after *Baratta* and *Lepore*, it included no jurisdictional analysis and no cite or discussion of *Baratta*.

1. Under the specific facts of this case, block 32's annotation is a matter of law.

Ordinarily, the accuracy of block 32's annotation is an administrative matter. However, here, the military judge made the Lautenberg Amendment's applicability an issue that affected the knowing nature of appellant's plea.[9] He raised and discussed the textual differences between 18 U.S.C. § 922(g)(9) and DODI 6400.06 with appellant, distinguishing consequences inside and outside the DoD. (JA 33–35). He determined appellant's conviction did not meet the statutory definition of a misdemeanor crime of domestic violence. *See* 18 U.S.C. § 922(g)(A). (JA 34). Even though the parties did not discuss specific consequences (e.g., a Service requirement to include an annotation on the STR), the military judge opined the conviction could be a qualifying conviction under Department of Defense instruction. (JA 31, 33–34; SJA 04–08). The military judge found appellant knowingly pleaded guilty based in part on appellant's understanding of possible Lautenberg consequences. (JA 33–35; SJA 02).

Because this otherwise collateral consequence was addressed at length on the record, the accuracy of block 32 implicates the knowing aspects of appellant's

[9] The military judge was not required by law to advise appellant of the Lautenberg Amendment's applicability. *See Groomes*, 2014 CCA LEXIS 752, at *18 (declining to extend the ruling in *Riley*, 72 M.J.at 122 to the Lautenberg context); *cf.* SJA 12–14 (addressing sex offender registration and immigration consequences). Nor did appellant raise the matter to the attention of the court and request the same.

plea which this Court and the Army Court can review.[10]

2. Reviewing changes to block 32 would be an act with respect to the findings affirmed by the Army Court.

The military judge found appellant, pursuant to his plea, guilty of violating domestic violence by violating a military protective order with intent to intimidate his spouse. (JA 08, 36). The Army Court affirmed this finding. (JA 02).

The Army Court's amendment to "Yes" in block 32 was an act with respect to the same finding entered into the record. *See* article 66(d)(1), UCMJ. As a part of the providence inquiry, the military judge determined appellant's conviction did not meet the statutory definition set forth in 18 U.S.C. § 922(g)(9). (JA 34). Citing to 18 U.S.C. § 922(g), block 32 asked whether appellant was convicted of a misdemeanor crime of domestic violence. (JA 08, 67). Consistent with his finding on the record, the military judge modified the annotation to "No." (JA 08). In so doing, he effectuated a legal determination that served as a basis for accepting appellant's plea. Thus, reviewing the Army Court's amendment of this same modification would be acting with respect to the findings as affirmed by the Army Court. *See* Article 67(c)(1)(B), UCMJ.

[10] Although appellant is not seeking to withdraw from the guilty plea, the Army Court's amendment to this block implicates the concerns the military judge addressed at length with appellant during his plea.

3. R.C.M. 1111(c)(2) authorized the Army Court to amend the military judge's modification.

Block 32's Lautenberg annotation is part of the judgment. *See* Article 60(a), UCMJ; Army Reg. 27–10, para. 5–42b(5). Unlike in *Baratta* and *Lepore*, the Lautenberg annotation is part of a reporting mechanism that is required by Army Regulation and applicable edition of the R.C.M. and UCMJ. *See* R.C.M. 1111(b)(3)(F), (4); Art. 60(a)(1)(C), UCMJ; Army Reg. 27–10, para. 5–42b(5). Moreover, the judgment incorporated by reference the entire STR. (JA 13). It made no distinction between the "Notifications" header under which the annotation appears and other sections of the STR. (JA 08, 13).

The military judge's modification of block 32 was also part of the judgment because the modification resulted "by reason of a determination that affects a plea or finding." *See* Art. 60, 60c(a)(1)(A)–(B), UCMJ. Namely, the military judge's modification from "Yes" to "No" resulted by reason of his determination that appellant's conviction did not qualify under the statutory definition of misdemeanor crime of domestic violence.[11] (JA 08, 13, 34). That determination affects the plea and finding. *See* discussion *supra* Issue I.A.1–2.

Additionally, having determined a change to block 32 is an act with respect

[11] The military judge annotated on the Judgment "None" as to whether there was "any ruling order or other determination of the military judge that affects a plea, a finding, or the sentence," but this fact is not dispositive. (JA 13).

to the finding in this case, such modification would be "in the performance of [the Army Court's] duties." *See* R.C.M. 1111(c)(2). Consequently, the Army Court was authorized to modify block 32's annotation in the exercise of its discretion. R.C.M. 1111(c)(2). Accordingly, this Court may review the Army Court's amendment.

B. In the alternative, this Court has discretion to correct Block 32 as a *de minimis* error.

If this Court finds article 67(c)(1)(A), UCMJ does not apply and instead, considers the accuracy of block 32 "so *de minimis* that it is unnecessary to remand the case to correct the error," this Court may correct it to accurately reflect trial proceedings.[12] *See United States v. Moseley,* 35 M.J. 481, 485 (C.M.A. 1992) (Cox, J., concurring), *overruled in part*.[13] Here, the Army Court exercised its discretion to direct correction of an error to appellant's detriment incident to its review of an issue otherwise subject to the Court's review: the providence of appellant's plea. Accordingly, this Court may review for and correct error.

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[12] Appellant relies upon article 67(c)(1)(B), UMCJ which confers this Court jurisdiction to review a "decision, judgment, or order by a military judge." (Appellant's Brief at 6). It is the government's position this article solely applies to article 62, UMCJ appeals and writs. *See, e.g.*, *Fink v. Y.B.* 83 M.J. 222, 225 (C.A.A.F. 2023) (per curiam) (stating the scope of article 67(c)(1)(B), UCMJ includes review of a military judge's decision or order on interlocutory questions).

[13] Judge Cox noted for the parties' consideration whether such a correction would be appropriate to raise via motion, rather than direct review.

Granted Issue II

WHETHER THE ARMY COURT ERRED BY ASSERTING THAT APPELLANT HAS A QUALIFYING CONVICTION UNDER 18 U.S.C. § 922(g)(9).

Summary of Argument

The Army Court erred by asserting appellant had a qualifying conviction under 18 U.S.C. § 922(g)(9) and modifying the military judge's amendment to block 32 of the STR from "no" to "yes." Appellant's conviction for violating a military protective order with intent to intimidate, in violation of Article 128b(3), UCMJ, does not include, as an element, use or attempted use of physical force.

Standard of Review

This Court reviews matters of statutory interpretation de novo. *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022) (citing *United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016)).

Law

The Gun Control Act of 1968 (GCA) establishes a regulatory scheme for the manufacture, sale, transfer, and possession of firearms and ammunition. 18 U.S.C. § 921 *et seq.*, as amended. The terms used by the GCA are further defined in the Code of Federal Regulations. *See* 27 C.F.R. § 478.11.

The Lautenberg amendment to the GCA criminalizes possession of firearms or ammunition by those previously convicted of a misdemeanor crime of domestic

violence offense. 18 U.S.C. § 922(g)(9). It has no military service member exception. *Id.*

A misdemeanor crime of domestic violence is an offense that is a (1) misdemeanor under Federal law that (2) "has as an element, the use or attempted use of physical force" (3) "committed by a current or former spouse[.]" 18 U.S.C. § 921(a)(33)(A). A misdemeanor is "an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine." 27 C.F.R. § 478.11. In the context of sentence enhancement, the Supreme Court has held that the term "physical force" is satisfied by the common-law battery definition.[14] *United States v. Castleman,* 572, U.S. 157, 168 (2014). While in section 922(g)(9) prosecutions, the prosecution must prove beyond a reasonable doubt the existence of the domestic relationship, it is not required as a statutory element. *United States v. Hayes*, 555 U.S. 415, 426–27 (2009) ("Construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute (one that does not designate a domestic relationship as an element of the offense) would frustrate Congress' manifest purpose.").

[14] While the *Castleman* Court also held the "categorical approach" applied to the definition of "misdemeanor crime of domestic violence" in determining whether a statute of conviction contained the physical force element, this Court need not adopt the same. *See* 572 U.S. at 168 (citing *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U. S. 13 (2005)).

Argument[15]

In this case, appellant does not dispute that his conviction was punishable by confinement for a term of one year or that he was the current spouse of the victim at the time of his offense. However, he was not convicted of an offense that has as an element, the use or attempted use of physical force.

Instead, appellant was convicted of wrongfully violating a military protection order by contacting his spouse by telephone with intent to intimidate her in violation of 18 U.S.C. § 928b(3). (JA 08, 36). In his plea colloquy, appellant admitted the following elements: (1) a lawful protection order was issued; (2) he violated that order by contacting Ms. LC by telephone; and (3) he committed the act with intent to intimidate (4) his spouse. (JA 14–25).

"Protection order" means an enforceable order under section 892, Title 10 of the U.S. Code. (JA 15). An "enforceable order" means he received the MPO to have no contact or communicate with his spouse, he had knowledge of that order, and it was his duty to obey the order. (JA 15). "Intimidate" means a serious act or course of conduct directed at a specific person that causes fear or apprehension in such person and serves no legitimate purpose. (JA 15). This crime did not include as an element the use or attempted use of physical force. (SJA 09–13).

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[15] The Army Court had authority to modify the block 32 annotation in this case. *See* discussion *supra* Issue I.A–B.

As such, appellant was not convicted of a misdemeanor crime of domestic violence. Accordingly, the Army Court erred when it determined appellant's conviction constituted a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9).

Conclusion

WHEREFORE, the government respectfully requests that this honorable Court direct correction of block 32 to "No."[16]

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[16] In the alternative, the government respectfully requests this Court return the record to the Army Court and direct them to provide their reasoning when amending block 32 "No" to "Yes".

CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains **4,627** 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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Attorney for Appellee
March 25, 2024

APPENDIX

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, HAYES, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant ENRIQUE CASTRO
United States Army, Appellant

ARMY 20220560

Headquarters, U.S. Army Fires Center of Excellence and Fort Sill
Tiffany D. Pond and Scott Z. Hughes, Military Judges
Colonel John M. McCabe, Staff Judge Advocate

For Appellant: Colonel Philip M. Staten, JA; Major Robert W. Rodriguez, JA; Captain Justin L. Watkins, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Chase C. Cleveland, JA; Captain Stewart A. Miller, JA (on brief).

13 March 2024

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.*

FOR THE COURT:

James W. Herring, Jr.
JAMES W. HERRING, JR.
Clerk of Court

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* The Judgment of the Court is amended to reflect "11/04/2022" instead of "11/03/2022" for the date of the Statement of Trial Results.

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 JANECIA A. WILSON
United States Army, Appellant

ARMY 20230052

Headquarters, U.S. Army Training Center and Fort Jackson
John H. Cook, Military Judge
Colonel Darren W. Pohlmann, Staff Judge Advocate

For Appellant: Major Mitchell D. Herniak, JA; Captain Patrick McHenry, JA.

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed.

7 February 2024

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.*

FOR THE COURT:

[redacted]
JAMES W. HERRING, JR.
Clerk of Court

* The Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect the response to block 29 as "Yes."

United States v. Charland

United States Army Court of Criminal Appeals

January 31, 2024, Decided

ARMY 20220512

Reporter
2024 CCA LEXIS 50 *

UNITED STATES, Appellee v. Specialist LOUIS E. CHARLAND IV, United States Army, Appellant

Prior History: [*1] Headquarters, Joint Readiness Training Center and Fort Polk. Maureen A. Kohn, Military Judge, Colonel Leslie A. Rowley, Staff Judge Advocate.

Core Terms

finding of guilt, sentence

Counsel: For Appellant: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert D. Luyties, JA; Captain Amber L. Bunch, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Chase C. Cleveland, JA (on brief).

Judges: Before WALKER, POND, and PARKER, Appellate Military Judges.

Opinion

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.[*]

[*] The Findings Worksheet of the Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect "12 April 2022" instead of "12 January 2021" in the language of the "Specification" block for Charge III, and "Not Guilty" in the "Plea" blocks for Specification 2 of Charge I, the Specification of Charge II, Specification 1 of Charge IV, and Specification 11 of Charge IV.

United States v. Moreldelossantos

United States Army Court of Criminal Appeals

March 17, 2022, Decided

ARMY 20210167

Reporter
2022 CCA LEXIS 164 *

UNITED STATES, Appellee v. Specialist MELVIN E. MORELDELOSSANTOS, United States Army, Appellant

Prior History: [*1] Headquarters, Fort Campbell. Jacqueline Tubbs, Military Judge. Lieutenant Colonel Ryan W. Leary, Staff Judge Advocate.

Core Terms

finding of guilt, sentence

Counsel: For Appellant: Colonel Michael C. Friess, JA; Major Christian E. DeLuke, JA; Captain Tumentugs D. Armstrong, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Lieutenant Colonel Anthony 0. Pottinger, JA (on brief).

Judges: Before FLEMING, HAYES, and PARKER, Appellate Military Judges.

Opinion

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.[*]

End of Document

[*] The Statement of Trial Results is corrected as follows: Block 13, concerning the sentence adjudged with regard to forfeitures, is amended from "Total" to "None;" Block 31, concerning *18 U.S.C. § 922 (g)(1)*, is changed to reflect "No."

United States v. Alhadi

United States Army Court of Criminal Appeals

March 16, 2022, Decided

ARMY 20190825

Reporter
2022 CCA LEXIS 173 *

UNITED STATES, Appellee v. Private First Class AHMAD R. ALHADI, United States Army, Appellant

Subsequent History: Motion granted by *United States v. Alhadi, 2022 CAAF LEXIS 362 (C.A.A.F., May 16, 2022)*

Motion granted by *United States v. Alhadi, 2022 CAAF LEXIS 416 (C.A.A.F., June 8, 2022)*

Motion granted by *United States v. Alhadi, 2022 CAAF LEXIS 438 (C.A.A.F., June 22, 2022)*

Review denied by *United States v. Alhadi, 2022 CAAF LEXIS 551 (C.A.A.F., Aug. 1, 2022)*

Prior History: **[*1]** Headquarters, U.S. Army Maneuver Support Center of Excellence. Steven C. Neil and Jeffrey W. Hart, Military Judges, Colonel Christopher B. Burgess, Staff Judge Advocate.

Core Terms

finding of guilt, sentence

Counsel: For Appellant: Captain Andrew R. Britt, JA; Frank J. Spinner, Esquire (on brief and reply brief).

For Appellee: Lieutenant Colonel Craig Schapira, JA; Captain Karey Marren, JA; Captain A. Benjamin Spencer, JA (on brief).

Judges: Before BROOKHART, PENLAND, and ARGUELLES[1], Appellate Military Judges.

Opinion

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

End of Document

[1] Judge Arguelles decided this case while on active duty. The Statement of Trial Results is corrected as follows: Block 30, concerning whether sex offender registration is required, is amended from "Yes," to "No," in accordance with the military judge's ruling dated 27 February 2020; Block 32, concerning whether appellant was convicted of a misdemeanor crime of domestic violence, is amended from "Yes" to "No;" and the "Plea" block for The Specification of Charge II is amended from "Not Guilty" to "Guilty."

United States v. Pennington

United States Army Court of Criminal Appeals

March 3, 2021, Decided

ARMY 20190605

Reporter
2021 CCA LEXIS 101 *; 2021 WL 824428

UNITED STATES, Appellee v. Sergeant Major PHILLIP D. PENNINGTON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Pennington, 2021 CAAF LEXIS 399, 2021 WL 1894284 (C.A.A.F., Apr. 28, 2021)*

Review denied by *United States v. Pennington, 2021 CAAF LEXIS 523 (C.A.A.F., June 8, 2021)*

Prior History: [*1] Headquarters, United States Maneuver Support Center of Excellence. J. Harper Cook and S. Charles Neill, Military Judges, Colonel Christopher B. Burgess, Staff Judge Advocate.

Core Terms

Specification, military, sentence, post-trial, reflects, replaced, court-martial, documents, appellate counsel, processing, convening

Case Summary

Overview
HOLDINGS: [1]-The court noted and corrected issues in appellant's post-trial documents because, in the exercise of its authority under R.C.M. 1111(c)(2), Manual Courts-Martial, a court of criminal appeals could modify the entry of judgment in the performance of its duties and responsibilities; [2]-Beyond highlighting documentary errors and the government's failure to timely serve appellant with his record of trial, appellant failed to cite any prejudice stemming from the raised errors; because appellant failed to make any colorable showing of possible prejudice from the post-trial processing of his case, beyond the corrections noted in the opinion, no further relief was warranted.

Outcome
The findings of guilty and the sentence were affirmed.

LexisNexis® Headnotes

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

Military & Veterans Law > ... > Courts Martial > Motions > Procedures

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

Military & Veterans Law > Military Justice > Counsel

HN1[] **Pretrial Proceedings, Charges & Specifications**

After final adjournment of a general court-martial, the military judge shall sign and include in the record of trial a statement of trial results (STR). R.C.M. 1101(a), Manual Courts-Martial (2019). For each charge and specification referred to trial, the STR shall consist of (A) a summary of each charge and specification; (B) the plea(s) of the accused; and (C) the finding or other disposition of each charge and specification. R.C.M. 1101(a)(1). The STR shall also reflect the sentence of the court-martial and the date the sentence was announced. R.C.M. 1101(a)(2). Trial counsel shall promptly provide a copy of the STR to the accused or to the accused's defense counsel. R.C.M. 1101(d). Any party may raise a post-trial motion asserting an allegation of error in the STR. R.C.M. 1104(b)(1)(D), Manual Courts-Martial. Parties have no less than fourteen days to raise such motions following defense

counsel's receipt of the STR. R.C.M. 1104(b)(2)(A).

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

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

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

HN2[] **Judicial Review, Courts of Criminal Appeals**

The entry of judgment (EOJ) reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders. R.C.M. 1111(a)(2), Manual Courts-Martial. It terminates the trial proceedings and initiates the appellate process. R.C.M. 1111(a)(2). The statement of trial results shall be included in the EOJ. R.C.M. 1111(b)(4). Computational or clerical errors in the EOJ may be corrected by the military judge within fourteen days of entry. R.C.M. 1111(c)(1). A court of criminal appeals may also modify the EOJ in the performance of its duties and responsibilities. R.C.M. 1111(c)(2).

Counsel: For Appellant: Lieutenant Colonel Angela D. Swilley, JA; Major Kyle C. Sprague, JA; Captain Thomas J. Travers, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Reanne R. Wentz, JA (on brief).

Judges: Before ALDYKIEWICZ, EWING,[1] and WALKER, Appellate Military Judges. Judges EWING and WALKER concur.

Opinion by: ALDYKIEWICZ

Opinion

SUMMARY DISPOSITION

ALDYKIEWICZ, Senior Judge:

Appellant's post-trial documents are replete with errors. In this opinion, we correct these errors. However, in doing so, we wonder why this court should have to step into the shoes of the numerous parties at the trial level whose responsibility it is to ensure these legal documents, documents of consequence, are properly drafted, reviewed, and executed. Surely this court is not the first line of defense. So we must ask, how did this happen?

BACKGROUND

Appellant's case was referred to trial by general court-martial on 18 April 2019. On 16 August 2019, a military judge sitting as a general court-martial **[*2]** convicted appellant, consistent with his pleas, of one specification of sodomy with a child under the age of twelve (Specification 2 of Charge II) and two specifications of indecent acts with a child (Specifications 1 and 2 of Charge III), in violation of *Articles 125* and *134*, Uniform Code of Military Justice, *10 U.S.C. §§ 925* and *934* [UCMJ]. The military judge granted the government's motion to dismiss the remaining charged offenses to which appellant pleaded not guilty on the condition that his convictions survive final appellate review. The dismissed offenses included Charge I and its Specification, Specification 1 of Charge II, and Specifications 3-8 of Charge III. The military judge sentenced appellant to a dishonorable discharge, confinement for seventeen years, and reduction to the grade of E-1.

Following the announcement of sentence, an initial and corrected copy of the statement of trial results (STR) was produced. On 7 October 2019, the convening authority, consistent with the pretrial agreement, approved the portion of the adjudged sentence extending to a dishonorable discharge, confinement for seven years, and reduction to the grade E-1. On 29 October 2019, the military judge entered the judgment **[*3]** of the court. The entry of judgment (EOJ) incorporated by reference the corrected copy of the STR.

Before this court, appellant's sole assignment of error is "Whether the government's post-trial processing errors warrant relief." In his brief, appellant highlights the numerous errors in the EOJ and STR. Appellant also complains that the government failed to properly serve him a copy of the record of trial. While we exercise our authority to correct the errors in appellant's post-trial documents, we conclude no other relief is warranted and affirm the findings of guilty and the sentence.

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

LAW AND DISCUSSION

The "military judge of a general . . . court-martial shall enter into the record of trial a document entitled 'Statement of Trial Results', which shall set forth . . . (A) each plea and finding; (B) the sentence, if any; and (C) such other information as the President may prescribe by regulation." *UCMJ art. 60(a)(1)* (2018). "In accordance with rules prescribed by the President, in a general . . . court-martial, the military judge shall enter into the record of trial the judgment of the court." *UCMJ art. 60c(a)(1)* (2018). The EOJ "shall consist of . . . (A) The [STR] . . . (B) Any modifications **[*4]** of, or supplements to, the [STR] by reason of . . . (i) any post-trial action by the convening authority; or (ii) any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence." *Id.*

HN1[↑] After final adjournment of a general court-martial, the military judge "shall sign and include in the record of trial a [STR]." Rule for Courts-Martial [R.C.M.] 1101(a) (2019). For each charge and specification referred to trial, the STR "shall consist of . . . (A) a summary of each charge and specification; (B) the plea(s) of the accused; and (C) the finding or other disposition of each charge and specification." R.C.M. 1101(a)(1). The STR shall also reflect the "sentence of the court-martial and the date the sentence was announced." R.C.M. 1101(a)(2). Trial counsel "shall promptly provide a copy of the [STR] to . . . the accused or to the accused's defense counsel." R.C.M. 1101(d). Any party may raise a post-trial motion asserting an "allegation of error in the [STR]." R.C.M. 1104(b)(1)(D). Parties have no less than fourteen days to raise such motions following defense counsel's receipt of the STR. R.C.M. 1104(b)(2)(A).

HN2[↑] The EOJ "reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders." R.C.M. 1111(a)(2). It "terminates the trial **[*5]** proceedings and initiates the appellate process." R.C.M. 1111(a)(2); *see United States v. Coffman, 79 M.J. 820, 823 (Army Ct. Crim. App. 2020)* (noting a properly executed EOJ is sufficient to confer appellate jurisdiction). The STR "shall be included in the [EOJ]." R.C.M. 1111(b)(4). Computational or clerical errors in the EOJ may be corrected by the military judge within fourteen days of entry. R.C.M. 1111(c)(1). A court of criminal appeals may also modify the EOJ in the performance of its duties and responsibilities. R.C.M. 1111(c)(2).

Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents:

(1) Page one of the EOJ incorporates the STR by reference, but incorrectly lists the date of the STR as "N/A." "N/A" shall be replaced with "16 August 2019."

(2) Page one of the EOJ reflects the convening authority's action with respect to deferment and waiver, but does not reflect the convening authority's action with respect to appellant's sentence. We amend this portion of the EOJ to include the convening authority's action on appellant's sentence by adding the following. language: "In the case of Sergeant Major (SGM) Phillip D. Pennington, [TEXT REDACTED BY THE COURT] United States Army, Headquarters and Headquarters Company, 3d Chemical Brigade, Fort Leonard Wood, Missouri, **[*6]** only so much of the sentence as provides for reduction to E-1, confinement for 7 years, and a Dishonorable Discharge is approved and except for that part of the sentence extending to a Dishonorable Discharge, will be executed."

(3) Every specification listed in pages 2-4 of the STR improperly states appellant's rank as "CSM" rather than his actual rank of Sergeant Major (SGM). Every reference to "CSM" shall be replaced with "SGM."

(4) Block 9 on page 2 of the STR erroneously states "N/A" as the date findings were announced. "N/A" shall be replaced with "16 August 2019."

(5) Page 2 of the STR erroneously reflects the alleged period of criminality for Specification 2 of Charge II. "12 February 2007" shall be replaced with "8 December 2006."

(6) Page 2 of the STR erroneously lists Specification 3 of Charge II, a sodomy specification that was neither preferred nor referred to trial. This entire specification shall be deleted.

(7) Page 3 of the STR erroneously reflects the alleged period of criminality for Specification 2 of Charge III, to which appellant pleaded guilty by exceptions and substitutions. "21 March 2007" shall be replaced with "8 December 2006" in both the original specification **[*7]** and the guilty finding.

(8) Page 3 of the STR erroneously reflects appellant's plea of "Not Guilty" to Specification 3 of Charge III. The record does not contain appellant's plea to Specification 3 of Charge III. "Not Guilty" shall be replaced with "None

Entered."[2]

(9) Page 3 of the STR erroneously reflects the alleged period of criminality for Specification 4 of Charge III. "21 March 2007" shall be replaced with "8 December 2006."

(10) Page 3 of the STR erroneously reflects the alleged period of criminality for Specification 6 of Charge III. "21 March 2007" shall be replaced with "8 December 2006."

(11) Page 4 of the STR erroneously reflects the alleged period and frequency of criminality for Specification 8 of Charge III. The language "on divers" shall be inserted immediately preceding the word "occasions" and "21 March 2007" shall be replaced with "8 December 2006."

(12) Block 39 on page 2 of the STR reflects an illegible signature from the military judge. It appears the military judge attempted to digitally sign the STR; however, the resulting signature is unrecognizable. Having no reason to believe the military judge did not actually sign the STR—regardless of its final **[*8]** form—we simply note the issue and direct no further corrective action.

(13) The STR contains a segmented sentencing worksheet even though segmented sentencing was not applicable to appellant's court-martial. This page of the STR shall be deleted.

Regarding the government's failure to timely serve appellant with the record of trial in accordance with R.C.M. 1112(e)(1)(A), we find that was error. However, the government's pleading before this court states, "On 31 August 2020, the United States Army Maneuver Center of Excellence Office of the Staff Judge Advocate notified appellate government counsel that the ROT was sent to appellant at the Joint Regional Correctional Facility on 26 August 2020." The government's brief further states, "On 1 September 2020, appellate government counsel informed defense appellate counsel that the ROT was sent to appellant." In other words, it appears appellant was ultimately served with a copy of the record. Considering government appellate counsel are officers of the court who owe "a duty of candor to the court," *see* Army Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, (28 June 2018), Rule 3.3 Candor Toward the Tribunal, and the absence of any reply brief by **[*9]** defense appellate counsel refuting the government's factual assertion regarding service, we are confident this issue is now moot. We see no reason to order an affidavit from government appellate counsel.

In conclusion, the post-trial processing of simple, standard documents in this case is less than exemplary. The STR is a product that, in most cases, is prepared by a paralegal and reviewed by the trial counsel and chief of military justice before it is given to the military judge for his or her review and signature. In some cases, the STR is also reviewed by the court reporter. That said, we are at a loss to explain how the documents in this case came to be.[3] We applaud defense appellate counsel for the attention to detail shown in reviewing appellant's case and its post-trial processing, to include all its related documents. However, beyond highlighting documentary errors and the government's failure to timely serve appellant with his record of trial, appellant fails to cite any prejudice stemming from the raised errors. Considering our authority under R.C.M. 1111(c)(2) to modify the EOJ, which includes by reference the STR, and further considering that appellant fails to make any "colorable showing **[*10]** of possible prejudice" from the post-trial processing of his case, we find that, beyond the corrections noted herein, no further relief is warranted. *See* *United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998)* (discussing when meaningful relief or remand is required for post-trial processing errors).

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[2] After review of the record in its entirety, to include the government's unopposed motion to dismiss all offenses to which appellant entered a plea of not guilty, its motion to conform the remaining charges to appellant's plea, and the plea agreement, we find that jeopardy attached for the offense alleged in Specification 3 of Charge III. Further, we find appellant's irregular plea harmless, warranting no relief or additional corrective action by this court. *See* *United States v. Williams, 47 M.J. 593, 594-95 (N.M. Ct. Crim. App. 1997)* (noting the failure of trial defense counsel to enter a plea to a specification was a technical oversight resulting in no harm to the appellant and warranting no relief); *see also* *United States v. Franklin, 68 M.J. 603, 603-05 (Army Ct. Crim. App. 2010)* (per curiam) (finding the appellant's failure to enter a plea to a charge was harmless); *United States v. Smith, 43 C.M.R. 630, 633-34 & n.1 (A.C.M.R. 1970)* (Nemrow, J., concurring and dissenting) ("A plea of guilty to the specification of the Charge was never entered. . . . The record of trial convinces me that the failure to plead to the specification of the Charge was through inadvertence and constitutes a mere procedural error.").

[3] The lack of attention to detail that went into preparing the post-trial documents in this case is amplified by the fact that this court finds itself correcting numerous errors in the "Corrected Copy" of the STR.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judges EWING and WALKER concur.

End of Document

United States v. Satterfield

United States Army Court of Criminal Appeals

October 30, 2019, Decided

ARMY 20180125

Reporter
2019 CCA LEXIS 448 *; 2019 WL 5697878

UNITED STATES, Appellee v. First Lieutenant HUNTER H. SATTERFIELD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Satterfield, 2020 CAAF LEXIS 270 (C.A.A.F., May 6, 2020)*

Prior History: [*1] Headquarters, 25th Infantry Division. Kenneth W. Shahan, Military Judge, Colonel Ian R. Iverson, Staff Judge Advocate.

Core Terms

military, assault, apologies, expert testimony, recantation

Case Summary

Overview

HOLDINGS: [1]-The defense expert's testimony was neither relevant nor necessary, under Mil. R. Evid. 702, Manual Courts-Martial, because the defense argument that appellant believed his wife suffered from Borderline Personality Disorder (BPD), appellant interacted with his wife as if she had BPD, and the expert was necessary to show that appellant was reasonable in his beliefs and actions failed because the defense never adduced evidence that at the time of the charged offenses appellant believed his wife had BPD; [2]-Appellant was not prevented from presenting a defense guaranteed by the *Fifth* and *Sixth Amendments* because, even without an expert, the defense was able to present and argue at trial that appellant's apologies were based on his belief in his wife's BPD.

Outcome

Findings of guilty and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

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

HN1 **Witnesses, Expert Testimony**

An appellate court reviews a military judge's decision regarding the admissibility of expert testimony pursuant to Mil. R. Evid. 702, Manual Courts-Martial, for an abuse of discretion. The abuse of discretion standard requires more than a mere difference of opinion. A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law. Additionally, an abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice.

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN2 **Witnesses, Expert Testimony**

Mil. R. Evid. 702, Manual Courts-Martial, provides that an expert witness may provide testimony if it will assist the trier of fact to understand the evidence or determine a fact in issue. A suggested test for deciding when

experts may be used is whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN3[] **Relevance, Confusion, Prejudice & Waste of Time**

In United States v. Houser, the U.S. Court of Military Appeals articulated six factors for a military judge to consider when determining if an expert may testify: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony is not substantially outweighed by the other considerations outlined in Mil. R. Evid. 403, Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

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

HN4[] **Evidence, Evidentiary Rulings**

An appellate military court evaluates prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.

Counsel: For Appellant: Colonel Elizabeth G. Marotta, JA; Major Julie L. Borchers, JA; Captain James J. Berreth, JA (on brief); Major Kyle C. Sprague, JA; Captain James J. Berreth, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Lauryn D. Carr, JA (on brief).

Judges: Before BROOKHART, SALUSSOLIA, and SCHASBERGER, Appellate Military Judges. Senior Judge BROOKHART and Judge SALUSSOLIA concur.

Opinion by: SCHASBERGER

Opinion

MEMORANDUM OPINION

SCHASBERGER, Judge:

Lieutenant Hunter H. Satterfield appeals his convictions for assaulting his wife, asking us to set aside the findings of guilty. Appellant alleges that the military judge abused his discretion in precluding a defense expert witness from testifying about Borderline Personality Disorder (BPD). He argues that the military judge's ruling prevented him from explaining that his apologies to his wife were not because he had beaten her, but instead were appellant's attempt to respond to a person suffering from a mental illness. We disagree that appellant was denied the **[*2]** ability to present his defense and find no abuse of discretion by the military judge.[1]

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of assault consummated by a battery, in violation of *Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928* [UCMJ]. The military judge sentenced appellant to a dismissal and confinement for four months. The convening authority approved the adjudged sentence.[2]

BACKGROUND

Appellant met SZ while she was an intern training dolphins in Hawaii. They began dating, and SZ stayed in

[1] Appellant also asserts factual insufficiency for one of the specifications of assault consummated by a battery, and that he should receive meaningful relief for the dilatory post-trial processing of his case. We find no merit in either assertion. Regarding the post-trial delay, the government took 255 days to process the 859-page record of trial. We do not find a due process violation in, or determine appellant suffered prejudice as a result of, this delay.

[2] We have 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 they are without merit.

Hawaii after the internship ended to continue the relationship. At first, SZ maintained her own apartment, but after a few months, she moved in with appellant.

A few months into the relationship, SZ and appellant got into an argument. The argument was loud and drew the attention of various neighbors who debated what to do. The argument ultimately turned physical. Appellant pushed SZ, causing SZ to fall and eventually hit her head on a nightstand. The neighbors heard the physical altercation, and one heard SZ say, "You promised you would never hit me." One of the neighbors then called the police. When the police arrived, SZ **[*3]** denied any assault.

Though this was not the only time appellant assaulted SZ, SZ agreed to marry appellant. They planned an elaborate and expensive wedding in Florida. Shortly before the wedding, appellant woke up with SZ's hair in his face. This angered appellant and he started punching SZ. After he went to work, SZ called her mother in Florida and told her about the assault. That day, SZ's mother sent SZ's cousin and step-father to Hawaii to bring SZ home to Florida.

When SZ's family members got to Hawaii, they took SZ to the hospital. The medical staff documented her injuries and bruises. While there, the police interviewed SZ and she made a statement regarding the assault. With her relatives' assistance, SZ left Hawaii and returned to Florida.

In response to SZ's departure, appellant sent a series of emails to SZ apologizing and stating that he loved her.[3] Appellant flew to Florida and contacted SZ. After a few days, he went to see SZ and spoke with her, her mother, and her step-father. While there, he apologized again and told them he was taking anger management classes. Appellant never mentioned anything about the possibility that SZ suffered from BPD. Appellant and SZ ultimately **[*4]** reconciled and got married on the beach in Florida.

After they married, SZ repeatedly recanted her previous claims of assault. She made a written recantation as part of an adverse administrative hearing, and also recanted when speaking with prosecutors from Hawaii. Approximately seven months after getting married, SZ and appellant separated. After they separated, SZ withdrew her recantations and again asserted that appellant assaulted her on various occasions.

At trial, appellant's defense strategy was to show that SZ was clumsy, bruised easily, and was not credible.[4] To put his various apologies into context, the defense argued that SZ suffered from BPD and that appellant believed the proper way to respond to a person with BPD was to apologize when accused of wrongdoing. In their opening statement, the defense counsel said they would put on evidence that SZ was impulsive, threw tantrums, had anger and violence issues, and had the ability to cut off close personal relationships. Defense counsel proffered that they would establish that appellant believed SZ had BPD, he researched BPD, and he sent the information about BPD to SZ. To support this theory, the defense wanted their expert consultant **[*5]** to testify as an expert witness. The government objected as to relevance, arguing that because SZ had never been diagnosed with this condition, an expert was not necessary.

The military judge ruled that based on the defense proffer he would allow the defense to discuss the theory in their opening statement. The military judge cautioned the defense that they would have to properly admit the evidence which they proffered to establish the relevance of the expert testimony and their theory. The defense was not able to meet this burden.

During the cross-examination of SZ, the defense attempted to lay the foundation that appellant believed SZ had BPD. However, the defense elicited no evidence of appellant's belief during the time frame of the charged assaults. The only evidence adduced was that months after the charged assaults, appellant sent SZ a link to an article about BPD.

During the defense case-in-chief, the defense called several witnesses to testify as to the behavior and character of SZ. The witnesses did not establish that SZ had any mental health conditions. The defense nonetheless renewed their request to call their expert witness. The government again objected on relevance grounds. **[*6]** After argument from both sides, the

[3] Appellant sent over a dozen emails professing his love and apologizing. For example, in response to SZ's email, "Marrying you won't change the fact that you beat me so bad I went to the [emergency room]," appellant responded, "All I can say is that I am very sorry and it will never happen again. . . ."

[4] The defense alleged several motives for SZ's "fabrications:" she was failing her classes and being a domestic violence victim got her an extension for classwork; she was embarrassed that she could not afford her wedding and needed an excuse to call it off; and that she suffered from BPD which caused her to lie.

military judge ruled that given the state of the evidence, "I believe it is wholly irrelevant that an expert witness might believe that [SZ] exhibits symptoms of someone who might have [BPD]." The defense then asked to have the expert testify on the proper way to deal with a person with BPD. The military judge again determined, "it's not relevant, given the state of the evidence in the case right now."

The defense concluded their case with appellant testifying. Appellant denied ever assaulting SZ. His explanation for the photographs of SZ depicting a bruise on her leg was that she slipped and fell while hiking. He also remembered the hair incident very differently than SZ. He testified that he politely asked her to move her hair and when she declined, he rolled over and said he was going to work. SZ then became enraged and threw a violent temper tantrum, attacking him. As an explanation for the litany of emails apologizing to SZ, appellant explained the apologies referred to his calling her names rather than any physical assaults. He did not mention BPD at all in his testimony, instead stating, "I just found that if I was not confrontational to [SZ], **[*7]** it made things better."

LAW AND DISCUSSION

HN1[↑] We review a military judge's decision regarding the admissibility of expert testimony pursuant to Military Rule of Evidence [Mil. R. Evid.] 702 for an abuse of discretion. *United States v. Griffin, 50 M.J. 278, 284 (C.A.A.F. 1999)* (citation omitted). The abuse of discretion standard requires "more than a mere difference of opinion." *United States v. Eugene, 78 M.J. 132, 134 (C.A.A.F. 2018)*. "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Flesher, 73 M.J. 303, 311 (C.A.A.F. 2014)* (quoting *United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008))*. Additionally, lain abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice." *Id.* (internal quotation marks and citations omitted).

HN2[↑] Military Rule of Evidence 702 provides that an expert witness may provide testimony if it "will assist the trier of fact to understand the evidence or determine a fact in issue." "A suggested 'test' for deciding 'when experts may be used' is 'whether the untrained layman would be qualified to determine intelligently and to the best possible degree the **[*8]** particular issue without enlightenment from those having a specialized understanding of the subject . . . .'" *Flesher, 73 M.J. at 313* (quoting *United States v. Meeks, 35 M.J. 64, 68 (C.M.A. 1992))*.

Appellant argues that the military judge failed to conduct a proper analysis, i.e., that he did not analyze the *Houser*[5] factors and did not justify his conclusions. While we agree with appellant that the military judge should have made detailed findings of fact and conclusions of law,[6] we do not find that the military judge's conclusion that the expert's testimony was irrelevant, in light of the evidence before him, to be clearly erroneous.

We concur with the military judge that the defense expert's testimony, as proffered by defense counsel, was neither relevant nor necessary. The defense argument was that appellant believed SZ suffered from BPD, appellant interacted with SZ as if she had BPD, and the expert was necessary to show that appellant was reasonable in his beliefs and actions. This argument fails because the defense never adduced evidence that at the relevant time (at the time of the charged offenses) appellant believed SZ had BPD. There is also no evidence that appellant believed that the appropriate way to deal with a person with **[*9]** BPD was to apologize. Without that predicate evidence, the testimony of the expert never became relevant.

Contrary to appellant's assertion that he was denied the "foundation of his defense," appellant was not prevented from presenting a defense guaranteed by the *Fifth* and *Sixth Amendments*. *See United States v. Ndanyi, 45 M.J. 315, 321 (C.A.A.F. 1996)*. Even without an expert,

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[5] ***HN3***[↑] In *United States v. Houser*, our superior court articulated six factors for a military judge to consider when determining if an expert may testify: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony is not substantially outweighed by the other considerations outlined in Mil. R. Evid. 403. *36 M.J. 392, 397 (C.M.A. 1993)*.

[6] As the military judge failed to put a detailed analysis on the record, we grant his conclusions less deference. *See United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002)*.

the defense was able to present and argue at trial that appellant's apologies were based on his belief in SZ's BPD. To that end, appellant expressly testified, "I just found that if I was not confrontational to [SZ], it made things better." Further, the defense introduced evidence that SZ was impulsive, spoiled, and a liar. The defense also introduced several of SZ's prior inconsistent statements and cross-examined her on them.

Even assuming the defense expert's testimony was relevant and more probative than prejudicia1,[7] we must still test for prejudice. *HN4*[↑] "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)* (citation omitted).

The government's case was strong. In addition to the victim's testimony, **[*10]** the government introduced the testimony of the neighbor who overheard one of the assaults, the testimony of the medical staff who treated SZ after another assault, the photographs of injuries from two separate assaults, the testimony of SZ's family, and the numerous apologies from appellant. The defense case was not as strong. It was based almost exclusively on attacking the credibility of SZ. The defense introduced evidence of SZ recanting various allegations of assault; however, all the recantations were in the context of either saving her relationship with appellant or saving appellant's career. Defense's recantation argument was also severely undercut by the evidence corroborating SZ's allegations. Though, appellant testified in his defense, his explanations of the apologies rang hollow; he did not mention BPD as a reason for apologizing, instead stating that the apologies were for calling her a "cunt" and a "bitch." The last two prongs of our prejudice analysis also don't support a conclusion that appellant was prejudiced: the evidence was not material and would have been speculative at best.

Accordingly, we find the military judge did not abuse his discretion in denying the defense **[*11]** request for expert testimony, and even if the military judge clearly erred, appellant was not prejudiced.

[7] As the military judge did not discuss an analysis under Mil. R. Evid. 403, we will assume if it was relevant then it should have been allowed.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge BROOKHART and Judge SALUSSOLIA concur.

NOTICE OF COURT-MARTIAL ORDER CORRECTION

IT IS ORDERED THAT, to reflect the true proceedings at the trial of the above-captioned case,

GENERAL COURT-MARTIAL ORDER NUMBER 9, HEADQUARTERS, 25TH INFANTRY DIVISION, SCHOFIELD BARRACKS, HAWAII 96857, dated 26 November 2018,

IS FURTHER CORRECTED AS FOLLOWS:

BY deleting at the top of page one "Firearms Prohibitions Apply-Felony Conviction. *18 U.S.C. 922(g)(1)*."

BY adding at the top of page one "Misdemeanor Crime of Domestic Violence. *18 U.S.C. 922(g)(9)*."

DATE: 30 October 2019

End of Document

Positive
As of: March 21, 2024 1:55 PM Z

United States v. Vance

United States Army Court of Criminal Appeals

April 8, 2020, Decided

ARMY 20180011

Reporter
2020 CCA LEXIS 112 *

UNITED STATES, Appellee v. Captain ELMO E. VANCE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Army Fires Center of Excellence and Fort Sill. Robert L. Shuck and Jacob D. Bashore, Military Judges. Colonel Maureen A. Kohn, Staff Judge Advocate.

In re Vance, 78 M.J. 631, 2018 CCA LEXIS 532 (A.C.C.A., Nov. 5, 2018)

Core Terms

sentence, court-martial, guilty plea, military, resignation, designee, continuance, superior court, asserts, ineffective, proceedings, discharged, directing, adjudged, pretrial, approve, regulations, disapprove, offender, charges, abate, sex, collateral consequence, finding of guilt, defense counsel, conditions, effectuate, promulgate, waiting

Case Summary

Overview
HOLDINGS: [1]-Appellant did not show that his counsel would have been successful had he filed a timely motion for a continuance; [2]-As to appellant's argument that his counsels' deficient legal advice precluded him from deciding what risks to incur in deciding when to plead guilty, he failed to demonstrate a reasonable probability that, absent the alleged error, he would not have pleaded guilty; [3]-He completed a knowing, voluntary, and intelligent plea of guilty to the charged offense; [4]-The convening authority approved the findings and sentence. That action was correct in law and the court affirmed findings of guilty; [5]-The court had before it a valid court-martial conviction, a valid administrative discharge, and documentation purporting to rescind an otherwise valid administrative discharge unsupported by any law or authority. The court was compelled to set aside his dismissal.

Outcome
The findings were affirmed. The sentence was set aside. All rights, privileges, and property, of which appellant had been deprived by virtue of that portion of his sentence set aside by this decision were ordered restored.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

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

HN1[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

The court reviews assertions of ineffective assistance of counsel de novo. In Strickland, the Supreme Court established a two-pronged test to determine whether counsel provided ineffective assistance. The U.S. Court of Appeals for the Armed Forces has adopted this two-pronged test. In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient and (2) that this deficiency resulted in prejudice. When it is apparent that the alleged deficiency has not caused prejudice, it is not necessary to decide the issue of deficient performance.

Military & Veterans Law > Military Justice > Courts Martial

Military & Veterans Law > Servicemembers

HN2[] **Military Justice, Courts Martial**

The tender of a Resignation for the Good of the Service (RFGOS) does not preclude or suspend court-martial procedures. Army Reg. 600-8-24, para. 3-12. Additionally, the Deputy Assistant Secretary of the Army (Review Boards) had complete discretion to act on the RFGOS, to include when to act. While the command must expeditiously process an RFGOS, the court does not find a set time upon which the Secretary's designee must act on a tendered resignation; refer to Army Reg. 600-8-24, para. 3-13e; Army Reg. 27-10, para. 5-26c.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

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

HN3[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In the guilty plea context, the prejudice prong of the Strickland test asks whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. A mere post-trial allegation is insufficient. According to Padilla, an appellant also must satisfy a separate, objective inquiry--he must show that if he had been advised properly, then it would have been rational for him not to plead guilty.

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

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

HN4[] **Trial Procedures, Pleas**

The court reviews a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the plea de novo. An abuse of discretion occurs when a military judge fails to obtain from an accused an adequate factual basis to support the plea or has an erroneous view of the law. A military judge's duties with respect to plea inquiries include: (1) ensuring there is a basis in law and fact to support the plea and offense charged; (2) ensuring the accused understands and accepts the terms of the pretrial agreement; and (3) ensuring the terms of the agreement comply with the law and fundamental notions of fairness. The court will not disturb a guilty plea unless appellant demonstrates a substantial basis in law or fact for questioning the plea.

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

HN5[] **Pleas, Voluntariness**

A guilty plea can be knowing and voluntary even if the defendant did not correctly assess every relevant factor entering into his decision, so long as it is entered by a defendant fully aware of the direct consequences of his plea. Generally, a court must only advise the defendant of the direct consequences of his plea and need not advise him of all possible collateral consequences.

Military & Veterans Law > Servicemembers > Administrative Discharge

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

HN6[] **Servicemembers, Administrative Discharge**

Military appellate courts have long recognized that administrative discharges, to include those resulting from a discharge in lieu of a court-martial, are collateral administrative matters.

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

HN7[] **Pleas, Voluntariness**

When challenging a guilty plea because of an unforeseen collateral consequence, appellant must demonstrate that the collateral consequence is major, and that appellant's misunderstanding of the

consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.

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

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

The court may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved; refer to Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

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

Military & Veterans Law > Servicemembers

HN9 **Posttrial Procedure, Actions by Convening Authority**

Although Unif. Code Mil. Justice art. 60, *10 U.S.C.S. § 860*, prevents a convening authority, in most cases, from vacating the findings and sentence upon the Deputy Assistant Secretary of the Army (Review Boards) (DASA's) acceptance of a resignation for the good of the service, it does not divest the DASA of the authority to effectuate the administrative discharge. Once charges are preferred, an administrative discharge certificate is "void until the charge is dismissed, the Soldier is acquitted at trial by court-martial, or appellate review of a conviction is complete." Army Reg. 27-10, para. 5-16b. However, the Secretary or "delegate," may approve an exception at the request of the soldier.

Military & Veterans Law > Military Justice > Jurisdiction > In Personam Jurisdiction

HN10 **Jurisdiction, In Personam Jurisdiction**

The U.S. Court of Appeals for the Armed Forces has identified three criteria to consider when determining whether a servicemember's discharge has been finalized for jurisdictional purposes: (1) the delivery of a discharge certificate (a DD Form 214); (2) a "final accounting of pay"; and (3) the completion of the "clearing" process that is required under service regulations.

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

Military & Veterans Law > Servicemembers

HN11 **Posttrial Procedure, Actions by Convening Authority**

Discharge only affects execution of the sentence; specifically, unexecuted portion, of the sentence.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Jonathan F. Potter, Esquire; Lieutenant Colonel Christopher D. Carrier, JA (on brief); Lieutenant Colonel Tiffany D. Pond, JA; Lieutenant Colonel Christopher D. Carrier, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Lauryn D. Carr, JA (on brief).

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER, Appellate Military Judges. Senior Judge ALDYKIEWICZ and Judge WALKER concur.

Opinion by: SALUSSOLIA

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

SALUSSOLIA, Judge

A military judge sitting as a general court-martial, convicted appellant, consistent with his pleas, often specifications of violating a general regulation, one specification of absence without leave, and one specification of conduct unbecoming an officer and gentleman, in violation of *Articles 92*, *86*, and *133*, *Uniform Code of Military Justice, 10 U.S.C. §§ 892*, *886*, *933 (2012 & Supp. II 2015)* [UCMJ]. The military judge sentenced appellant to a dismissal from the service and forfeiture **[*2]** of $1000 per month for three months.

The general court-martial convening authority (GCMCA) originally set aside the findings of guilty and the sentence pursuant to the direction of the Deputy Assistant Secretary of the Army (Review Boards), (the "DASA"). Previously, in *In Re Vance*, this court determined the GCMCA's action violated *Article 60, UCMJ*, and such action "was invalid at the time it was signed and void *ab initio*" *78 M.J. 631, 636 (Army Ct. Crim. App. 2018)*. We also issued a writ of mandamus directing the GCMCA to take action in this case in the manner as required under *Article 60, UCMJ* . *Id.* The GCMCA subsequently took action approving the adjudged findings and sentence in this case.

Appellant's case is now pending review before this court pursuant to *Article 66, UCMJ*. On appeal, appellant asserts two assignments of error: (1) whether appellant received effective assistance of counsel when he was advised that his pending resignation for the good of the service (RFGOS) in lieu of court-martial could still be approved even if he pleaded guilty and was sentenced to a dismissal; and (2) whether appellant's pleas of guilty were not provident. Appellant asserts that given either error, this court should set aside the findings and sentence. Having ordered **[*3]** and received affidavits from appellant's military defense counsel,[1] we address each assigned error below. In the end, we affirm the findings of guilty but set aside the sentence.

BACKGROUND

On 26 September 2017, the government preferred charges against appellant. On 10 October 2017, appellant, pursuant to advice from his trial defense counsel, CPT LA, submitted a Resignation for the Good of the Service (RFGOS) pursuant to Army Reg. 600-8-24, Personnel-General: Officer Transfers and Discharges, para. 3-13 (12 Apr. 2008; Rapid Action Revision 13 Sept. 2011) [AR 600-8-24]. Although appellant requested the GCMCA hold the referral of his charges in abeyance until action was taken on his RFGOS, the GCMCA referred the charges on 13 October 2017. Approximately a week later, the GCMCA recommended disapproval of appellant's RFGOS in lieu of court-martial.

With a trial set for 30 January 2018, appellant submitted an offer to plead guilty on 17 November 2017, which the GCMCA accepted on 22 December 2017. On 17 January 2018, appellant was found guilty pursuant to his pleas and sentenced. On 19 January 2018, appellant's command forwarded appellant's RFGOS to the United States Army Human Resources Command, **[*4]** which in turn, forwarded the case to the Army Review Boards Agency for action by the DASA, operating under a delegation of authority from the Secretary of the Army (the Secretary). On 20 March 2018, the DASA accepted appellant's resignation and directed that he be administratively discharged with an under Other Than Honorable Conditions (OTH) characterization of service. The DASA also directed that "the entire court-martial proceedings, both the findings and sentence, if any, be vacated."

On 29 March 2018, after receiving advice from his staff judge advocate, the GCMCA disapproved the findings and sentence pursuant to the DASA's direction. On 10 April 2018, appellant received orders directing the issuance of his administrative discharge and received a DD 214 that characterized appellant's discharge as under OTH conditions.

This court issued its opinion in *In Re Vance* on 5 November 2018. Subsequently, the DASA, in an undated memorandum, rescinded her prior approval of appellant's RFGOS. Her memorandum reasoned, "I have now been informed that my action was in contravention of *Article 60, Uniform Code of Military Justice*, which has recently been amended to limit my authority to act on Resignations **[*5]** for the Good of the Service in lieu of General Court-Martial after trial." On 25 February 2019, the Army revoked the order that served to discharge appellant and later, revoked his DD 214. On 22 March 2019, pursuant to this court's directive to take action in accordance with *Article 60, UCMJ*, the GCMCA approved appellant's findings and sentence.

LAW AND DISCUSSION

Effective Assistance of Counsel

Appellant asserts his military defense counsel were ineffective in their: (1) failure to seek a continuance to delay appellant's guilty plea until after secretarial action on his resignation occurred, and 2) deficient legal advice precluding appellant from deciding what risks to incur when deciding to enter a plea of guilty. For the reasons stated below, we find no ineffective assistance of

[1] The appellant was represented by MAJ RM and CPT LA, both of whom were assigned to the U.S. Army Trial Defense Service.

counsel.

HN1[] We review assertions of ineffective assistance of counsel de novo. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)). In *Strickland v. Washington*, the Supreme Court established a two-pronged test to determine whether counsel provided ineffective assistance. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Our superior court has adopted this two-pronged test. United States v. Green, 68 M.J. 360 (C.A.A.F. 2010). "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient **[*6]** and (2) that this deficiency resulted in prejudice." *Id.* (citing Strickland, 466 U.S. at 687). When it is apparent that the alleged deficiency has not caused prejudice, it is not necessary to decide the issue of deficient performance. *See* Loving v. United States, 68 M.J. 1, 2 (C.A.A.F. 2009).

Appellant first asserts that his military defense counsel were ineffective for failing to request a continuance. He contends that the military judge "should" have granted a continuance had counsel merely articulated to the military judge that once findings and sentence had been adjudged, the DASA would no longer have the authority to accept appellant's RFGOS.[2] Appellant argues that had his counsel appreciated and articulated this consequence as the basis for a continuance, he could have delayed the court-martial until the Secretary's designee took action. Appellant indicates that the period of delay would have only been two months—the time from the date of trial, 17 January 2018, until secretarial action approved the RFGOS on 20 March 2018.

We reject appellant's claim because he has not carried "his burden to show that his counsel would have been successful if he had filed . . . [a] timely motion" for a continuance. United States v. Jameson, 65 M.J. 160, 164 (C.A.A.F. 2007). HN2[] "The tender of a RFGOS does not **[*7]** preclude or suspend [court-martial] procedures." AR 600-8-24, para. 3-12. Additionally, the DASA had complete discretion to act on the RFGOS, to include when to act.[3] Lastly, the entire chain of command recommended denial of appellant's RFGOS. Even appellant acknowledges this latter fact and admits that he believed the RFGOS would be denied based on his command's recommendations. Given that a motion for a continuance filed by appellant at the time of trial would have sought an indefinite delay on a discretionary collateral matter, we find it unlikely that the military judge would have granted the motion and ordered a continuance. *See* Jameson, 65 M.J. at 163-64 (citing United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001)); *see also* United States v. Wiest, 59 M.J. 276, 279 (C.A.A.F. 2004) (listing factors relevant for a continuance); Rule for Court-Martial [R.C.M.] 906(b)(1).

We next address appellant's argument that his counsels' deficient legal advice precluded appellant from deciding what risks to incur in deciding when to plead guilty. HN3[] In the guilty plea context, the prejudice prong of the Strickland test asks whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). A mere post-trial allegation is insufficient. **[*8]** *See* United States v. Bradley, 71 M.J. 13, 17 (C.A.A.F. 2012) (citing Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284, (2010) (the court finding appellant's affidavit alleging he would not have pleaded guilty was insufficient to demonstrate prejudice, and finding "Appellant also must satisfy a separate, objective inquiry — he must show that if he had been advised properly, then it would have been rational for him not to plead guilty.")

Appellant fails to demonstrate a reasonable probability that, absent the alleged error, he would not have pleaded guilty. Appellant had two choices: to enter a plea of guilty or to enter a plea of not guilty. Appellant did the former and his affidavit makes no mention that

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[2] Appellant cites to our decision in *In Re Vance*. To clarify *In Re Vance*, we determined that in appellant's case, the CA lacked the authority under Article 60, UCMJ, "to dismiss or set aside a finding of guilty or disapprove, commute, suspend, certain parts of the sentence." Id. at 634. We did not address whether the DASA had the authority to accept a RFGOS post-trial, because any resolution of that issue would have been nothing more than an advisory opinion at that juncture, and this court should "adhere to the prohibition on advisory opinions as a prudential matter." United States v. Chisholm, 59 M.J. 151, 152 (C.A.A.F. 2003). In fact, we noted that nothing in that opinion "should be construed as limiting the Secretary's authority to act under Article 74, UCMJ, or any other authority." *In* Re Vance, 78 M.J. at 635, n.12.

[3] While the command must expeditiously process a RFGOS, we do not find a set time upon which the Secretary's designee must act on a tendered resignation. *See* AR 600-8-24, para. 3-13e; AR 27-10, para. 5-26c.

he would have done the latter. Rather appellant's affidavit states: "I would not have pleaded guilty if I had known that the plea would make it impossible for the resignation, if approved to take effect. I would have waited for a final answer." His claim that he "would have waited for a final answer" clearly refers to waiting for secretarial action on his RFGOS. By making such a statement, appellant assumes that waiting for a final answer was a viable option. It was not. Nothing in the record before us shows that waiting was one of appellant's options. There is no statutory nor regulatory authority **[*9]** requiring the DASA to take action on appellant's RFGOS within a certain period. Moreover, the granting of an indefinite continuance on such a collateral matter was unlikely.

Appellant also makes no showing that it would have been objectively rational for him to plead not guilty. The government had a strong case, to include documentary evidence demonstrating appellant's wrongdoing, as well as numerous admissions by appellant. In the face of these facts, appellant entered into a pretrial agreement with the CA, which limited any period of adjudged confinement to sixty days and deferred adjudged or automatic forfeitures until action. Appellant received no confinement, but benefitted from the deferral of the adjudged forfeiture of $1000 per month from the date of his sentence, 17 January 2018, until the CA's initial, but flawed, action on 29 March 2018. Had appellant not agreed to plead guilty and proceed to trial in January 2018, he may not have received such favorable terms in a pretrial agreement.

The Military Judge's Acceptance of the Guilty Plea

In appellant's second assignment of error, appellant asserts the military judge erred by accepting appellant's plea because he failed to discuss **[*10]** with appellant the consequence that the findings and sentence, once adjudged, would have had on the DASA's authority to accept appellant's RFGOS in lieu of court-martial.

HN4[↑] We review a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the 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)*). An abuse of discretion occurs when a military judge fails to obtain from an accused an adequate factual basis to support the plea or has an erroneous view of the law. *Id.* A military judge's duties with respect to plea inquiries include: (1) ensuring there is a basis in law and fact to support the plea and offense charged; (2) ensuring the accused understands and accepts the terms of the pretrial agreement; and (3) ensuring the terms of the agreement comply with the law and fundamental notions of fairness. *United States v. Soto, 69 M.J. 304, 306-07 (C.A.A.F. 2011)*. We will not disturb a guilty plea unless appellant demonstrates a substantial basis in law or fact for questioning the plea. *Inabinette, 66 M.J. at 305*.

HN5[↑] A guilty plea can be knowing and voluntary even "if the defendant did not correctly assess every relevant factor entering into his decision," *Brady v. United States, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)*, so long as it is "entered by [a defendant] fully aware of the direct consequences" of his plea. *Id. at 755* (internal **[*11]** quotations omitted). Generally, a court must only advise the defendant of the direct consequences of his plea and need not advise him of all possible collateral consequences. *See United States v. Delgado-Ramos, 635 F.3d 1237, 1239 (9th Cir. 2011)*.

In part, appellant asserts we "could find" that his plea was not provident, applying the decision in *United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013)*. In *Riley*, the Court of Appeals for the Armed Forces (CAAF) stated that sex offender registration is not merely a collateral consequence of a guilty plea. *72 M.J. at 122*. In arriving at this conclusion, the CAAF acknowledged that the consequence of sex offender registration, like deportation, is an automatic result, which while not a criminal sanction, is a particularly severe penalty. The CAAF went on to explain "it is the military judge who bears the ultimate burden of ensuring that the accused's guilty plea is knowing and voluntary." *Id.* The court found "that the military judge abused his discretion when he accepted [the appellant]'s guilty plea without questioning defense counsel to ensure [the appellant]'s knowledge of the sex offender registration consequences of her guilty plea." *Id.* Sex offender registration is now recognized as a direct consequence of a guilty plea, imposing upon the military judge the requirement **[*12]** to advise on the matter prior to acceptance of the plea.

We decline appellant's invitation to treat any action on appellant's RFGOS in the same fashion as the requirement to register as a sex offender. ***HN6***[↑] Military appellate courts have long recognized that administrative discharges, to include those resulting from a discharge in lieu of a court-martial, are collateral administrative matters. *See United States v. Bedania, 12 M.J. 373, 376 (CM.A. 1982)*; *United States v.*

Johnson, 76 M.J. 673, 686 (A.F. Ct. Crim. App. 2017). Appellant offers nothing to convince us to depart from this long-standing acknowledgment and treat a RFGOS—a purely discretionary administrative matter—in the same manner as a post-conviction requirement to register as a sex offender.

To the extent appellant asserts the military judge was still required to address any post-trial action on his RFGOS, though it constitutes a collateral administrative matter, we find such an assertion meritless. ***HN7***[⬆] When challenging a guilty plea because of an unforeseen collateral consequence, appellant must demonstrate that the collateral consequence is major, and that "appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence **[*13]** inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding." *United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982)*. In the case at hand, appellant makes no showing that one of these conditions has been met. Additionally, we find nothing in the record to support such a conclusion.

First, appellant clearly understood and accepted the terms of his pretrial agreement. Second, the pretrial agreement was not conditioned upon nor did it otherwise reference appellant's RFGOS. As such, any claimed misunderstanding by appellant regarding this alleged consequence did not result inexorably from his pretrial agreement. We find nothing in the record demonstrating any misunderstanding of a collateral consequence was made readily apparent to the military judge. Accordingly, having reviewed the entire record we find the appellant completed a knowing, voluntary, and intelligent plea of guilty to the charged offense, including a proper inquiry pursuant to *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969)*.

United States v. Woods

HN8[⬆] This court may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as we find correct in law and fact and determine, on the basis of the entire record, should be approved. *Article 66(c), UCMJ*. **[*14]** Although not addressed by the parties, this court next addresses the applicability of our superior court's decision in *United States v. Woods, 26 M.J. 372 (C.M.A. 1998)*. In that case, Captain (CPT) Woods was charged with drunk and reckless driving and involuntary manslaughter, in violation of *Articles 111* and *119, UCMJ*. Pursuant to his pleas, CPT Woods was found guilty, and sentenced to confinement for seven months and a dismissal. Prior to his guilty plea, however, CPT Woods submitted a RFGOS in lieu of court-martial in accordance with applicable regulations.[4] For some unknown reason, his tendered resignation was not forwarded to the Secretary's designee until almost three months after it was tendered and nearly two months after the CA took final action approving the findings of guilty and sentence. *Id. at 373*. The CA recommended denial of the RFGOS on the same day he approved the findings and sentence. After initial action by the CA, the Secretary's designee accepted CPT Woods' RFGOS and administratively discharged him with a discharge characterized as under OTH conditions. *Id.*

We take judicial notice of the record of trial in *Woods* and note the following: (1) the Secretary's memorandum accepting the service member's RFGOS was silent **[*15]** as to its effect on the court-martial proceedings; and (2) the Secretary's designee submitted an affidavit indicating that his acceptance of the resignation was done with the intent to abate all court-martial proceedings. *Id.* at Supplement to Appellant's Pet., App. C, D.

On appeal, this court seemingly treated CPT Wood's RFGOS as a request for clemency under *Articles 71* and *74, UCMJ*, and concluded that while the Secretary had the power to grant clemency pursuant to these articles of the UCMJ, and discharge CPT Wood's administratively, such action did not abate the court-martial proceedings. Accordingly, we approved the findings, in part, but declined to affirm the adjudged dismissal. *Id. at 373*. Our superior court reversed our decision in *Woods*, concluding the case should be abated. *Id. at 375*.

First, our superior court recognized the Secretary's authority to grant clemency pursuant to *Article 71* and *74 of the UCMJ* was distinct from his statutory power to approve a resignation in lieu of a court-martial. The court determined that the exercise of this latter statutory power pursuant to promulgated regulatory procedures permitted an agreement between CPT Woods and the

[4] In *Woods*, the service member submitted his RFGOS in accordance with Army Reg. 635-120, Personnel Separations: Officer Resignations and Discharges, para. 5-1, 5-2 (8 Apr. 1968)(C. 16, 1 Aug. 1982) [AR 635-120].

Secretary's designee "which provides **[*16]** for some action other than a court-martial be taken with respect to criminal charges." *Id. at 373-74*. Our superior court found this court erred by not enforcing the agreement. *Id. at 374*.

Our superior court clarified that the power of the Secretary or his designee to act on resignations and the power of a CA to convene courts-martial "harmoniously coexist." *Id. at 375*. The court also determined that an administrative action cannot divest a court-martial of its judicial power, and "a court-martial can neither deprive the Secretary of his powers nor defeat a lawful agreement between an accused and the Secretary." *Id.* The court reasoned that the secretarial authority to approve the RFGOS in lieu of a court-martial should not depend upon a race between the Secretary's acceptance of the resignation and the CA's action in accordance with *Article 60, UCMJ*. *Id. at 374*.

In light of these considerations, our superior court concluded that the agreement between CPT Woods and the Secretary's designee, which resulted in appellant's administrative discharge from the Army, required abatement of the criminal proceedings, a set aside of the court-martial's findings and sentence, and a dismissal of the underlying charges and specifications with **[*17]** prejudice. *Id. at 374-75*.

We distinguish appellant's case from *Woods*. Here, as in *Woods*, the Secretary's designee approved appellant's resignation post-trial pursuant to her statutorily vested authority, and appellant was separated from the service with an administrative discharge. *See generally 10 U.S.C. §§ 1181*, *7013*, and *14902*. The distinction between these cases lies in what the CA could or should have done.

Had the Secretary accepted the resignation in *Woods* prior to action, the CA would have been compelled by the regulatory scheme in AR 635-120 to disapprove the findings and sentence in order to effectuate the Secretary's designee's decision. The regulatory scheme allowed for a rush to action, which, if taken before a decision on a RFGOS, could thwart the Secretary's designee's statutory authority to discharge an officer and abate the proceedings. Unlike in *Woods*, the CA here had no discretion over the findings and sentence in appellant's case. Here, the CA attempted to effectuate the DASA's wishes by initially setting aside the findings and sentence; it was a statutory change to *Article 60, UCMJ*, that rendered the CA's initial action invalid.

As we previously noted, amendments to *Article 60* upset a regulatory scheme **[*18]** that previously allowed the Secretary's designee, by virtue of his or her decision, to approve a RFGOS, direct the CA to disapprove the findings and sentence of a court-martial once reached, and to abate the proceedings, with prejudice. *See In Re Vance, 78 M.J. at 633-34*; Army Reg. 27-10, Legal Services, Military Justice, para. 5-18 *b*. (11 May 2016). As applied to this case, *Article 60* required the CA to approve the findings and sentence, prohibiting the CA from acting in accordance with Army Reg. 27-10 to disapprove the findings and sentence to effectuate appellant's approved RFGOS. Consequently, this court found the GCMCA's action in disapproving both findings and sentence to be void *ab initio*. *Id. at 636*. Based on this court's directive, the GCMCA approved the findings and sentence. We find that action is correct in law and we affirm the findings of guilty.

What About the Sentence?

What we did not address in *In Re Vance* was the effect of appellant's administrative discharge resulting from the DASA's approval of his RFGOS. In our view, appellant was administratively discharged, and later efforts to recall appellant to active duty had no legal effect.

As our superior court noted in *Woods*, the RFGOS process involved two **[*19]** separate but coexistent authorities: the authority of the CA under *Article 60, UCMJ*; and the Secretary's statutory authority under *10 U.S.C. § 3012* to promulgate regulations allowing for an officer to resign in lieu of court-martial. *26 M.J. at 374-75*. The amendment to *Article 60, UCMJ*, impacted one part of this scheme—the ability of the CA to comply with a directive from the Secretary's designee to vacate the findings and sentence. The amendment did not invalidate the Secretary's statutory authority to promulgate and act under regulations concerning military personnel, to include acceptance of an officer's resignation. *See generally 10 U.S.C. § 7013*.

The RFGOS process, as it existed, consisted of two parts, one involving a purely administrative act of effectuating the officer's discharge, and one of vacating the findings and sentence. *See* AR 600-8-24, para. 3-13; AR 27-10, para. 5-18b. ***HN9***[⬆] Although *Article 60, UCMJ*, prevents a CA, in most cases, from vacating the findings and sentence upon the DASA's acceptance of a RFGOS, it does not divest the DASA of the authority to effectuate the administrative discharge.

Once charges are preferred, an administrative discharge certificate is "void until the charge is dismissed, the Soldier is acquitted **[*20]** at trial by court-martial, or appellate review of a conviction is complete." Army Reg. 27-10, para. 5-16b. However, the Secretary or "delegate," may approve an exception at the request of the soldier. Here, we have such a request in the form of the RFGOS. And we have action by the DASA (the Secretary's delegate) directing Army Human Resources Command to discharge appellant. *See* Army Reg. 600-8-24, para. 3-13h. The DASA's decision resulted in the promulgation of orders that administratively separated appellant from the service on 10 April 2018. Pursuant to the DASA's decision, appellant received orders directing his discharge, cleared the installation, and received final pay and accounting and a DD 214.

HN10[↑] Our superior court has "identified three criteria to consider when determining whether a servicemember's discharge has been finalized for jurisdictional purposes: (1) the delivery of a discharge certificate (a DD Form 214); (2) a 'final accounting of pay'; and (3) the completion of the 'clearing' process that is required under service regulations." *United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018)* (quoting *United States v. Hart, 66 M.J. 273, 276-79 (C.A.A.F. 2008))*. Under this rubric, appellant was, by any definition, discharged.[5] Nothing in the appellate record suggests rescission of the DASA's **[*21]** approval of the RFGOS would invalidate appellant's administrative discharge. Appellant's discharge was obtained by following a validly promulgated Army regulation, without fraud or deceit by appellant.

Assuming appellant was discharged from the Army and not validly recalled to active duty, we nonetheless have jurisdiction to review the findings and sentence in his case. *United States v. McPherson, 68 M.J. 526, 530-31 (Army Ct. Crim. App. 2009)* (citing *Steele v. Van Riper, 50 M.J. 89, 91 (C.A.A.F. 1997)*. *See also United States v. Woods, 26 M.J. 372, 373* (citing *United States v. Speller, 8 C.M.A. 363, 24 C.M.R. 173, 179* ***HN11***[↑] (discharge only affects execution of the sentence; specifically, unexecuted portion, of the sentence).

On the record before us we have: 1) a valid court-martial conviction; 2) a valid administrative discharge issued by proper authority; and 3) documentation purporting to rescind an otherwise valid administrative discharge unsupported by any law or authority. We are compelled to set aside appellant's dismissal.[6]

CONCLUSION

For the foregoing reasons, we find appellant's counsel were not ineffective and his pleas were not improvident. The findings are hereby AFFIRMED. The sentence is SET ASIDE. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored.

Senior Judge ALDYKIEWICZ and **[*22]** Judge WALKER concur.

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[5] On 31 January 2020, we issued an order directing the government to, *inter alia*, provide the legal authority relied upon by the DASA in rescinding her acceptance of the RFGOS almost a year after it was accepted. While the government provided the documents purporting to rescind the RFGOS, cancel appellant's DD214, and place appellant on appellate leave, the government did not provide the legal authority relied upon by the DASA in rescinding her acceptance of the RFGOS and triggering the actions that purportedly restored appellant to active duty.

[6] Appellant's approved sentence included forfeiture of $1000 per month for three months. As the CA initially vacated this punishment and appellant was supposedly reinstated on appellate leave before the CA's second action, there were no pay and allowances against which to execute this part of the sentence.

United States v. Macias

United States Navy-Marine Corps Court of Criminal Appeals

October 13, 2022, Decided

No. 202200005

Reporter
2022 CCA LEXIS 580 *

UNITED STATES, Appellee v. NATHANIEL R. MACIAS, Lance Corporal (E-3), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: John P. Norman. Sentence adjudged 21 September 2021 by a special court-martial convened at Twentynine Palms, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for one-hundred-and-fifty days, and a bad-conduct discharge.[1] **[*1]** .

Core Terms

convicted, court-martial, ammunition, punishable by imprisonment, possession of a firearm, dishonorable discharge, substantial rights, general order, no prejudice, take action, one year, incorrectly, proceedings, Correction, triggering, exceeding, decretal, firearms, offenses, sentence, ban

Counsel: For Appellant: Lieutenant Megan E. Horst, JAGC, USN.

Judges: Before DEERWESTER, HACKEL, and KIRKBY Appellate Military Judges.

Opinion

PER CURIAM:

Appellant was convicted, consistent with his pleas, of conspiracy to disobey a lawful general order, failure to obey a lawful general order, and assault consummated by battery in violation of *Articles 81*, *92*, and *128*, Uniform Code of Military Justice [UCMJ].[2] Appellant does not assert any assignments of error (AOEs). However, on 23 August 2022, Appellant submitted a Motion to Correct Error in the Record arising from an alleged error regarding firearm possession in the Statement of Trial Results, which we granted. We take action arising from Appellant's motion in our decretal paragraph.

I. Background

The *Gun Control Act of 1968* [GCA] governs the impact of criminal convictions on the ability to possess firearms and ammunition.[3] Under **[*2]** *section 922(g) of the GCA*, it becomes unlawful for a person to receive, possess, ship, or transport firearms or ammunition if that person has been convicted of any offense punishable by imprisonment for a term exceeding one year.[4] The prohibition also extends to persons who receive a dishonorable discharge or dismissal at a general court-martial, as well as any person convicted of a domestic violence offence; unlawful users of controlled substances; and fugitives from justice.[5] Under the statute, convictions adjudicated by a special court-martial do not count as offensives punishable by imprisonment for a term exceeding one year because of the jurisdictional limitations attached to that forum.[6]

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[1] Appellant was credited with one-hundred-and-eighty-three days of pretrial confinement credit.

[2] *10 U.S.C. §§ 881*, *892*, *982*.

[3] *18 U.S.C. § 921 et seq.*, as amended.

[4] *18 U.S.C. § 922(g) (2022)*.

[5] *Id.*

[6] *27 C.F.R. § 478.11 (2022)*.

II. Discussion

A. Record Correction Pursuant to *United States v. Crumpley*

Whether a record of trial is accurate and complete is a question we review de novo.[7] An appellant is entitled to have the official record accurately reflect what happened in the proceedings.[8] Appellant submits that the Statement of Trial Results in his case does not accurately reflect the proceedings because it incorrectly indicates that he is subject to the ban effectuated by the GCA. The Government concedes that "section G of **[*3]** the Statement of Trial Results incorrectly states that Appellant's case triggers a firearm possession prohibition in accordance with *18 U.S.C. § 922*."[9]

Because Appellant was convicted by a special-court martial, received a bad conduct discharge (vice a dishonorable discharge), and was not convicted of one of the aforementioned triggering offenses under the GCA, we agree that the Statement of Trial Results is inaccurate. We find that the inclusion of this error in the post-trial processing paperwork did not affect Appellant's substantive rights at trial, since no prejudice was alleged or is apparent.[10] However, we take action in our decretal paragraph to ensure that this administrative error does not affect Appellant's rights in the future.

III. Conclusion

After careful consideration of the record, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[11] However, the record of trial does not accurately reflect the disposition of Appellant's court-martial.[12] Although we find no prejudice, Appellant is entitled to have court-martial records that correctly reflect the content of his proceeding.[13] In accordance **[*4]** with Rule for Courts-Martial 1111(c)(2), we modify section G of the Statement of Trial Results and direct that the erroneous indication that Appellant is subject to the ban imposed by the GCA be removed and section G be corrected to accurately reflect that Appellant is **not** subject to the weapons and ammunition controls imposed by the GCA.

The findings and sentence are **AFFIRMED**.

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[7] *United States v. Crumpley, 49 M.J. 538 (N-M Ct. Crim. App. 1998)*.

[8] *Crumpley, 49 M.J. at 539*.

[9] Government's Consent Motion for Leave to File and Motion to Correct Error in the Record at 2.

[10] *Crumpley, 49 M.J. at 539*.

[11] *Articles 59* & *66*, Uniform Code of Military Justice, *10 U.S.C. §§ 859*, *866*.

[12] The record of trial contains two charge sheets. The first, preferred on March 2, 2021 and referred on April 1, 2021, has been erroneously included and should be removed.

[13] *Crumpley, 49 M.J. at 539*.

United States v. Finco

United States Air Force Court of Criminal Appeals

November 16, 2021, Decided

No. ACM S32603 (f rev)

Reporter
2021 CCA LEXIS 603 *; 2021 WL 5346639

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

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Finco, 2022 CAAF LEXIS 20, 2022 WL 510351 (C.A.A.F., Jan. 10, 2022)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Christopher M. Schumann; Andrew R. Norton (remand). Sentence: Sentence adjudged on 7 June 2019 by SpCM convened at Nellis Air Force Base, Nevada. Sentence entered by military judge on 26 June 2019 and reentered on 29 September 2020: Bad-conduct discharge, confinement for 5 months, reduction to E-1, and a reprimand.

United States v. Finco, 2020 CCA LEXIS 246, 2020 WL 4289983 (A.F.C.C.A., July 27, 2020)

Core Terms

sentence, military, marijuana, confinement, bad-conduct, attach, convening, adjudged, stipulation of facts, official statement, disparate, reduction, grade

Case Summary

Overview

HOLDINGS: [1]-The convening authority properly sentenced a servicemember for signing a false official statement, making a false official statement, wrongful use of marijuana, and wrongful possession of marijuana in violation of Unif. Code Mil. Justice arts. 107 and 112a, *10 U.S.C.S. §§ 907* and *912a* because the servicemember failed to meet his burden to show that two other cases were closely related to his, the sentence was within the maximum available punishment given his pleas of guilty and the jurisdictional limits of a special court-martial, the military judge conducted a proper inquiry on the pretrial agreement's quantum portion with the servicemember, there was nothing unconscionable or borderline outrageous about the sentence, and it was not inappropriately severe.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

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

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

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

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

Military & Veterans Law > Military Justice > Judicial Review > Finality

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

The United States Court of Appeals for the Armed Forces, in deciding United States v. Jessie, 79 M.J. 437, 444-45 (C.A.A.F. 2020), addressed when the United States Court of Criminal Appeals is permitted to consider matters entirely outside of the record of trial in

using their broad discretionary power to review sentence appropriateness under Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN2[] **Courts Martial, Sentences**

In a military context, the appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases.

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

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

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

HN3[] **Judicial Review, Courts of Criminal Appeals**

The United States Court of Criminal Appeals reviews sentence appropriateness de novo. It may affirm only as much of the sentence as it finds correct in law and fact and determines should be approved on the basis of the entire record. Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866. The Court assesses sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy.

Counsel: For Appellant: Major Stuart J. Anderson, USAF; Major Alexander A. Navarro, USAF.

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

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

Opinion by: LEWIS

Opinion

Upon Further Review

LEWIS, Senior Judge:

This case is before our court for the second time. Previously, our court 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 the adjudged sentence. *United States v. Finco, No. ACM S32603, 2020 CCA LEXIS 246, at *20-21 (A.F. Ct. Crim. App. 27 Jul. 2020)* (unpub. op.).[1] We also determined that Appellant's entry of judgment (EoJ) required modification during the remand **[*2]** as it did not include the language of Appellant's reprimand. *Finco, unpub. op. at *3-5*. We deferred deciding the issue of whether Appellant's sentence was inappropriately severe, an issue initially raised by Appellant personally in accordance with *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

During the remand, on 22 September 2020 the successor to the convening authority took action on the sentence by approving the sentence. Consequently, on 29 September 2020 the military judge signed a modified EoJ, which included the previously omitted reprimand language. We find the convening authority's 22 September 2020 action on the sentence complies with applicable law and the modified EoJ correctly reflects the post-trial actions taken by the convening authority in this case.

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[1] Subsequent to our remand, the United States Court of Appeals for the Armed Forces (CAAF) decided *United States v. Brubaker-Escobar, M.J. , No. 20-0345, 81 M.J. 471, 2021 CAAF LEXIS 818 (C.A.A.F. 7 Sep. 2021)* (per curiam). In *Brubaker-Escobar*, the CAAF held the convening authority committed a procedural error by taking no action on the sentence, when the case involved a conviction for at least one offense committed before 1 January 2019 and referral was after 1 January 2019. *Id.* at *6-8. The CAAF tested the procedural error for material prejudice. *Id.* at *8; *see also United States v. Aumont, M.J. , No. 21-0126, 82 M.J. 37, 2021 CAAF LEXIS 892 (C.A.A.F. 12 Oct. 2021)* (remanding to our court to determine whether the procedural error of taking no action on the sentence materially prejudiced a substantial right of appellant).

After the remand, Appellant's counsel raised the issue of sentence severity—this time as an assignment of error with supplemental briefs. One claim—which we address in this point in the opinion—is whether Appellant has met his burden of demonstrating that the cases of Senior Airman (SrA) JB and SrA RD are "closely related" to his, and if so, that the sentences are "highly disparate." *See* United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999). Before we address the merits of that issue, we address the scope of what we may consider. **[*3]**

In support of his claim, Appellant moved to attach a declaration he wrote about the conduct of SrA JB and SrA RD. He also moved to attach Air Force court-martial summaries from March 2019 that provided some details about SrA JB's special court-martial. According to Appellant's declaration, SrA RD received an administrative discharge. On 8 October 2019, we granted the unopposed motion to attach.

Subsequent to our decision to grant the motion to attach, ***HN1***[↑] the United States Court of Appeals for the Armed Forces (CAAF) decided United States v. Jessie, 79 M.J. 437, 444-45 (C.A.A.F. 2020), where it addressed when we are permitted to consider matters entirely outside of the record of trial in using our broad discretionary power to review sentence appropriateness under Article 66, UCMJ, 10 U.S.C. § 866. Applying Jessie, we see no references to SrA JB and SrA RD during Appellant's trial or in the allied papers of the record of trial. Accordingly, we understand that we are not permitted to consider the outside-the-record submissions that Appellant moved to attach.

We distinguish Appellant's case from recent decisions where our court considered outside-the-record materials to resolve sentence disparity claims. *See* United States v. Daniel, No. ACM S32654, 2021 CCA LEXIS 365, at *5 n.4 (A.F. Ct. Crim. App. 26 Jul. 2021) (unpub. op.), *rev. denied*, No. 21-0365, __ M.J. __, 2021 CAAF LEXIS 976 (C.A.A.F. 9 Nov. 2021); United States v. Cruspero, No. ACM S32595 (f rev), 2021 CCA LEXIS 208, at *7 n.2 (A.F. Ct. Crim. App. 30 Apr. 2021) (unpub. op.), *rev. denied*, No. 21-0297, **[*4]** __ M.J. __, 82 M.J. 15, 2021 CAAF LEXIS 812 (C.A.A.F. 8 Sep. 2021). In Daniel and Cruspero, our court decided that we could consider outside-the-record materials because the stipulations of fact showed how other Airmen were involved in at least some of the appellants' crimes. *See* Daniel, unpub. op. at *5 n.4; Cruspero, unpub. op. at *7 n.2. As the stipulations of fact could not fully resolve the issue of sentence disparity, our court was permitted to supplement the record and considered the outside-the-record materials. *See* Jessie, 79 M.J. at 442-44. In Appellant's case, the stipulation of fact does not mention SrA JB or SrA RD. The parties have not identified other portions of the record referencing SrA JB or SrA RD, and we found no specific or generic references to them during our review. Accordingly, we understand that we cannot supplement the record in this case.

We also find sentence comparison is not required, as Appellant has failed to meet his burden to show that the cases are closely related to his and include highly disparate sentences. *See* United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001) (citation omitted); Lacy, 50 M.J. at 288.

We are mindful that the CAAF in *United States v. Stanton* considered documents related to the appellant's administrative discharge "without ruling on [the] issue" of whether the documents were in the entire record. 80 M.J. 415, 417 n.2 (C.A.A.F. 2021). The CAAF noted that the parties did **[*5]** not object and did not explain in their briefs how the documents could be considered under *Jessie*. *Id*. Similarly, this case does not involve an objection by the parties or an explanation of how we should apply Jessie. On the other hand, the parties filed their initial briefs before Jessie but submitted their post-remand briefs more than a year after Jessie. Given the circumstances of this case and the passage of time since Jessie, we determined the best approach was to rule on the issue and decide that we cannot consider the matters Appellant moved to attach.

We note, however, that even if we considered the materials Appellant moved to attach, we would not find this to be one of "those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *See* Sothen, 54 M.J. at 296 (internal quotation marks and citation omitted). ***HN2***[↑] We would also decline to deviate from the general rule that "[t]he appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases." United States v. LeBlanc, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015) (en banc) (citing United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)).

After conducting the remaining analysis necessary to determine the issue of sentence severity, we find no error that **[*6]** materially prejudiced a substantial right of Appellant and we affirm the findings and sentence.

I. Background

A special court-martial composed of a military judge sitting alone convicted Appellant, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of one specification of signing a false official statement, 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, UCMJ*, *10 U.S.C. §§ 907*, *912a*.[2] The military judge sentenced Appellant to a bad-conduct discharge, confinement for five months, reduction to the grade of E-1, and a reprimand. The PTA limited the amount of confinement to seven months if a bad-conduct discharge was not adjudged and to five months if bad-conduct discharge was adjudged. Otherwise, the PTA provided no limits on the convening authority's discretion to approve a lawful sentence.[3]

Our prior opinion explained the facts underlying the investigation of Appellant's drug use by the Air Force Office of Special Investigations (AFOSI). *Finco*, unpub. op. at *3-5. We noted that during **[*7]** an eight-month period of time, Appellant purchased marijuana and marijuana edible products more than 50 times from a local dispensary and subsequently smoked or consumed most of them. *Id.* at *3-4. When interviewed by AFOSI, Appellant made several false official statements when he denied using marijuana and denied using it with Airman First Class (A1C) JJ. *Id.* at *4-5. Appellant also signed a written statement that was false because he denied using marijuana. *Id.* at *5.

II. Discussion

A. Law

HN3[↑] We review sentence appropriateness de novo. *United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)* (en banc) (per curiam) (citation omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. *Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *Sauk, 74 M.J. at 606* (alteration in original) (quoting *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)*). Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

B. Analysis

Appellant argues that his conduct was not worthy of both multiple months **[*8]** of confinement and a bad-conduct discharge. Appellant concedes that his conduct was unacceptable for someone in the military but asserts the term of confinement the military judge imposed was "unconscionable." Appellant characterizes his sentence as a whole as one that "borders on outrageous." In his view, the sentence sends a message to other military members and the public that the military justice system is "arbitrary and draconian." In contrast, the Government argues the sentence reflects appropriate punishment for Appellant's crimes. We find the sentence appropriate.

Appellant faced a maximum sentence of a bad-conduct discharge, confinement for one year, forfeiture of two-thirds pay per month for 12 months, and reduction to the grade of E-1. Trial counsel argued that an appropriate sentence included a bad-conduct discharge, eight months' confinement, forfeitures of an unspecified amount and period, and reduction to the grade of E-1. Trial defense counsel argued that some amount of punishment was appropriate and proposed 20 days' confinement, 15 days' hard labor without confinement, and reduction to the grade of E-2. The military judge determined an appropriate sentence was a bad-conduct **[*9]** discharge, five months' confinement, reduction to the grade of E-1, and a reprimand. The adjudged sentence was within the discretion of the convening authority to approve based on the PTA, and the successor to the convening authority approved the adjudged sentence.

As a threshold matter, we do not share Appellant's views that his adjudged confinement was

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[2] References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). 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.).

[3] The convening authority also agreed in the PTA to withdraw and dismiss one specification of wrongful distribution of marijuana, an alleged violation of *Article 112a, UCMJ*.

unconscionable or that his sentence to a bad-conduct discharge and multiple months of confinement bordered on outrageous. The sentence was within the maximum available punishment given Appellant's pleas of guilty and the jurisdictional limits of a special court-martial. During trial, the military judge conducted a proper inquiry on the PTA's quantum portion with Appellant. Appellant and his trial defense counsel raised no concerns with the PTA's limits on the sentence. We observe nothing unconscionable or borderline outrageous about the lawful sentence the military judge imposed.

Appellant's involvement with marijuana was extensive and well documented in the stipulation of fact, a 27-page document including the attachments. In general, Appellant stipulated to purchasing marijuana more than 50 times and using it the majority of those **[*10]** times. Additionally, Appellant agreed to an interview with AFOSI then orally made false official statements where he repeatedly denied using marijuana. Appellant then signed a false written statement in which he denied smoking marijuana. Appellant, to his credit, made a second written statement to AFOSI—later that same day—admitting that he smoked marijuana and that he did so with A1C JJ.

The Government presented no witnesses during sentencing. The military judge admitted a personal data sheet and an enlisted performance report as prosecution exhibits in sentencing. The stipulation of fact contained evidence in aggravation and Appellant agreed the military judge could use the stipulation in deciding an appropriate sentence.

Appellant's sentencing case included eight character letters from commissioned and noncommissioned officers who worked with Appellant. The character letters describe Appellant's positive duty performance and military bearing, his excellent or outstanding rehabilitative potential, his volunteer work, and his remorse for committing the offenses. Appellant also made oral and written unsworn statements. He acknowledged that "things snowballed out of control" and that **[*11]** he "spent a lot of money trying to self-medicate" for anxiety and family problems. In hindsight, Appellant stated that he should have "sought out traditional medicine."

We considered the particular circumstances of Appellant's case, including his extensive involvement with marijuana and his false official statements to AFOSI. We acknowledge the Defense presented important and favorable evidence in extenuation and mitigation. We have fully considered that evidence and determined that it does not render the sentence inappropriately severe. After giving individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we conclude that the sentence is not inappropriately severe. *See* *Sauk, 74 M.J. at 606*.

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)*, Uniform Code of Military Justice, *10 U.S.C. §§ 859(a)*, *866(d)*.[4] Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

[4] We note that the modified EoJ includes an unsigned memorandum from the staff judge advocate detailing criminal indexing requirements that resulted from Appellant's convictions. The parties did not identify this irregularity and Appellant has not claimed prejudice. We do not have authority under *Article 66, UCMJ*, to direct this unsigned memorandum **[*12]** be corrected to include a signature. *See* *United States v. Lepore, M.J. , No. ACM S32537 (f rev), 81 M.J. 759, 2021 CCA LEXIS 466, at *11 (A.F. Ct. Crim. App. 16 Sep. 2021)* (en banc) (holding that our court lacked the authority to direct correction of a court-martial order's *18 U.S.C. § 922(g)* firearms prohibition annotation). However, we note this matter because R.C.M. 1111(c) permits The Judge Advocate General to modify an EoJ in the performance of his duties and responsibilities.

United States v. Brown

United States Navy-Marine Corps Court of Criminal Appeals

March 31, 2016, Decided

NMCCA 201300181

Reporter
2016 CCA LEXIS 205 *

UNITED STATES OF AMERICA v. BRANDON J. BROWN SERGEANT (E-5), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Review denied by *United States v. Brown, 2016 CAAF LEXIS 611 (C.A.A.F., July 25, 2016)*

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 31 March 2015. Military Judge: LtCol D.M. Jones, USMC. Convening Authority: Commanding General, 2d Marine Aircraft Wing, II Marine Expeditionary Force, Cherry Point, NC. Staff Judge Advocate's Recommendation: Col J.J. Murphy, USMC.

United States v. Brown, 2014 CCA LEXIS 375 (N-M.C.C.A., June 30, 2014)

Core Terms

military, sentence, confinement, domestic violence, convicted, pretrial, Lautenberg Amendment, guilty plea, misdemeanor, abate, court-martial, proceedings, offenses, abuse of discretion, district court, jury trial, adjudged, assault, pay grade, specifications, violations, witnesses, firearms, punitive

Case Summary

Overview

HOLDINGS: [1]-The military judge did not abuse his discretion in awarding confinement credit instead of ordering corrective pay or abating the proceedings after concluding that the servicemember was improperly paid as an E-1 pending rehearing; [2]-The servicemember's wrongful weapon possession pleas were provident because the servicemember's prior North Carolina domestic violence conviction was a Lautenberg Amendment qualifying conviction under *18 U.S.C.S. § 921(a)(33)(B)(i)(II)*; [3]-The sentence was too severe; and (4) the military judge abused his discretion in allowing major changes to two original trial specifications over defense objections.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

HN1 **Weapons Offenses, Possession of Weapons**

18 U.S.C.S. § 922(g)(9), commonly known as the Lautenberg Amendment, is part of the 1996 amendment to the Gun Control Act of 1968, *18 U.S.C.S. §§ 921-930*. It criminalizes possession of firearms or ammunition by those previously convicted of misdemeanor domestic violence offenses and has no military service member exception.

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

HN2 **Judicial Review, Standards of Review**

The appellate court reviews the military judge's ruling on the defense motion to abate proceedings for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous or his conclusions of law are incorrect.

Governments > Courts > Courts of Claims

Military & Veterans Law > Military Justice > Courts Martial > Motions

HN3 Courts, Courts of Claims

A military judge may abate proceedings for Government failures to take actions requested by the defense when the military judge orders those actions and the failures have due process implications. R.C.M. 703(c)(2)(D) (failure to produce ordered lay witnesses), 703(d) (failure to produce ordered expert witnesses), and 704(e) (failure to immunize ordered witnesses), Manual Courts-Martial (2012). But the Tucker Act, 28 U.S.C.S. § 1491, exclusively confers jurisdiction to the United States Court of Federal Claims for claims against the United States exceeding $ 10,000, and the Little Tucker Act, 28 U.S.C.S. § 1346, grants concurrent jurisdiction to the Court of Federal Claims and United States District Courts for claims under $ 10,000. Consequently, military courts have no jurisdiction to issue orders directing Government pay officials in the execution of their independent, statutory, fiscal responsibilities.

Military & Veterans Law > Military Justice > Courts Martial > Motions

HN4 Courts Martial, Motions

A military judge may abate proceedings for unavailable witnesses or evidence under R.C.M. 703, Manual Courts-Martial and abatement ab initio is required when an appellant dies during the trial or before completion of mandatory appeal.

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

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

HN5 Sentences, Credits

In cases involving Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813, violations, the appellate court reviews for meaningful relief as a question of law de novo. Meaningful relief is required, provided such relief is not disproportionate in the context of the case, including the harm an appellant may have suffered and the seriousness of the offenses of which he was convicted.

Military & Veterans Law > Military Justice > Counsel

HN6 Military Justice, Counsel

The government bears no financial responsibility to ensure that the appellant has enough money to hire a civilian counsel at his own expense. R.C.M. 506(a), Manual Courts-Martial. With no constitutional right to hire a civilian attorney, an appellant's appointed military counsel meets the legal requirements for representation.

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN7 Witnesses, Expert Testimony

R.C.M. 703(d), Manual Courts-Martial provides the mechanics of employing expert defense witnesses at Government expense.

Military & Veterans Law > Military Justice > Courts Martial > Pretrial Proceedings

HN8 Courts Martial, Pretrial Proceedings

The presumption of innocence has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

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

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

HN9 Pleas, Providence Inquiries

The decision to accept a guilty plea is reviewed for

abuse of discretion. Failure to obtain an adequate factual basis from an accused to support the plea and any ruling based on an erroneous view of the law constitutes an abuse of discretion. The appellate court sets aside a voluntary guilty plea only if the record as a whole shows with regard to the factual basis or the law, there is something that would raise a substantial question regarding the appellant's guilty plea. The appellant has the burden to demonstrate such a basis. The mere possibility of a conflict between the plea and the accused's statements or other evidence in the record is not a sufficient basis to overturn the trial results.

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

HN10 **Pleas, Providence Inquiries**

An otherwise perfect providency colloquy may yield an improvident plea if there is a fundamental definitional error.

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

HN11 **Weapons Offenses, Possession of Weapons**

18 U.S.C.S. § 921(a)(33)(B)(i)(II) provides that a domestic violence misdemeanor conviction does not qualify for Lautenberg Amendment purposes unless, in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (aa) the case was tried by a jury, or (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

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

HN12 **Courts Martial, Sentences**

The appellate court conducts de novo review for sentence appropriateness, which involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. It requires our individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender. Despite the appellate court's significant discretion in reviewing the appropriateness and severity of the adjudged sentence, it may not engage in acts of clemency.

Military & Veterans Law > ... > Courts Martial > Sessions > Arraignments

HN13 **Sessions, Arraignments**

The Government may correct charges before arraignment, and arraignment is part of the procedure in a full rehearing.

Counsel: For Appellant: Capt Daniel Douglass, USMC.

For Appellee: LCDR Robert Miller, JAGC, USN.

Judges: Before J.A. FISCHER, A.C. RUGH, T.H. CAMPBELL, Appellate Military Judges. Senior Judge FISCHER and Judge RUGH concur.

Opinion by: T.H. CAMPBELL

Opinion

OPINION OF THE COURT

CAMPBELL, Judge:

This case is before us a second time. In 2012, general court-martial officer and enlisted members convicted the appellant of making a false official statement, committing an assault consummated by a battery, communicating a threat, and wrongfully possessing two firearms under *18 U.S.C. § 922(g)(9)*[1] (the Lautenberg Amendment), in violation of Articles 107, 128, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 907*, *928*,

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[1] ***HN1*** *18 U.S.C. § 922(g)(9)*, commonly known as the "Lautenberg Amendment," is part of the 1996 amendment to the Gun Control Act of 1968, *18 U.S.C. §§ 921-930*. It criminalizes possession of firearms or ammunition by those previously convicted of misdemeanor domestic violence offenses and has no military service member exception.

and 934. On 30 June 2014—after the convening authority (CA) had approved the adjudged sentence of 15 years' confinement, reduction to pay grade E-1, 12 months of total forfeiture of pay and allowances, and a dishonorable discharge—this court set aside the findings and sentence and authorized a rehearing. The Judge **[*2]** Advocate General returned the case to the CA on 16 July 2014. The CA ordered a rehearing on 21 July 2014.

On 31 March 2015, a military judge sitting as a general court-martial convicted the appellant, this time pursuant to his pleas, of assault consummated by battery and two Lautenberg Amendment offenses, in violation of Articles 128 and 134, UCMJ.[2] The CA approved the adjudged sentence of total forfeiture of pay and allowances, confinement for two years, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant now raises four assignments of error (AOEs): (1) after concluding that the appellant was improperly paid as an E-1 pending rehearing, the military judge abused his discretion in awarding confinement credit instead of ordering corrective pay or abating the proceedings; (2) the appellant's wrongful weapon possession pleas were improvident; (3) the sentence was too severe; and (4) the military judge abused his discretion in allowing major changes to two original trial specifications over defense objections.[3] Having carefully considered the record of trial, the parties' submissions, and their oral arguments on the first and second AOEs, we conclude the findings and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Background

At his January 2011 initial appearance in a North Carolina District Court, the appellant waived his right to counsel and elected to represent himself in contesting allegations of assaulting his then-five-month pregnant wife. In March 2011, a judge convicted **[*4]** him of a misdemeanor assault on a female, in violation of N.C. Gen. Stat. § 14-33(c)(2).

The North Carolina Constitution provides no right to a jury trial for misdemeanor crimes in the court of first instance. N.C. Const. art. 1, § 24. Consequently, North Carolina District Courts exercise exclusive, original jurisdiction over misdemeanor crimes in judge alone trials. N.C. Gen. Stat. §§ 7A-196, 7A-272. However, state law allows appeal to a Superior Court for a *de novo* jury trial. N.C. Gen. Stat. § 7A-196. The appellant did not appeal his North Carolina conviction.

In June 2012, following additional reports of domestic violence, and almost immediately after a brief confinement by civil authorities, the appellant was placed in pretrial confinement. Two handguns with loaded magazines and additional ammunition were discovered in the car that the appellant drove to base on the day he was arrested.

The court-martial sentence sentence and Article 58b, UCMJ, resulted in the appellant's confinement without pay before his original findings and sentence were set aside. He remained confined pending the rehearing and his enlistment period did not end until after the rehearing.[4] However, he was paid at the E-1 pay grade from 16 July 2014 through his new convictions.

In September 2014, trial counsel made pen and ink changes to the wrongful weapon possession specifications, adding the phrase, "in or affecting interstate or foreign commerce." The modified specifications were then considered at an Article 32, UCMJ hearing, and were re-referred to general court-martial before the appellant was arraigned in November 2014.

Along with detailed military counsel, a civilian defense counsel (CDC) represented the appellant at the Article 32 hearing, as a pretrial agreement signatory, and during all but the final court session when the appellant pled guilty and was sentenced. The CDC's representation included pretrial motions sessions litigating, to at least some degree, the first, second and

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[2] After findings the military judge consolidated Specifications 2 and 3 of Charge V: "In that [appellant] . . . having been convicted of a misdemeanor crime of domestic violence, did . . . wrongfully possess firearms, to wit: a Rock Island Armory M1911-A1FS .45 caliber pistol, serial number RIA1359941, and a Walther PK .380 pistol, serial number PK030653, in violation of 18 U.S. Code Section 922(g)(9) . . . which conduct was of a nature to bring discredit upon the armed forces **[*3]** and prejudicial to good order and discipline in the armed forces."

[3] The fourth AOE is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[4] The appellant reenlisted on 2 September 2010 **[*5]** for four years and 11 months.

fourth AOEs. Citing the appellant's inability to compensate him, the CDC ultimately withdrew representation less than two weeks before the appellant's guilty pleas.[5]

Analysis

I. *Abuse of Discretion in the Illegal Punishment Remedy*

The military judge partially granted defense motions related to the first AOE. Applying *Keys v. Cole, 31 M.J. 228 (C.M.A. 1990)* and *United States v. Combs, 47 M.J. 330 (C.A.A.F. 1997)*, he interpreted *Article 75(a), UCMJ*, as entitling the appellant to pay at the grade held before the **[*6]** first trial's findings and sentence. He acknowledged this view of the law conflicted with the interpretation of *Article 75(a)* held by the United States Constitution, Article III courts specifically designated jurisdiction over government pay claims. Nonetheless, he held that a punitive effect resulted from pay officials' stated efforts to follow the Article III courts' interpretation—as reflected in *Dock v. United States, 46 F.3d 1083 (Fed. Cir. 1995)* and *Combs v. United States, 50 Fed. Cl. 592 (Fed. Cl. 2001)*. The military judge ultimately awarded 516 days of additional confinement credit pursuant to *Article 13, UCMJ,* for the illegal pretrial punishment of not paying the appellant as an E-5 for the 258 days he was pending rehearing.

But the military judge rejected arguments that reduced pay improperly infringed upon the appellant's right to counsel and ability to hire experts. He also found that he lacked authority to issue a court order for the appellant's pay at a higher grade or for back-pay pending rehearing. Unable to issue the appellant's requested order that would potentially justify additional relief for Government non-compliance, the military judge denied his request to abate the proceedings.

The appellant argues that it was an abuse of discretion for the military judge to refuse to abate the proceedings in a decision **[*7]** relying upon an erroneous view of the law regarding judicial authority to order the Government to provide pay at a specific grade. He further contends that it was an abuse of discretion for the military judge to award 516 days of pretrial punishment confinement credit as a remedy that ultimately provided no meaningful relief—the total credits applied against adjudged confinement resulted in the appellant's release following trial with 810 days of excess confinement credit.[6]

a. Abatement

HN2[] We review the military judge's ruling on the defense motion to abate proceedings for an abuse of discretion. *United States v. Monroe, 42 M.J. 398, 402 (C.A.A.F. 1995)*. A military judge abuses his discretion when his "findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)*.

We find that the military judge's findings of fact related to his decision to not abate proceedings are supported by the record **[*8]** and not clearly erroneous. We adopt them. Having reviewed his conclusions of law in this regard, we also find no error.

HN3[] A military judge may abate proceedings for Government failures to take actions requested by the defense when the military judge orders those actions and the failures have due process implications. *See* RULES FOR COURTS-MARTIAL 703(c)(2)(D) (failure to produce ordered lay witnesses), 703(d) (failure to produce ordered expert witnesses), and 704(e) (failure to immunize ordered witnesses), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).[7] But the Tucker Act, *28 U.S.C. § 1491*, exclusively confers jurisdiction to the United States Court of Federal Claims for claims against the United States exceeding $10,000.00, and the Little Tucker Act, *28 U.S.C. § 1346*, grants concurrent jurisdiction to the Court of Federal Claims and United States District Courts for claims under $10,000.00. Consequently, military courts have no jurisdiction to issue orders directing Government pay officials in the execution of their independent, statutory,

[5] Appellate Exhibit XXXVII.

[6] The appellant was credited with 1,540 days of confinement, consisting of 1,023 days of pretrial confinement, one day under RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), and 516 days for illegal pretrial punishment from 16 July 2014 through 30 March 2015. Record at 293-97; General Court-Martial Order No. W15-18 of 30 Jun 2015 at 5.

[7] In different **[*9]** due process contexts, *HN4*[] a military judge may abate proceedings for unavailable witnesses or evidence under R.C.M. 703, and abatement *ab initio* is required when an appellate dies during the trial or before completion of mandatory appeal. *See United States v. Ribaudo, 60 M.J. 691, 694 (N.M.Ct.Crim.App.. 2004)* (*en banc*), *aff'd*, *62 M.J. 286 (C.A.A.F. 2006)*.

fiscal responsibilities. *See* United States v. Fischer, 61 M.J. 415, 421 (C.A.A.F. 2005); Keys, 31 M.J. at 234; and United States v. Shelton, 53 M.J. 387, 391 (C.A.A.F. 2000) (Sullivan, J., concurring in the result). Thus, we find the military judge did not abuse his discretion in denying the requested order or in not abating the proceedings.

b. Meaningful Relief

Separate from the sentence appropriateness analysis required in every case, and discussed *infra*, **HN5**[↑] in cases involving Article 13, UCMJ, violations, we also review for meaningful relief as a question of law *de novo*. United States v. Zarbatany, 70 M.J. 169, 177 (C.A.A.F. 2011). Meaningful relief is required, "provided such relief is not disproportionate in the context of the case, including the harm an appellant may have suffered and the seriousness of the offenses of which he was convicted." *Id.*

The appellant's pretrial confinement alone far exceeds his adjudged confinement.[8] In discussing the pretrial agreement's ultimate impact, the military judge overtly indicated that the adjudged sentence did not reflect any consideration of illegal pretrial punishment.[9] So the appellant asks us to set aside his convictions as appropriate relief related to the additional confinement credit awarded at trial. While the approved total forfeitures, reduction to pay grade E-1, and bad-conduct discharge **[*10]** are all sentencing elements against which meaningful relief might also apply, we consider any such relief disproportionate to both the seriousness of the appellant's conviction offenses and the harm he suffered.

1. *Seriousness of the Offenses*

The appellant was convicted of domestic violence by hitting his wife with a door and then continuing to assault her with his hands and feet while she was on the floor. Sentencing evidence indicated he had engaged in seven other incidents of spousal abuse between November 2008 and June 2012 in addition to the incident that resulted in his previous North Carolina conviction.[10] His Lautenberg Amendment violations contravene requirements established as Congressional efforts to prevent potential incidents of escalated domestic violence by previously convicted abusers. *See* United States v. Castleman, 134 S. Ct. 1405, 1408-1409, 188 L. Ed. 2d 426 (2014) ("Recognizing that '[f]irearms and domestic strife are a potentially deadly combination,' . . . Congress forbade the possession of firearms **[*11]** by anyone convicted of 'a misdemeanor crime of domestic violence.' . . . '[A]ll too often . . . the only difference between a battered woman and a dead woman is the presence of a gun.'") (citations omitted)). Setting aside any of the appellant's court-martial convictions or the punitive discharge is not warranted in this context.

2. *Harm the Appellant Suffered*

As to the nature of the harm, the appellant's E-1 pay did not prejudice the conduct of a fair trial. The military judge correctly noted, **HN6**[↑] "[t]he government bears no financial responsibility to ensure that the [appellant] has enough money to hire a civilian counsel at his own expense. See R.C.M. 506(a)."[11] With no constitutional right to hire a civilian attorney, the appellant's appointed military counsel met the legal requirements for representation. *See* Keys, 31 M.J. at 234. And even if a right to Government-paid civilian defense counsel existed, the specific circumstances under which the appellant released his CDC would clearly demonstrate no prejudice occurred since that release expressly did not impact the appellant's decision to plead guilty or his confidence in his detailed military counsel's ability to represent him during the guilty plea.[12] Similarly, **[*12]** and consistent with the Article 46, UCMJ, requirement for equal opportunity to obtain witnesses, **HN7**[↑] R.C.M. 703(d) provides the mechanics of employing expert defense witnesses at Government expense. Finally, although paid as an E-1, since the appellant wore sergeant rank insignia outside of the brig during each court appearance, his pay had no impact on the presumption of his innocence. *See* Bell v. Wolfish, 441 U.S. 520, 533, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (**HN8**[↑] "The . . . presumption of innocence . . . has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."); United States v. Cruz, 25 M.J. 326, 329

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[8] Before sentencing, the appellant was in confinement for 1,023 days between 12 June 2012 and 30 March 2015.

[9] "[H]owever much confinement credit I gave or how much *Allen* credit you did, did not consider into my awarding the sentence. I just gave the sentence I thought was appropriate." Record at 472.

[10] Prosecution Exhibit 2.

[11] AE XV at 15 n.33. *See also* Art 38(b)(2), UCMJ.

[12] Record at 272-74.

(C.M.A. 1987) (even with unlawful command influence and punitive intent towards co-accuseds, "there was no direct or indirect attempt to orchestrate the findings portion of their courts-martial. . . . Moreover, appellant pleaded guilty to the charged offenses, and he makes no particular complaint that his defense on the findings was in any way impaired. In this context, the findings of guilty may be affirmed.") (Citations omitted)).

So any further relief on these grounds must be measured against what the appellant actually suffered—financial harm. Unlike *United States v. Combs*, the military judge found that the **[*13]** appellant here was not paid less pursuant to any punitive intent. There were no indignities beyond the appellant's direct deposits, as he was lawfully held in pretrial confinement and otherwise treated as properly as any sergeant under those circumstances.[13] Assuming, without deciding, that the military judge had the authority to resolve conflicting interpretations of *Article 75(a), UCMJ,* by finding illegal pretrial punishment based on a punitive effect, the nearly strict liability nature of such an *Article 13, UCMJ*, violation on the part of any Department of Defense officials places it on the less severe end of the pretrial punishment spectrum.

Considering the nature and overall context of the Article 13 violations found here, including the unsettled relationship between the Court of Appeals for the Armed Forces (CAAF) and Article III court precedent, additional relief is not warranted under Article 66(c), UCMJ. *See United States v. Harris, 66 M.J. 166, 169 (C.A.A.F. 2008)* (holding that despite no pending confinement against which previously awarded credits could be applied, any **[*14]** relief would be disproportionate to the harm suffered). Our decision does not limit the appellant's ability to pursue improper pay claims at venues more appropriate than this court-martial.[14] *See United States v. Allen, 33 M.J. 209, 215 (C.M.A. 1991)*; *Keys, 31 M.J. at 234*; and *Shelton, 53 M.J. at 391* (Sullivan, J., concurring in the result), and *392* (Gierke, J., concurring in part and in the result and dissenting in part).

II. *Providence of Pleas*

The appellant argues that the military judge failed to define predicate domestic violence convictions, and that it is unclear whether the 2011 North Carolina conviction discussed during the providence inquiry is actually a Lautenberg Amendment qualifying conviction.

HN9[↑] The decision to accept a guilty plea is reviewed for abuse of discretion. *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*. Failure to obtain **[*15]** an adequate factual basis from an accused to support the plea and any ruling based on an erroneous view of the law constitutes an abuse of discretion. *Id.* (citing *United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002))*. We set aside a voluntary guilty plea only if the record as a whole shows "with regard to the factual basis or the law," there is something "that would raise a substantial question regarding the appellant's guilty plea." *Id.* The appellant has the burden to demonstrate such a basis. *United States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004)*. The "mere possibility" of a conflict between the plea and the accused's statements or other evidence in the record "is not a sufficient basis to overturn the trial results." *United States v. Shaw, 64 M.J. 460, 462 (C.A.A.F. 2007)* (internal quotation marks and citations omitted).

Based upon a thorough providence inquiry and the parties' trial stipulation, the military judge obtained an adequate factual basis to support Lautenberg Amendment violations as a Clause 3, *Article 134, UCMJ*, offense. When asked to explain his guilt for the first alleged Lautenberg Amendment violation,[15] the accused's lengthy response began with his state domestic violence conviction:

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[13] With the exception of his pretrial confinement review hearing occurring on the eighth day after the CA ordered a rehearing, for which he received one day of R.C.M. 305k credit.

[14] Pursuant to *31 U.S.C. § 3702(a)*, the Secretary of Defense established the Defense Office of Hearings and Appeals (DOHA), which processes pay claims in accordance with Department of Defense Instruction 1340.21 (May 12, 2004). If DOHA officials reached the same conclusions as DFAS regarding the appellant's pay entitlements, or if he chose to by-pass DOHA in favor of a more direct legal redress, the Court of Federal Claims possesses both the jurisdiction and remedies under the Tucker Act which the military judge and this court lack.

[15] The military judge initially explained to the appellant that the third element of Specifications 2 and 3 under Charge V required evidence beyond a reasonable doubt, "that before you possessed the firearm you were convicted in a court of a misdemeanor crime of domestic violence[.]" Record at 336-37. He then defined the following terms, applicable to both specifications: possess, service discrediting conduct, conduct prejudicial to good order and discipline, knowingly, interstate commerce, and foreign commerce.

> Sir, I'm guilty of this offense because I'm not permitted to possess or own firearms due to my prior domestic violence conviction. I know that this prohibited me from possessing firearms **[*16]** because [the person he had approached about one of the two hand guns at issue, and from whom his wife later purchased that weapon] explained to me when I attempted to buy the 1911 from him. But I realize that it doesn't even matter what I knew. My prior conviction prohibits me from possessing firearms period.[16]

Portions of the subsequent colloquy further discussed the state domestic violence conviction:

> MJ: Did you know that you had been convicted of a crime of misdemeanor — a misdemeanor crime of domestic violence?
> A: Yes, sir.
> MJ: You were actually at the hearing and knew that you had a conviction?
> A: Yes, sir.
> MJ: What was the date of that again, the first conviction of that?
> A: 11 March 2011, sir. I'm sorry[,] 16 March 2011.
> MJ: And that was in, if I remember correctly, Onslow County?
> A: Onslow County, Jacksonville, North Carolina, sir.
> MJ: And that was — there's nothing wrong with the conviction other than you may not have liked it. But what I mean was, it was a proper court and you got convicted by somebody?
> A: Yes, sir.
> MJ: A judge or somebody?
> A: Yes, sir.[17]
> . . . .
> MJ: Were you, in fact, convicted of a crime of domestic violence?
> A: Yes, sir.
>
> MJ: And that's what you told me about it. It was 2011 **[*17]** in Onslow County, correct?
> A: Yes, sir.[18]
> . . . .
> MJ: On page one of your stipulation of fact, it indicates that for an assault on a female on 16 March 2011 you were tried by a district court judge — okay. Earlier I might have said you didn't testify. I'm very sorry if I misspoke. Sergeant [E.B] did not testify at the trial. The judge found you guilty. Sentenced you as it indicates. Is all that accurate?
> A: Yes, sir.[19]

But ***HN10***[↑] "an otherwise perfect providency colloquy" may yield an improvident plea if there is a "fundamental definitional error." *Negron, 60 M.J. at 142*. In *Negron*, the military judge erroneously used "the definition of 'indecent acts' to evaluate Appellant's alleged 'indecent language'" during **[*18]** a guilty plea for placing obscene material in the mail. *Id.* The CAAF held "this definitional error . . . tainted the entire providency inquiry," causing "focus . . . on the indecent nature of the acts that were the subject of Appellant's language [in a mailed letter] rather than [the] 'planned' and 'intended' result from use of his language." *Id.* (citation omitted).

While not claiming incorrect definitions here, the appellant asserts a deficiency in the military judge's failure to define qualifying convictions under *18 U.S.C. § 921(a)(33)(B)(i)(II)*[20] and specifically address with him the potential for a jury trial in his North Carolina misdemeanor case. He also contends his state conviction is not a predicate offense for Lautenberg Amendment purposes, since he did not knowingly and intelligently waive his right on appeal to a *de novo* jury trial—despite never filing a notice of appeal. We hold, instead, that the record of trial enabled both the military judge and this court to decide, as a matter of law, that the appellant's North Carolina domestic violence conviction is a predicate offense under the Lautenberg Amendment.

In *United States v. Artis, 132 Fed. Appx 483 (4th Cir. 2005)*, the United States Court of Appeals for the Fourth Circuit addressed arguments that a Virginia District Court misdemeanor domestic violence conviction was not a Lautenberg Amendment predicate conviction since Virginia, like North Carolina, affords a right to a jury on appeal. The *Artis* court initially determined that "whether a prior misdemeanor conviction for domestic violence

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[16] *Id.* at 341.

[17] *Id.* at 345-46.

[18] *Id.* at 350.

[19] *Id.* at 350-51.

[20] ***HN11***[↑] It provides that a domestic violence misdemeanor conviction does not qualify for Lautenberg Amendment purposes unless, "in the case of a prosecution for an offense **[*19]** described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (aa) the case was tried by a jury, or (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise."

qualifies [for Lautenberg Amendment purposes] . . . is a question of law for the court to decide" and "that the district court did not err by . . . prevent[ing] the issue from going to the jury." *Id. at 484* (citations omitted). It further determined "that [the appellant] was not entitled to a jury trial as a matter of law" since, again like North Carolina, there was no right to a jury trial in the Virginia District Court where he was convicted, and "he did not invoke his right to a jury trial in a Circuit Court of Appeals because he failed to file a notice of appeal." *Id. at 485* (citations **[*20]** omitted).

The appellant may be the first in a court-martial context to argue that the right to a jury on appeal in a prior state prosecution, in and of itself, disqualifies an otherwise valid conviction from a bench trial-only lower court for Lautenberg Amendment purposes. But his argument is far from novel. *See United States v. Gordon, 264 Fed.App'x 274 (4th Cir. 2008)* (per curiam); *United States v. Stanko, 491 F.3d 408 (8th Cir. 2007)*; *United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003)*; *United States v. Holbrook, 613 F. Supp. 2d 745 (W.D. Va. 2009)*; and *United States v. Combs, 2005 U.S. Dist LEXIS 35406 (D. Neb 2005)*. It is also as unpersuasive here as it has been in other jurisdictions. Despite the military judge in this case having not provided definitions related to these matters of law during the providence inquiry, there is no substantial basis in law or fact for questioning the appellant's Lautenberg Amendment guilty pleas.

III. *Sentence Appropriateness*

HN12[↑] We conduct *de novo* review for sentence appropriateness, *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*, which "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*. It requires our "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender." *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)* (internal quotation marks and citation omitted). Despite our significant discretion in reviewing the appropriateness and severity of the adjudged sentence, we may not engage in acts of clemency. *United States v. Nerad, 69 M.J. 138, 146-47 (C.A.A.F. 2010)*.

Partially **[*21]** for the reasons discussed *supra* regarding the second AOE, the appellant's argument here that his sentence should only include a reduction to the pay grade of E-4 is also unpersuasive. With individualized consideration of the appellant, the nature and seriousness of his offenses, his overall record of service, and all the matters within the record of trial, we find the CA approved an appropriate sentence.

IV. *Improper Referral*

The appellant withdrew his second motion to dismiss for improper referral of the *Article 134, UCMJ*, specifications alleging Lautenberg Amendment violations (the military judge having denied the first motion), and then pled guilty to the offenses. As part of the pretrial agreement, he specifically agreed "to withdraw any prior objection . . . [and] to not raise any additional motions related to . . . [r]elief pursuant to R.C.M. 603 for modifications to any charge or specification."[21] Thus, waiver applies. Even if it did not, this AOE lacks merit. ***HN13***[↑] The Government may correct charges before arraignment, and arraignment is part of the procedure in a full rehearing. *See United States v. Staten, 21 C.M.A. 493, 45 C.M.R. 267, 269 (C.M.A. 1972)*.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge FISCHER and Judge **[*22]** RUGH concur.

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[21] AE XXXVIII at 4.

United States v. Groomes

United States Air Force Court of Criminal Appeals

October 2, 2014, Decided

ACM 38360

Reporter
2014 CCA LEXIS 752 *

UNITED STATES v. Staff Sergeant CHRISTOPHER T. GROOMES, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Review denied by *United States v. Groomes, 2015 CAAF LEXIS 123 (C.A.A.F., Feb. 10, 2015)*

Prior History: **[*1]** Sentence adjudged 10 April 2013 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Natalie B. Richardson. Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-4.

Core Terms

military, guilty plea, sentence, civilian, investigators, good order, discipline, obstruction of justice, confinement, domestic violence, specifications, intruder, child endangerment, false statement, prejudicial, convicted, shot, factual basis, armed forces, accepting, shooting, cases, circumstances, bad-conduct, disparate, adjudged, assault, firearm, closely related, authorities

Case Summary

Overview

HOLDINGS: [1]-The military judge correctly explained the elements of the offenses of child endangerment, and there was no substantial basis to question appellant's guilty plea to the child endangerment specifications under Unif. Code Mil. Justice 134, *10 U.S.C.S. § 934*; [2]-The military judge found a factual basis for finding that appellant's false statement was directly prejudicial to good order and discipline under Manual Courts-Martial pt. IV, para. 60.c.(2)(a) (2012), and there was no substantial basis to question appellant's guilty plea to the obstruction of justice specification; [3]-In light of his willingness to concede up to an additional year of confinement in order to gain some certainty prior to trial, his contention that he would have pleaded not guilty simply to avoid the less onerous consequences of a conviction for a crime of domestic violence was unpersuasive.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

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

HN1 **Pleas, Providence Inquiries**

During a guilty plea inquiry, the military judge is responsible for determining whether there is an adequate basis in law and fact to support the plea before accepting it. In order to ensure a provident plea, the military judge must accurately inform the accused of the nature of his offense and elicit from him a factual basis to support his plea. The military judge may consider the facts contained in the stipulation of fact along with the appellant's inquiry on the record. Before accepting a guilty plea, the military judge must conduct an inquiry to determine whether there is factual basis for the plea, the accused understands the plea and is entering it voluntarily, and the accused admits each element of the offense.

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

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

HN2[] Pleas, Providence Inquiries

The appellate court reviews a military judge's acceptance of a guilty plea for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. The appellate court affords significant deference to the military judge's determination that a factual basis exists to support the plea. If, during the plea or at any time during the court-martial, the accused presents a matter inconsistent with the plea, the military judge has an obligation to settle the inconsistency, or if that is untenable, to reject the plea. The appellate court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient. The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts.

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

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

HN3[] Categories of Offenses, Prejudicial to Discipline & Good Order

Prior to acceptance of a guilty plea, the military judge must elicit sufficient facts, through inquiry or the stipulation of fact, to establish the appellant's conduct under the circumstances caused a reasonably direct and obvious injury to good order and discipline. The act in question must be directly prejudicial to good order and discipline and not prejudicial only in a remote or indirect sense. Manual Courts-Martial pt. IV, para. 60.c.(2)(a) (2012). Determining whether those factual circumstances establish conduct that is or is not prejudicial to good order and discipline is a legal conclusion that remains within the discretion of the military judge in guilty plea cases.

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

HN4[] Categories of Offenses, Prejudicial to Discipline & Good Order

Conduct that affects a military member's capability to perform military duties has a direct and palpable effect on good order and discipline.

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

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

HN5[] Pleas, Providence Inquiries

In order to establish a factual basis for the appellant's guilty plea, the inquiry and stipulation of fact must contain circumstances elicited from the appellant that objectively support a finding of guilt as to each element of the offense. If those underlying facts exist in the record, failure to explain each and every element of the charged offense to the accused in a clear and precise manner is not reversible error.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > General Overview

Military & Veterans Law > Military Offenses > Obstruction of Justice

HN6[] Criminal Offenses, Obstruction of Administration of Justice

Several courts have addressed whether lying to investigators about one's own misconduct constitutes an offense under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934. The Court of Appeals for the Armed Forces has held that the scope of obstruction of justice under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934 was broader than the scope of the federal obstruction of justice statute. The Court has held that willful destruction of evidence in a military investigation was prejudicial to good order and discipline because it harms the orderly administration of justice.

Military & Veterans Law > Military Offenses > Obstruction of Justice

HN7 **Military Offenses, Obstruction of Justice**

In the context of military cases, while courts have also upheld obstruction of justice charges for interference with a foreign investigation, they have typically relied on the service discrediting aspect of the conduct.

Military & Veterans Law > Military Offenses > Obstruction of Justice

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

HN8 **Military Offenses, Obstruction of Justice**

In the context of military cases, even a short-lived diversion of accountability for misconduct constitutes prejudice to good order and discipline.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > General Overview

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > General Overview

HN9 **Weapons Offenses, Possession of Weapons**

The Lautenberg Amendment, 18 U.S.C.S. § 922(g)(9), makes it unlawful for a person convicted in any court of a misdemeanor crime of domestic violence to possess or receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. Congress enacted this provision in order to ensure that perpetrators of domestic violence who are only convicted of misdemeanors are subject to the same gun control restrictions in place for convicted felons. Under Department of Defense policy, a qualifying conviction for this provision includes a conviction at a general or special court-martial of an offense that has as its factual basis, the use of physical force committed by a current or former spouse.

Military & Veterans Law > Military Offenses > General Overview

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

HN10 **Military & Veterans Law, Military Offenses**

In the context of guilty pleas in military cases, the court declines to find a military judge's failure to inquire into an accused's knowledge of the ramifications of a domestic violence conviction to be comparable to a failure to inquire into his knowledge of sex offender registration requirements.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

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

HN11 **Weapons Offenses, Possession of Weapons**

Federal law has long prohibited firearm possession by someone convicted in any court of a crime punishable by imprisonment for a term exceeding one year. 18 U.S.C.S. § 922(g)(1). Although the restriction on gun ownership by such individuals has been in place for years, no military appellate court has ever required an accused to be advised of those restrictions during his guilty plea inquiry. The court declines to undertake such a dramatic step in a case where the appellant has not personally indicated any concern about his ability to possess a firearm.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN12 **Effective Assistance of Counsel, Pleas**

When an appellant asserts that his counsel provided ineffective assistance in the context of a guilty plea, the prejudice question is whether there is a reasonable probability that, but for counsel's errors, the appellant

would not have pleaded guilty and would have insisted on going to trial.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

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

Evidence > Burdens of Proof > Burden Shifting

HN13[] **Burdens of Proof, Allocation**

The appellate court may affirm only the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The appellate court reviews sentence appropriateness de novo, employing a sweeping congressional mandate to ensure a fair and just punishment for every accused. The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. The appellate court is not required to engage in comparison of specific cases except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases. The appellant bears the burden of demonstrating that any cited cases are closely related to his or her case and that the sentences are highly disparate. If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. Closely related cases involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design. Examples of such cases include co-actors in a common crime, service members involved in a common or parallel scheme, or some other direct nexus between the service members whose sentences are sought to be compared.

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

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

HN14[] **Courts Martial, Sentences**

In the context of sentences and military cases, the test in a highly disparate case is not limited to a narrow comparison of the numerical values of the sentences at issue.

Counsel: For the Appellant: Captain Jeffrey A. Davis.

For the United States: Major Roberto Ramírez and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, HECKER, and TELLER, Appellate Military Judges. ALLRED, Chief Judge, concurs. HECKER, Senior Judge, concurring in part and dissenting in part.

Opinion by: TELLER

Opinion

OPINION OF THE COURT

TELLER, Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial of conspiracy to malinger; aggravated assault with a weapon likely to produce death or grievous bodily harm; child endangerment by culpable negligence; and obstructing justice, in violation of *Articles 81*, *128*, and *134*, UCMJ, *10 U.S.C. §§ 881*, *928*, *934*. A panel of officer members sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-4. The convening authority approved the sentence as adjudged.

The appellant contends his pleas of guilty to child endangerment and obstructing justice are improvident. Additionally, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, the appellant alleges (1) he received ineffective **[*2]** assistance of counsel when trial defense counsel failed to inform him that he was pleading guilty to a charge (or charges) that would result in a conviction for a crime of domestic violence; (2) the military judge abused her discretion in accepting the appellant's guilty plea without inquiring whether the appellant understood he was pleading guilty to a charge that would be reported as a crime of domestic violence; and (3) his sentence to a bad-conduct discharge was overly harsh in light of his co-conspirator's sentence.

Background

On 13 September 2013, the appellant and his wife, then-Staff Sergeant (SSgt) JG, devised a plan to shoot

the appellant in the leg to avoid the appellant's impending physical fitness assessment and blame the incident on an intruder. The appellant feared the assessment would result in his second failure and administrative sanctions. At the time, the appellant lived in an off-base home in Bossier City, Louisiana, with his wife, four-year-old daughter, and eight-month-old son. Although the appellant and SSgt JG followed the plan up to the point where she pointed a weapon at him, in the end, the appellant could not go through with it.

SSgt JG, facing a deployment **[*3]** she wanted to avoid, then suggested the appellant shoot her in the leg so she would not have to deploy. The appellant agreed, and they carried out their plan. The shooting took place in the living room of the home, approximately three feet from the wall separating the appellant from the bedroom where his children were sleeping.

As part of their revised plan, the couple agreed to tell police that someone had broken into their home and shot SSgt JG. After shooting his wife, the appellant called 911 and reported that an unknown male had entered their home and shot her. He then called his first sergeant and told him the same story and asked the first sergeant to come to his residence. When civilian police officers and detectives responded to the 911 call, the couple again relayed the false story about an intruder.

After rights advisement at the civilian police station, the appellant initially told a civilian detective the same false story about an intruder. When investigators asked to swab his hands for gunpowder, the appellant asserted his right to counsel and refused to answer further questions. Meanwhile, when confronted with the inconsistent physical evidence while at the hospital, SSgt **[*4]** JG admitted she and the appellant had fabricated the intruder story.

After SSgt JG called her husband and told him to "tell them everything," the appellant waived his rights and told a second civilian detective the truth about the incident. Military investigators from the Security Forces Squadron then arrived and interviewed the appellant under rights advisement. The appellant again confessed about the plan he and his wife entered into and his role in injuring her.

Providency of the Plea to Article 134, UCMJ, Specifications

The appellant contends his guilty plea to two specifications of child endangerment and one specification of obstructing justice charged under Article 134, UCMJ, are improvident because an insufficient factual basis exists to sustain the convictions. Specifically, he argues there were no facts developed or evidence presented to show that his conduct caused a reasonably direct and palpable injury to good order and discipline in the armed forces.

HN1[] During a guilty plea inquiry, the military judge is responsible for determining whether there is an adequate basis in law and fact to support the plea before accepting it. United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008). In order to ensure a provident plea, the military judge must "accurately inform [the **[*5]** accused] of the nature of his offense and elicit from him a factual basis to support his plea." United States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004); United States v. Whitaker, 72 M.J. 292, 293 (C.A.A.F. 2013) (the military judge may consider the facts contained in the stipulation of fact along with the appellant's inquiry on the record). Before accepting a guilty plea, the military judge must conduct an inquiry to determine whether there is factual basis for the plea, the accused understands the plea and is entering it voluntarily, and the accused admits each element of the offense. United States v. Mitchell, 66 M.J. 176, 177-78 (C.A.A.F. 2008).

HN2[] We review a military judge's acceptance of a guilty plea for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. Inabinette, 66 M.J. at 322. We afford significant deference to the military judge's determination that a factual basis exists to support the plea. *Id*. (citing United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)); *see also* United States v. Barton, 60 M.J. 62 (C.A.A.F. 2004). If, during the plea or at any time during the court-martial, the accused presents a matter inconsistent with the plea, the military judge has an obligation to settle the inconsistency, or if that is untenable, to reject the plea. United States v. Hines, 73 M.J. 119, 124 (C.A.A.F. 2014) (quoting United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011)). "This court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict **[*6]** is not sufficient." *Id*. (internal quotation marks omitted) (quoting United States v. Watson, 71 M.J. 54, 58 (C.A.A.F. 2012)). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing United States v. Care, 18

C.M.A. 535, 538-39, 40 C.M.R. 247 (1969)).

The appellant was charged with two specifications of child endangerment by culpable negligence for discharging a loaded firearm within a residence in which his children were present; the specifications were identical except for the identity of the child. He was also charged with obstructing justice by falsely telling a civilian detective that an intruder had shot his wife. All three specifications allege a violation under clause 1 of Article 134, UCMJ.

As such, HN3[] prior to acceptance of a guilty plea, the military judge must elicit sufficient facts, through inquiry or the stipulation of fact, to establish the appellant's conduct under the circumstances caused a reasonably direct and obvious injury to good order and discipline. *Cf.* United States v. Cendejas, 62 M.J. 334, 340 (C.A.A.F. 2006). The act in question must be "directly prejudicial to good order and discipline" and not "prejudicial only in a remote or indirect sense." *Manual for Courts-Martial, United States*, Part **[*7]** IV, ¶ 60.c.(2)(a) (2012 ed.). "Determining whether those factual circumstances establish conduct that is or is not prejudicial to good order and discipline is a legal conclusion that remains within the discretion of the military judge in guilty plea cases." United States v. Nance, 67 M.J. 362, 366 (C.A.A.F. 2009).

1. Child endangerment specifications

In the guilty plea inquiry for the child endangerment specifications, the appellant acknowledged that his conduct created the risk his children could be seriously injured. He also told the military judge his conduct was prejudicial to good order and discipline because it caused his active duty wife to be absent from her military duty while meeting with child protective services personnel who were investigating the child endangerment issue. We do not find a substantial basis in law or fact for questioning the providence of the appellant's plea.

The military judge correctly explained the elements and definitions of the offenses, including the applicable terminal element. After acknowledging his understanding of the elements and definitions, the appellant admitted a reasonably direct and obvious injury to good order and discipline occurred when his wife did not perform her military duties because **[*8]** she was involved at certain times in the child protective services investigation that began due to his misconduct.[1] After considering the entire inquiry, we find no substantial basis to question his guilty plea to the child endangerment specifications. *See* United States v. Erickson, 61 M.J. 230, 232-33 (C.A.A.F. 2005) HN4[] (conduct that affects a military member's capability to perform military duties has a direct and palpable effect on good order and discipline).

2. Obstruction of justice specification

The appellant was also charged with "wrongfully endeavor[ing] to impede an investigation by making a false statement to Bossier City . . . Detective Kevin Jones, to wit, 'my wife was shot by an intruder,' or words to that effect, which conduct was prejudicial to good order and discipline in the armed forces." When the military judge asked the appellant why he thought he was guilty of the offense, the appellant stated:

> On 14 September 2012, . . . I made a statement to Detective Kevin Jones which was false and I knew that the statement was false. I knew that when I **[*9]** called 911 to falsify the report of an intruder had [sic] shot my wife. I figured there would be an investigation into the shooting. The reason I did this, was to disrupt the investigation.
> . . . .
> It is prejudicial to good order and discipline in the armed forces because of the extra investigation that took place in order to find out the truth.[2]

When the military judge followed up on the "extra investigation" issue, the appellant noted two Air Force security forces investigators "came over to do an investigation also" after the civilian authorities began investigating the intruder story. After the military judge expressed doubts about how that created a direct and obvious injury to good order and discipline, the appellant consulted with trial defense counsel. He then told the judge:

> [T]he lie I told was a perpetuating plan for my wife

[1] The stipulation of fact, which was not discussed or referenced during the guilty plea inquiry, simply stated that the appellant's "conduct was prejudicial to good order and discipline in the armed forces."

[2] The stipulation of fact, which was not discussed or referenced during the guilty plea inquiry, simply stated "making false statements to an investigator to perpetuate a crime was to the prejudice of good order and discipline in the armed forces."

> to avoid deployment. I believe if I would have told [civilian] Detective Jones the truth, the military would have been **[*10]** less involved in investigating the alleged malingering.
> . . . .
> [If] I would have, you know, had already told the truth to Detective Jones, and the military would have, I believe, would have been involved in less.

The military judge again followed up, asking if the appellant believed the civilian authorities may not have bothered contacting the military if they had quickly learned the appellant had shot his wife, even if they also learned he did it so she could avoid her military deployment. The appellant indicated he did. The military judge then found his plea to be provident. The appellant now contends his guilty plea is improvident because there were no facts developed or evidence presented to show that his lie to civilian detectives caused a reasonably direct and palpable injury to good order and discipline in the armed forces.

The military judge found a factual basis for the conclusion that the false statement to Detective [Det.] Jones was directly prejudicial to good order and discipline, as indicated by her acceptance of the guilty plea. The military judge elicited two potential bases for that conclusion. First, the appellant admitted that he made the false statement with the intent **[*11]** of disrupting the investigation, believing that the military would be involved. Second, the appellant asserted that the false statement created extra work for military investigators. The military judge, with good reason, expressed grave doubts about this second theory of liability. However, she never discussed the first basis for liability with the accused, so the record is unclear as to which basis she relied upon in accepting the plea.

HN5[] In order to establish a factual basis for the appellant's guilty plea, the inquiry and stipulation of fact must contain circumstances elicited from the appellant that objectively support a finding of guilt as to each element of the offense. *United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980)*. If those underlying facts exist in the record, "[f]ailure to explain each and every element of the charged offense to the accused in a clear and precise manner . . . is not reversible error." *United States v. Fisher, 58 M.J. 300, 304 (C.A.A.F. 2003)* (military judge's incorrect reference to falsity by omission in a false swearing inquiry did not invalidate a guilty plea when the record demonstrated other elements of the statement were knowingly false).

If one of the two potential bases contained in the record objectively support the plea, then the military judge did not abuse her **[*12]** discretion in accepting the plea, even if she did not explain why she accepted the plea on the record. We find that the assertion that the appellant's false statement created more work for military investigators was so implausible that it cannot form a legitimate basis for accepting the plea. If, however, lying to a civilian investigator with the intent of disrupting the investigation constitutes a direct injury to good order and discipline, then the plea is still provident.

HN6[] Several courts have addressed whether lying to investigators about one's own misconduct constitutes an offense under *Article 134*, UCMJ. In *United States v. Arriaga, 49 M.J. 9, 12 (C.A.A.F. 1998)*, the Court of Appeals for the Armed Forces upheld a soldier's guilty plea to obstruction of justice for lying to Army Criminal Investigation Division investigators about the location where he had disposed of stolen property. The court held that the scope of obstruction of justice under *Article 134*, UCMJ, was broader than the scope of the federal obstruction of justice statute. Although the court did not expressly rule on which clause of *Article 134*, UCMJ, was violated,[3] the facts in the case centered around Arriaga's impact on the military investigation into his misconduct. In **[*13]** deciding *Arriaga*, the court cited to its opinion in *United States v. Jones, 20 M.J. 38, 40 (C.M.A. 1985)*, where that court held that willful destruction of evidence in a military investigation was prejudicial to good order and discipline because it "harms the orderly administration of justice."

HN7[] While courts have also upheld obstruction of justice charges for interference with a foreign investigation, they have typically relied on the service discrediting aspect of the conduct. *See United States v. Ashby, 68 M.J. 108, 118-19 (C.A.A.F. 2009)* (discussing obstruction of justice in the context of *Article 133*, UCMJ, *10 U.S.C. § 933*); *United States v. Bailey, 28 M.J. 1004, 1006-07 (A.C.M.R. 1989)*.

The Army Court of Criminal Appeals addressed a fact pattern similar to the instant case in *United States v. Jenkins, 48 M.J. 594 (Army Ct. Crim. App. 1998)*. Private First Class Jenkins had engaged in sustained abuse of his wife, including sexual assault. After one

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[3] *United States v. Arriaga, 49 M.J. 9, 12 (C.A.A.F. 1998)*, was decided before *United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)*, and the specification at issue did not allege a terminal element. *See Arriaga, 49 M.J. at 10*.

such assault, Jenkins' wife reported the abuse to his company commander, but the subsequent investigation was handled by Colorado Springs police. *See* *Id. at 596*. In a verbal statement to a Colorado Springs investigator, Jenkins denied assaulting his wife and said the sex was consensual. The court found that "[e]ven though appellant was being interrogated by a civilian police officer, the allegations were first **[*14]** reported to military authorities and [the] appellant must have known that at least a possible disposition of the allegations would occur within the administration of military justice." *Id. at 601*. *See also* *United States v. Smith, 34 M.J. 319, 324 (C.M.A. 1992)* (the impact of charged misconduct "on a later, but nonetheless probable, military investigation" brings it within the intended scope of *Article 134*, UCMJ, where military authorities were already aware of the underlying situation at the time of the alleged obstruction activity), *rev'd on other grounds*, *39 M.J. 448 (CMA 1994)*.

In light of this, the question before us in this case is whether the military judge elicited sufficient facts during her inquiry, combined with the stipulation of fact, to find that the appellant's false statement to Det. Jones harmed the orderly administration of military justice in the same manner as if it had been made to a military investigator. We find that she did.

As in *Jenkins*, the military was aware of the incident before the false statement was made to the civilian investigator because the appellant told his first sergeant that an intruder had shot his wife before the questioning by detectives even began. While Bossier City police took the lead in the questioning, the appellant expected **[*15]** there to be some military involvement, and military investigators did, in fact, join the investigation. His false statement to Det. Jones was intended to allow him to escape accountability from either civilian or military authorities. Therefore, under these circumstances, at the moment he lied, the appellant caused a reasonably direct and palpable injury to good order and discipline in the armed forces. In this case, the duration of the injury was curtailed by the physical evidence and probable existence of gunpowder residue on the appellant's hands. But ***HN8***[⬆] even a short-lived diversion of accountability for misconduct constitutes prejudice to good order and discipline. Accordingly, we find no substantial basis to question his guilty plea to the obstruction of justice specification.

The dissent cites *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F 2008), but we find that case distinguishable. In *Medina*, the court held that as a matter of fair notice, an accused had a right to know which clause of *Article 134*, UCMJ, formed the basis for the charge. *Id. at 26-27*. The court explicitly noted "[i]t bears emphasis that this is a question about the knowing and voluntary nature of the plea and not the adequacy of the factual basis supporting the plea." *Id. at 27*. The **[*16]** appellant in this case had no doubt that the charge alleged a violation of only clause 1 of *Article 134*, UCMJ, and the military judge adequately explained that basis in the inquiry. We find no basis on this record to doubt the knowing and voluntary nature of the appellant's plea.

Domestic Violence Conviction

In a declaration submitted on appeal, the appellant says he was served with paperwork shortly after his trial that indicated at least one of his convictions was a "Crime of Domestic Violence and would be reported as such." He contends this was the first time he became aware of this fact, that his attorneys never advised him that pleading guilty would result in a reportable conviction, and that he would not have pled guilty if he had known this requirement. The appellant also states this reported domestic violence conviction "has caused [him] hardship, to include not being able to find jobs [and] not being able to pick [his] daughter up from school." Pursuant to *Grostefon*, he now contends the military judge erred in failing to inquire into his understanding on this matter and that his defense counsel were ineffective for not advising him of this consequence before he pled guilty.

[*17] Although the appellant does not personally complain about the impact of his conviction on his ability to possess firearms, his appellate brief focuses almost exclusively on this consequence of his conviction. In making this argument, the brief references ***HN9***[⬆] the Lautenberg Amendment, *18 U.S.C. § 922(g)(9)*, which makes it unlawful for a person convicted "in any court of a misdemeanor crime of domestic violence" to possess or receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce.[4]

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[4] Congress enacted this provision in order to ensure that perpetrators of domestic violence who are only convicted of misdemeanors are subject to the same gun control restrictions in place for convicted felons. *United States v. Castleman, 134 S. Ct. 1405, 1409, 188 L. Ed. 2d 426 (2014)*. Under Department of Defense (DoD) policy, a qualifying conviction for this provision includes a conviction at a general or special court-martial of "an offense that has as its factual basis, the

HN10[] The appellant invites us to find a military judge's failure to inquire into an accused's knowledge of the ramifications of a "domestic violence" conviction to be comparable to a failure to inquire into his knowledge of sex offender registration requirements. *Cf.* United States v. Riley, 72 M.J. 115, 122 (2013) (failure to inquire into **[*18]** the accused's knowledge of sex offender registration requirements results in a substantial basis to question the providence of a guilty plea). We decline to do so.

It is important to note that, under the facts of this case, the appellant's conviction for a "domestic violence" offense created no consequences for him beyond those he already faced. HN11[] Federal law has long prohibited firearm possession by someone convicted "in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Because the appellant was convicted of multiple crimes punishable by over one year of confinement, his "domestic violence" conviction had no effect on his ability to possess a firearm. Furthermore, there is no evidence this "domestic violence" conviction is negatively affecting his ability to find a job or pick his daughter up from school, as opposed to his other convictions.

Extending Riley to cover the scenario in this case would extend those requirements to every court-martial in which the accused is pleading guilty to an offense with a potential term of confinement over one year. Although the restriction on gun ownership by such individuals has been in place for years, no military appellate **[*19]** court has ever required an accused to be advised of those restrictions during his guilty plea inquiry. We decline to undertake such a dramatic step in a case where the appellant has not personally indicated any concern about his ability to possess a firearm.

For similar reasons, we do not find his trial defense counsel were ineffective even if they failed to advise him of these ramifications that would follow from his guilty plea to a crime of domestic violence. HN12[] When an appellant asserts that his counsel provided ineffective assistance "[i]n the context of a guilty plea, the prejudice question is whether 'there is a reasonable probability that, but for counsel's errors, [the appellant] would not have pleaded guilty and would have insisted on going to trial.'" United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). We find no such reasonable probability here.

Based on the charges in the case, the appellant faced a maximum punishment of 20 years of confinement and a dishonorable discharge. Prior to trial, the appellant submitted an offer for a pretrial agreement in which he would plead guilty if the convening authority would limit confinement to no more than 24 months if a punitive discharge was adjudged, and 30 months if no punitive **[*20]** discharge was adjudged. The convening authority declined the offer. The appellant then successfully modified the offer, and the convening authority agreed to disapprove any confinement in excess of three years. In light of the appellant's willingness to concede up to an additional year of confinement in order to gain some certainty prior to trial, we find unpersuasive his contention now on appeal that he would have plead not guilty and litigated the case simply to avoid the comparatively less onerous consequences of a conviction for a crime of domestic violence.

Sentence Appropriateness

The appellant's final contention is that his punishment was overly harsh, particularly in light of his co-conspirator's sentence. HN13[] This court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review sentence appropriateness de novo, employing "a sweeping congressional mandate" to ensure "a fair and just punishment for every accused." United States v. Baier, 60 M.J. 382, 384-85 (C.A.A.F. 2005) (citations omitted).

The appropriateness of a sentence generally should be determined without reference or comparison **[*21]** to sentences in other cases. United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985). We are not required to engage in comparison of specific cases "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting Ballard, 20 M.J. at 283). The "appellant bears the burden of demonstrating that any cited cases are

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use . . . of physical force . . . committed by a current or former spouse." DoD Instruction 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Peronnel*, E2.8, ¶ 6.1.4.3 (21 August 2007, incorporating Change 1, 20 September 2011).

'closely related' to his or her case and that the sentences are 'highly disparate.'" *Id*. If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id*.

We find that the appellant's case and that of SSgt JG are closely related. *See* *United States v. Kelly, 40 M.J. 558, 570 (N.M.C.M.R. 1994)* (closely related cases "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design"); see also *Lacy, 50 M.J. at 288* (examples of closely related cases include co-actors in a common crime, service members involved in a common or parallel scheme, or "some other direct nexus between the service members whose sentences are sought to be compared"). The appellant's conduct arose from a common scheme with SSgt JG: they shared a common goal of getting SSgt JG excused from her upcoming deployment; they jointly planned the stories they would **[*22]** tell law enforcement after the shooting; and SSgt JG even encouraged the appellant to go through with the plan after he could not initially pull the trigger.

We do not find, however, that the sentences are highly disparate. While both the appellant and SSgt JG received approximately 6 months of confinement, other aspects of the sentence were distinct. SSgt JG received—in addition to 179 days confinement—3 months of hard labor without confinement, forfeiture of $994.00 pay per month for 6 months, reduction to E-1, and a reprimand. The appellant received—in addition to 6 months confinement——a bad-conduct discharge and a reduction of one grade to E-4. Accordingly, this case requires us to compare the bad-conduct discharge the appellant received to 6 months of two-thirds forfeiture of pay, 3 months of hard labor without confinement, and a reduction of an additional three grades which his co-conspirator received. While the bad-conduct discharge may have longer-lasting consequences, the distinct aspects of SSgt JG's punishment would be considered severe in their own right. As our superior court noted, ***HN14***[] "[t]he test in such a case is not limited to a narrow comparison of the numerical values of the **[*23]** sentences at issue." *Lacy, 50 M.J. at 289*. While the punishments are different, the differences are not of such a magnitude as to render the appellant's sentence unfair or unjust.

Even if we found that the sentences were highly disparate, we would still find that a rational basis for the disparity exists. Although they participated in a common scheme, the appellant is the one who actually pulled the trigger and shot his co-conspirator. This distinction alone provides a sufficient basis for the difference between the two sentences. Furthermore, SSgt JG was only convicted of malingering, whereas the appellant was convicted of aggravated assault, child endangerment, obstructing justice, and conspiracy to commit malingering.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the approved findings and sentence are

AFFIRMED.

ALLRED, Chief Judge, concurs.

Concur by: HECKER (In Part)

Dissent by: HECKER (In Part)

Dissent

HECKER, Senior Judge, concurring in part and dissenting in part:

I concur with the majority opinion other than its conclusion that the appellant's plea to obstruction of justice **[*24]** was provident, and I respectfully dissent from that portion of the opinion. Although I agree that false statements to civilian investigators could, under certain circumstances, result in a reasonably direct and palpable injury to good order and discipline in the armed forces by harming the orderly administration of military justice, I find the factual and legal predicate for such a conclusion to be lacking in this case.

To the extent the appellant's lie to a civilian detective harmed the orderly administration of military justice, I find the plea cannot be sustained on the factual admissions made by the appellant as the military judge did not explain that theory or how it related to the facts relayed by the appellant, who only referenced how his lie impeded the civilian detective's investigation into the intruder story and into him for discharging the weapon. An accused has a right to know under what legal theory he is pleading guilty, and "this fair notice resides at the heart of the plea inquiry." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F 2008). "The providence of a plea is

based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those **[*25]** facts." *Id*. (citing Care, 40 C.M.R. at 250-51).

Instead, the military judge focused on whether the military would have become involved and, once involved, how extensive its involvement would be. When asked how his lie to the civilian detective caused an injury to good order and discipline, the appellant first referenced the "extra investigation [by military investigators] that took place in order to find out the truth." This cannot serve as the basis for the guilty plea, however, because he had already told the truth by the time military investigators arrived to conduct their interview, and there is no indication in the record that any "extra investigation" occurred. The military judge's reaction to this explanation indicated that she too found this statement insufficient to support this element of the guilty plea, as does the majority here.

The appellant then stated his belief the military investigators would have been "less involved" if he had not lied to the detective and that the civilians would not have contacted the military if he had outright admitted to shooting his wife to help her avoid a deployment. After hearing this, the military judge then found the plea provident. I disagree.

The first basis cited **[*26]** by the appellant is simply a restatement of his inadequate "extra investigation" point. As to his second point, as revealed during the guilty plea inquiry, the military was already involved in the situation before he lied to the detective, based on a phone call made by the appellant to his first sergeant. Thus, once this call was made, it would not matter whether the appellant told the civilian detective the truth or a lie—the military was already involved. This apparent inconsistency between the appellant's statement and other facts in the record was not resolved, and therefore, I find that the appellant's plea improvident and that the military judge erred in accepting it.

Despite this conclusion, I would not provide the appellant with any sentence relief nor order a sentence rehearing. At his court-martial, the appellant was sentenced using a maximum period of confinement of 20 years, 5 years of which come from the obstruction of justice specification. I do not find this to be a "dramatic change in the penalty landscape. *See* United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003) (a "dramatic change in the 'penalty landscape'" lessens an appellate court's ability to reassess a sentence). Additionally, the evidence of the appellant's lie **[*27]** to civilian detectives would have been before the sentencing authority even in the absence of an obstruction charge. *See* Rule for Courts-Marital 1001(b)(4). It was part of the facts and circumstances surrounding the appellant's conspiracy with, and aggravated assault of, his wife and was an aggravating circumstance directly relating to those charges. *See id*.

Given this, I am confident that, absent this error, the panel would have adjudged a sentence no less severe than that approved by the convening authority and therefore would reassess the sentence to the one adjudged by the panel—a bad-conduct discharge, confinement for 6 months, and reduction to E-4. *See* United States v. Doss, 57 M.J. 182, 185-86 (C.A.A.F. 2002) (citing United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)); United States v. Reed, 33 M.J. 98, 99 (C.M.A. 1991).

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United States v. Malone

United States Navy-Marine Corps Court of Criminal Appeals

April 24, 2002, Decided

NMCM 200101164

Reporter
2002 CCA LEXIS 90 *; 2002 WL 737353

UNITED STATES v. Marcus A. MALONE, Corporal (E-4), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 19 January 2001. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aircraft Group 11, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

Disposition: Convening authority's action was set aside and returned for new action.

Core Terms

convening, Court-Martial, confinement, sentence, assigned error, judge advocate, promulgating, scrivener's, wrongfully, correctly, suspended, Military, adjudged, pretrial

Case Summary

Procedural Posture

Appellant corporal was convicted pursuant to his pleas by a special court-martial convened at MCAS Miramar, San Diego, California of making a false official statement, carnal knowledge, service discrediting conduct by wrongfully providing alcohol to a minor, and wrongfully impeding an investigation, in violation of Unif. Code Mil. Justice arts. 107, 120, 134, *10 U.S.C.S. §§ 907*, *920*, *934*. The corporal appealed his sentence.

Overview
The corporal received a sentence which included confinement for 6months, forfeiture of $ 650 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the adjudged sentence, but suspended confinement in excess of 150 days for 12 months pursuant to the pretrial agreement. The military court of appeals held that the action of the convening authority that incorporated the promulgating order approved the sentence for another individual. While the action suggested a scrivener's error the action was at the very least ambiguous as to whether the convening authority intended to act on the corporal's case or the case of another individual. The matter could be returned to the Judge Advocate General of the Navy who could order an appropriate convening authority to prepare a new convening authority's action and court-martial order in the case.

Outcome
The convening authority's action was set aside and the case was returned for a new action.

Counsel: CDR SALVADOR A. DOMINGUEZ, JAGC, USNR, Appellate Defense Counsel.

CAPT CAROL J. COOPER, JAGC, USN, Appellate Defense Counsel.

LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE R.B. LEO, K.R. BRYANT, M.E. FINNIE. Chief Judge LEO and Senior Judge FINNIE concur.

Opinion by: K.R. BRYANT

Opinion

BRYANT, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of making a false official statement, carnal knowledge, service

discrediting conduct by wrongfully providing alcohol to a minor, and wrongfully impeding an investigation, in violation of Articles 107, 120, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 907*, *920*, and *934*. The adjudged sentence includes confinement for six months, forfeiture of $ 650.00 pay per month for six months, reduction to pay **[*2]** grade E-1, and a bad-conduct discharge. The convening authority approved the adjudged sentence, but suspended confinement in excess of 150 days for 12 months pursuant to the pretrial agreement.

We have examined the record of trial, the appellant's assignment of error, and the Government's response in accordance with Articles 59(a) and 66(c), UCMJ. Finding merit in the appellant's assignment of error, we set aside the convening authority's action and return the case for a new action. RULE FOR COURTS-MARTIAL 1107(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

The first paragraph of the promulgating order correctly identifies the appellant, "Corporal Marcus A. Malone [SSN]." Group Special Court-Martial Order Number 34-01 of 13 Jun 2001. However, the action of the convening authority, incorporated in the promulgating order pursuant to R.C.M. 1114(c)(1), approves the sentence in the "Special Court-Martial U.S. v. Lance Corporal Paul A. Richardson [SSN]." *Id*. Citing *United States v. Crumpley, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)*, the Government argues that the obvious error is "nothing more than a scrivener's error and should be tested under **[*3]** the 'harmless-error standard.'" Government's Answer of 18 Jan 2002 at 2. In support of this argument, the Government correctly notes that the incorporated action suspended confinement as required by the existing pretrial agreement and that the action referenced the appellant's clemency petition.

While we agree there are internal indicators in the action that may suggest a scrivener's error, the patently obvious inconsistency is egregious. Unlike *Crumpley*, where the error was with the recommendation of the staff judge advocate, the error in this case is with the convening authority's action itself. *Crumpley, 49 M.J. at 538*. The action, at the very least, is "ambiguous" as to whether the convening authority intended to act on the appellant's case or the case of another individual. R.C.M. 1107(g). We decline to speculate on the true intention of the convening authority.

Accordingly, we return the record of trial to the Judge Advocate General of the Navy, who may order an appropriate convening authority to prepare a new convening authority's action and court-martial order in this case. Following those actions, the record will be returned to this court for further **[*4]** review pursuant to Article 66(c), UCMJ.

Chief Judge LEO and Senior Judge FINNIE concur.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 25, 2024.

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