7 October 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellant*	) REPLY TO APPELLEE'S) ANSWER))
v.	) USCA Dkt. No. 19-0398/AF))
Senior Airman (E-4) CHASE J. EASTERLY *Appellee*	) Crim. App. Misc. Dkt. No. 39310))

UNITED STATES' REPLY TO APPELLEE'S ANSWER

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

COMES NOW the United States, pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to Appellee's Answer Brief Concerning the Certified issue.

ISSUE CERTIFIED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT THE MILITARY JUDGE COMMITTED PLAIN AND PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE PANEL SUA SPONTE REGARDING THE IMPACT OF A PUNITIVE DISCHARGE ON APPELLEE'S POTENTIAL PERMANENT DISABILITY RETIREMENT, WHERE APPELLEE DID NOT REQUEST SUCH AN INSTRUCTION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review these issues under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

The United States adopts the statement of the case contained within its brief in support of the issue certified, dated 28 August 2019.

STATEMENT OF FACTS

The United States adopts the statement of facts contained within its brief in support of the issue certified, dated 28 August 2019.

ADDITIONAL ARGUMENT

Relief Sought

COMES NOW Appellant, the United States, by and through counsel, and pursuant to Rule 30 of this Honorable Court's Rules of Practice and Procedure requests this Court reverse the AFCCA's decision and find that omitting a sua sponte retirement instruction did not amount to plain and prejudicial error.

Argument

The AFCCA majority erred in evaluating each prong of the plain error analysis in Appellee's case. A sufficient factual predicate that would require the

military judge to provide the members an instruction concerning medical retirement benefits was not presented at trial. Appellee cannot cure this factual insufficiency by presenting additional matters on appeal to now demonstrate the effect and weight of a medical retirement recommendation.

Appellee further argues the military judge's instruction on the effect of a punitive discharge on Appellee's benefits followed by an instruction on collateral consequences confused the members. (App. Br. at 24.) Despite this assertion, Appellee has failed to identity any facts in the record that provide a basis for finding that the military judge's instruction on collateral consequences (consequences stemming from the conviction) confused the members' understanding of how they could consider the effect of a punitive discharge on retirement benefits (consequences stemming from the punishment).

Finally, Appellee argues the United States has misconstrued the standard required for a finding of prejudice. Specifically, Appellee argues the right to substantially present the accused's particular sentencing case to the members is the incorrect standard to measure prejudice in this case. (App. Br. at 25.) Appellee argues the proper prejudice analysis is "whether the omitted instruction had a substantial influence on the sentence." (Id.) The United States agrees that a finding of prejudice requires determining the sentence was substantially influenced by the omitted instruction. AFCCA incorrectly assessed prejudice in this case, and

found the effect to a substantial right in this case was the panel members' inability to consider all the information they were allowed to consider before adjudging a sentence. (JA at 25-26.) Appellee was not prejudiced, as there is no indication that Appellee was prevented from presenting to the members any evidence or arguments concerning his potential medical retirement benefits.

1. Appellee's introduction of regulations and implementing features on appeal does cure the lack of an evidentiary predicate at trial.

Appellee argues "[t]he government attempts to obfuscate the import of [the disability retirement] evidence by posing a series of hypothetical questions intended to demonstrate the uncertain nature of [Appellee's] disability retirement." (App. Br. at 17.) At trial, Appellee failed to present evidence that a Formal Physical Evaluation Board (FPEB) recommendation for disability retirement carried significant weight, if any, in the ultimate decision to approve or deny such retirement. In order to now bridge that evidentiary gap, Appellee cites matters that were not put before the military judge. (Id. at 17-18.)

Appellee now provides Department of Defense Instruction 1332.18 to argue the significance of an FPEB recommendation. (App. Br. at 17.) This does not cure Appellee's failure at trial to 1) provide any history of FPEB recommendations; 2) provide any evidence to indicate approval would occur in this case; 3) provide any other regulation or implementing instruction. *See* United States v. Perry, 48 M.J. 197, 198 (C.A.A.F. 1998) (No abuse of discretion when the trial judge denied trial

defense counsel's request for instruction on the possibility that a dismissal may cause a Naval academy graduate to reimburse the government for all costs associated with his education. The military judge denied the request due to there being insufficient evidence presented to show the consequence was more than just a possibility).

Appellee further argues disability retirement is no less uncertain than a servicemember who has earned retirement after 20 years of service. (App. Br. at 18.) However, Appellee presented no evidence at trial that a disability recommendation from the FPEB carried the same certainty of retirement as a member retiring after meeting length of service requirements pursuant to 10 U.S.C. § 8914 (2018). The full requirements to secure a disability retirement are not as well-understood or universally known to the average military member (including a military judge) as a servicemember's eligibility to retire after 20 years of service. Appellee had the obligation to show the trial court he was "perilously close" to disability retirement before being entitled to a retirement instruction. *See* United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997).

Appellee also states, "[t]he government's suggestion that the military judge did not err because [Appellee] did not have a vested retirement is the exact *per se* rule […] this Court rejected in *Luster*." (App. Br. at 18.) This misapprehends this Court's decision in Luster, which rejected a *per se* rule precluding the defense

from introducing evidence simply because a member is not retirement eligible at the time of court-martial. United States v. Luster, 55 M.J. 67, 71 (C.A.A.F. 2001). Luster did not analyze the sufficiency of a factual predicate that would require a military judge to provide a retirement instruction, especially in the absence of a defense request.[1]

Appellee had the ability at trial to build the record to establish a factual predicate for a retirement instruction. He neither built the record, nor requested the instruction. Appellee notes that he argued to the convening authority in clemency that "before this conviction, [he] had been approved for 100% VA and USAF disability benefits." (App. Br. at 27.) The fact Appellee chose to present this to the convening authority and not the military judge or the members demonstrates a strategic decision on his part.[2] The record lacked evidence to support a likelihood that a disability retirement for Appellee would ultimately be approved. Given this uncertainty, it could not have been plain or obvious error for the military judge to fail to sua sponte give the medical retirement instruction. Appellee was able to put

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[1] Unlike in Appellee's case, the military judge in Luster gave an instruction at the request of trial defense counsel. 55 M.J. at 70.

[2] Despite Appellee's claim that he presented a case about retirement benefits, Appellee's sentencing case was about medical treatment, not retirement benefits. (App. Br. at 26-27.) The members received an instruction stating a punitive discharge would deprive Appellee of "substantially all benefits administered by the Department of Veterans Affairs and the Air Force establishment." (JA at 397.)

on the sentencing case he wanted, which highlighted his need for medical benefits, and avoided drawing attention to a retirement check.

2. Boyd[3] does not stand for the proposition that once a factual predicate is established, a military judge commits plain error unless he gives the retirement instruction. Boyd only holds that a retirement instruction is required when there is a factual predicate and a party requests an instruction.

In a footnote, Appellee appears to argue that the military judge might still have a duty to give the retirement instruction even if not requested by a party. (App. Br. at 19.) Appellee also argues, "[i]f [. . .] an accused has to request the instruction in order for there to be error, there would be no plain error review at all." (App. Br. at 19.) This argument misunderstands the United States' position. The United States agrees that under some circumstances not presented here, it could theoretically be plain error for the military judge to fail to sua sponte give a retirement instruction.[4] AFCCA appeared to treat the requirement for the retirement instruction as if it were per se required if a factual predicate is raised, which is not supported by Boyd.

The United States concurs that the holding in Boyd makes the retirement instruction a "required" instruction when a factual predicate is raised, but *only* if the instruction is requested by a party. Boyd, 55 M.J. at 221. The finding in Boyd

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[3] United States v. Boyd, 55 M.J. 217 (C.A.A.F. 2001)

[4] For example, if members asked a question that demonstrated confusion, and the military judge failed to instruct accordingly in order to resolve the confusion, this failure to sua sponte instruct could potentially be error.

does not stand to require an instruction if it is not requested by a party. Notably, otherwise required instructions are listed in R.C.M. 920(e) and 1005, and a retirement instruction is not one of them.

Thus, when a retirement instruction was not requested at trial, this Court next analyzes whether omitting a retirement instruction was plain error. In doing so, this Court considers whether the error was "so obvious in the context of the entire trial that the military judge should be faulted for taking no action even without an objection." United States v. Gomez, 76 M.J. 76, 81 (C.A.A.F. 2017) (internal citations and quotations omitted). As described in the United States' initial brief, it was not plain error for the military judge to decline to sua sponte give this discretionary instruction, because there was an insufficient factual predicate and defense had strategic reasons to avoid it.

When evaluating the context of an omitted retirement instruction, Appellee argues this Court should not look to whether trial defense counsel employed a strategy to avoid a disability retirement instruction, because "defense counsel did not shy away from discussing retirement benefits" during sentencing argument. (App. Br. at 22.) While trial defense counsel emphasized Appellee's need for veteran benefits, trial defense counsel wisely shied away from highlighting to the members that without adjudging a punitive discharge Appellee would potentially receive the same retirement as though he has served honorably. This was likely a

strategic decision, and the military judge had no reason to interfere with the defense's chosen strategy. Moreover, this was a proper consideration when analyzing for plain and obvious error. As a result, this Court should hold the military judge did not commit plain error when omitting a medical retirement instruction.

3. There is no basis to find that the military judge's instruction on collateral consequences confused the members' consideration of the effect of a punitive discharge on Appellee's benefits.

The military judge provided an instruction to the members on the effect of a punitive discharge on Appellee's veteran benefits. (JA at 397.) The military judge later gave an instruction on collateral consequences. (JA at 398.) Appellee now argues that without further instruction, the members could have been confused as to how they were permitted to consider the loss of retirement benefits. (App. Br. at 23-24.) This argument ignores the fact that the military judge specifically instructed the members that adjudging a punitive "discharge deprives [Appellee] of substantially all benefits administered by the Department of Veterans Affairs and the Air Force establishment." (JA at 397.) Additionally, the loss of retirement benefits would be a result of the sentence imposed, not the conviction itself.

The instruction concerning the effect of a punitive discharge on veteran benefits and the instruction concerning collateral consequences are not inherently confusing. Appellee has failed to identify evidence in the record that the members

were confused about the instruction. In short, the members are presumed to follow the military judge's instruction, and there is no basis to presume that the members were confused without any evidence to the contrary. United States v. Custis, 65 M.J. 366, 372 (C.A.A.F. 2007).

4. The test for prejudice in this case is whether the military judge's erroneous decision to not provide an instruction affected the substantial rights of Appellee.[5] Appellee was not prejudiced by the omission of an instruction on potential retirement benefits.

Appellee argues the United States has misstated the analysis for prejudice when arguing Appellee was allowed to substantially present his particular sentencing case to the members. (App. Br. at 25.) Citing Boyd, 55 M.J. at 221, Appellee argues a showing of prejudice requires the omitted instruction to have had a substantial influence on the sentence. (App. Br. at 25.) The United States agrees this is the correct standard for prejudice in this case. (Govt. Br. at 40.)

As Appellee noted, in determining whether there was prejudice, AFCCA needed to be assured that the sentence in Appellee's case was not "substantially swayed" by a failure to give the medical retirement instruction. (App. Br. at 25.) However, AFCCA did not ultimately make a finding that the members' failure to consider this information swayed the sentence. Instead, AFCCA found Appellee's substantial rights were affected when the members were not able to "consider all of

[5] *See* United States v. Gomez, 76 M.J. 76, 79 (C.A.A.F. 2017)

the information they were allowed to consider before they adjudged [Appellee's] sentence." (JA at 25-26.)

The United States disagrees with the AFCCA majority finding of prejudice in this case. The United States explained in its initial brief that contrary to AFCCA's finding of prejudice, Appellee was not limited in presenting his sentencing case to the members. (Govt. Br. at 47.) Appellee has not identified any evidence or arguments that he was not permitted to present to the members at trial, or how such evidence or arguments that were not made would have swayed the sentence. Not only was Appellee able to present his case to the members, the record does not support that the members were substantially swayed by the omission of a retirement instruction. Thus, Appellee has failed to establish prejudice to a substantial right. As discussed in the United States' initial brief, a punitive discharge for attempted murder was not a "close call."

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court reverse AFCCA's decision and find that omitting a sua sponte retirement instruction did not amount to plain and prejudicial error.

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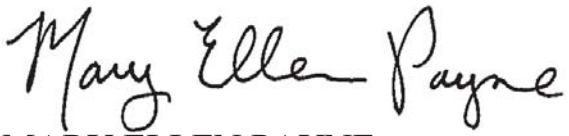

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was delivered to the Clerk of Court and the Air Force Appellate Defense Division on October 7, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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Date: 7 October 2019