IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 201900234
Chase T. MILLER, Yeoman Second Class (E-5) U.S. Navy Appellee	)	USCA Dkt. No. 21-0222/NA

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RULES FOR COURTS-MARTIAL

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016),

because Appellee's approved sentence included a bad-conduct discharge. This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2016).

Statement of the Case

A military judge sitting as a special court-martial convicted Appellee, pursuant to his pleas, of violation of a general order for possessing drug paraphernalia, false official statement, and wrongful use of a controlled substance, in violation of Articles 92, 107, and 112a, UCMJ, 10 U.S.C. §§ 892, 907, 912a (2012). The Military Judge sentenced Appellee to twelve months of confinement, reduction to pay grade E-1, and a bad-conduct discharge. The Pretrial Agreement had no effect on the sentence. The Convening Authority approved the sentence as adjudged.[1] The Military Judge entered the judgment into the Record, and the sentence, except for the punitive discharge, was executed.

The Record of Trial was docketed at the lower court. After briefing, the United States moved to attach an Addendum of post-trial documents. (J.A. 87.) The lower court attached the documents to the Record. (J.A. 129). The lower

[1] The Convening Authority purported to act on the sentence under Article 60, UCMJ, 10 U.S.C. § 860 (2012). But per this Court's recent holding in *United States v. Brubaker-Escobar*, because Appellee's charges were preferred after January 1, 2019, the Convening Authority's action was governed by the more recent Article 60a, UCMJ, 10 U.S.C. § 860a (2018). *See United States v. Brubaker-Escobar*, No. 20-0345, 2021 CAAF LEXIS 508, at *1–2 (June 4, 2021). The Convening Authority's ultra vires action to approve the sentence as adjudged was harmless, as his action was the functional equivalent of taking no action under Article 60a, UCMJ.

court specified two issues on completeness of the Record and prejudice. (J.A. 90.) The United States and Appellee submitted briefs on the specified issues. (J.A. 92, 112.) The lower court remanded the case for new post-trial processing. *United States v. Miller*, No. 20190234, 2020 CCA LEXIS 476, at *10 (N-M. Ct. Crim. App. Dec. 28, 2020). The United States filed a Motion for En Banc Consideration or Panel Reconsideration. (J.A. 133.) The panel reconsidered, withdrawing the order and issuing a new opinion, again ordering remand for new post-trial processing.[2] *United States v. Miller*, No. 201900234, 2021 CCA LEXIS 59, at *10 (N-M. Ct. Crim. App. Feb. 10, 2021).

On April 12, 2021, the Judge Advocate General filed a Certificate for Review, on behalf of the United States, at this Court.

[2] In the decretal paragraphs of both the withdrawn order and the reconsidered opinion, the lower court ordered new post-trial processing "in compliance with R.C.M. 1110." *Miller*, 2020 CCA LEXIS 476, at *10; *Miller*, 2021 CCA LEXIS 59, at *10. The United States presumes these were scrivener's errors, since Appellee was convicted of offenses "for which the maximum authorized sentence to confinement is more than two years," the post-trial action on which is governed by R.C.M. 1109. R.C.M. 1109(a)(1)(A); *see also* R.C.M. 1110(a) (noting rule applies to convening authority action in general or special court-martial not specified in R.C.M. 1109(a)); (J.A. 149–154).

Statement of Facts

A. The United States charged Appellee with fourteen violations of the Uniform Code of Military Justice.

The United States charged Appellee with, inter alia, wrongful drug use, violation of a general order, and false official statement. (J.A. 149–54.)

B. Appellee entered into a Pretrial Agreement and pled guilty to five specifications.

At trial, Appellee pled guilty to three specifications of false official statement and one specification each of wrongful drug use and violation of a general order. (J.A. 182.) The Military Judge found Appellee guilty in accordance with his pleas. (J.A. 155.)

C. The Military Judge sentenced Appellee to the maximum jurisdictional limit.

The Military Judge sentenced Appellee to twelve months of confinement, reduction to pay grade E-1, and a bad-conduct discharge. (J.A. 156.) The Military Judge awarded Appellee 201 days of pre-trial confinement credit and twenty-three days of non-judicial punishment credit, for a total of 224 days of confinement credit. (J.A. 157.)

D. The Military Judge issued the Statement of Trial Results.

On May 8, 2019, the same day the sentence was announced, the Military Judge issued the Statement of Trial Results. (*See* J.A. 180 (referencing Statement of Trial Results of 8 May 2019).)

E. After sentencing, Appellee began his post-trial confinement, first at a civilian facility and then at a military brig.

Appellee entered post-trial protective custody, separating him from all other inmates, at a civilian correctional facility for thirty-three days. (J.A. 186.) Appellee requested to be transferred to the general population. (J.A. 187.)

On June 10, 2019, Appellee transferred to a military brig, where he self-reported that he had an infectious disease. (J.A. 187.) Complying with Navy policy, brig personnel placed Appellee in medical segregation until he could be evaluated by medical staff for release into the general population. (J.A. 187.)

F. Appellee submitted clemency matters discussing financial hardships in affording housing at a sober living facility after confinement. His requests did not mention any issues with his confinement conditions.

On May 17, 2019, Appellee submitted two clemency requests to the Convening Authority. (J.A. 176–78.) The requests discussed Appellee's future financial hardships in affording housing at a "civilian sober living center" upon release from confinement. (J.A. 176–78.) Appellee's clemency requests did not allege illegal confinement conditions. (J.A. 176–78.)

G. Before the Convening Authority acted, Appellee filed an out-of-time post-trial 39(a) Motion requesting relief for alleged illegal confinement conditions. At the 39(a) hearing, the Military Judge promised a ruling in days, to be followed by a written ruling.

On June 28, 2019, Appellee submitted an out-of-time post-trial Motion, alleging illegal pre-trial and post-trial solitary confinement conditions and

requesting confinement credit and a sentence reduction. (J.A. 327–335); *see* R.C.M. 1104(b)(2)(A) (2019) ("post-trial motions shall be filed not later than [fourteen] days after defense counsel receives the Statement of Trial Results"; military judge may extend time thirty days "for good cause").

On Tuesday, July 9, 2019, the Military Judge heard arguments on the Motion in a post-trial 39(a) session. (J.A. 200.) Noting "the need for a quick ruling," the Military Judge said he would "do [his] best to get a ruling out to the parties hopefully Thursday, Friday at the latest" but that he might "just inform [the parties] of [his] ruling and then follow up with written findings of fact and conclusions of law" at another time. (J.A. 323–24.)

H. The Military Judge corrected the Statement of Trial Results to reflect additional pre-trial confinement credit.

Two days later, the Military Judge corrected the original Statement of Trial Results by adding an additional fifteen days of confinement credit, for a total of thirty-eight days of judicially-ordered credit. (J.A. 180.)

I. The Staff Judge Advocate completed her review, and the Convening Authority acted. The Convening Authority considered Appellee's clemency requests, but did not consider the Record of Trial.

On July 24, 2019, the Staff Judge Advocate completed her review, and the Convening Authority acted on the sentence. (J.A. 179–80.) The Convening Authority considered the Pretrial Agreement, both the original and corrected

Statements of Trial Results, and Appellee's two clemency requests. (J.A. 180.) The Convening Authority did not consider the Record of Trial. (*See* J.A. 180.)

The next day, Appellee received a copy of the Convening Authority's Action. (J.A. 185.)

J. The Military Judge issued his written Ruling in which he granted an additional fifteen days of judicially-ordered confinement credit.

On July 31, 2019, the Military Judge issued his written Ruling. (J.A. 192.) In the Ruling, the Military Judge denied Appellee's Motion, holding that trial courts do not have the "same ability as the [Courts of Criminal Appeal]" to "review conditions of post-trial punishment, [or] grant relief if the conditions are unduly rigorous." (J.A. 190–91.) Finding a violation of Article 13, UCMJ, the Military Judge awarded Appellant, sua sponte, fifteen days of additional credit for his pre-trial confinement conditions—201 days of pretrial confinement credit and 38 days of judicially ordered credit, or a total of 239 days of credit. (J.A. 172, 192.)

The original Record, as docketed at the lower court, included the Ruling but omitted the hearing transcript, Appellee's Motion, and the United States' Response. (J.A. 3, 87–88.)

K. On appeal, the lower court remanded the case for new post-trial processing.

1. The United States moved to attach the omitted post-trial 39(a) documents to the Record.

The United States moved to attach an Addendum containing Appellee's post-trial 39(a) Motion and corresponding documents to the Record. (J.A. 87.) The Addendum included the post-trial 39(a) Record of Proceedings, Appellee's post-trial Motion, the United States' Response, and the Military Judge's post-trial Ruling. (J.A. 87–88.)

The lower court granted the United States' Motion, attaching the Addendum to the Record. (J.A. 129.)

2. The lower court remanded the case for new post-trial processing, holding that the absence of the post-trial documents from the Record during the Convening Authority's review constituted a substantial omission.

In a remand order, the lower court held that the absence of the post-trial documents from the Record at the time of Convening Authority Action was a substantial omission, and that the "spirit and intent" of R.C.M. 1109 requires a complete record of trial before a convening authority determines what to consider when taking action. *Miller*, 2020 CCA LEXIS 476, at *6–9. The court held that the United States did not rebut the presumption of prejudice due to the substantial omission. *Miller*, 2020 CCA LEXIS 476, at *6.

The court also held that, because the Record was incomplete, the Staff Judge Advocate's Review was not "an informed recommendation," depriving Appellee "of a full opportunity for corrective action or clemency from the [C]onvening [A]uthority." *Miller*, 2020 CCA LEXIS 476, at *8.

3. The United States moved the court to reconsider its Order. The lower court reconsidered, but again remanded the case for new post-trial processing.

The United States moved for en banc consideration or panel reconsideration. (J.A. 133.) Upon panel reconsideration, the court held that the Ruling's omission at the time of the Convening Authority's Action was a substantial omission and thus prejudicial error because the Ruling "addressed a significant issue that was ultimately resolved in favor of Appell[ee]." *Miller*, 2021 CCA LEXIS 59, at *6. The Convening Authority therefore "was deprived of the ability to review material that was within his discretion to consider, and thus to meaningfully exercise his clemency authority." *Miller*, 2021 CCA LEXIS 59, at *8. Citing *United States v. Underhill*, No. 200700144, 2007 CCA LEXIS 306 (N-M. Ct. Crim. App. Aug. 9, 2007), the court applied the substantial omission test to determine whether the Record was complete at the time of the Convening Authority's Action. *Miller*, 2021 CCA LEXIS 59, at *5.

The court held that the Convening Authority "took action on the sentence prematurely" and "abused the discretion conferred upon him under R.C.M. 1109(d)(3)." *Miller*, 2021 CCA LEXIS 59, at *10.

The court noted that the Rules for Courts-Martial no longer require a verbatim transcript but still held that "the trial should be complete, and all substantive rulings of the military judge should exist, either in writing or placed orally on the record in open court, before a convening authority determines what to consider prior to taking action" and that "it is an abuse of discretion" for a convening authority to take action "prior to this point in the case." *Miller*, 2021 CCA LEXIS 59, at *9.

The court declined to "speculate whether the convening authority would have granted relief . . . had he been fully aware of the conditions of [Appellee's] pre and post-trial confinement" but emphasized that the Convening Authority acted before the Military Judge ruled on the Motion, which "was ultimately resolved in [Appellee's] favor." *Miller*, 2021 CCA LEXIS 59, at *9.

Although the court noted that the Convening Authority did consult with the Staff Judge Advocate before acting, the court nevertheless found that the Staff Judge Advocate was "unable to provide an informed recommendation, such that [Appellee] was deprived of a full opportunity for corrective action or clemency

from the [C]onvening [A]uthority" since the written Ruling "did not exist" at that time. *Miller*, 2021 CCA LEXIS 59, at *8.

Summary of Argument

Failing to account for changes in post-trial processing under the Military Justice Act of 2016, the lower court erred in three respects.

First, the court erroneously held that the Convening Authority's Action was premature and an abuse of discretion. Under R.C.M. 1109, the Convening Authority was not required to wait for the completion of post-trial motions before acting. Instead, R.C.M. 1109 only requires that the Convening Authority consult the Staff Judge Advocate and consider Appellee's R.C.M. 1106 clemency matters before deciding whether to act. By applying the substantial omission test of *United States v. Henry*, 53 M.J. 108 (C.A.A.F. 2000), instead of the plain error test for post-trial processing, the lower court improperly treated the potential error as a record completeness issue, rather than assessing for post-trial processing error. By requiring the Record be complete at the time of the Convening Authority's review, the court improperly heightened the standard for convening authority action.

Second, the lower court erred in holding the Staff Judge Advocate's recommendation was not informed because her review took place before the Military Judge issued his written Ruling. Under R.C.M. 1109, the Staff Judge Advocate was under no obligation to wait for the complete Record before making

her recommendation. The lower court improperly heightened the requirements for the Staff Judge Advocate's consultation with the Convening Authority.

Finally, the lower court erred in holding that the non-existence of the Military Judge's written post-Action Ruling during the Convening Authority's Action was a substantial omission. Under the correct standard—the plain error test—there was no error because R.C.M. 1109 did not require a complete Record at the time of the Convening Authority's Action. If error, any error was not plain or obvious. Even assuming plain error, Appellee cannot make a colorable showing of prejudice because he had multiple opportunities to raise allegations of convening authority error but elected not to do so. Because Appellee cannot make a colorable showing of prejudice, this Court should vacate the opinion below and affirm the findings and sentence.

Argument

I.

THE LOWER COURT ERRED FINDING THE CONVENING AUTHORITY'S ACTION WAS PREMATURE AND AN ABUSE OF DISCRETION. THE COURT ERRONEOUSLY HEIGHTENED THE STANDARD FOR CONVENING AUTHORITY ACTION UNDER R.C.M. 1109 BY REQUIRING THE CONVENING AUTHORITY TO WAIT FOR A POST-TRIAL RULING, DESPITE THAT NOTHING IN THE RULES REQUIRES THIS.

A. Standard of review.

Interpretation of a provision of the Rules for Courts-Martial is a question of law reviewed de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008).

B. The Military Justice Act of 2016 altered post-trial processes, including the timeline for clemency matters, convening authority action, and completion and certification of the record of trial.

1. Under R.C.M. 1106 and 1106A, the accused and crime victims now have ten days from announcement of the sentence to submit clemency matters.

Before the Military Justice Act of 2016, at special court-martial, the accused and any crime victims could submit matters "within the later of [ten] days" after receiving a copy of the authenticated record of trial or the staff judge advocate's recommendation. R.C.M. 1105(c) (2016); R.C.M. 1105A(d) (2016). For good cause, the convening authority may extend this period an additional twenty days. R.C.M. 1105(c) (2016); R.C.M. 1105A(d) (2016).

Now, under R.C.M. 1106 and 1106A, the accused and any crime victims have ten days from announcement of the sentence to submit matters for convening authority review. The convening authority may still extend this submission period up to twenty days for good cause. R.C.M. 1106(d)(4)(A) (2019); R.C.M. 1106A(e)(3)(A) (2019). Failure to timely submit R.C.M. 1106 or 1106A matters "waives the right to submit such matters." R.C.M. 1106(e)(1) (2019); R.C.M. 1106(f)(1) (2019).

2. Under R.C.M. 1109, the convening authority first consults with the staff judge advocate and considers timely R.C.M. 1106 and 1106A clemency matters, then acts before entry of judgment.

As with clemency matters, the Military Justice Act of 2016 expedited the timeline for convening authority action.

Previously, multiple steps took place before the convening authority could act: the record of trial was authenticated and served on the accused and any sexual assault victims, *see* R.C.M. 1104 (2016); the accused and crime victims submitted clemency matters, *see* R.C.M. 1105 and 1105A (2016); the staff judge advocate prepared a written recommendation, using the record to prepare the recommendation, *see* R.C.M. 1106 (2016); the recommendation was served on defense counsel, the accused, and any victims, *see* R.C.M. 1106(f)(1) (2016); the defense counsel had the opportunity to submit a written response to the staff judge advocate's recommendation, *see* R.C.M. 1106(f)(4) (2016); the staff judge

advocate could supplement their recommendation with an addendum, *see* R.C.M. 1106(f)(7) (2016); and, if new matter was introduced in the addendum, the accused was served with the new matter and received time to submit additional comments, *see* R.C.M. 1106(f)(7) (2016).

The current Rules for Court-Martial no longer require these steps before convening authority action. Instead, the only restrictions to the timing of convening authority action now are that the convening authority must consult with the staff judge advocate and consider any timely R.C.M. 1106 and 1106A clemency matters before taking action or declining to take action. R.C.M. 1109(d)(2)–(3) (2019). "[A]ny action taken by the convening authority shall be taken *prior to entry of judgment*." R.C.M. 1109(d)(3) (2019) (emphasis added). Only a general court-martial convening authority—based on a trial counsel's substantial assistance recommendation—may act after entry of judgment. R.C.M. 1109(e)(3)(B) (2019).

3. Under R.C.M. 1112(c), the court reporter or military judge now certifies the record of trial after entry of judgment.

As with clemency matters and convening authority action, the Military Justice Act of 2016 changed the timeline for certification of the record of trial.

Previously, a military judge authenticated the complete record of trial before forwarding it to the convening authority for review and action. R.C.M. 1104(e)

(2016); *see also supra* Section I.B.2 (listing steps between authentication of record and convening authority action before Military Justice Act of 2016).

Now, "the record of trial shall be certified as soon as practicable after the judgment has been entered into the record." R.C.M. 1112(c)(1) (2019). Thus, under the new Rules, "the convening authority's decision on action occurs before the [record of trial] is complete, and preparation of the record necessarily continues after that decision occurs." *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020); *see supra* Section I.B.2.

C. The Military Justice Act of 2016 expedited post-trial processing. But the lower court erroneously applied the "substantial omission" test. This failed to account for changes under the new Rules and improperly heightened the standard for convening authority action.

Despite the new Rules, the lower court crafted its own judicial rule requiring a convening authority to possess the completed record of trial before deciding whether to take action. *Miller*, 2021 CCA LEXIS 59, at *9. Following its unpublished *Underhill* opinion, the lower court incorrectly applied the substantial omission framework under *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000), to its analysis of the completeness of the Record during the Convening Authority's review. *Miller*, 2021 CCA LEXIS 59, at *9; *see also infra* Section III.C (discussing lower court's erroneous application of *Henry* at time of convening authority review).

The lower court held that "all substantive rulings of the military judge should exist . . . before a convening authority determines what to consider before taking action." *Miller*, 2021 CCA LEXIS 59, at *9. Thus, the court held a convening authority abuses his discretion when acting on the sentence "prior to this point in a case." *Id*.

But nothing in the Rules supports this. *See generally* R.C.M. 1109 (convening authority must consult with staff judge advocate and consider R.C.M. 1106 and 1106A matters timely submitted by accused and crime victims before acting, and must take action before entry of judgment; but no further limitations exist on timing of action).

Further, nothing in the Rules supports the court's reasoning that a convening authority taking action "prior to this point" acts to "deprive[] the accused and crime victim from being able to submit matters under R.C.M. 1106 and 1106A." *Compare Miller*, 2021 CCA LEXIS 59, at *9 n.4, *with supra* Section I.B.1 (clemency matters submitted within ten days of sentence announcement).

Here, the Military Judge announced the sentence on May 8, 2019. Appellee had until May 18, 2019, to submit timely clemency matters under R.C.M. 1106. Even assuming good cause, Appellee would only have until June 7, 2019, to submit timely matters. The Military Judge issued his written Ruling on July 9, 2019, more than two months after any clemency deadline extension could be

authorized under the Rules. *Compare* R.C.M. 1106 (2019) (ten days to submit clemency, with maximum twenty day extension for good cause), *and* R.C.M. 1106A (2019) (same for victim), *with* R.C.M. 1109(d)(3) (2019) (convening authority "shall consider matters timely submitted under R.C.M. 1106 and 1106A"; no requirement to consider post-trial matters or untimely R.C.M. 1106 and 1106A submissions).

Ultimately, Appellee timely submitted his clemency matters, (*see* J.A. 176–78), and the Convening Authority considered Appellee's requests during his review, (J.A. 180).

Nothing supports the lower court's holding that a convening authority must wait for post-trial motions to be resolved in order to provide an accused with additional time to submit clemency matters. *See generally* R.C.M. 1106 (2019) (no exception tolling period for accused's clemency submission when filing post-trial motions); *see also* R.C.M. 1106A (2019) (same for crime victim). Nor do the seriousness of the allegations in Appellee's post-trial Motion support judicially creating an equitable exception to the current Rules.

If Appellee wanted the Convening Authority to consider his post-trial confinement conditions, he could have timely filed a post-trial motion alleging convening authority action error. But Appellee elected not to do so. *Cf. United States v. Way*, No. ACM 39723, 2020 CCA LEXIS 473, at *12–13 (A.F. Ct. Crim.

App. Dec. 23, 2020) (under new Rules, "most appropriate time" to raise concern about convening authority action within five days of receipt under R.C.M. 1104, "not months later on direct appeal").

The lower court judicially revived the old Rule that records of trial be complete before the convening authority's action. This erroneously raised the standard prescribed by the President's current Rules for Courts-Martial.

Because post-trial processing in Appellee's case complied with the new Rules, this Court should vacate the lower court's opinion.

II.

THE LOWER COURT ERRED IN FINDING THE STAFF JUDGE ADVOCATE'S REVIEW WAS UNINFORMED. THE RULES NO LONGER REQUIRE THE STAFF JUDGE ADVOCATE TO REVIEW THE RECORD BEFORE CONSULTING WITH THE CONVENING AUTHORITY UNDER R.C.M. 1109. THE STAFF JUDGE ADVOCATE PROPERLY REFERENCED APPELLANT'S R.C.M. 1106 MATTERS—THE ONLY PART OF THE RECORD THE CONVENING AUTHORITY MUST CONSIDER.

A. Standard of review.

Interpretation of a provision of the Rules for Courts-Martial is a question of law reviewed de novo. *Hunter*, 65 M.J. at 401.

B. The Military Justice Act of 2016 significantly altered requirements for staff judge advocate review. The staff judge advocate need not review the record of trial before consulting with the convening authority.

Before the Military Justice Act of 2016, the staff judge advocate was required to "forward the convening authority a recommendation" in the form of a "concise written communication." *See* R.C.M. 1106(d)(1) (2016). The staff judge advocate was required to "use the record of trial in the preparation of the recommendation" and could "use the personnel records of the accused or other matters in advising the convening authority whether clemency is warranted." R.C.M. 1106(d)(1) (2016). The staff judge advocate was also required to provide the convening authority with the report of results of the trial; the pretrial agreement, if any; any crime victim's statement under R.C.M. 1105A (2016); any clemency recommendations by the sentencing authority; and the staff judge advocate's written recommendation. R.C.M. 1106(d)(3) (2016). Before acting, the convening authority was required to consider the staff judge advocate's recommendation. R.C.M. 1107(b)(3)(A) (2016).

Today, the Rules require only that "[i]n determining whether to take action . . . the convening authority shall consult with the staff judge advocate or legal advisor" and that the convening authority "shall consider matters timely submitted under R.C.M. 1106 and 1106A . . . ." R.C.M. 1109(d)(2)–(3) (2019).

C. The lower court erred in holding that the Staff Judge Advocate's review was not "an informed recommendation." R.C.M. 1109 no longer requires the staff judge advocate to use the record in preparing their review.

In an unpublished opinion by the Air Force Court of Criminal Appeals, the appellant argued that although the staff judge advocate's consultation took place, the review was not in written form, and thus the convening authority erred by not stating whether he considered the clemency matters. *Way*, 2020 CCA LEXIS 473, at *13–15. Finding no error or colorable showing of prejudice, the court explained that "the convening authority only needed to 'consult' with the staff judge advocate to comply with R.C.M. 1109(d)(2)." *Id.*, at *11 (no further requirements on staff judge advocate consultation under new Rules).

Here, as in *Way*, the Rules placed no requirements on the Staff Judge Advocate's Recommendation, except that the Convening Authority must consult before acting. *See* R.C.M. 1109(d)(2) (2019). As the Staff Judge Advocate need not review the Record, or wait for a completed Record, the lower court erred in holding that the omission of the Military Judge's Ruling rendered the Staff Judge Advocate's Recommendation uninformed. *Miller*, 2021 CCA LEXIS 59, at *8 (Staff Judge Advocate "unable to provide an informed recommendation").

As with the Convening Authority's review, if Appellee wanted the Staff Judge Advocate to consider his post-trial Motions, Appellee could have raised allegations of illegal confinement conditions in R.C.M. 1106 clemency matters.

But he chose not to do so. (*See* J.A. 176–78.)

Thus, the Staff Judge Advocate had no obligation under R.C.M. 1109 to seek out additional information from the Record—or wait for post-trial allegations to be made and resolved for or against Appellee. Instead, Appellee had the burden to submit clemency matters for any issues he wanted considered by the Staff Judge Advocate in consultation with the Convening Authority. *See* R.C.M. 1109 (2019) (convening authority required to consult with staff judge advocate and consider clemency matters; no further limitations on staff judge advocate review).

The lower court's holding erroneously heightened the standard for the staff judge advocate's review and directly contradicts the Rules prescribed by the President. *See id.*; *see also United States v. Davis*, No. ACM S32602, 2020 CCA LEXIS 434, at *13 n.12 (A.F. Ct. Crim. App. Dec. 1, 2020) ("R.C.M. 1109(d)(2) only requires the convening authority to 'consult' with the [staff judge advocate]. This rule does not explicitly require the [staff judge advocate] to give any particular advice during this consultation . . . .").

Nothing supports a finding of error in the Staff Judge Advocate's Recommendation: the Staff Judge Advocate was aware of Appellee's timely R.C.M. 1106 clemency matters, and nothing deprived Appellee of the "full opportunity for corrective action or clemency from the convening authority." *Contra Miller*, 2021 CCA LEXIS 59, at *8; *cf. Way*, 2020 CCA LEXIS 473, at *11

(staff judge advocate only required to consult with convening authority before action).

Because the post-trial processing in Appellee's case complied with the new Rules, this Court should vacate the lower court's opinion.

III.

THE LOWER COURT ERRED FINDING THE POST-ACTION RULING WAS A SUBSTANTIAL OMISSION. PLAIN ERROR, NOT THE SUBSTANTIAL OMISSION TEST, APPLIES TO A CONVENING AUTHORITY'S R.C.M. 1109 REVIEW. EVEN ASSUMING PLAIN ERROR, APPELLEE CANNOT MAKE A COLORABLE SHOWING OF PREJUDICE. REMAND IS INAPPROPRIATE.

A. Standard of review.

Allegations of post-trial processing errors are reviewed de novo for plain error. *See United States v. Kho,* 54 M.J. 63, 65 (C.A.A.F. 2000). To prove plain error, an appellant must show: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.*

"Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323–34 (C.A.A.F. 1997)).

B. On appeal, an appellant is entitled to a complete record. This includes a verbatim transcript of post-trial Article 39(a) hearings and exhibits accepted into evidence. But the Rules no longer require a completed record of trial before the convening authority acts.

"A complete record of the proceedings and testimony must be prepared . . . in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months." Art. 54, UCMJ, 10 U.S.C. § 854 (2018). A "substantial omission" of a record's contents renders it "incomplete and raises a presumption of prejudice that the Government must rebut," but mere "[i]nsubstantial omissions . . . do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Henry*, 53 M.J. at 111.

Under the Military Justice Act of 2016, "the record of trial shall be certified as soon as practicable after the judgment has been entered into the record." R.C.M. 1112(c) (2019). But neither R.C.M. 1112, nor anything else in the Rules, still requires a complete record of trial before the convening authority acts. *See supra* Section I.B; *see also* R.C.M. 1109.

C. The lower court erred by failing to apply the *Kho* plain error test for post-trial processing error. Here, *Henry*'s substantial omission standard is inappropriate for three reasons.

In *Henry*, this Court reviewed a record of trial for completeness to "uphold the validity of a verbatim record sentence" where multiple prosecution exhibits were missing from the record. *Henry*, 53 M.J. at 110–11. In reviewing for a

substantial omission, the *Henry* court was concerned with whether the record could support a sentence with a punitive discharge or confinement in excess of six months, given the omission. *Id.* at 111. Making no distinction between the completeness of the record during the convening authority's review and during appellate review, this Court found no substantial omission. *Id.* at 111.

Unlike *Henry*, here, the lower court's application of the substantial omission standard fails for three reasons.

1. First, the *Henry* error—completeness of the record to uphold the validity of the verbatim record sentence—is neither relevant nor ripe for identification during convening authority review.

First, the lower court's application of *Henry* is inappropriate because R.C.M. 1109 no longer requires a complete record of trial before the convening authority acts. In a footnote, the court acknowledged that *Henry* was based on the pre-Military Justice Act of 2016 Rules for Courts-Martial. *Miller*, 2021 CCA LEXIS 59, at *4. However, it failed to consider significant post-trial changes to convening authority action, staff judge advocate review, entry of judgment, and certification of the record of trial under the new Rules. *See supra* Section I.B–C (discussing lower court's failure to consider changes under Military Justice Act of 2016 to timing of clemency matters, convening authority action, entry of judgment, and certification of record) and II.B–C (same for staff judge advocate review).

Additionally, unlike the post-trial processing rules in effect in *Underhill*, nothing required the Convening Authority to consider the Record, or wait for the Record's authentication, before acting. *Compare Underhill*, 2007 CCA LEXIS 306, at *9, *with* R.C.M. 1109(d)(2) (2019); *see also supra* Section I.B (discussing timing of convening authority review). Thus, the *Henry* substantial omission test, and final certification of the Record, is irrelevant: the Convening Authority need not consider the Record before acting. *See* R.C.M. 1109(b)(3)(B).

The lower court misapplied *Henry*, erroneously viewing the Convening Authority's Action in light of requirements in the old Rules and imposing an incorrect framework for evaluating allegations of post-trial processing error.

2. Second, Appellee failed to file a motion to correct alleged error in the Convening Authority's Action under R.C.M. 1104, forfeiting any claims of convening authority error. As in *Kho*, this claim should be reviewed for plain error, not for a substantial omission under *Henry*.

In *Kho*, this Court tested a forfeited claim of error in a staff judge advocate's recommendation for plain error and material prejudice. *Kho*, 54 M.J. at 65. The *Kho* court rejected a claim that the Government must disprove prejudice, and held that appellants bear the burden to show plain error and a colorable showing of possible prejudice. *Id.*

However, in its reconsidered opinion, citing its unpublished opinion in *United States v. Underhill*, a pre-Military Justice Act of 2016 case, the lower court

erroneously applied the *Henry* substantial omission test to the Convening Authority's Action, as a "primary point[] in the post-trial process during which prejudice could result" from a substantial omission in the record. *See Miller*, 2021 CCA LEXIS 59, at *5.

Unlike *Henry*, the lower court's concern was not whether the non-existence of the written Ruling during the Convening Authority's review would affect the validity of the sentence, but whether Appellee "was deprived of a full opportunity for corrective action or clemency from the [C]onvening [A]uthority." *Compare Henry*, 53 M.J. at 110–11, *with Miller*, 2021 CCA LEXIS 59, at *8.

Here, upon receiving the Convening Authority's Action, Appellee had five days to file a motion alleging the Convening Authority erred by acting before the Military Judge issued the written Ruling. *See* R.C.M. 1104(b)(2)(B) (2019). But he did not do so. Thus, like *Kho*, the issue is not completeness of the Record, but instead forfeited post-trial processing error tested for plain error. *See* R.C.M. 1104 (2019).

3. Third, *Kho* established that an appellant bears the burden to show plain error and prejudice from alleged post-trial processing errors. However, *Henry* places the burden on the United States to rebut a presumption of prejudice raised by a substantial omission. This burden conflicts with *Kho* and is inapplicable to forfeited claims of post-trial processing error.

Finally, this Court's precedent in *Kho* rejected that the Government bears the burden to show an appellant was not prejudiced from a forfeited post-trial

processing error. *See Kho*, 54 M.J. at 64–65; *see also Brubaker-Escobar*, 2021 CAAF LEXIS 508, at *13–14, (Ohlson, J., concurring) (convening authority procedural error should be tested for material prejudice as appellant forfeited right to object to convening authority action by failing to file timely post-trial motion).

Under *Henry*, substantial omissions create a presumption of prejudice, rebuttable by the Government, and not subject to waiver or forfeiture. *See Henry*, 53 M.J. at 111; *see also id.* at 110 (noting requirement that completeness of record of trial is matter of jurisdictional proportion that cannot be waived). But this contravenes *Kho*.

By applying the substantial omission framework, the lower court improperly elevated this alleged post-trial processing error to one of jurisdictional import. *Compare Miller*, 2021 CCA LEXIS 59, at *6 (finding substantial omission and applying rebuttable presumption of prejudice); *with Kho*, 54 M.J. at 64–65 (forfeited claim of staff judge advocate recommendation error tested for plain error).

The *Henry* substantial omission test is inapplicable to claims of post-trial processing error. The lower court erred in failing to apply the *Kho* plain error standard for post-trial processing.

D. Under the plain error test, the Convening Authority committed no error. Even assuming plain error, Appellee cannot make a colorable showing of prejudice.

1. The Convening Authority properly acted before the Military Judge issued his written Ruling. No error occurred.

Under R.C.M. 1109, nothing required the Convening Authority to wait for the Military Judge's written Ruling before acting; acting before the Record was complete created no error under the Rules. *See infra* Section I.B.2 (convening authority action before entry of judgment but after consultation with staff judge advocate and consideration of timely R.C.M. 1106 and 1106A matters; no other restrictions on timing of action).

2. Even assuming the Convening Authority erred in acting prematurely, the error is not plain or obvious.

The plain error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Fisher*, 21 M.J. 327, 328–29 (C.M.A. 1986). Accordingly, "a court of appeals cannot correct an error [under the plain error doctrine] unless the error is clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). "While the terms clear or obvious do not have any special definition, the Supreme Court has distinguished clear and obvious errors from errors that are "subject to reasonable dispute." *United State v. Gonzales*, 78 M.J. 480, 486 (C.A.A.F. 2019) (citing *United States v. Marcus*, 560 U.S. 258, 262 (2010)). "[N]o plain error

occurs when the state of the law is murky." *United States v. Sweeney*, 226 F.3d 43, 46 (1st Cir. 2000).

The post-trial processing issue here is one of first impression for this Court; the state of the law regarding the impact of the Military Justice Act of 2016's changes to post-trial processing is not settled. *See United States v. Knapp*, 73 M.J. 33, 37 (C.A.A.F. 2014) ("In determining whether the error was clear or obvious, we look to law at the time of the appeal."). If the Convening Authority, despite having complied with R.C.M. 1109, nonetheless erred by acting before the Military Judge issued his written Ruling, such error cannot be plain or obvious. *Cf. Gonzales*, 78 M.J. at 486–87 (finding error in convicting on lesser included offense not clear or obvious where, inter alia, edition of Manual for Courts-Martial applicable at trial incorrectly listed offense as a lesser included offense of that charged); *cf. also Brubaker-Escobar*, 2021 CAAF LEXIS 508, at *15 (Ohlson, J., concurring) (finding appellant cannot meet burden to show convening authority's procedural error was clear or obvious because "this whole area of the law is a quagmire of confusion").

3. Even assuming plain error, Appellee cannot make a colorable showing of prejudice.

In *United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005), the appellant claimed that the staff judge advocate prejudicially erred by incorrectly advising the convening authority that the appellant had not been subject to pretrial restraint. *Id.*

at 436. The appellant argued there was a colorable showing of prejudice because he was a strong candidate for clemency, and that knowledge of his pretrial restraint may have led the convening authority to grant clemency. *Id*. at 437.

Finding no colorable showing of prejudice, this Court noted that the appellant's clemency request neither discussed his pretrial restraint nor suggested that the convening authority should consider the restraint in considering clemency. *Id.* The Court opined that there was no reasonable likelihood that the length of restraint alone "without any mention by [the appellant]—would have attracted the convening authority's attention for purposes of clemency."

Here, as in *Scalo*, even assuming plain error, Appellee cannot make a colorable showing of prejudice for two reasons.

First, like *Scalo,* Appellee never discussed the allegations of illegal post-trial confinement in his R.C.M. 1106 clemency requests. And under R.C.M. 1104, after receiving the Convening Authority's Action, Appellee had five days to file a post-trial motion to correct an error in the Action but chose not to do so.

That Appellee neither mentioned post-trial confinement conditions in his clemency matters nor asserted error in the Convening Authority's Action for premature action supports a finding that, like in *Scalo,* even had the Convening Authority waited to act—nothing in the Ruling would have attracted the

Convening Authority's attention for clemency purposes. Appellee cannot make a colorable showing of prejudice. *Cf. Scalo*, 60 M.J. at 437.

Second, the Convening Authority was not required under the new Rules to review the Military Judge's Ruling. *See* R.C.M. 1109(d)(3) (2019) (requiring convening authority to consider timely R.C.M. 1106 and 1106A matters, but no other portions of record). Even had the written Ruling existed at the time of the Convening Authority's review, the Record does not support a speculative claim that the Convening Authority would have considered the Ruling, absent Appellee requesting he do so in clemency matters. (*See* J.A. 180 (considering R.C.M. 1106 matters, both Statements of Trial Results, and Pretrial Agreement, but no other portions of Record).)

Even assuming the Convening Authority erred by acting prematurely, Appellee still cannot make a "colorable showing of prejudice." Nothing in the Record supports that the Convening Authority would have considered and acted favorably on matters Appellee never raised in clemency matters. (*See* J.A. 180.)

Because the lower court erred applying the *Henry* substantial omission test instead of requiring Appellee to show plain error under *Kho*, this Court should vacate the lower court's opinion and affirm the findings and sentence as adjudged.

Conclusion

The United States respectfully requests that this Court vacate the lower court's decision and affirm the findings and sentence as adjudged.

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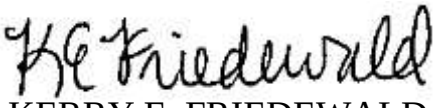

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on June 21, 2021.

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