IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	))	REPLY 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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Pursuant to Rule 19(b)(3) of this Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer. (Appellee's Answer, Sept. 7, 2021.)

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. Appellee misstates the Record: (1) the Convening Authority did not elect to consider the entire Record before taking action; and (2) the Military Judge did not make a clemency recommendation in the post-trial Ruling.

The Convening Authority specified the matters in the Record he considered when acting:

> Matters Considered: In taking this action, I have considered the pretrial agreement of 3 April 2019, Statement of Trial Results of 8 May 2019 and correction thereto of 11 July 2019, and the two defense counsel letters of 17 May 2019.

(J.A. 180.) The Convening Authority also noted that, "upon review of the record" and "[a]fter carefully considering the record," he denied Appellee's requests for deferment and clemency. (J.A. 180.)

Appellee takes these latter statements out of context, incorrectly asserting that the Convening Authority elected to consider the entire Record. (Appellee's Ans. at 14–16.) Appellee fails to acknowledge the portions of the Record the Convening Authority specifically noted that he considered "[i]n taking this action." (J.A. 180.) The Convening Authority's statements about reviewing "the record" refer to the portions of the Record listed as "Matters Considered" and no more. This Court should reject Appellee's broad interpretation of the Convening Authority's Action. (Appellee's Ans. at 14–16.)

Appellee similarly misconstrues the Military Judge's Ruling as a "clemency recommendation." (Appellee's Ans. at 26.) Not so. The Military Judge noted in his Ruling that the correctional facility was incorrectly interpreting its inmate housing contract with the Navy, such misinterpretation explaining Appellee's conditions of confinement. (J.A. 191.) The Military Judge "strongly encourage[d] the Navy and the Lake County Correctional Facility to correct this issue." (J.A. 191.) In other words, the "corrective action," (Appellee's Ans. at 26), the Military Judge called for was that the Navy engage with the correctional facility to ensure compliance with the inmate housing contract—not that the Convening Authority grant Appellee clemency because of the conditions of his post-trial confinement.

B. While the Rules for Courts-Martial do not require a convening authority to have access to a full record before acting, the Rules provide an accused ample opportunity to draw the convening authority's attention to portions of the record. Appellee had meaningful opportunity at trial to raise the error he alleges on appeal.

Under R.C.M. 1109, the only restrictions to the timing of convening authority action are that the convening authority must consult with the staff judge advocate, consider any timely R.C.M. 1106 and 1106A clemency matters, and take action prior to entry of judgment. R.C.M. 1109(d)(2)–(4) (2019). The convening authority may consider matters in the record, including appellate exhibits and transcriptions of the proceedings, or other matters the convening authority deems appropriate. R.C.M. 1109(d)(3)(B) (2019).

Submitting clemency matters is an accused's first opportunity to "inform the convening authority's exercise of discretion under R.C.M. 1109"—including advocating that the convening authority deem it appropriate to consider certain portions of the record before acting on the sentence. R.C.M. 1106(a)–(b)(1) (2019). An accused has up to thirty days from announcement of the sentence to submit R.C.M. 1106 clemency matters. R.C.M. 1106(d) (2019). Submission of clemency matters waives the right to submit additional matters unless expressly reserved in writing. R.C.M. 1106(e) (2019).

Even where, as here, submission of post-trial motions falls outside the time allotted for submission of R.C.M. 1106 matters such that an accused could not

have included those matters in his clemency request, R.C.M. 1104(b)(1)(F) permits an accused to file a motion alleging error in the convening authority's action. Such a motion may be filed within five days of the accused's receipt of the action. R.C.M. 1104(b)(2)(B) (2019).

Appellee incorrectly argues that he had no "meaningful opportunity" to allege error in the Convening Authority's Action because the Military Judge issued the post-trial Ruling the same day he entered judgment, "thereby initiating the appellate process." (Appellee's Ans. at 17.) But Appellee did not need to wait for the Ruling to file an R.C.M. 1104 motion. Notwithstanding that the Ruling was still forthcoming, Appellee could have filed a motion under R.C.M. 1104(b)(1)(F) that the Convening Authority erred by acting without considering at least his post-trial Motion and the circumstances of his post-trial confinement, if not that the Convening Authority should wait to act until receiving the Ruling. The Convening Authority acted on July 24, 2019, (J.A. 181), after the Parties litigated the post-trial Motion, (*see* J.A. 200 (post-trial Art. 39(a) session held July 9, 2019)), and before the Entry of Judgment on July 31, 2019, (J.A. 184). Regardless of whether the Military Judge would ultimately afford relief on his Motion, Appellee had the facts at hand to allege error in the Convening Authority's Action based on his failure to consider the conditions of Appellee's post-trial confinement as detailed in his post-trial Motion.

Additionally, even though entry of judgment "initiates the appellate process," R.C.M. 1111(a)(2) (2019), R.C.M. 1104 still contemplates that the parties can file post-trial motions at the trial level after entry of judgment. *See* R.C.M. 1104(b)(2)(C) (2019) (allowing five days from receipt of entry of judgment to file motion to correct clerical or computational error in a judgment). Thus the Entry of Judgment was no barrier to Appellee's opportunity at the trial level to move to correct the alleged error he now asserts on appeal. (*Contra* Appellee's Ans. at 17.)

C. R.C.M. 1106(c)'s guarantee of an accused's right to access the record in preparing his clemency submission does not support the lower court's holding that a convening authority cannot take action before all substantive rulings exist.

R.C.M. 1106(c) permits an accused, upon request, to access "a copy of the recording of all open sessions of the court-martial, and copies of, or access to, the evidence admitted at the court-martial, and the appellate exhibits." R.C.M. 1106(c) (2019).

The United States acknowledges that the conditions of Appellee's post-trial confinement were perhaps not fully apparent at the point at which he could timely submit clemency matters under R.C.M. 1106. (Appellee's Ans. at 21.) But Appellee incorrectly points to R.C.M. 1106(c) as support for the lower court's holding that a convening authority deprives an accused from the ability to submit clemency matters when he takes action before all substantive rulings exist. (*Id.* at

22.) There is no requirement under R.C.M. 1109 that the convening authority review the entire record before acting, let alone that he must review non-existent potential future post-trial motions and their accompanying rulings. *See* R.C.M. 1109(d)(3)(B) (2019).

Appellee seems to argue that R.C.M. 1106(c)'s guarantee of an accused's access to the record could extend his ability to submit clemency matters such that he could "collect relevant matters presented post-trial" where those matters do not arise until after R.C.M. 1106(d)'s submission periods. (Appellee's Ans. at 19–20); R.C.M. 1106(d)(4)(B) (2019). Even if that were so, Appellee made no such request for additional time to resubmit clemency matters when the objectionable conditions of his post-trial confinement became apparent, waiving his right to submit additional matters. *See* R.C.M. 1106(e)(2) (2019).

D. The Convening Authority properly acted in accordance with R.C.M. 1109. Remand is unwarranted.

Nothing in the Record or the Rules supports Appellee's argument that the Convening Authority's Action was erroneous or ambiguous; *Lee*, *Craig*, and *Politte* are inapposite. (Appellee's Ans. at 23–27.)

In *United States v. Lee*, 50 M.J. 296 (C.A.A.F. 1999), the court remanded for new post-trial processing where the staff judge advocate failed to advise the convening authority of the military judge's clemency recommendation, as required by the Rules for Courts-Martial. *Id.* at 297–98. Similarly, in *United States v.*

Craig, 28 M.J. 321 (C.M.A. 1989), the court remanded for new post-trial processing where the record—which was missing attachments containing the appellant's clemency matters—demonstrated the convening authority failed to consider the appellant's clemency matters, as required by the Rules for Courts-Martial. *Id.* at 324–25.

Unlike *Lee* and *Craig*, Appellee's post-trial processing complied with the Rules for Courts-Martial. The Convening Authority considered Appellee's timely clemency matters and portions of the Record he deemed appropriate for review before taking action. *See* (J.A. 180–81); R.C.M. 1109 (2019). Nor did the Military Judge make a clemency recommendation in the Ruling, unlike *Lee*. *See supra* Section I.A. And unlike the missing clemency matters in *Craig*, that the Record here lacks the original Statement of Trial Results is immaterial to the Convening Authority's Action where (1) R.C.M. 1109 does not require consideration of the Statement of Trial Results, R.C.M. 1109(d)(3)(B)(i) (2019), and (2) the modified Statement of Trial Results is controlling.

Finally, in *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006), the court held the convening authority's action was ambiguous because it was unclear whether he approved or disapproved the bad conduct discharge and remanded for clarification. *Id.* at 25–26. No such ambiguity exists here. The Convening Authority precisely identified the portions of the Record he considered before

acting, properly considered all required matters under the Rules, and clearly stated the approved sentence. (J.A. 180.) Additionally, that the Statement of Trial Results accounts for the fifteen days of pretrial confinement credit the Military Judge only awarded in writing a week later is a red herring; the Record shows the Military Judge ruled on the matter but only later put it in writing. (J.A. 323–24 (noting need for a quick ruling and informing Parties he would make a ruling and follow it up with written findings of fact and conclusions of law); J.A. 180 (two days later Military Judge corrected Statement of Trial Results to reflect additional credit).) There is no error or ambiguity in the Convening Authority's Action.

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. The Staff Judge Advocate complied with the new post-trial processing rules. She had no duty to advise the Convening Authority of the post-trial litigation or provide him the Military Judge's post-trial Ruling.

The Military Justice Act of 2016 streamlined the staff judge advocate's post-trial processing role, requiring 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). Nothing requires a staff judge advocate to delay advisement until completion of post-trial litigation.

Nor do post-trial confinement conditions impact the adjudged sentence such that it might be plain error for a staff judge advocate not to advise the convening authority of the litigation or pending ruling; Appellee' reliance on *Clear* is misplaced. (Appellee's Ans. at 28–31.) In *United States v. Clear*, 34 M.J. 129 (C.M.A. 1992), the court held it was plain error for the staff judge advocate to fail to include in his recommendation that the military judge recommended clemency. *Id.* at 132–33. Although the Rules did not require staff judge advocates to include clemency recommendations by the military judge in their recommendation, the Court found it would be "almost misleading" not to advise the convening authority about the sentence adjudged without also noting that the military judge—and sentencing authority—made a concomitant clemency recommendation. *Id.* at 133.

Even assuming *Clear*'s holding applies to the current post-trial processing rules, which also do not require the staff judge advocate to provide any specific advice, the Military Judge made no clemency recommendation in his post-trial Ruling, let alone a concomitant clemency recommendation at the time of sentencing like in *Clear*. *See supra* Section I.A.

Moreover, the Military Judge found he had no authority to reduce the adjudged sentence based on the conditions of Appellee's post-trial confinement, since R.C.M. 1104(b)(1)(C) only authorizes post-trial action "to correct a computational, technical, or clear error in the sentence." (J.A. 189–90.) The Staff Judge Advocate had no "independent duty," (Appellee's Ans. at 33), under R.C.M. 1109, Article 6, UCMJ, or otherwise, to advise the Convening Authority that Appellee filed a post-trial Motion for relief that he could not be afforded. Additionally, the Staff Judge Advocate properly advised the Convening Authority about the additional pretrial confinement credit reflected in the modified Statement of Trial Results, the credit that actually impacted the sentence. (J.A. 180.)

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. *King* does not support application of the substantial omission test to the state of the record at the time of convening authority action.

In an unpublished decision, the Air Force Court of Criminal Appeals in *United States v. King*, No. ACM 39583, 2021 CCA LEXIS 415 (A.F. Ct. Crim. App. Aug. 16, 2021), applied the substantial omission test to evaluate error and

prejudice from the record's omission of several pretrial rulings. *Id.* at *20–21. Like the lower court did here, the *King* court relied on *Underhill* for support that it could evaluate error at the time of convening authority action under the substantial omission framework. *Id.* at *24 (citing *United States v. Underhill*, No. 200700144, 2007 CCA LEXIS 306, at *8–9 (N-M. Ct. Crim. App. Aug. 9, 2007)). Notably, *King* involved the pre-Military Justice Act of 2016 rules. *Id.* at *2 n.1 (noting all R.C.M. references to 2016 edition of Manual). Applying unpublished precedent from its own court, the *King* court looked to whether the missing rulings "affected an appellant's rights at trial." *Id.* at *22 (citation omitted).

But courts apply the *Henry* substantial omission test to review a record of trial for completeness to "uphold the validity of a verbatim record sentence." *See United States v. Henry*, 53 M.J. 108, 110–11 (C.A.A.F. 2000). That another service court misapplied the substantial omission test where it should have applied the *Kho* plain error test for post-trial processing error is of no moment. Even so, the *King* court found the Government rebutted the presumption of prejudice at the time of convening authority action because the appellant in his clemency matters did not allege legal error in the missing ruling or note its omission from the record. *King*, No. ACM 39583, 2021 CCA LEXIS 415, at *28–29; *see also* (Appellant's Br. at 30–32 (arguing Appellee cannot make colorable showing of prejudice in part

because he did not mention post-trial confinement conditions in clemency matters or raise allegation of convening authority action error in R.C.M. 1104 motion)).

Thus, even assuming error, Appellee warrants no relief. *See United States v. Brubaker-Escobar*, No. 20-0345, 2021 CAAF LEXIS 818, at *8 n.12 (C.A.A.F. Sept. 7, 2021) (convening authority action error harmless, warranting no relief, where, inter alia, appellant did not seek clemency; contemplating forfeiture where appellant failed to raise issue in timely manner under R.C.M. 1104(b)(2)(B)).

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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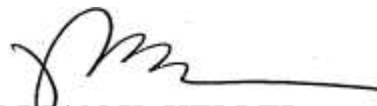

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1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 2596 words.

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Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on September 17, 2021.

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United States v. Brubaker-Escobar

United States Court of Appeals for the Armed Forces

March 9, 2021, Argued; September 7, 2021, Decided

No. 20-0345

Reporter

2021 CAAF LEXIS 818 *

UNITED STATES, Appellee v. Jacob L. BRUBAKER-ESCOBAR, Sergeant, United States Army, Appellant

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION

Prior History: **[*1]** Crim. App. No. 20190618. Military Judges: Douglas K. Watkins and Maureen A. Kohn.

Counsel: For Appellant: Major Alexander N. Hess (argued); Colonel Michael C. Friess, Lieutenant Colonel Angela D. Swilley, Major Kyle C. Sprague, and Captain Nandor F. R. Kiss (on brief).

For Appellee: Major Amanda L. Dixson (argued); Colonel Steven P. Haight, Lieutenant Colonel Craig Schapira, and Lieutenant Colonel Wayne H. Williams (on brief).

Opinion

PER CURIAM.[1]

We hold that in any court-martial where an accused is found guilty of at least one specification involving an offense that was committed before January 1, 2019, a convening authority errs if he fails to take one of the following post-trial actions: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part. However, depending upon the date that the charges were preferred or referred and depending upon the sentence that was adjudged, such an error does not necessarily deprive a Court of Criminal Appeals of jurisdiction. In the instant case, the charges were referred after January 1, 2019, and a bad-conduct discharge was adjudged. Under these circumstances, we conclude that the United States Army Court of **[*2]** Criminal Appeals (ACCA) had jurisdiction to review Appellant's case despite the procedural error committed by the convening authority. We further conclude that Appellant is entitled to no relief here because the convening authority's error was harmless.

I. Background

Appellant was convicted at a general court-martial, pursuant to his pleas, of five specifications of maltreating subordinates and one specification of assault

[1] Oral argument for this case was held on March 9, 2021, when Chief Judge Stucky was still serving as an active judge on the Court. On July 31, 2021, Chief Judge Stucky's term expired. *See* Article 142(b)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 942(b)(2) (2018). Pursuant to Article 142(e)(1), UCMJ, 10 U.S.C. § 942(e)(1) (2018), he continues to serve on this case in a senior status.

consummated by a battery. Articles 93 and 128, UCMJ, 10 U.S.C. §§ 893, 928 (2018). Appellant committed these offenses in 2018 but the charges were not referred until June 2019. The military judge sentenced Appellant to a bad-conduct discharge and reduction to the grade of E-1.

As part of the clemency process, the staff judge advocate advised the convening authority that the provisions of the Military Justice Act of 2016 (MJA),[2] which generally became effective on January 1, 2019, applied to Appellant's case. Thus, unlike in prior cases where the convening authority was required under the provisions of the old version of Article 60, UCMJ,[3] to approve, disapprove, commute, or suspend a sentence in whole or in part, the staff judge advocate indicated that pursuant to the provisions of the new Article 60a, UCMJ,[4] the convening authority in Appellant's case (a) was not authorized **[*3]** to take action on the findings or on the adjudged bad-conduct discharge, (b) could disapprove Appellant's reduction to the grade of E-1 if he deemed it appropriate, or (c) could take no action at all in regard to Appellant's sentence. The convening authority thereafter signed a form entitled "Convening Authority Action" stating he was taking "No Action" in this case.

On appeal, the ACCA cited its own precedent of *United States v. Coffman*, which held that the President's executive order implementing the MJA provides that in cases where at least one of the offenses was committed before January 1, 2019, "the version of Article 60, UCMJ, applicable to an accused's court-martial will be that version in effect on the earliest date of misconduct for which an accused was convicted." 79 M.J. 820, 822 (A. Ct. Crim. App. 2020) (citing Exec. Order No. 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (Mar. 1, 2018)). Thus, the CCA held, the provisions of the old Article 60 rather than those of the new Article 60a applied to the instant case, and the convening authority's failure to take action on the sentence as required by the old Article 60 was error. However, the CCA further concluded that the error was neither jurisdictional nor prejudicial to Appellant's substantial rights. *United States v. Brubaker-Escobar*, No. ARMY 20190618, slip op. at 1 n.* (A. Ct. Crim. App. June 9, 2020) (per curiam). **[*4]** The court then affirmed the adjudged findings and sentence. *Id.* at 1.

We granted review of Appellant's petition in which he argued that the convening authority erred in taking "no action" in his case, and that this error deprived the CCA of jurisdiction to hear his appeal under Article 66, UCMJ, 10 U.S.C. § 866 (2018).[5] Appellant sought a remand of his case to the convening authority for appropriate action. After oral argument, we specified an issue which asked whether the President's

[2] The MJA is a division of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2968 (2016).

[3] 10 U.S.C. § 860 (2012 & Supp. I 2013-2014).

[4] 10 U.S.C. § 860a (2018).

[5] The granted issue was as follows: "Whether the convening authority's failure to take action on the sentence as a result of the staff judge advocate's erroneous advice deprived the Army court of jurisdiction under Article 66, UCMJ."

executive order implementing the MJA was lawful when it required convening authorities to apply the post-trial procedures for taking action on findings and sentence that were in effect on the date of an appellant's earliest offense.[6]

We hold that Exec. Order No. 13,825 was a valid exercise of the President's rulemaking authority. We therefore further hold that the convening authority erred by taking "no action" in this case pursuant to the new Article 60a rather than by taking one of the specified actions required under the old Article 60. However, we conclude that the convening authority's determination did not constitute plain error. Accordingly, we affirm the judgment of the CCA for the reasons stated below.[7]

II. Standard of Review

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citing *United States v. Politte*, 63 M.J. 24, 25 (C.A.A.F. 2006)). The scope of that jurisdiction is a legal question this Court reviews de novo. *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019). We review a lower court's construction of statutes and executive orders de novo. *See United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000), *aff'd*, 533 U.S. 262, 121 S. Ct. 2135, 150 L. Ed. 2d 326 (2001) (treaties, statutes, and executive orders); *United States v. Fetrow*, 76 M.J. 181, 185 (C.A.A.F. 2017) (statutes and rules).

III. Discussion

In the Military Justice Act of 2016, Congress gave the President the authority to

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[6] The specified issue was as follows: "Whether Section 6(b) of Executive Order 13,825 of March 1, 2018 was a lawful exercise of the authority delegated to the President by Section 5542(c)(1) of the National Defense Authorization Act for fiscal year 2017 or by any other law."

[7] On June 4, 2021, this Court issued a prior opinion in this case, holding that, "as applied to this case, the executive order was not lawful, and the convening authority properly complied with the MJA." *United States v. Brubaker-Escobar*, No. 20-0345, 2021 CAAF LEXIS 508, at *2, 2021 WL 2303088, at *1 (C.A.A.F. June 4, 2021). On June 14, 2021, the time for reconsideration of our decision expired. C.A.A.F. R. 31(a). On June 22, 2021, we issued the mandate pursuant to C.A.A.F. R. 43A. On June 30, 2021, appellate defense counsel and appellate government counsel filed untimely petitions for reconsideration, citing for the first time § 531(n)(1) of the National Defense Authorization Act of Fiscal Year 2018 (NDAA 2018), Pub. L. No. 115-91, 131 Stat. 1283, 1387 (2017). This provision of NDAA 2018 amended MJA § 5542(c)(1) so as to authorize the President to prescribe which MJA amendments apply when an offense occurred before January 1, 2019. And importantly, the President promulgated Exec. Order No. 13,825 several months after the enactment of NDAA 2018. On June 29, 2021, the Army Court issued the Certificate of Completion of Appellate Review. On that same day the parties filed a joint motion to withdraw the mandate with this Court. On July 19, 2021, we granted the joint motion to withdraw the mandate and vacated our opinion of June 4, 2021. *United States v. Brubaker-Escobar*, 2021 CAAF LEXIS 508, _ M.J. _ (C.A.A.F. 2021) **[*5]** (granting petition for reconsideration, recalling mandate, and vacating judgment). We also granted Appellant's and Appellee's joint motion to file petitions for reconsideration out of time. We took these steps to prevent the "grave, unforeseen" consequence of erroneously invalidating a provision of Exec. Order No. 13,825 based on the initial failure of the parties to cite MJA § 5542(c)(1). *United States v. Dearing*, 64 M.J. 364, 364 (C.A.A.F. 2006) (summary disposition) (quoting *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998)); *see also Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) (If a situation arose . . . which showed that our original judgment was demonstrably wrong, a motion to recall mandate might be entertained."); *United States v. Wiesen*, 57 M.J. 48, 49 (C.A.A.F. 2002) ("To be successful on a petition for reconsideration, the petition must demonstrate that the Court misconstrued or overlooked an issue of law or fact.") We note that at the time we granted the joint motion to withdraw the mandate, the parties had not filed a petition for a writ of certiorari with the Supreme Court, the time to file such a petition had not yet expired, and Appellant's discharge had not yet been executed.

This opinion constitutes this Court's decision in this case.

designate the effective date of its provisions, as well as the duty to "prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in which *a specification alleges the commission, before the effective date of such amendments, of one or more offenses* or to a case in which one or more actions under [the UCMJ] have been taken before the effective date of such amendments." MJA § 5542(c)(1), 130 Stat. at 2967, *as amended by* NDAA 2018, § 531(n)(1), 131 Stat. at 1387 (emphasis added). The President then designated January 1, 2019, as the effective date of the MJA, *except* as otherwise provided in the MJA or his executive order. Exec. Order No. 13,825 § 3(a), 83 Fed. Reg. 9889.

As one of those exceptions, the President ordered that if an accused is found guilty of committing at least **[*6]** one offense before January 1, 2019:

> Article 60, of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> > (1) requires action by the convening authority on the sentence;
> >
> > . . . .
> >
> > . . . or
> >
> > (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Id. § 60(b).

Unlike the new Article 60a,[8] the old version of Article 60, states that "[a]ction on the sentence of a court-martial *shall* be taken by the convening authority." Article 60(c)(2)(A), UCMJ (emphasis added). Therefore, in any case where an accused is found guilty of at least one specification where the offense was committed before January 1, 2019, a convening authority errs if he fails to take one of the following mandated post-trial actions in a case: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part. Article 60(c)(2)(B), UCMJ. In the instant case, despite the fact that Appellant committed the offenses in 2018, the convening authority failed to take one of the required actions under the old Article 60. He instead took "no action." Therefore, the convening authority erred.

The effect of this error, however, depends on which version of Article 66, UCMJ, is applicable **[*7]** to a specific case—the old version at 10 U.S.C. § 866 (2012), or the new version at 10 U.S.C. § 866 (2018). The new version of Article 66, UCMJ, is applicable to those cases that were preferred or referred on or after January 1, 2019. Exec. Order No. 13,825 § 3, 83 Fed. Reg. 9889. In the instant case, the charges were referred after January 1, 2019. Therefore, the new version of Article 66, UCMJ, applies here.

The new version of Article 66 automatically

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[8] Under the provisions of the new Article 60a(a)(1)(A), convening authorities are no longer required to affirmatively take action on the sentence. It states: "The convening authority . . . *may* act on the sentence of the court-martial only as provided in subsection (b), (c), or (d)." (Emphasis added.)

provides the CCAs with jurisdiction when the military judge enters a judgment into the record that includes a sentence of a bad-conduct discharge. Article 66(b)(3), UCMJ. Here, the military judge sentenced Appellant to a bad-conduct discharge, and under the old Article 60(c)(4)(A), UCMJ, the convening authority could not disturb this portion of the sentence.[9] Consequently, the convening authority's error in taking "no action" had no effect on the bad-conduct discharge sentence. Therefore, once the military judge entered into the record a judgment including a bad-conduct discharge, the Army CCA obtained jurisdiction in this case. Article 66(b)(3), UCMJ.[10] Therefore, the convening authority's erroneous failure to take action on the sentence did not deprive the CCA of jurisdiction over this case.[11]

Because the convening authority's error was not jurisdictional, **[*8]** it instead is procedural. Pursuant to Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2018), procedural errors are "test[ed] for material prejudice to a substantial right to determine whether relief is warranted." *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

Despite the convening authority's error by taking no action, Appellant is not entitled to relief for the following reasons. First, Appellant did not seek clemency from the convening authority. Second, under the old Article 60, the convening authority lacked the power to grant clemency with respect to the punitive discharge. *See* Article 60(c)(4)(A), UCMJ. Third, although the convening authority in theory could have granted clemency with respect to the rank reduction, that relief would have been meaningless because Appellant's punitive discharge would have resulted in an automatic reduction to E-1. *See* Article 58a, UCMJ (2016); Dep't of the Army, Reg. 600-8-19, Personnel-General, Enlisted Promotions and Reductions para. 10-3 (April 25, 2017). Thus, the convening authority's error was harmless.[12]

IV. Judgment

The judgment of the United States Army Court of Criminal Appeals is affirmed.

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[9] Under Rule for Courts-Martial (R.C.M.) 1109(c)(1), the convening authority could not disapprove the bad-conduct discharge because a convening authority can "[m]odify a bad-conduct discharge . . . *only as provided* in subsections (e) and (f)." (Emphasis added.) R.C.M. 1109(e)(1) permits relief where "the accused has provided substantial assistance in the criminal investigation or prosecution of another person." R.C.M. 1109(f) permits relief where the military judge recommends a sentence suspension. Neither exception is applicable in this case.

[10] As R.C.M. 1111(a)(2) details, "[t]he entry of judgment terminates the trial proceedings and initiates the appellate process."

[11] In the past, this Court has indicated that a convening authority's failure to take action is a jurisdictional error depriving the CCA of jurisdiction. *See Politte*, 63 M.J. at 25 ("[T]he Courts of Criminal Appeals may hear a case on the merits where: (1) a Judge Advocate General refers courts-martial records to the court; (2) a convening authority has approved the findings and sentence; and (3) the sentence as approved extends to death, a dismissal, a punitive discharge or confinement for one year or more.") However, the Court's opinion in *Politte* was based on the language of the prior version of Article 66(c), UCMJ. Because of the manner in which the language of Article 66, UCMJ, has changed, the convening authority's error is now procedural in nature and did not deprive the CCA of jurisdiction.

[12] Two judges would hold that Appellant is entitled to no relief because he forfeited this issue by failing to raise it in a timely manner under R.C.M. 1104(b)(2)(B), and because he is unable to demonstrate on appeal that the convening authority's error was clear or obvious. However, these two judges decline to write separately because neither party asked for reconsideration of this issue.

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