

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220195

Private First Class (E-3)

GLEN R. SPITZ,
United States Army,

Appellant

Tried at Fort Riley, Kansas, on 16
December 2021 and 19 April 2022,
before a general court-martial
convened by the Commander,
Headquarters, 1st Infantry Division,
Colonel Steven C. Henricks,
military judge, presiding.

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Specified Issue

**WHETHER THE MILITARY JUDGE ERRED BY
ADMITTING A COMPANY GRADE ARTICLE 15
IN THE GOVERNMENT'S PRESENTENCING
CASE.**

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of two specifications of aggravated assault with substantial bodily harm inflicted upon a child under the age of sixteen years and one specification of assault consummated by battery upon a child under the age of sixteen years, in violation of Article 128, Uniform Code of Military Justice, 10

U.S.C. §928 (2019) [UCMJ]. (Statement of Trial Results; R. at 16).¹ The military judge sentenced appellant to confinement for thirty-six months and a dishonorable discharge. (R. at 107). On 3 May 2022, the convening authority approved the sentence. (Action). On 4 May 2022, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant committed substantial bodily harm to [REDACTED], a minor child.

Appellant and [REDACTED] are married and have one child, [REDACTED] (Pros. Ex. 1, pg. 1). On 29 April 2021 at approximately 1415, appellant, [REDACTED], and [REDACTED] arrived at the Irwin Army Community Hospital (IACH) Emergency Department (ED). (R. at 26; Pros. Ex. 1, pg 1). Appellant took [REDACTED] out of his car seat and removed his onesie before placing him on the exam table so that the medical providers could examine him. (Pros. Ex. 1, pg 2). At this point, the IACH

¹ The government initially charged appellant with two specifications of aggravated assault with grievous bodily harm inflicted upon a child under the age of sixteen years and one specification of assault consummated by battery upon a child under the age of sixteen years; one specification of maiming; and one specification of wrongful abuse of an animal of a nature to bring discredit upon the armed forces, in violation of Articles 128, 128a, and 134, UCMJ. (Charge Sheet). In accordance with the pretrial agreement, appellant pleaded not guilty to Charge II and its Specification and to Charge III and its Specification; the government dismissed those charges and specifications. (R. at 81). For Specifications 1 and 2 of Charge I, in accordance with the pretrial agreement, appellant pleaded to excepted and substituted language, which changed the charged offense from grievous to substantial bodily harm. (App. Ex. IX; R. at 29).

examining physician did not notice anything abnormal about [REDACTED]. (Pros. Ex. 1, pg 2). The physician then left [REDACTED] alone with appellant in the exam room. (Pros. Ex. 1, pg 2).

While appellant was alone in the room with [REDACTED] began to cry. (R. at 26; Pros. Ex. 1, pg 2). Appellant picked up [REDACTED] and cradled him while he was crying. (Pros. Ex. 1, pg 2). He attempted to calm [REDACTED] down, but [REDACTED] would not stop crying. (Pros. Ex. 1, pg 2). Appellant then hit [REDACTED] in the face with an open hand. (R. at 38, 49; Pros. Ex. 1, pg 2). When [REDACTED] continued to cry, appellant picked [REDACTED] up with both hands, wrapped [REDACTED] around his chest, squeezed him forcefully, broke his clavicle, and shook him back and forth three to four times. (R. at 27; Pros. Ex. 1, pg 2). [REDACTED] was still crying after appellant shook him, so appellant put his finger into a pacifier, dipped the pacifier in sugar water, and attempted to force it into [REDACTED] mouth. (R. at 49; Pros. Ex. 1, pg 2). Doctors came back into the room roughly one minute later. (Pros. Ex. 1, pg 2).

The IACH physician conducted another exam before discharging appellant and [REDACTED] (Pros. Ex. 1, pg 2). Using a tongue depressor, the physician looked into [REDACTED] mouth, and noticed blood in [REDACTED] throat. (Pros. Ex. 1, pg 2). The examining physician then called a pediatrician at IACH for consultation, and to conduct an independent exam of [REDACTED]. (Pros. Ex. 1, pg 2). The pediatrician confirmed the presence of blood in the back of [REDACTED] throat, and suspected non-accidental trauma

as a possible cause. (Pros. Ex. 1, pg 2). At 1900, IACH staff notified the Family Advocacy Program (FAP) and the Fort Riley Criminal Investigative Command (CID). (Pros. Ex. 1, pg 2). IACH staff decided to keep the family at IACH under observation. (Pros. Ex 1, pg 2).

On 30 April 2021, at approximately 0100 hours, during an examination, another IACH physician noticed [REDACTED] left eye began to exhibit swelling and bruising which were not present when the physician came on shift. (Pros. Ex. 1, pg 2). The physician also noticed [REDACTED] seemed to have an altered mental state. (Pros. Ex. 1, pg 2). A Computed Tomography (CT) scan revealed "brain bleeding." (Pros. Ex. 1, pg 2). Staff also observed [REDACTED] had a right clavicle fracture with no signs of healing. (Pros. Ex. 1, pg 3).

Doctors concluded [REDACTED] left eye and nasal bridge had bruising and swelling—he suffered from diffused intracranial injuries, including bilateral subdural hemorrhages, subarachnoid hemorrhages, and an acute right clavicle fracture. (Pros. Ex. 1, pg 3). The doctors concluded that these injuries were indicative of inflicted trauma, and the diagnosis of child physical abuse and abusive head trauma. (Pros. Ex. 1, pg 3). Appellant reported to investigators that he struck [REDACTED] in the face, squeezed, and shook him. (Pros. Ex. 1, pg 3). [REDACTED] remained in the Pediatric Intensive Care Unit from 30 April 2021 until 6 May 2021. (Pros. Ex. 1, pg 3).

When questioned by CID about [REDACTED] injuries, appellant initially denied responsibility, telling CID that he believed IACH ED personnel may have hurt [REDACTED] when they were examining him. (Pros. Ex. 1, pg 3). Ultimately, appellant admitted that he caused the injuries to [REDACTED] and expressed remorse for his actions. (Pros. Ex 1, pg 3).

B. The government introduced Appellant's Company Grade Article 15 into evidence during sentencing.

During the government's sentencing case, the trial counsel introduced six exhibits. (R. at 86). The exhibits included a Company Grade Article 15 appellant received for disrespect in deportment toward a Chief Warrant Officer adjudged on 13 September 2021. (R. at 86; Pros. Ex. 6). The trial counsel presented a "true and accurate" copy of appellant's Article 15 for introduction into evidence, and an affidavit by the unit paralegal specialist stating she was the custodian of records for the HQ, 2d Armored Brigade Combat Team Legal Office, and a statement that the Article 15 was filed in accordance with Army Regulation 25-400-2 (The Army Records and Information Management System)² and Army Regulation 27-10 (Military Justice). (R. at 85; Pros. 6).

² The version in effect at the time of appellant's court-martial was dated 2 October 2007.

The defense counsel objected to the military judge admitting the Article 15 into evidence, and argued that the unit paralegal was not the proper records custodian. (R. at 85). The defense stated that AR 27-10, in the context of records retention for Prosecution Exhibit 6, applied to military justice record keeping and not to appellant's local file, which was maintained by appellant's unit personnel office. (R. at 86). The military judge overruled the defense counsel's objection, (R. at 86), and admitted the Article 15 into evidence. (R. at 95).

During the sentencing case and argument, neither the government nor defense counsel referenced the Article 15 or the underlying misconduct in the Article 15. (R. at 95–105). At the close of its sentencing argument, the trial counsel asked the military judge to sentence appellant to the maximum time authorized in the plea agreement which was four years;³ however, the military judge sentenced appellant, *inter alia*, to only three years confinement. (R. at 99, 107).

Standard of Review

This court reviews a military judge's decision to admit evidence at sentencing under an abuse of discretion standard. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009). If the court finds the judge abused his discretion, the

³ Defense Counsel recommended to the military judge that one year confinement was appropriate for appellant's crimes (R. at 105).

Court must also determine whether admission of that evidence in aggravation “substantially influenced the adjudged sentence.” *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

Law and Argument

“Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's . . . character of prior service. Such evidence includes . . . any disciplinary actions including punishments under Article 15[, UCMJ].” R.C.M. 1001(b)(2). Army Regulation 27-10, Legal Services: Military Justice (20 Dec. 2020) [AR 27-10] authorizes admission of records of NJP “from any file in which the record is properly maintained by regulation.” Additionally, as this court recently held in *United States v. Frasur*, ARMY 20210420, 2022 CCA LEXIS 401 (Army Ct. Crim. App. 8 Jul. 2022) ([mem. op.](#)):

‘[r]ecords of NJP’ a[re] an example of an admissible record of the accused's prior service for purposes of sentencing, so long as the NJP is not a summarized Article 15 and the record comes ‘from any file in which the record is properly maintained by regulation.’ AR 27-10, para. 5-37a(4) (emphasis added). See also Rule for Courts-Martial [R.C.M.] 1001(b)(2) (permitting the introduction of personnel records of the accused including Article 15). A copy of the Article 15 can be substituted for the original if properly authenticated. See AR 27-10, para. 5-37b and Military Rule of Evidence 901.

In the case *sub judice*, attached to the Article 15 was an affidavit from the records custodian for the Brigade Legal Office attesting to its authenticity as a true and accurate copy of the original Article 15. (Pros. Ex. 6, pg. 1). The affidavit also states the copy of the Article 15 was “kept in accordance” applicable regulations. (Pros. Ex. 6, pg. 1).

A. The Article 15 was properly admitted into evidence.

The military judge was well within his discretion to overrule defense counsel’s objection and admit the Article 15 into evidence. As the record reflects, and appellant appears to concede, appellant received the Article 15 within two years of his court-martial. (R. at 87). Therefore, the issue is not whether appellant received the Article 15, but whether it was “from any file in which the record is properly maintained by regulation”. Here, in accordance with Army Regulations and R.C.M 1001(b)(2), the Article 15 was from a properly maintained file in accordance with regulation. Moreover, the affidavit from the paralegal specialist—the custodian of records for the Article 15—establish that she was the proper record custodian and the copy of the Article 15 was filed in accordance with Army regulations. (Pros. Ex. 6, pg. 1).

Appellant’s argument that the record was pulled from a legal file and it should have been clarified on the record if it was retrieved from Military Justice Online (MJO) is misplaced. (Appellant’s Br. 6–7.) There is simply no evidence in

the record that the copy was retrieved from MJO and nothing to support appellant's speculative assertion that the paralegal specialist was not a proper records custodian who failed to comply with the regulations as stated in her affidavit. *See generally United States v. Vettison* ARMY 9600303, 1999 CCA LEXIS 426 (Army Ct. Crim. App. 3 Aug. 1999)(mem. op.)(applying the legal doctrine of the presumption of administrative regularity and therefore finding "that government finance officials likely followed the statutory requirements"); *United States v. McCrary* ARMY 9601483, 1999 CCA LEXIS 416 (Army Ct. Crim. App. 29 Apr. 1999)(mem. op.)(applying presumption of administrative regularity).⁴

Therefore, the military judge did not abuse his discretion by admitting the Article 15 into evidence and this court should affirm the findings and sentence.

B. If this court finds the military judge erred, the Article 15 did not substantially influence the adjudged sentence.

In both *Lewis* and *Frasur*, the inadmissible Article 15s were for the same or similar conduct for which the defendant was being tried. *United States v. Frasur*, at *5; *United States v. Lewis*, ARMY 20210179, 2022 CCA LEXIS 303 *7–8 (Army Ct. Crim. App. 20 May 2022). Distinguishable from both *Frasur* and

⁴ Appellant's citation to *Frasur* and argument that appellant's Article 15 may have been pulled from MJO can be easily rejected by this court. As previously stated in this brief, there is simply no evidence in the record that this Article 15 was retrieved from MJO and the facts in this case are distinguishable from *Frasur*.

Lewis, the Article 15 in the instant case was completely unrelated to the misconduct in which appellant pled guilty. (Pros. Ex. 6, STR). Appellant entered into a plea agreement, and agreed *inter alia* to a maximum of forty-eight months confinement for the offense of assault upon a minor child.⁵ (App. Ex. I, pg. 3). Appellant received a sentence of confinement for thirty-six months and a dishonorable discharge. (R. at 107). Moreover, in contrast to both *Frasur* and *Lewis*, the trial counsel in the instant case did not reference the Article 15 in his sentencing argument. Therefore, the admission of the Article 15 did not substantially influence the adjudged sentence.

⁵ In accordance with the pretrial agreement, appellant pleaded not guilty to Charge II and its Specification and to Charge III and its Specification; the government dismissed those charges and specifications. (R. at 81).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.



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CERTIFICATE OF SERVICE U.S. v. Spitz (20220195)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]

[REDACTED] on this 16th day of November 2022.

[REDACTED]

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[REDACTED]

APPENDIX



Cited

As of: October 18, 2022 2:29 PM Z

United States v. Lewis

United States Army Court of Criminal Appeals

May 20, 2022, Decided

ARMY 20210179

Reporter

2022 CCA LEXIS 303 *; 2022 WL 1624835

UNITED STATES, Appellee v. Specialist
PIETR N. LEWIS, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Army
Fires Center of Excellence and Fort Sill. Lanny
J. Acosta, Jr., Military Judge, Lieutenant
Colonel Michael E. Schauss, Acting Staff
Judge Advocate.

Core Terms

sentence, military, soldier, regulation, court-
martial, paralegal, personnel, adjudged,
records, underage drinking, two year,
reassessment, aggravation, confinement,
misconduct, destroyed, permanent, purposes,
station, grade

Case Summary

Overview

HOLDINGS: [1]-Because the unit paralegal
copy did not constitute a file in which the
record was properly maintained by regulation
within the meaning of Army Regulation 27-10,
the military judge abused his discretion in
allowing the admission of appellant's prior Unif.
Code Mil. Justice art. 15, [10 U.S.C.S. § 815](#),
for underage drinking; [2]-The erroneous
admission of the Article 15 had a substantial
influence on the adjudged sentence, and

materially prejudiced appellant's rights as the
government relied on it as the prime piece of
evidence in justifying the imposition of a
harsher sentence by arguing that it
demonstrated appellant's lack of rehabilitative
potential; [3]-In conducting a reassessment of
appellant's sentence based on the judges'
experience with sentences for the offense of
involuntary manslaughter, the court of appeals
reduced his confinement to 36 months.

Outcome

Finding of guilty affirmed. Only so much of
sentence as provided for dishonorable
discharge, confinement for 36 months, and
reduction to grade of E-1 was affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military
Justice > Nonjudicial Punishments

[HN1](#) [Download] Military Justice, Nonjudicial Punishments

An Article 15 is nonjudicial punishment (NJP)
imposed by a commander that is authorized
under Unif. Code Mil. Justice art. 15, [10 U.S.C.S. § 815](#).

Criminal Law &

Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN2](#) Standards of Review, Abuse of Discretion

The court of appeals reviews a military judge's decision on the admission of evidence in aggravation at sentencing for an abuse of discretion. The abuse of discretion standard requires more than a mere difference of opinion; rather, the military judge's ruling must be arbitrary, clearly unreasonable, or clearly erroneous. If the court of appeals finds the military judge abused his discretion, its inquiry does not end there, and the court of appeals must then determine whether the admission of the evidence substantially influenced the adjudged sentence.

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

Military & Veterans Law > Military Justice > Nonjudicial Punishments

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

[HN3](#) Posttrial Procedure, Actions by Convening Authority

Army Regulation 27-10 serves as the authority for both the destruction and the admission of records of non-judicial punishment under Unif. Code Mil. Justice art. 15, [10 U.S.C.S. § 815](#). The regulation states that soldiers who are below the rank of specialist or corporal - and are not guilty of a sex-related offense - will have their original Article 15 filed locally in the unit nonjudicial punishment (NJP) or unit personnel files, and locally filed originals will be destroyed at the end of 2 years from the date of imposition of punishment or on the Soldier's permanent change of station or permanent reassignment to another General Court-Martial Convening Authority, whichever occurs first. A record of NJP may be admissible at courts-martial from any file in which it is properly maintained by regulation.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Nonjudicial Punishments

[HN4](#) Disclosure & Discovery, Discovery by Defense

A copy of the Unif. Code Mil. Justice art. 15, [10 U.S.C.S. § 815](#), can be substituted for the original if properly authenticated.

Military & Veterans Law > Servicemembers > Administrative Discharge

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military
Justice > Nonjudicial Punishments

HN5 **Servicemembers, Administrative Discharge**

The unit paralegal copy does not constitute a file in which the record is properly maintained by regulation within the meaning of Army Regulation 27-10. The regulatory and official purpose of Military Justice Online (MJO) is to be the primary tool for: (1) creating, processing, and managing administrative reprimands, administrative separation, nonjudicial punishment (NJP), and courts martial; and, (2) for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice. The MJO application is not a personnel file but rather, an official Army application for creating and processing adverse administrative actions and NJP and for data analysis. It is those stated purposes for which the unit paralegal must maintain the information contained in MJO for a period of two years. It is clear from the language of Army Regulation 27-10 and R.C.M. 1001(b)(2), Manual Courts-Martial that the admission of prior records of service are to be pulled from an accused's personnel file (whether local or permanent Official Military Personnel File), not a paralegal database used for record keeping.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel, JA; Captain Ian P. Smith, JA (on brief and brief on specified issue).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Andrew M. Hopkins, JA (on brief and brief on specified issue).

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

Opinion by: WALKER

Opinion

MEMORANDUM OPINION


WALKER, Senior Judge:

Appellant asserts the military judge erred by admitting a company grade [Article 15](#) in the government's pre-sentencing case that was administered during appellant's prior permanent assignment to a different duty station when he was a Private First Class.¹ We agree and provide relief in our decretal paragraph.

BACKGROUND

On 11 June 2020, appellant and a group of fellow soldiers went out to a few bars to socialize. Appellant, being under 21, was one of the designated drivers. By the end of the evening, only appellant and the victim remained at the bar. Despite **[*2]** being under the legal drinking age of 21, and a designated driver, appellant consumed "about five to seven drinks" that evening.

At approximately 0200, appellant drove himself and the victim back to White Sands Missile Range (WSMR), their current duty station. The victim did not wear his seatbelt on the drive back to the installation. At approximately 0317, appellant's vehicle rapidly approached one of the WSMR's installation access points. The guard shined a flashlight at appellant in an attempt to get his attention, but appellant's vehicle ultimately collided with one of the concrete barriers. The impact from the collision

¹ **HN1**  An "[Article 15](#)" is nonjudicial punishment (NJP) imposed by a commander that is authorized under [Article 15](#), Uniform Code of Military Justice, [10 U.S.C. § 815](#) [UCMJ]. The record of an [Article 15](#) proceeding is documented on a Department of the Army [DA] Form 2627.

launched the vehicle into air where it then struck the guard shack and landed upside down. The guard narrowly escaped being hit by appellant's vehicle, which had been traveling approximately eighty-six to ninety-one miles-per-hour at the time of impact. Appellant was airlifted to a nearby hospital for the injuries he sustained. Appellant's blood alcohol level was 0.068 at the time his blood was drawn a few hours after the accident. The victim was declared dead at the scene.

A military judge sitting as a general court-martial convicted appellant, pursuant to his plea, [*3] of one specification of involuntary manslaughter, in violation of [Article 119, UCMJ](#). The military judge sentenced appellant to a dishonorable discharge, confinement for forty-two months, and reduction to the grade of E-1.

During the presentencing phase of appellant's court-martial, the government moved to admit into evidence a company grade [Article 15](#) that appellant received at his former duty station for underage drinking. Appellant's defense counsel objected to its admission, stating that the [Article 15](#) appellant received as a Private First Class should have been destroyed upon appellant's permanent change of station (PCS), pursuant to Army Regulation 27-10, Legal Services: Military Justice, para. 3-37b(1) (20 Dec. 2020) [AR 27-10]. In response, the government argued that they were moving to admit the unit paralegal specialist copy into evidence, pursuant to AR 27-10, para. 3-37h, which directs the unit paralegal to maintain a copy of the completed [Article 15](#) with all allied documents in Military Justice Online (MJO) for a period of two years. The military judge overruled defense counsel's objection and admitted appellant's prior [Article 15](#) into evidence as Prosecution Exhibit 5.

LAW AND DISCUSSION [*4]

A. Standard of Review

[HN2](#)[↑] "We review a military judge's decision on the admission of evidence in aggravation at sentencing for an abuse of discretion." [United States v. Ashby, 68 M.J. 108, 120 \(C.A.A.F. 2009\)](#) (citing [United States v. Stephens, 67 M.J. 233, 235 \(C.A.A.F. 2009\)](#)). The abuse of discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." [United States v. Wicks, 73 M.J. 93, 98 \(C.A.A.F. 2014\)](#) (cleaned up). If this court finds the military judge abused his discretion, our inquiry does not end there, and we must then determine whether the admission of the evidence "substantially influenced the adjudged sentence." [United States v. Griggs, 61 M.J. 402, 410 \(C.A.A.F. 2005\)](#).

For the reasons set forth below, we conclude the military judge's ruling to admit the evidence was an abuse of discretion and that the erroneous admission of the [Article 15](#) substantially influenced the adjudged sentence and warrants relief.

B. The Filing and Maintaining of [Article 15](#) Records of Proceedings

[HN3](#)[↑] Army Regulation 27-10 serves as the authority for both the destruction and the admission of records of non-judicial punishment under [Article 15, UCMJ](#). The regulation states that soldiers who are below the rank of specialist or corporal—and are not guilty of a sex-related offense—will have their original [Article 15](#) "filed locally in the unit [*5] NJP or unit personnel files" and:

Locally filed originals will be destroyed at the end of 2 years from the date of imposition of punishment or on the Soldier's permanent change of station or

permanent reassignment to another GCMCA, *whichever occurs first*.

AR 27-10, para. 3-37b(1) (emphasis added). Within that same paragraph, the regulation also states that the unit "paralegal specialist will maintain a copy of the completed DA Form 2627 with all allied documents in MJO for a period of 2 years." AR 27-10, para. 3-37h. Further, when we look to AR 27-10, para. 3-44b, a record of NJP may be admissible at courts-martial "from any file in which it is properly maintained by regulation." Specifically, for purposes of introducing records of the accused's prior service for sentencing, AR 27-10 states:

For purposes of RCM 1001(b)(2) and (d), trial counsel and defense counsel may, at the counsel's discretion, introduce to the court-martial copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations.

AR 27-10, para. 5-37a. That same paragraph gives "[r]ecords of NJP" as an example of an admissible record of the accused's prior [*6] service for purposes of sentencing, so long as the NJP is not a summarized [Article 15](#) and the record comes "from any file in which the record is properly maintained by regulation." AR 27-10, para. 5-37a(4). See *also* Rule for Courts-Martial [R.C.M.] 1001(b)(2) (permitting the introduction of personnel records of the accused including [Article 15](#)). [HN4](#)² A copy of the [Article 15](#) can be substituted for the original if properly authenticated. See AR 27-10, para. 5-37b and Military Rule of Evidence 901.

C. The Admission of the [Article 15](#) Was Clearly Erroneous

Here, there is no dispute that appellant's original [Article 15](#) should have been destroyed

upon his PCS to WSMR—the main point of contention is whether the paralegal's copy maintained in MJO constitutes a "file in which the record is properly maintained by regulation." AR 27-10, para. 3-44b.

Appellant argues the [Article 15](#) was improperly admitted into evidence because: (1) the declaration used to authenticate Prosecution Exhibit 5 did not indicate whether it was maintained in or obtained from MJO; (2) the MJO database is not a personnel record akin to a local unit file or Official Military Personnel File (OMPF)²; and, (3) any conflicts in filing guidance in AR 27-10 should weigh in favor of appellant—namely, the requirement [*7] to destroy locally filed NJP records when a soldier conducts a PCS would be rendered "a useless nullity" if that same record is maintained in MJO for two years regardless of that soldier's assignment status.

The government argues that the separate provisions for "filing" and "maintaining" an [Article 15](#) are compatible and not contradictory. Specifically, the government asserts that the requirement to "file" the original [Article 15](#) in a soldier's local unit file and the requirement to "maintain" a copy of the locally filed [Article 15](#) for a period of two years in MJO are separate and distinct requirements that are harmonious. In asserting this argument, the government summarily dismisses the policy rationale for destroying a

² "The OMPF is defined as permanent documentation within the [Army Military Human Resource Record (AMHRR)] that documents facts related to a Soldier during the course of his or her entire Army career, from time of accession into the Army until final separation, discharge or retirement." Army Reg. 600-8-104, Army Military Human Resource Records Management, para. 1-6b (7 April 2014) [AR 600-8-104]. Additionally, "[t]he purpose of the OMPF is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and other personnel actions." AR 600-8-104, para. 1-6b(1).

locally filed [Article 15](#) when a soldier conducts a PCS or after a period of two years, that being rehabilitation. Rather, the government asserts this "compelling rationale," as the government concedes, is "inapplicable to the admissibility of recent NJP evidence during a pre-sentencing court-martial." In essence, the government argues that because appellant was being court-martialed for conduct involving the same misconduct of underage drinking then the government [*8] is justified, and the military judge is allowed, to use the prior [Article 15](#) in determining an appropriate sentence. The government argues that because appellant's [Article 15](#) for underage drinking was so close in time to his court-martial, it is relevant aggravation evidence merely based upon timing. The government's argument ignores the distinction between *relevant* information and *admissible* information under the rules of evidence.

We are unpersuaded by the government's argument that AR 27-10 para. 3-3-37b(1) is harmonious with para. 3-37h for purposes of admission of evidence in aggravation by the government. Rather, we agree with appellant and find that [HN5](#)³ the unit paralegal copy does not constitute a "file in which the record is properly maintained by regulation" within the meaning of AR 27-10. The regulatory and official purpose of MJO is to be the primary *tool* for: (1) "creating, processing, and managing administrative reprimands, administrative separation, NJP, and courtsmartial[;]" and, (2) "for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice." AR 27-10, para. 14-1a. The MJO application is not a personnel *file* but rather, an [*9] official Army *application* for creating and processing adverse administrative actions and NJP and for data analysis. It is those stated purposes for which the unit paralegal must maintain the information contained in MJO for a period of

two years. It is clear from the language of AR 27-10 and R.C.M 1001(b)(2) that the admission of prior records of service are to be pulled from an accused's *personnel file* (whether local or permanent OMPF), not a paralegal database used for record keeping.³ To interpret the regulation otherwise would, in fact, render paragraph 3-37b as a nullity because it would go against the plain language of the regulation and the purpose of allowing junior soldiers to have a clean slate when they PCS or change to a different General Court-Martial Convening Authority (GCMCA). We therefore find the military judge's interpretation of AR 27-10 to be clearly erroneous and conclude he abused his discretion in allowing the admission of appellant's [Article 15](#) because it was inadmissible given appellant's PCS move to WSMR.

D. A Substantial Influence on the Adjudged Sentence

After examining the evidence and the parties' respective sentencing cases, we find the erroneous admission of the [Article 15](#) had a substantial [*10] influence on the adjudged sentence, and materially prejudiced appellant's rights.

We recognize the severity and significance of appellant's misconduct in that his negligent actions of underage drinking and driving while intoxicated took the life of another soldier. The government presented compelling evidence about the impact of the victim's death of family and friends. The victim's mother testified she attempted suicide due to the loss of her son. The victim's sister and a fellow soldier testified that the impact of the victim's death caused them to have to seek behavioral health treatment. The guard who was at the entry

³ In its brief, the government concedes that the MJO system, "is not a place where personnel records are filed like the local unit file or AMHRR."

control point at the time of the incident described months of sleepless nights as result of the trauma of witnessing the accident. Yet, the government relied on appellant's [Article 15](#), less than two years old at the time of trial, as the prime piece of evidence in justifying the imposition of a harsher sentence by arguing that it demonstrated appellant's lack of rehabilitative potential:

Finally, Your Honor, after receiving an [Article 15](#) for underage drinking in 2019, [appellant] was not deterred from again drinking underage and making poor choices that night, he knew better, [*11] only this time it led to the death of another Soldier. Your Honor, the sentence you give, therefore, needs to affect the fundamental change in [appellant] to ensure that his actions do not result in any more senseless loss of pain—senseless loss of life or pain and suffering in others.

Appellant presented a relatively strong case in extenuation and mitigation. Appellant's mother testified about appellant's childhood and his decision to join the Army despite begin offered full scholarships from three colleges. Appellant's mother and father both testified about the long-term brain injuries appellant suffered as a result of the accident and the impact it has on his daily life. Appellant provided an unsworn statement in which he described the remorse he felt for taking his friend's life and the emotional impact it had on him, his feelings of worthlessness, nightmares, as well as the resulting anxiety and depression he experiences from having taken a life. He also discussed suffering from TBI and the loss of short-term memory from injuries he sustained during the accident.

Although this is a close case on prejudice, we believe the balance tips in favor of appellant in light of the nature [*12] of the underlying misconduct for the [Article 15](#) and appellant's

adjudged sentence. Appellant received the inadmissible [Article 15](#) for underage drinking which was the same type of misconduct that resulted in appellant taking the life of another soldier. Repeated acts of similar misconduct within less than two years of each other is certainly aggravating evidence that would impact appellant's sentence as evidenced by the adjudged sentence. The government requested appellant be sentenced to four years of confinement. The military judge sentenced appellant to forty-two months of confinement, just six months less than the sentence the government requested and almost double the minimum sentence of twenty-four months the military judge could have imposed. For all of the aforementioned reasons, we find that the erroneously admitted [Article 15](#) substantially influenced the adjudged sentence.

In light of this conclusion, we now address whether we are able to reassess appellant's sentence. Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in [United States v. Sales, 22 M.J. 305, 307-08 \(C.M.A. 1986\)](#) and [United States v. Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#). We recognize this case was tried by a military judge alone, which [*13] favors reassessment by this court. [United States v. Adams, 74 M.J. 589, 593 \(Army Ct. Crim. App. 2015\)](#) (finding reassessment appropriate, in part, because a judge alone sentenced the appellant). Based on our experience as judges on this court, we are familiar with the offense of involuntary manslaughter such that we may reliably determine what sentence would have been imposed had the [Article 15](#) not been erroneously admitted as evidence in aggravation. Having conducted this reassessment, we affirm only so much of appellant's sentence as provides for a dishonorable discharge, confinement for thirty-

six months, and reduction to the grade of E-1.

CONCLUSION

Upon consideration of the entire record, the finding of guilty is AFFIRMED. We AFFIRM only such much of the sentence as provides for a dishonorable discharge, confinement for thirty-six months, and reduction to the grade of E-1.

Judge EWING and Judge PARKER concur.

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United States v. Frasur

United States Army Court of Criminal Appeals

July 8, 2022, Decided

ARMY 20210420

Reporter

2022 CCA LEXIS 401 *; 2022 WL 2619802

UNITED STATES, Appellee v. Private E1 ETHAN J. FRASUR, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 7th Army Training Command. Kenneth W. Shahan, Military Judge, Lieutenant Colonel John J. Merriam, Staff Judge Advocate.

Counsel: For Appellant: Major Christian E. DeLuke, JA; Captain David D. Hamstra, JA.

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

Judges: Before WALKER, EWING, and PARKER, Appellate Military Judges. Judge EWING and Judge PARKER concur.

Opinion by: WALKER

Opinion

MEMORANDUM OPINION

WALKER, Senior Judge:

While not raised by appellant on appeal before this court, we hold that the military judge erred in admitting an Article 15 during the government's presenting case, over defense objection, that a paralegal downloaded from Military Justice Online. We further hold that the admission of the [Article 15](#) substantially influenced the adjudged sentence and provide relief.

BACKGROUND

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of absence without leave, one specification of larceny, and one specification of

communicating a threat, in violation of [Articles 86](#), [121](#), and [115](#), Uniform Code of Military Justice, [10 U.S.C. §§ 886](#), [921](#), and [915](#) [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and confinement for a total of 110 days.

During the presentencing [*2] phase of appellant's court-martial, the government moved to admit into evidence a company grade Article 15 that appellant received less than two years prior to his court-martial while assigned to his current General Court-Martial Convening Authority (GCMCA).¹ Appellant's defense counsel objected to its admission "on the basis of authentication and hearsay. . . ." In response, the government argued the Article 15 bore "an attestation memorandum from the paralegal that pulled the Article 15 from a system of records regularly maintained and regularly used by that paralegal." Defense counsel argued that the business records exception should not apply because the "attestation should be coming from S1 as this document is appropriately maintained in Private Frasur's AMHRR; that's where it's stored."² The military judge clarified that the Article 15 was pulled from Military Justice Online (MJO)—and not appellant's AMHRR—before he overruled defense counsel's objection and admitted appellant's Article 15 into evidence as Prosecution Exhibit 5.

LAW AND DISCUSSION

¹ An "Article 15" is nonjudicial punishment (NJP) imposed by a commander that is authorized under Article 15, Uniform Code of Military Justice, [10 U.S.C. § 815](#) [UCMJ]. The record of an Article 15 proceeding is documented on a Department of the Army [DA] Form 2627.

² AMHRR is the acronym for Army Military Human Resource Record. We note that defense counsel's assertion was incorrect, as appellant's original Article 15 would have been "filed locally in the unit NJP or unit personnel files" AR 27-10, para. 3-37b(1).

A. Standard of Review

"We review a military judge's decision on the admission of evidence in aggravation at sentencing for an abuse of discretion." [*3] United States v. Ashby, 68 M.J. 108, 120 (C.A.A.F. 2009) (citing United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009)). The abuse of discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014) (cleaned up). If this court finds the military judge abused his discretion, our inquiry does not end there, and we must then determine whether the admission of the evidence "substantially influenced the adjudged sentence." United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005).

B. The Filing and Maintaining of Article 15 Records of Proceedings

Army Regulation 27-10, Legal Services: Military Justice (20 Dec. 2020) [AR 27-10], serves as the authority for the admission of records of non-judicial punishment under Article 15, UCMJ. A record of NJP may be admissible at courts-martial "from any file in which it is properly maintained by regulation." AR 27-10, para. 3-44b. Soldiers who are below the rank of specialist or corporal—and are not guilty of a sex-related offense—will have their original Article 15 "filed locally in the unit NJP or unit personnel files. . . ." AR 27-10, para. 3-37b(1). Specifically, for purposes of introducing records of the accused's prior service for sentencing, AR 27-10 states:

For purposes of RCM 1001(b)(2) and (d), trial counsel and defense counsel [*4] may, at the counsel's discretion, introduce to the court-martial copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations.

AR 27-10, para. 5-37a. That same paragraph gives "[r]ecords of NJP" as an example of an admissible record of the accused's prior service for purposes of sentencing, so long as the NJP is not a summarized Article 15 and the record comes "from any *file* in which the record is properly maintained by regulation." AR 27-10, para. 5-37a(4) (emphasis added). See also Rule for Courts-Martial [R.C.M.] 1001(b)(2) (permitting the introduction of personnel records of the accused including Article 15). A copy of the Article 15 can be

substituted for the original if properly authenticated. See AR 27-10, para. 5-37b and Military Rule of Evidence 901.

C. The Military Judge Erred in Admitting the Article 15

Here, appellant's Article 15 occurred within two years of his court-martial while assigned to the same GCMCA, making it admissible evidence in presentencing so long as the authenticated copy was pulled from a "file in which the record is properly maintained by regulation." AR 27-10, para. 5-37a(4). In this case, appellant's Article 15 was pulled from MJO. Pursuant [*5] to our recent opinion in United States v. Lewis, ARMY 20210179, 2022 CCA LEXIS 303 (Army Ct. Crim. App. 20 May 2022), we find that the unit paralegal copy in MJO does not constitute a "file in which the record is properly maintained by regulation" within the meaning of AR 27-10. AR 27-10, para. 5-37a(4). The outlined purpose of MJO is to be the primary *tool* for: (1) "creating, processing, and managing administrative reprimands, administrative separation, NJP, and courts-martial[;]" and, (2) "for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice." AR 27-10, para. 14-1a. The MJO application is not a personnel *file* but rather, an *application* for creating and processing adverse administrative actions and NJP and for data analysis. It is those stated purposes for which the unit paralegal must maintain the information contained in MJO for a period of two years. It is clear from the language of AR 27-10 and R.C.M. 1001(b)(2) that the admission of prior records of service are to be pulled from an accused's *personnel file* (whether local or permanent Official Military Personnel File (OMPF)), not a paralegal database for record keeping.³ We therefore find the military judge's interpretation that MJO constituted a "file" in this context to be erroneous [*6]

³ "The OMPF is defined as permanent documentation within the AMHRR that documents facts related to a Soldier during the course of his or her entire Army career, from time of accession into the Army until final separation, discharge, or retirement. Army Reg. 600-8-104, Army Military Human Resource Records Management, para. 1-6b (7 April 2014) [AR 600-8-104]. Additionally, "[t]he purpose of the OMPF is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and any other personnel actions." AR 600-8-104, para. 1-6b(1).

and conclude he abused his discretion in allowing the admission of appellant's Article 15.

D. A Substantial Influence on the Adjudged Sentence

After examining the evidence and the parties' respective sentencing cases, we find the erroneous admission of the [Article 15](#) had a substantial influence on the adjudged sentence, and materially prejudiced appellant's rights.

The government relied heavily on appellant's Article 15 as the prime piece of evidence in justifying the imposition of a harsher sentence by asserting in their sentencing argument that it demonstrated appellant's lack of rehabilitative potential:

[Appellant] received an Article 15 not only for his failure to wear the correct uniform and to secure his barracks room but for his purposeful deceit of an NCO when he lied about his whereabouts and for larceny by stealing \$827 worth of audio equipment from the PX.

Lying and stealing, that's not—forgetting to wear the right socks with your PT uniform, that isn't just immaturity; that is serious misconduct requiring a deliberative decision to make a false official statement and commit larceny. Despite that serious misconduct, Your Honor, his command gave him another chance. Even though he'd stolen [*7] over \$800 worth of goods from the PX, the Article 15 he received was a Company Grade. But at that point, does Private Frasur get that message and try to turn things around? Nope. . . .

. . . Private Frasur has some rehabilitative potential; he just needs some assistance with that process. Private Frasur has thus far failed to get that message, and we will be remiss in not helping him rehabilitate by getting that message through to him with additional time to reflect on these offenses.⁴

Appellant presented a relatively strong case in extenuation and mitigation. Details of appellant's

childhood difficulties, as well as a diagnosis of [TEXT REDACTED BY THE COURT], were described in a stipulation of expected testimony from appellant's adoptive mother. These difficulties were further expanded on during appellant's unsworn statement: appellant "grew up around drugs, being beaten, being abandoned, and, on top of that, being poor." Appellant stated his biological mother was addicted to drugs, which resulted in her "selling [his] sister for a bottle of pills." Appellant described having to live in homeless shelters and a trailer without power and hot water. Appellant described being beaten [*8] up by his mother's boyfriends as a child and being abandoned for days, or sometimes up to a week at a time.

Both appellant's former First Sergeant, 1SG RT, and the stipulation of expected testimony of appellant's adoptive mother stated appellant was "a good person" who had "a good heart." Appellant's wife testified when she found out she was pregnant appellant was supportive and excited to be a father. First Sergeant RT testified appellant had some capacity to contribute to society and apply himself outside the military. The stipulation of expected testimony stated appellant's adoptive mother would support him when he was discharged from the Army. Appellant stated during his unsworn that he was remorseful for his actions and intended to get a job to support his family when he was released from confinement.

Although this is a close case on prejudice, we believe the balance tips in favor of appellant in light of the nature of the underlying misconduct for the [Article 15](#) and appellant's adjudged sentence. Appellant received the inadmissible [Article 15](#) for false official statement and larceny, among other offenses, which contained one of the same types of misconduct of which appellant was convicted. Repeated [*9] acts of similar misconduct within less than two years of each other is certainly aggravating evidence that would impact appellant's sentence as evidenced by the adjudged sentence. The government requested appellant be sentenced to the maximum 120 days of confinement. The military judge sentenced appellant to 110 days of confinement, just ten days less than the sentence the government requested. The minimum sentence the military judge could impose in accordance with the plea agreement was zero days for each offense. For all of the afore-mentioned reasons, we find that the erroneously admitted [Article 15](#) substantially influenced the adjudged sentence.

In light of this conclusion, we now address whether we

⁴ The government's other presentencing evidence consisted of photographs of appellant in his barracks building (Prosecution Exhibit 2), a picture of a broken barracks window screen (Prosecution Exhibit 3), appellant's enlisted record brief (Prosecution Exhibit 4), and testimony from one of appellant's former First Sergeants, SFC RH, stating appellant had low rehabilitative potential.

are able to reassess appellant's sentence. Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in [United States v. Sales, 22 M.J. 305, 307-08 \(C.M.A. 1986\)](#) and [United States v. Winckelmann, 73 M.J. 11, 12 \(C.A.A.F. 2013\)](#). We recognize this case was tried by a military judge alone, which favors reassessment by this court. [United States v. Adams, 74 M.J. 589, 593 \(Army Ct. Crim. App. 2015\)](#) (finding reassessment appropriate, in part, because a judge alone sentenced the appellant). Based on our experience as judges on this court, we are familiar with the offenses of absence [*10] without leave, larceny, and communicating a threat such that we may reliably determine what sentence would have been imposed had the [Article 15](#) not been erroneously admitted as evidence in aggravation. Having conducted this reassessment, we affirm only so much of appellant's sentence as provides for a bad-conduct discharge and confinement for a total of 90 days as outlined in the decretal paragraph.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are AFFIRMED. The bad conduct discharge and only so much of the sentence to confinement to run concurrently, as outlined below, is AFFIRMED:⁵



[Go to table 1](#)

Judge EWING and Judge PARKER concur.

⁵The Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect the response to block 29 as "Yes."

Table1 ([Return to related document text](#))

Absence Without Leave (Charge II, Specification 1)	10 days
Absence Without Leave (Charge II, Specification 2)	90 days
Larceny (Charge III, Specification 1)	90 days
Communicating a Threat (Charge V, The Specification)	10 days

Table1 ([Return to related document text](#))

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