**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>Appellee<br><br>v.<br><br>Private First Class (E-3)<br>**GLEN R. SPITZ,**<br>United States Army,<br>Appellant | **APPELLEE BRIEF ON SPECIFIED ISSUES**<br><br>Docket No. ARMY 20220195<br><br>Tried at Fort Riley, Kansas, on 16 December 2021 and 19 April 2022, before a general court-martial convened by the Commander, 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 I**

**HOW, IF AT ALL, DO THE PRINCIPLES OF STATUTORY INTERPRETATION AND JUDICIAL NOTICE GOVERN WHAT INFORMATION THIS COURT MAY CONSIDER, AND HOW MUCH WEIGHT WE GIVE IT, IN DETERMINING WHETHER THE RECORDS MAINTAINED IN MILITARY JUSTICE ONLINE ARE ADMISSIBLE AT SENTENCING UNDER R.C.M. 1001(b)(2)?**

**Specified Issue II**

**IS MILITARY JUSTICE ONLINE IDENTIFIED AS A SYSTEM OF RECORD KEEPING IN THE ARMY RECORDS INFORMATION MANAGEMENT SYSTEM? IN WHAT WAY, IF ANY, DOES THE IDENTIFICATION OR LACK OF IDENTIFICATION OF MILITARY JUSTICE ONLINE AS A SYSTEM OF RECORD KEEPING IMPACT THIS COURT'S LEGAL DETERMINATION WHETHER NONJUDICIAL**

**PUNISHMENT RECORDS CAN THEREBY BE PROPERLY "MAINTAINED" IN ACCORDANCE WITH ARMY REGULATION 27-10 IN MILITARY JUSTICE ONLINE FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?**

**Specified Issue III**

**IS MILITARY JUSTICE ONLINE LISTED AS A LOCATION OF MILITARY JUSTICE FILES IN THE SYSTEM OF RECORDS NOTIFICATION (SORN) UNDER THE REQUIREMENTS OF THE PRIVACY ACT? IF MILITARY JUSTICE ONLINE IS NOT LISTED AS A LOCATION FOR MILITARY JUSTICE FILES, WHAT IMPACT, IF ANY, DOES THAT HAVE ON THIS COURT'S LEGAL DETERMINATION WHETHER NONJUDICIAL PUNISHMENT RECORDS CAN THEREBY BE PROPERLY "MAINTAINED" IN ACCORDANCE WITH ARMY REGULATION 27-10 IN MILITARY JUSTICE ONLINE FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?**

**Specified Issue IV**

**WHAT, IF ANY, IS THE LEGAL SIGNIFICANCE OF ARMY REGULATION 27-10, PARA. 3-44(b) AND 5-37(a) STATING THAT A RECORD OF NONJUDICIAL PUNISHMENT MAY BE ADMITTED AT COURTS-MARTIAL FROM ANY FILE IN WHICH IT IS PROPERLY "MAINTAINED" BY REGULATION WHILE PARAGRAPH 14-1(a) IDENTIFIES MILITARY JUSTICE ONLINE AS A TOOL FOR "MANAGING" VARIOUS ADVERSE ADMINISTRATIVE DOCUMENTS, INCLUDING NONJUDICIAL PUNISHMENT? AND WHAT SIGNIFICANCE, IF ANY, SHOULD WE PLACE ON THE FACT THAT PARAGRAPH 5-37 IS TITLED SENTENCING?**

## Specified Issue V

**WHAT IMPACT, IF ANY, DOES ARMY REGULATION 27-10, PARA. 3-37(h) REQUIRING A UNIT PARALEGAL TO "MAINTAIN" A COPY OF NONJUDICIAL PUNISHMENT IN MILITARY JUSTICE ONLINE FOR A PERIOD OF TWO YEARS HAVE ON THIS COURT'S LEGAL DETERMINATION WHETHER RECORDS PULLED FROM MILITARY JUSTICE ONLINE ARE RECORDS THAT HAVE BEEN "MAINTAINED" IN ACCORDANCE WITH REGULATION FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001? HOW DOES THE LANGUAGE OF ARMY REGULATION 27-10, PARA. 3-37(h), IF AT ALL, COMPORT WITH THE LANGUAGE IN PARAGRAPH 14-1(a) IDENTIFYING MILITARY JUSTICE ONLINE AS A TOOL FOR "MANAGING" VARIOUS ADVERSE ADMINISTRATIVE DOCUMENTS, INCLUDING NONJUDICIAL PUNISHMENT?**

## Specified Issue VI

**DOES THE FACT THAT ARMY REGULATION 27-10 STATES THAT MILITARY JUSTICE ONLINE IS A TOOL FOR "MANAGING" ADVERSE ADMINISTRATIVE INFORMATION IMPACT THIS COURT'S LEGAL DETERMINATION WHETHER RECORDS PULLED FROM MILITARY JUSTICE ONLINE ARE RECORDS THAT HAVE BEEN "MAINTAINED" IN ACCORDANCE WITH REGULATION FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?**

On 20 March 2023, this court ordered appellant and the government to provide their responses to the issues specified in its order. (Order (20 Mar. 2023)).[1] On 3 April 2023, appellant submitted his brief on the specified issues. (Appellant's Br.). The government's response to the specified issues is below.

**Specified Issue I**

**HOW, IF AT ALL, DO THE PRINCIPLES OF STATUTORY INTERPRETATION AND JUDICIAL NOTICE GOVERN WHAT INFORMATION THIS COURT MAY CONSIDER, AND HOW MUCH WEIGHT WE GIVE IT, IN DETERMINING WHETHER THE RECORDS MAINTAINED IN MILITARY JUSTICE ONLINE ARE ADMISSIBLE AT SENTENCING UNDER R.C.M. 1001(b)(2)?**

Prior to turning to the principles of statutory interpretation, this court should find that, under the plain language of Rules for Courts-Martial [R.C.M.] 1001(b)(2), nonjudicial punishment [NJP] records from Military Justice Online [MJO] are admissible at sentencing because such records are "made or maintained" in accordance with a departmental regulation.[2] However, even if this court reverts to the principles of statutory interpretation, the applicable principles support the same conclusion of admissibility. Additionally, this court may take judicial notice

[1] The statement of the case and the statement of facts are contained in appellee's original reply brief, dated 16 November 2022.

[2] Appellee's position regarding the admissibility of records in MJO is confined solely to NJP records and does not apply to other documents that are contained in MJO.

of the applicable regulations that further support the notion that NJP records from MJO are admissible during sentencing. Army Court of Criminal Appeals Rules of Practice and Procedure Rule 6(a)(b)(2); *see also* Joint Rules of Practice and Procedure of the Courts of Criminal Appeals Rule 30A(b).

**A. Statutory Interpretation.**

This court reviews interpretations of R.C.M. provisions de novo. *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014). "It is a well established rule that principles of statutory construction are used in construing the Manual for Courts-Martial in general and the Military Rules of Evidence in particular." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citing *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006); *United States v. Lucas*, 1 U.S.C.M.A. 19, 22, 1 C.M.R. 19, 22 (1951)). Furthermore, "rules applicable to the construction of statutes are applicable, generally speaking, to the construction of regulations." *United States v. Baker*, 18 U.S.C.M.A. 504, 507, 40 C.M.R. 216 (1969).

However, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Custis*, 65 M.J. at 370 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)) (internal quotation marks omitted). Therefore, "if uncertainty does not exist, . . . the regulation then just means what it means—and the court must give it effect, as the

court would any law." *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (cleaned up).

On the other hand, if there is ambiguity or uncertainty in the language, this court "can and may consider whether one interpretation or the other creates potential constitutional or other issues." *United States v. Kohlbek*, 78 M.J. 326, 331 (C.A.A.F. 2019). Courts, however, must keep in mind that principles of statutory interpretation are "rules of thumb" to "help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent." *United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015).

In determining whether the records maintained in MJO are admissible at sentencing under R.C.M. 1001(b)(2), this court should first look at the plain meaning of the rule. Rule for Courts-Martial 1001(b)(2) states that trial counsel can obtain personnel records and introduce evidence of character of prior service. Such evidence includes "evidence of any disciplinary actions including punishments under Article 15." R.C.M. 1001(b)(2). The rule defines "[p]ersonnel records' of the accused" as "any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." R.C.M. 1001(b)(2). Army Regulation 27-10, para. 3-37(h), requires a unit paralegal to "maintain" a copy of NJP, also known as Article 15s, in MJO for a period of two years. Army Reg. 27-10,

Military Justice, para. 3-37(h) (20 Nov. 2020) [AR 27-10]. Nonjudicial records in MJO are governed by Army Regulation 27-10, which is a Department of the Army regulation and therefore a "departmental regulation[]." AR 27-10, para. 3-37(h); R.C.M. 1001(b)(2). Further, AR 27-10, para. 5-37(a), permits trial counsel to introduce "copies of any personnel records." Since copies of NJP records are required to be stored and maintained in MJO per AR 27-10, para. 3-37(h), then the copy of NJP record in MJO is "any record made or maintained in accordance with departmental regulations." R.C.M. 1001(b)(2).

Therefore, under the plain language of R.C.M. 1001(b)(2), NJP records in MJO are admissible at sentencing because such records are "made or maintained" in accordance with a departmental regulation. *See United States v. Heng*, ARMY 20210404, 2022 CCA LEXIS 377, at *5-6 (Army Ct. Crim. App. 24 June 2022) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously.") (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982)).

However, even if this court finds ambiguity and turns to principles of statutory interpretation for assistance, the result is still the same—properly maintained NJP records in MJO are admissible under R.C.M. 1001(b)(2). *See infra* Specified Issue IV, para. B (titles and headings canon), and Specified Issue V (presumption of consistent usage).

**B. Judicial Notice.**

This court can take judicial notice of the applicable regulations that pertain to the issues before this court. Army Court of Criminal Appeals Rules of Practice and Procedure Rule 6(a)(b)(2); *see also* Joint Rules of Practice and Procedure of the Courts of Criminal Appeals Rule 30A(b). "Judicial notice is a procedure for the adjudication of certain facts or matters without the requirement of formal proof." *United States v. Williams*, 3 M.J. 155, 157 (C.M.A. 1977). Judicial notice is governed by Military Rule of Evidence [Mil. R. Evid.] 201 and 202. Military Rule of Evidence 201 governs judicial notice of only adjudicative facts, whereas Mil. R. Evid. 202 governs judicial notice of law. Under Mil. R. Evid. 201, a military judge may "judicially notice a fact that is not subject to reasonable dispute" because it "is generally known universally, locally, or in the area pertinent to the event" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

"[A]n appellate court can take judicial notice of law and fact under certain circumstances." *United States v. Paul*, 73 M.J. 274, 278 (C.A.A.F. 2014). For example, a general regulation and general orders are proper subjects of judicial notice. *United States v. Ayers*, 54 M.J. 85, 91 (C.A.A.F. 2000); *United States v. Hennis*, 75 M.J. 796, 805 (Army Ct. Crim. App. 2016); *see also United States v. Corral*, ARMY 20121031, 2014 CCA LEXIS 588, at *4 n.1 (Army Ct. Crim. App.

15 Aug. 2014) (unpub. op.), pet. denied, 74 M.J. 326 (C.A.A.F. 2015) (taking judicial notice of the fact that the convening authority was suspended from command because the court is "permitted to take judicial notice of indisputable facts important to resolve appellate issues."). Therefore, this court can take judicial notice of the applicable regulations that pertain to the issues before this court.

In particular, this court, or the military judge at the trial level, can take judicial notice of the adjudicative fact that NJP records stored in MJO are "personnel records," which are "made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." R.C.M. 1001(b). Appellant argues that military justice offices "are dissimilar to the traditional sources of information that may be judicially noticed." (Appellant's Br. 4). However, appellant's argument is predicated on the assumption that the government would request courts to take judicial notice of an individual's record of NJP. Instead, a court would take judicial notice of the adjudicative fact that, under applicable regulations and rules, NJP records properly maintained in MJO,[3] *as a category*, are "personnel records"

[3] Courts should also apply the legal presumption of regularity when assessing whether NJP records were properly maintained in MJO: "In the absence of a showing to the contrary, this court must presume that the Army and its officials carry out their administrative affairs in accordance with regulations . . . ." *United States v. Masusock*, 1 C.M.R. 32, 35 (C.M.R. 1951); *see, e.g., United States v.*

under R.C.M. 1001(b). Once a court takes judicial notice, it has "no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292, 301–02 (1937). In other words, no weight is given to the evidence itself; rather, it is a matter of conserving judicial economy. Thus, an appellant or accused can still object, like in any other evidentiary circumstance, as to why that *particular or specific* NJP record is inadmissible.[4]

Under the plain reading of R.C.M. 1001 and AR 27-10, NJP records properly maintained in MJO are admissible records under R.C.M. 1001. Since regulations are proper subjects for judicial notice, this court can and should take judicial notice of the adjudicative fact that NJP records in MJO are personnel records "made or maintained in accordance with departmental regulations." R.C.M. 1001(b)(2).

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*Loving*, 41 M.J. 213, 241 (C.A.A.F. 1994) (citing to *Masusock* for the presumption of regularity in the conduct of governmental affairs). *But cf. United States v. Wilson*, ARMY 9700659, 1999 CCA LEXIS 386, at *5–6 (Army Ct. Crim. App. 11 June 1999) (mem. op.) (noting that a DA Form 2627 was "deprived of its 'presumption of regularity'" due to a commander's delay in signing the form).

[4] For example, an accused or appellant could object that the record was not properly maintained because it was kept beyond the required two years in MJO. *See* AR 27-10, para. 3-37(h).

## Specified Issue II

**IS MILITARY JUSTICE ONLINE IDENTIFIED AS A SYSTEM OF RECORD KEEPING IN THE ARMY RECORDS INFORMATION MANAGEMENT SYSTEM? IN WHAT WAY, IF ANY, DOES THE IDENTIFICATION OR LACK OF IDENTIFICATION OF MILITARY JUSTICE ONLINE AS A SYSTEM OF RECORD KEEPING IMPACT THIS COURT'S LEGAL DETERMINATION WHETHER NONJUDICIAL PUNISHMENT RECORDS CAN THEREBY BE PROPERLY "MAINTAINED" IN ACCORDANCE WITH ARMY REGULATION 27-10 IN MILITARY JUSTICE ONLINE FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?**

Although MJO is not identified as a system of record keeping in the Army Records Information Management System (ARIMS), it does not affect this court's legal determination as to whether NJP records can be properly maintained for purposes of admissibility because records can be stored outside of ARIMS. *See* Army Reg. 25-400-2, Army Records Management Program, para. 5-3(c) (18 Oct. 2022) [AR 25-400-2].

### A. Military Justice Online is not identified as a system of record keeping in the ARIMS.

The Army Records Information Management System is "the official records repository for all Army records." AR 25-400-2, para. 5-3.

Military Justice Online is not identified as a system of record keeping in ARIMS. *Record Instruction Details*, Army Records Information Management System.[5]

**B. The ARIMS does not affect this court's legal determination on admissibility under R.C.M. 1001.**

Pursuant to AR 25-400-2, para. 5-3(c), all Army records "should be stored in accordance with applicable records management policies and directives . . . ." However, organizations can store their records in an information system outside of ARIMS if the organization ensures "that the system has the ability to maintain the records throughout their life cycle according to its scheduled disposition." AR 25-400-2, para. 5-3(c).

Appellant's argument, that AR 25-400-2 does not list MJO as a system example, is irrelevant. (Appellant's Br. 7). Army Regulation 25-400-2, para. 5-3(c), uses the word "examples" and "include" to denote the fact that the enumerated systems do not constitute an exhaustive list. Instead, the regulation's only specific requirement is that a system is able to maintain records throughout their life cycle. AR 25-400-2, para. 5-3(c).

Since MJO can maintain NJP records for two years, as directed by AR 27-10, para. 3-37(h), and AR 25-400-2, para. 5-3(c), the NJP records in MJO are

[5] https://www.arims.army.mil/ARIMS/RRSA/ViewDetailLegacyACRS.aspx?instructionId=15244 (last visited 12 Apr. 2023).

"maintained in accordance with departmental regulations." R.C.M. 1001(b)(2). Therefore, the answer to whether MJO is identified as a system of record keeping in ARIMS has no impact on this court's legal determination on whether NJP records can be properly "maintained" in MJO for purposes of admission under R.C.M. 1001.

**Specified Issue III**

**IS MILITARY JUSTICE ONLINE LISTED AS A LOCATION OF MILITARY JUSTICE FILES IN THE SYSTEM OF RECORDS NOTIFICATION (SORN) UNDER THE REQUIREMENTS OF THE PRIVACY ACT? IF MILITARY JUSTICE ONLINE IS NOT LISTED AS A LOCATION FOR MILITARY JUSTICE FILES, WHAT IMPACT, IF ANY, DOES THAT HAVE ON THIS COURT'S LEGAL DETERMINATION WHETHER NONJUDICIAL PUNISHMENT RECORDS CAN THEREBY BE PROPERLY "MAINTAINED" IN ACCORDANCE WITH ARMY REGULATION 27-10 IN MILITARY JUSTICE ONLINE FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?**

Military Justice Online is not listed as a location of military justice files in the SORN. However, because the SORN and R.C.M. 1001(b)(2) are focused on different purposes, MJO's relation to the SORN does not impact this court's determination as to whether NJP records can be properly maintained in MJO under R.C.M. 1001.

**A. Military Justice Online is not listed as a location of military justice files in the SORN.**

The term "system of records" means "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). "Records," as defined by the Privacy Act, means "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or the identifying number, symbol, or other identifying particular assigned to the individual . . . ." 5 U.S.C. § 552a(a)(4). Each federal agency that maintains a system of records must publish a notice of the existence and character of the system of records in the Federal Register. 5 U.S.C. § 552a(e)(4). This notice, referred to as the SORN, "identifies the purpose for which Personally Identifiable Information (PII) is collected, from whom, what type, how information is shared, and how to access and correct information maintained by the agency." *Privacy Act System of Records Notice (SORN)*, U.S. Army Records Management Directorate, https://www.rmda.army.mil/privacy/sorns/index.html?param=UP7-4T2-6N6-5NJ (last visited 12 Apr. 2023). The SORN "allows questions to be raised and resolved

before the system is put into effect and ensures that privacy considerations have been addressed." *Id.*

Military Justice Online is not listed as a location of military justice files in the SORN under the requirements of the Privacy Act. *Military Justice Files*, Privacy, Civil Liberties, and Freedom of Information Directorate, U.S. Department of Defense.[6]

**B. The SORN does not impact this court's legal determination on whether NJP records can be properly "maintained."**

Military Justice Online's status in relation to SORN has no impact on this court's legal determination as to whether NJP records in MJO can be properly "maintained" in accordance with AR 27-10 for purposes of admission under R.C.M. 1001. The purpose of the SORN is to comply with the Privacy Act. 5 U.S.C. § 552(e)(5). However, R.C.M. 1001(b)(2), in specifying that personnel records include those "made or maintained in accordance with departmental regulations," is not focused on privacy matters. Instead, when the progenitor of R.C.M. 1001 was initially added to the Manual for Courts-Martial, the drafters at the time intended to limit admissible items to those "contained in official records" so that the accused was "on notice of what may be considered against him." Dep't of Army, Pam. 27-2, Analysis of Contents Manual for Courts-Martial, United

[6] https://dpcld.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/569941/a0027-10a-daja/ (last visited 12 Apr. 2023).

States 1969, Revised Edition, para. 75*d* (28 July 1970) [DA Pam. 27-2]. In other words, a statute concerning privacy and the storage of personally identifiable information has no nexus to a person's substantive right in a criminal proceeding where the remedy is exclusion of otherwise admissible evidence. Since the SORN and R.C.M. 1001(b)(2) fulfill different purposes, the SORN is irrelevant to the admissibility of NJP records.

For example, copies of permanently filed NJP records that are retrieved from a soldier's Official Military Personnel File (OMPF) are admissible at courts-martial. *See United States v. Lewis*, ARMY 20210179, 2022 CCA LEXIS 303, at *9 (Army Ct. Crim. App. 20 May 2022). A soldier's OMPF records are maintained and stored in the interactive Personnel Electronic Records Management System (iPERMS). Army Reg. 600-8-104, Army Military Human Resource Records Management, para. 3-1 and 3-5(a) (7 Apr. 2014) [AR 600-8-104]. However, neither the "Official Military Personnel Record" nor the "Military Justice Files" SORNs mention iPERMS.[7] *Official Military Personnel Record*, Privacy, Civil Liberties, and Freedom of Information Directorate, U.S. Department of Defense.[8]

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[7] Army Regulation 600-8-104, para. 2-2, briefly discusses the Privacy Act of 1974 and states that it applies to information and records contained in iPERMS; however, there is no mention of SORNs.

[8] https://dpcld.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570051/a0600-8-104b-ahrc/ (last visited 12 Apr. 2023).

Since the SORN is not relevant to admissibility under R.C.M. 1001, the fact that MJO is not listed as a location for military justice files does not impact this court's legal determination as to whether NJP records can be properly "maintained" in MJO.

**Specified Issue IV**

**WHAT, IF ANY, IS THE LEGAL SIGNIFICANCE OF ARMY REGULATION 27-10, PARA. 3-44(b) AND 5-37(a) STATING THAT A RECORD OF NONJUDICIAL PUNISHMENT MAY BE ADMITTED AT COURTS-MARTIAL FROM ANY FILE IN WHICH IT IS PROPERLY "MAINTAINED" BY REGULATION WHILE PARAGRAPH 14-1(a) IDENTIFIES MILITARY JUSTICE ONLINE AS A TOOL FOR "MANAGING" VARIOUS ADVERSE ADMINISTRATIVE DOCUMENTS, INCLUDING NONJUDICIAL PUNISHMENT? AND WHAT SIGNIFICANCE, IF ANY, SHOULD WE PLACE ON THE FACT THAT PARAGRAPH 5-37 IS TITLED SENTENCING?**

Army Regulation 27-10, para. 14-1(a), which identifies MJO as a tool for "managing" adverse administrative documents does not affect this court's determination as to whether properly maintained NJP records pulled from MJO are admissible under R.C.M. 1001 because MJO can be both a tool and a file where NJP records are maintained. The fact that AR 27-10, para. 5-37, is titled "Sentencing" demonstrates that the regulation explicitly considered what sort of records were admissible under R.C.M. 1001(b). By using intentionally broad

language, AR 27-10, para. 5-37, encompasses NJP records maintained in MJO as admissible personnel records.

**A. There is no legal significance to AR 27-10, para. 14-1(a), identifying MJO as a tool for "managing" NJP.**

Army Regulation 27-10, para. 14-1(a), does not impact admissibility because being a tool for creating and managing NJP does not preclude MJO from also being a file where NJP records are maintained. Even if one of MJO's purpose is to be a "tool for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice," MJO still needs to maintain NJP records to generate that data and conduct analyses. AR 27-10, para. 14-1(a). *See also infra* Specified Issue VI (discussing how "managing" encapsulates "maintaining" records).

Appellant claims that AR 27-10's guidance to transmit records via MJO does not say that MJO must be used to store those records. (Appellant's Br. 13). [9] However, AR 27-10, para. 3-37(h), directs paralegals to "maintain a copy" of the

[9] Appellant also avers that AR 27-10's guidance for removal of NJP from military records "highlights that MJO is not a file." AR 27-10, Table 3–2; (Appellant's Br. 12). However, the table specifically states that it is for removal of NJP records from "personnel files." AR 27-10, Table 3–2. Since MJO is just "a file" rather than a "personnel file," Table 3–2 is inapplicable to MJO. AR 27-10, para. 5-37(a)(4). Lastly, appellant cites to AR 27-10, Appendix M, to argue that MJO is not a file. (Appellant's Br. 13). However, the purpose of AR 27-10, Appendix M, is "to assist chiefs of military justice and SJAs in evaluating their key internal controls. It is not intended to cover all controls."

NJP in MJO for two years. Even if the regulation does not specifically use the word "store," the regulation clearly contemplates that storage is part and parcel of maintaining the copies of NJP records. Military Justice Online is the "single tool in the Regular Army for creating . . . NJP."[10] AR 27-10, para. 14-1(a). Further, MJO is "the sole means of transmitting files to HRC that are directed to a Soldiers' official record." Deputy Judge Advocate (DJAG) Policy Memorandum 18-02 by Office of the Judge Advocate General, Subject: The Judge Advocate General's Corps Enterprise Applications (19 Dec. 2017) [DJAG Policy Mem. 18-02][11]; AR 27-10, para. 3-37(b)(2) ("The servicing legal office will transmit [NJP] via Military Justice Online (MJO) to U.S. Army Human Resources Command."). If NJP records are created in MJO and must be transmitted to HRC, the NJP records necessarily have to be stored for some period of time in MJO for those records to be transmitted.

Lastly, the fact that AR 27-10, para. 3-37(b)(2), provides guidance on how to file NJP records without using MJO does not support appellant's argument.

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[10] Since NJP records are made in MJO pursuant to AR 27-10, para. 14-1(a), the NJP records in MJO are admissible under R.C.M. 1001(b)(2): "any records *made* or maintained in accordance with departmental regulations." (emphasis added).

[11] The most recent version of the DJAG's policy memo contains the same language identifying MJO as the "sole means of transmitting files to HRC." DJAG Policy Memorandum 22-02 by Office of the Judge Advocate General, Subject: The Judge Advocate General's Corps Enterprise Applications and Knowledge Sharing Tools (1 Mar. 2022).

(Appellant's Br. 13–14). Army Regulation 27-10, para. 14-4, states that "[t]he *only method* for submitting NJP and reprimands to HRC for permanent filing in the iPERMS is via . . . the MJO application." In other words, NJP must be submitted to HRC via MJO; however, there is a back-up provision in case MJO is unavailable at the time for whatever reason. AR 27-10, para. 14-4. Therefore, this court should not place any legal significance on MJO being described as a tool for "managing" NJP.

**B. This court should recognize that AR 27-10, para. 5-37(a), explicitly acknowledges that NJP from any file is admissible under R.C.M. 1001(b)(2).**

Army Regulation 27-10, para. 5-37, is titled "Sentencing" because it is explicitly directed towards R.C.M. 1001, as further evidenced by the words "[f]or purposes of RCM 1001(b)(2) and (d)" in the body of the paragraph. *See also INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); *United States v. Brooks*, 64 M.J. 587, 590 n.2 (Army Ct. Crim. App. 2006) ("A statute's title may aid in construing any ambiguities in a statute.") (cleaned up); *United States v. Jackson*, 46 C.M.R. 1128, 1129–30 (A.C.M.R. 1973) (considering a regulation's title and the titles of the regulation's enclosures in deciding whether the regulation applied punitively to the appellant).

In addition to being explicit, AR 27-10, para. 5-37, is broad, particularly when it comes to admissible NJP records. In the context of AR 27-10, para. 5-37,

the word "file" is used as a noun. Army Regulation 25-400-2's glossary defines "file" as "[a]n accumulation of records maintained in a predetermined physical or electronic arrangement . . . ."[12] Army Regulation 27-10, para. 5-37, uses the word "any" to broaden the word "file": "Examples of personnel records that may be presented include . . . [r]ecords of NJP . . . from any file in which the record is properly maintained by regulation." *See United States v. Perry*, 20 M.J. 1026, 1027 (A.C.M.R. 1985) (finding that a form documenting an approved recommendation for disciplinary action against the appellant was admissible under R.C.M. 1001(b)(2) due to the broad language of AR 27-10, which provides that trial counsel may present copies of "any personnel records" that are "contained in the OMPF or located elsewhere"); *see also*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–19 (2008) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). In doing so, the regulation acknowledges that there are multiple potential locations—or files—where NJP may be stored. One of those potential locations is MJO. Pursuant to AR 27-10, para. 3-37(h), the paralegal specialist must maintain a copy of the NJP in MJO for a period of two years. Thus, MJO

[12] The second half of the definition pertains to when "file" is used as a verb. AR 25-400-2, Glossary.

qualifies as a file for NJP since it is a predetermined electronic arrangement where an "accumulation" of NJP is "maintained." AR 25-400-2, Glossary.

This intentional breadth of admissible files is reinforced in the NJP section of the regulation: AR 27-10, para. 3-44(b), states that a "record of NJP or a duplicate as defined in MRE 1001(e), not otherwise inadmissible, may be admitted at courts-martial . . . from *any file* in which it is *properly maintained by regulation*." (emphasis added). Army Regulation 27-10, para. 5-37(a)(12), further endorses a comprehensive view by reiterating that admissible personnel records include: "personnel records contained in the AMHRR *or located elsewhere*, *including but not limited* to the correctional file, *unless prohibited by law or other regulation*." (emphasis added). Similarly, R.C.M. 1001(b)(2) defines personnel records as "*any records* made or maintained in accordance with departmental regulations." (emphasis added). Since NJP records, regardless of whether they come from MJO or the AMHRR, are personnel records that are both "made" and "maintained in accordance with departmental regulations," the NJP records from MJO are admissible under R.C.M. 1001(b)(2). *See also* AR 27-10, para. 14-1(a) (noting that MJO is "the single tool" for creating NJP).

In *United States v. Lewis*, a panel of this court found that "[t]he 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." ARMY 20210179, 2022 CCA LEXIS 303, at *8–9 (Army Ct. Crim. App. 20 May 2022) (mem. op.). In *United States v. Frasur* and *United States v. Long*, the same panel reiterated *Lewis*'s finding that MJO is not a "personnel file" and that a copy of NJP in MJO did not "constitute a 'file in which the record is properly maintained by regulation' within the meaning of AR 27-10." *United States v. Frasur*, ARMY 20210420, 2022 CCA LEXIS 401, at *5 (8 Jul. 2022) (mem. op.) (quoting AR 27-10, para. 5-37); *United States v. Long*, ARMY 20210591, 2022 CCA LEXIS 685, at *7 (22 Nov. 2022) (mem. op.). However, AR 27-10, para. 5-37 and 3-44(b), do not require NJP records be pulled from a "personnel" file; rather, the only requirement is that it come from "any" file.[13] AR 27-10, para. 5-37(a)(4). Insofar as *Frasur* and *Long* narrowed *Lewis*'s finding, that MJO is not a "personnel file," to finding that MJO is not a "file" at all, this court should clarify its reasoning in those cases in light of AR 25-400-2's definition of a "file." AR 25-400-2, Glossary. Since MJO is "[a]n accumulation of records maintained in a predetermined physical or electronic arrangement," MJO is "a file" that falls under the umbrella of "any file" pursuant to AR 27-10, para. 5-37 and 3-44(b). [14] AR 25-400-2, Glossary.

[13] Although NJP records in MJO are personnel *records*, appellee is not arguing that MJO is a personnel *file*. Rather, MJO is merely *a file* where NJP records are maintained.

[14] Additionally, MJO organizes NJP records as files on an individual; in other words, an individual, such as appellant, would have a file within MJO that is

If AR 27-10, para. 5-37(a)(4), meant to restrict admissible files to "personnel files," such as the AMHRR, it would have done so. For example, AR 27-10, para. 5-37(a)(5) narrows written reprimands or admonitions to those "required by regulation to be maintained in the AMHRR of the accused."[15] Additionally, AR 27-10, para. 5-37(a)(8), limits evidence of civilian convictions to "official military files," while para. 5-37(a)(11) constrains admissible disciplinary records to those "filed in corrections files in accordance with AR 190-47." Therefore, in comparison to the other subsections that clearly evince a desire to limit admissible records, the expansiveness of para. 5-37(a)(4) confirms that NJP records in MJO are admissible under R.C.M. 1001.

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unique to him and would contain records—such as NJP, general officer memorandums of reprimand, investigations, and so forth—related to him as the subject. *See* Military Justice Online, https://www.jagcnet126army.mil/mjoactive/ui (last visited 12 Apr. 2023); DJAG Policy Mem. 18-02, para. 1(b) (stating that MJO is "the sole means of transmitting *files* to HRC that are directed to a Soldiers' official record.") (emphasis added).

[15] Older versions of AR 27-10 also initially restricted NJP to those "required by regulation to be maintained in the Military Personnel Records Jacket." Army Reg. 27-10, para. 2-20(b)(4) (15 Sep. 1981) [AR 27-10, 1981].

## Specified Issue V

**WHAT IMPACT, IF ANY, DOES ARMY REGULATION 27-10, PARA. 3-37(h) REQUIRING A UNIT PARALEGAL TO "MAINTAIN" A COPY OF NONJUDICIAL PUNISHMENT IN MILITARY JUSTICE ONLINE FOR A PERIOD OF TWO YEARS HAVE ON THIS COURT'S LEGAL DETERMINATION WHETHER RECORDS PULLED FROM MILITARY JUSTICE ONLINE ARE RECORDS THAT HAVE BEEN "MAINTAINED" IN ACCORDANCE WITH REGULATION FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001? HOW DOES THE LANGUAGE OF ARMY REGULATION 27-10, PARA. 3-37(h), IF AT ALL, COMPORT WITH THE LANGUAGE IN PARAGRAPH 14-1(a) IDENTIFYING MILITARY JUSTICE ONLINE AS A TOOL FOR "MANAGING" VARIOUS ADVERSE ADMINISTRATIVE DOCUMENTS, INCLUDING NONJUDICIAL PUNISHMENT?**

Army Regulation 27-10, para. 3-37(h), requires the unit's paralegal specialist to "maintain a copy" of NJP in MJO for a period of two years. This paragraph provides further evidence that copies of NJP records pulled from MJO are admissible under AR 27-10, para. 5-37(a)(4). By using the word "maintain," AR 27-10, para. 3-37(h), categorizes NJP records in MJO as records that are "properly maintained by regulation" under AR 27-10, para. 5-37(a)(4).

Although this court should "adhere[] to the plain meaning" of the text, even the principles of statutory interpretation point to admissibility. *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020). The presumption of consistent usage

is a canon of statutory construction where "identical words used in different parts of the same statute are . . . presumed to have the same meaning." *Robers v. United States*, 572 U.S. 639, 643 (2014); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012). Army Regulation 27-10, para. 3-37(h), uses the word "maintain" in directing the unit paralegal to store a copy of the NJP records in MJO for two years. If the NJP records in MJO were not intended to be admissible under R.C.M. 1001, the regulation could have used more specific words, such as "stored" or "saved" in AR 27-10, para. 3-37(h). However, the fact that the word "maintain" was specifically used in both AR 27-10, para. 3-37(h) and 5-37(a)(4), demonstrates the regulation's purposeful intent to render NJP records from MJO admissible under R.C.M. 1001. *See also* AR 27-10, para. 3-37(b)(1) and 3-38(c)(3)-(4) (using the word "maintained" to describe filing and/or storing NJP records).

Furthermore, the language of AR 27-10, para. 3-37(h), comports with the language in paragraph 14-1(a), identifying MJO as a tool for "managing" various administrative documents, because "maintaining" a copy is necessarily part of "managing" NJP. *See infra* Specified Issue VI.

## Specified Issue VI

**DOES THE FACT THAT ARMY REGULATION 27-10 STATES THAT MILITARY JUSTICE ONLINE IS A TOOL FOR "MANAGING" ADVERSE ADMINISTRATIVE INFORMATION IMPACT THIS COURT'S LEGAL DETERMINATION WHETHER RECORDS PULLED FROM MILITARY JUSTICE ONLINE ARE RECORDS THAT HAVE BEEN "MAINTAINED" IN ACCORDANCE WITH REGULATION FOR PURPOSES OF ADMISSION UNDER R.C.M. 1001?**

The fact that AR 27-10 states that MJO is a tool for "managing" adverse administrative information does not impact this court's legal determination on whether NJP records pulled from MJO are records that have been "maintained" in accordance with regulation for purposes of admission under R.C.M. 1001. This is because "managing" records includes maintaining records. *See* AR 25-400-2, para. 3-1.

Army Regulation 27-10, para. 14-1(a), states that "MJO is the single tool in the Regular Army for creating, processing, and managing . . . NJP . . . ." Although the word "maintaining" is not explicitly mentioned in that paragraph, "maintaining" is necessarily included within the word "managing." Army Regulation 25-400-2, para. 3-1, defines "records management" as "the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records *maintenance* and use, and records disposition . . . ." (emphasis added). The glossary for AR 25-400-2

again defines "records management" as "other managerial activities involved with respect to record information creation, *maintenance (use, storage, and retrieval)*, and disposition . . . ." (emphasis added).[16] Department of the Army Pamphlet 25-403, para. 4-1(a)(2), states that "[p]roper *management* provides for economic, efficient, and reliable *maintenance*, retrieval, preservation, storage, and applied disposition of the information." (emphasis added); Dep't of Army, Pam. 25-403, Army Guide to Recordkeeping (10 Nov. 2022) [DA Pam. 25-403]. Since AR 25-400-2 defines "records management," this court does not need to resort to a dictionary definition. (Appellant's Br. 12).

Appellant contends that since MJO is an "application," MJO is not a file. (Appellant's Br. 16). Yet, MJO's status as an application or tool has no bearing on whether NJP records pulled from MJO are admissible. As previously discussed, the definition of a file is "[a]n accumulation of records maintained in a predetermined physical or electronic arrangement . . . ." AR 25-400-2, Glossary; *see supra* Specified Issue IV. Simply put, MJO is an "accumulation of records" that is maintained in a "predetermined physical or electronic arrangement": as noted by regulation and policy, NJP records must be created, maintained, and managed in MJO. AR 27-10, para. 14-1(a), 3-37(b)(2), 3-37(h); DJAG Policy

[16] Contrary to appellant's assertion that "responsibility for managing a document imposes no obligation to maintain that document," AR 25-400-2 does impose such a responsibility in the context of records management. AR 25-400-2, Glossary.

Mem. 18-02. Therefore, since NJP records pulled from MJO are records from a file, such records are admissible under AR 27-10 and R.C.M. 1001, regardless of whether MJO is a tool or an application.

## Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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# APPENDIX

# United States v. Corral

United States Army Court of Criminal Appeals

August 15, 2014, Decided

ARMY 20121031

**Reporter**
2014 CCA LEXIS 588 *

UNITED STATES, Appellee v. Staff Sergeant LUIS R. CORRAL United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Petition denied by *United States v. Corral, 2015 CAAF LEXIS 760 (C.A.A.F., Mar. 25, 2015)*

**Prior History:** [*1] Headquarters, U.S. Army Training Center and Fort Jackson. Stephen Castlen and David H. Robertson, Military Judges. Lieutenant Colonel Eric K. Stafford, Acting Staff Judge Advocate (pretrial). Colonel Steven B. Weir, Staff Judge Advocate (post-trial).

## Case Summary

**Overview**
HOLDINGS: [1]-Where appellant servicemember was charged with forcible sodomy, sexual assault, and sexual harassment of trainees, because the convening authority was also accused of sexual misconduct, inappropriate relationships with subordinates, and assaultive behavior, and his conduct was being investigated when he took action in appellant's case, his actions had to be set aside in order to preserve the public's confidence in the fairness and integrity of the military justice system.

**Outcome**

The action of the convening authority was set aside and the record of trial was returned to the Judge Advocate General for a new action by a different convening authority, pursuant to Unif. Code Mil. Justice art. 60(c)-(e), *10 U.S.C.S. § 860(c)-(e)*.

**Counsel:** For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Robert N. Michaels, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major John K. Choike, JA; Major Alison L. Gregoire, JA (on brief).

**Judges:** Before LIND, KRAUSS, and PENLAND, Appellate Military Judges. Judge KRAUSS and Judge PENLAND concur.

**Opinion by:** LIND

## Opinion

SUMMARY DISPOSITION

LIND, Senior Judge:

An panel of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of five specifications of violation of a lawful general regulation, five specifications of maltreatment of subordinates, one specification of abusive sexual contact, two specifications of indecent acts, one specification of forcible sodomy, one specification of assault consummated by a battery, and one specification of adultery in violation of Articles 92, 93, 120, 125, 128, and 134, Uniform Code of Military Justice [hereinafter UCMJ], [*2] *10 U.S.C. §§ 892*, *893*, *920*, *925*, *928*, *934 (2006 and Supp. V 2012)*. The members sentenced appellant to a bad-conduct discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 73 days against the sentence to confinement.

This case is before the court for review under *Article 66, UCMJ*. Appellant avers, inter alia, that when acting on appellant's request for deferment and waiver and when taking action in appellant's case, the convening authority was engaged in misconduct similar to that of appellant and was not acting in an impartial manner in appellant's

case. Appellant requests this court set aside the action and return the record of trial to a new convening authority for post-trial review and clemency. We hold that a new review and action is warranted in this case.

Appellant was a drill sergeant at Fort Jackson, South Carolina. His convictions involve illegal associations with five trainees; maltreatment by sexually harassing the same five trainees; forcible sodomy and adultery with one of the trainees; abusive sexual contact with another trainee; indecent acts with two of the trainees; and assault consummated [*3] by a battery against one of the trainees by grabbing her shirt and kissing her.

Appellant's case was referred on 21 June 2012. Action was taken on 22 March 2013. Throughout this time, Brigadier General (BG) Bryan T. Roberts acted as the convening authority in appellant's case. On 29 November 2012, BG Roberts denied: (1) appellant's request for deferment of adjudged and automatic forfeitures, reduction in rank, and confinement, and (2) appellant's request for waiver of automatic forfeitures.

Appellant has asked the court to consider published accounts of an Army announcement that BG Roberts was suspended as commander of the Army Training Center on 21 May 2013 based on a preliminary investigation by Army Criminal Investigation Command (CID) into alleged adultery and assault by BG Roberts.[1] Appellant has also asked us to consider a redacted report of investigation (ROI) of BG Roberts by the U.S. Army Inspector General Agency (DAIG) dated 16 September 2013 substantiating that BG Roberts engaged in two inappropriate relationships with civilian subordinates between December 2010 and February 2013 and improperly used government resources.[2]

We do not find that any additional inquiry into BG Roberts's misconduct is necessary to resolve this case. The Air Force Court of Criminal Appeals' predecessor addressed a similar situation where a convening authority took action in cases involving sexual misconduct while he was under investigation [*5] for sexual misconduct. *See* United States v. Gregg, ACM 28848, 1991 CMR LEXIS 745, 1991 WL 85323 (A.F.C.M.R. 18 Apr. 1991) (per curiam).[3] In these cases, the Air Force Court of Military Review in "an abundance of caution over the need to preserve the appearance of propriety in the military justice system" recognizing "the effect of the consciousness of one's own misbehavior might influence decisions about the misbehavior of others" set aside the convening authority action and remanded the case for a new recommendation and action by a different convening authority.[4] United States v. Kroop, 34 M.J. 628, 630-32 (A.F.C.M.R. 1992) (opinion on further review); *see* Gregg, 1991 CMR LEXIS 745, 1991 WL 85323; United States v. Moore, ACM 28290, 1992 CMR LEXIS 580, 1992 WL 153607, at *1 (A.F.C.M.R. 15 Jun. 1992) (opinion on further review).

Unlike Gregg, Kroop, and Moore, the similarities between appellant's misconduct and that of BG Roberts are less clear. [*6] The gravamen of the misconduct in appellant's case is forcible sodomy, sexual assault, and sexual harassment of trainees in a cadre/training environment. In contrast, there was no allegation of non-consensual *sexually* assaultive behavior by BG Roberts. Nonetheless, both appellant's misconduct and that of

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[1] The government does not concede that the facts in the [*4] admitted publications are accurate, however, the government does not dispute that BG Roberts was suspended from command on 21 May 2013 pending investigation into alleged adultery and assault. We are permitted to take judicial notice of indisputable facts important to resolve appellate issues. United States v. Paul, 73 M.J. 274, 278 (C.A.A.F. 2014) (citing United States v. Williams, 17 M.J. 207, 214 (C.M.A. 1984)). We take judicial notice the BG Roberts was suspended from command on 21 May 2013 pending investigation into alleged adultery and assault.

[2] The ROI states that on 13 February 2013, CID received a complaint of an assault by BG Roberts and began its investigation. The complainant told CID she was in a sexual relationship with BG Roberts from May 2011 to 13 February 2013 and that BG Roberts had assaulted her. The ROI further states that following a 2 August 2013 CID final report, BG Roberts received non-judicial punishment under Article 15, UCMJ, for assault, adultery, and conduct unbecoming an officer.

[3] In *Gregg,* the Air Force Court of Military Review joined three cases involving this same issue: *Gregg, United States v. Kroop* (ACM 28424), and United States v. Moore, 1991 CMR LEXIS 745 (ACM 28290). Gregg, 1991 CMR LEXIS 745, 1991 WL 85323, at *1.

[4] In *Kroop* and *Moore,* the Air Force Court of Criminal Appeals rejected the contention that the collateral misconduct of the convening authority disqualified him from referring the case or selecting or impact his selection of members for the court-martial. Kroop, 34 M.J. at 632-33; Moore, 1992 CMR LEXIS 580, 1992 WL 153607, at *4; *see also* United States v. Robertson, ARMY 9700500, 1999 CCA LEXIS 454, 1999 WL 35021399, at *1 (Army Ct. Crim. App. 22 Jul. 1999) (mem. op.).

BG Roberts involve sexual misconduct and inappropriate relationships with subordinates and assaultive behavior. Brigadier General Roberts's misconduct occurred, at least in part, contemporaneous with his denial of appellant's requests for deferment and waiver. Furthermore, the CID investigation into BG Roberts's sexual relationship with and assaults of the complainant was ongoing when he took action in appellant's case. Under the unique facts of this case, we also find it necessary to exercise an abundance of caution to preserve the public's confidence in the fairness and integrity of the military justice system.

**CONCLUSION**

The action of the convening authority dated 22 March 2013 is set aside. The record of trial is returned to the Judge Advocate General for a new action by a different convening authority in accordance with *Article 60(c)-(e), UCMJ*.

Judge KRAUSS and Judge PENLAND concur. [*7]

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# *United States v. Wilson*

United States Army Court of Criminal Appeals

June 11, 1999, Decided

ARMY 9700659

**Reporter**
1999 CCA LEXIS 386 *; 1999 WL 35021305

UNITED STATES, Appellee v. Private E2 ROHAN G. R. WILSON, United States Army, Appellant.

**Notice:** NOT FOR PUBLICATION

**Prior History:** [*1] Headquarters, Fort Riley. G. O. Varo and K. H. Hodges, Military Judges.

**Counsel:** For Appellant: Richard T. McNeil, Esq.; Mary Ramsay McCormick, Esq. (on brief).

For Appellee: Colonel Russell S. Estey, JA; Major Patricia A. Ham, JA (on brief).

**Judges:** Before SQUIRES, MERCK, and TRANT, Appellate Military Judges. Senior Judge SQUIRES and Judge TRANT concur.

**Opinion by:** MERCK

## Opinion

MEMORANDUM OPINION

MERCK, Judge:

Pursuant to his pleas, a military judge convicted appellant of breaking restriction in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934* [hereinafter UCMJ]. Contrary to his pleas, a general court-martial composed of officer members convicted appellant of unpremeditated murder in violation of *Article 118*, UCMJ. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for thirty years, forfeiture of all pay and allowances, and reduction to Private E1.

This case is before the court for automatic review pursuant to *Article 66, UCMJ*. We have considered the record of trial, appellant's three assignments of error, the matter personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and the government's response thereto. We [*2] find no basis for relief; however, one of appellant's assignments of error merits discussion. Appellant asserts:

> THE MILITARY JUDGE ERRED IN ADMITTIING OVER DEFENSE OBJECTION, THE RECORD OF APPELLANT'S PREVIOUS NON-JUDICIAL PUNISHMENT WHERE THE RECORD WAS FACTUALLY DEFECTIVE.

During the presentencing phase of the trial, the military judge admitted, over defense objection, a certified record, Department of Army (DA) Form 2627, Record of Proceedings Under *Article 15, UCMJ*. This *Article 15, UCMJ*, proceeding resulted from appellant stabbing a fellow soldier in the abdomen with a steak knife on or about 15 September 1996. The trial defense counsel argued that the DA Form 2627 was "spatially (sic) defective . . . and [was] not maintained in compliance with military regulation under (sic) Rule For Courts-Martial 1001(b)(2) [hereinafter R.C.M.]. [1] [Appellant] was forced to make an appellate election before being advised by his commander and before punishment was imposed."

In determining whether the military judge erred, we make the following findings of fact under *Article 66(c)*, UCMJ.

1. Appellant was offered an *Article 15* for stabbing a soldier in the abdomen with a steak knife on or about 15 September 1996.

2. Appellant's battalion commander conducted the *Article 15, UCMJ*, proceeding on 4 November 1996.

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[1] Rule for Courts-Martial 1001(b)(2) provides in part: "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 [*3] of prior service. Such evidence includes copies of . . . punishments under Article 15."

3. The battalion commander's practice was, if he determined that punishment was appropriate, he would:

a. announce the punishment to the soldier at the close of the hearing and fill in a punishment worksheet provided by the brigade legal advisor; and

b. not sign the DA Form 2627 until the punishment was typed in by his legal staff, so that he could "read it and verify that it [did] indeed match what he verbally gave to that soldier that day in his office."

4. The battalion commander followed this procedure in appellant's case.

5. After the commander announced the punishment on 4 November 1996, appellant waived his right to appeal and signed the DA Form 2627 on the same day.

6. Soon after conducting the *Article 15, UCMJ*, proceeding, the commander was deployed to Bosnia. He [*4] returned to his office on 19 November 1996, and the same day, personally signed appellant's DA Form 2627 with the filled-in punishment block.

***DISCUSSION***

The standard of review is whether the military judge abused his discretion. *United States v. Clemente, 50 M.J. 36 (1999)*; *United States v. Sullivan, 42 M.J. 360, 363 (1995)*. "[A]n abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)* (quoting *United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980))*.

The military judge correctly stated that the commander who imposed the punishment did not follow "the regulation." Army Reg. 27-10, Legal Services Military Justice, para. 3-21 (24 June 1996), provides that the commander who imposes punishment should normally sign the DA Form 2627 indicating imposition of punishment on the same day that punishment is imposed.

As a result of this commander's delay, the DA Form 2627 was deprived of its "presumption of regularity." Absent an explanation of these deficiencies by independent evidence, the DA Form 2627 would not [*5] be admissible for sentencing purposes. *United States v. Wiggers, 25 M.J. 587, 595 (A.C.M.R. 1987)* (citing with approval *United States v. Mack, 9 M.J. 300 (C.M.A. 1980))*; *United States v. Burl, 10 M.J. 48 (C.M.A. 1980)*. Based on our findings of fact, we hold that the irregularity was explained. Appellant was not denied any procedural due process rights based on his commander's actions. *Compare* *United States v. Godden, 44 M.J. 716 (A.F. Ct. Crim. App. 1996)* (absence of reviewing attorney's typed signature block and dates the record of *Article 15, UCMJ*, proceeding was forwarded to an administrative officer for processing did not affect procedural due process rights of appellant), *with* *United States v. Rimmer, 39 M.J. 1083 (A.C.M.R. 1994)* (record of *Article 15, UCMJ*, proceedings was inadmissible because it was missing an election of appeal rights). In contrast to *Rimmer*, the administrative defect at issue in this case did not deprive appellant of any due process rights. Accordingly, we find that the military judge did not abuse his discretion when he admitted the record of *Article 15, UCMJ*, proceedings as Prosecution Exhibit 30.

The remaining allegations of error, to include those raised [*6] personally by the appellant pursuant to *Grostefon, 12 M.J. 431*, are without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge SQUIRES and Judge TRANT concur.

**CERTIFICATE OF SERVICE, U.S. SPITZ (20220195)**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 14th day of April, 2023.

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