

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
PENLAND, MORRIS, and ARGUELLES  
Appellate Military Judges

UNITED STATES, Appellee  
v.  
Warrant Officer One JOSEPH S. BURCH  
United States Army, Appellant

ARMY 20230576

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ORDER  
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WHEREAS:

On 6 November 2023, a military judge sitting as a general court-martial, convicted appellant, in accordance with his plea, of one specification of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice [UCMJ]. Pursuant to the Plea Agreement, the military judge adjudged no punishment. The convening authority took no action on the finding and the military judge entered judgment. This case is now before us for review under Article 66, UCMJ.

On 14 February 2023, appellant filed a brief before this Court asserting, *inter alia*, “a *sub rosa* agreement between the government and defense counsel that appellant was not pleading to a Lautenberg qualifying offense affected the voluntariness of appellant’s plea (or, in the alternative, whether there was a misunderstanding as to the meaning and effect of the guilty plea under *United States v. Parrish*).” Related to this assignment of error, it appears there may be a potential disagreement between defense counsel and the military judge as to the substance of an unrecorded Rule for Court Martial [R.C.M.] 802 session held during the trial. The government filed its responsive brief on 15 March 2023.

In addition, appellant has filed a Motion to Attach Defense Exhibits A-C, which the government opposes.

NOW THEREFORE, IT IS ORDERED:

1. Pursuant to R.C.M. 810(f)(1), we remand the record of trial for additional fact finding on the issues set forth below in order to address a substantial issue on appeal.
2. At a minimum, the military judge detailed to the remand will address the following questions:

- a. Whether there existed a *sub rosa*, or unwritten agreement, between the parties that the provisions of the Lautenberg Amendment would not apply to the specification to which appellant pled guilty?
  - b. Whether appellant understood the full meaning and effect of his guilty plea, and if not, why not?
  - c. Whether there was a mutual misunderstanding between the parties as to the applicability of the provisions of the Lautenberg Amendment to the specification to which appellant pled guilty? And if there was such a misunderstanding, why?
  - d. Was the military judge aware of any agreement or understanding between the parties as to the applicability of the Lautenberg Amendment in this case, and if so when?
  - e. What role, if any, did the military judge's involvement in the case, to include her email communications with the parties prior to the trial and the R.C.M. 802 session held during trial, play in appellant's alleged misunderstanding of the applicability of the Lautenberg Amendment?
3. Given the potential dispute between the military judge and the defense as to the substance of the R.C.M. 802 session, the military judge who presided at trial may not serve as the military judge detailed to the remand.
  4. The military judge detailed to the remand will permit the presentation of witnesses and evidence, make rulings as appropriate, and enter findings of fact concerning the questions in Paragraph 2 above.
  5. The hearing will be concluded no later than 90 days from the date of this order.
  6. At the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, will be expeditiously returned to this court for further review.
  7. Neither appellee nor appellant will submit any briefs to this court after the remand hearing is completed without either an order by this court directing they do so or this court granting a motion to file additional briefs.
  8. In light of this remand order, appellant's Motion to Attach Appellate Exhibits A-C is denied as moot.

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DATE: 17 April 2024

FOR THE COURT:



JAMES W. HERRING, JR.  
Clerk of Court

CF: JALS-DA  
JALS-GA  
JALS-CCR  
JALS-CR3