

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE ON THE
SPECIFIED ISSUE**

v.

Docket No. ARMY 20230403

Specialist (E-4)

MALACHI M. TEMPLE

United States Army,

Appellant

Tried at Fort Cavazos, Texas, on 24
July 2023, before a special court-
martial appointed by the
Commander, 1st Cavalry Division,
Lieutenant Colonel Joseph K.
Venghaus, military judge, presiding.

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

Specified Issue

**WHETHER APPELLANT’S FIRST CLAIM UNDER
UNITED STATES V. GROSTEFON, 12 M.J. 431
(C.M.A. 1982), ERRONEOUS POST-TRIAL
ADVICE FROM THE STAFF JUDGE ADVOCATE
TO THE CONVENING AUTHORITY, MERITS
RELIEF**

Statement of the Case

On 30 April 2024, appellant submitted his brief to this court. In that brief appellant only personally alleged errors pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). On 1 May 2024, the government filed a brief on behalf of appellee. On 8 May 2024, this court ordered additional briefing on the above specified issue. (Order). On 20 May 2024, appellant submitted his brief on the specified issue. This is the government’s answer.

Statement of Facts

On 24 July 2023, a military judge sitting as a special court-martial found appellant guilty, in accordance with his pleas, to three specifications domestic violence in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b (2018) [UCMJ].¹ (Statement of Trial Results [STR]; App. Ex. IV.; R. at 63). Pursuant to his plea agreement with the convening authority, appellant was sentenced to 225 days confinement, reduction to the grade of E-1, and a bad-conduct discharge [BCD].² (App. Ex. IV; R. at 99). Appellant was credited with 234 days of confinement credit.³ (R. at 100).

On 8 August 2023, appellant's trial defense counsel provided Rule for Courts-Martial [R.C.M.] 1106 matters to include a "good soldier book" along with an unsigned Authorization to Release Funds Deferred or Waived by the Convening

¹ As part of his agreement with appellant, the convening authority agreed to dismiss one specification of domestic violence in violation of Article 128b, UCMJ, one specification of failure to follow a lawful order in violation of Article 92, UCMJ, and one specification of child endangerment in violation of Article 119b, UCMJ. (App. Ex. IV).

² Appellant was sentenced to ninety days confinement for Specification 1 of Charge I, fifteen days confinement for Specification 2 of Charge I, and one hundred and twenty days confinement for Specification 3 of Charge I, to be served consecutively. (Appellate Ex. IV, p. 3; R. at 99).

³ Appellant was credited with 147 days of *Allen* credit for pretrial confinement, 4 days of *Mason* credit for pretrial restriction tantamount to confinement, and 83 days of *Pierce* credit for prior punishment under Article 15, UCMJ. (R. at 100).

Authority [Authorization Form] for the convening authority's consideration.

(R.C.M. 1106 Submission). In that submission, appellant's counsel wrote:

The Defense respectfully requests that [the convening authority] defer automatic forfeitures and adjudged rank reduction until the entry of judgment, and then disapprove the reduction at [the convening authority's] action. Second, [appellant] requests [the convening authority] waive the forfeitures until [appellant] is able to go on excess administrative leave. The Defense asks this be done so that [appellant's] pay may go to his wife, Ms. [TT].

(R.C.M. 1106 Submission). Defense counsel further noted that Mrs. TT had testified that appellant provided "financial support to her and her son" who is not appellant's biological child, but treats "as one of his own children." (R.C.M. 1106 Submission). The request only briefly mentions that appellant has four other biological children. (R.C.M. 1106 Submission). Appellant included a fund transfer authorization form with Mrs. TT's bank information but did not sign the document next to "Soldier's Signature." (Authorization Form).

The Staff Judge Advocate [SJA] provided all substantive R.C.M. 1106 matters to the convening authority who subsequently disapproved the request for deferment and waiver of automatic forfeitures. (R.C.M. 1106 Submission; Staff Judge Advocate Clemency Advice [Clemency Advice]; Convening Authority Action [Action]). In the Clemency Advice, the SJA marked "no" to Section B(6)(a) in response to the inquiry of "[h]as the accused submitted necessary

information for transferring forfeitures for benefit of dependents?” (Clemency Advice). When denying the requests, the convening authority noted that he reviewed “any matters submitted by the accused” before making his determination. (Action). The military judge entered judgment on 9 September 2023. (Judgment of the Court).

Standard of Review

“The standard of review for determining whether post-trial processing was properly completed is de novo.” *United States v. Miller*, 82 M.J. 204, 207 (C.A.A.F. 2022) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

Law

The Court of Appeals for the Armed Forces (CAAF) has “establish[ed] the following process for resolving claims of error connected with the convening authority’s post-trial review.” *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Once an appellant has alleged a “legal error or deficiency” at the service Court of Criminal Appeals he “must allege prejudice as a result of the error.” *Id.*; *United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F. 2016). Lastly, “an appellant must show what he would do to resolve the error if given such an opportunity.” *Wheelus*, 49 M.J. at 288. “If an appellant meets this threshold, then it is incumbent upon the Courts of Criminal Appeals, given their plenary review authority under Article 66(c), . . . to remedy the error and provide meaningful

relief.” *Id.* When determining whether to grant relief, the standard of review is de novo. *United States v. Kelly*, 77 M.J. 404, 407 (A.F. Ct. Crim. App. 2018).

“Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant ‘makes some colorable showing of possible prejudice.’” *Wheelus*, 49 M.J. at 288 (quoting *United States v. Chatman*, 46 M.J. 321, 324 (C.A.A.F. 1997)).

“By definition, assessments of prejudice during the clemency process are inherently speculative. Prejudice, in a case involving clemency, can only address possibilities in the context of an inherently discretionary act.” *United States v.*

Hasan, __ M.J. __, 2024 CAAF LEXIS 127, *141–142 (C.A.A.F. 4 Mar. 2024).

Once an appellant has made a showing of error and material prejudice resulting from that error, “the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post-trial recommendation and action.” *Wheelus*, 49 M.J. at 289.

However, “there are those cases where an appellant has not been prejudiced, even though there is clearly an error in the post-trial proceedings. If that be the case, then the Courts of Criminal Appeals preferably should say so and articulate reasons why there is no prejudice.” *Id.*

Article 58b(a), UCMJ states: “any *sentence* that includes — (A) confinement for more than six months or death; or (B) confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal” “shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole.” 10 U.S.C. § 858b (emphasis added). Article 58b(b), UCMJ further provides “in a case involving an accused who has dependents, the convening authority . . . may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months.” 10 U.S.C. § 858b.

Argument

Appellant is not entitled to relief as the SJA advice was not erroneous as appellant failed to complete the Authorization Form that would allow for his pay to be diverted. Even if the SJA advice was erroneous, appellant was not prejudiced as the convening authority received and reviewed all submitted material prior to denying appellant’s request.

1. The SJA did not give erroneous advice as appellant failed to provide all necessary information for transferring forfeitures for benefit of dependents.

The SJA was not incorrect when she noted that appellant failed to provide all necessary information on the Authorization Form. (Clemency Advice). To put it simply, the form was unsigned and therefore lacked legal efficacy. *See generally United States v. Gunderman*, 67 M.J. 683, 686–87 (Army Ct. Crim. App. 2009)

(discussing, in the context of unsigned documents as evidence, the importance of legal importance signing documents). Appellant apparently expected the Defense Finance and Accounting Service to redirect his pay and allowances to his spouse and her son without signing the necessary form. Appellant's failure to sign the Authorization Form, although it included all the other information, rendered the form incomplete; thus, appellant had not, in fact, "submitted necessary information for transferring forfeitures" for the benefit of his dependents. (Clemency Advice); *see also Gunderman*, 67 M.J., at 686–87.

2. Assuming error, appellant has not shown prejudice.

Assuming that the Clemency Advice was incorrect, appellant cannot show prejudice. The fund transfer authorization form is an administrative document, devoid of any substantive matters. The substantive documents necessary for the convening authority's informed decision to grant clemency were provided and properly considered by the convening authority. (R.C.M. 1106 Submission; Action). Appellant's R.C.M. 1106 memorandum and the "good soldier book," including photographs of his family, were all presented for the convening authority's consideration. (R.C.M. 1106 Submission). That submission referenced his wife, her child, and most importantly, appellant's four other children. (R.C.M. 1106 Submission). Although appellant had four biological children, he asked only that his pay and allowances be diverted to Mrs. TT and her son. (R.C.M. 1106

Submission). Despite being “a proud father,” appellant made no effort to secure deferral of pay and allowances for the four other children he had. (R.C.M. 1106 Submission).

Most crucially, the convening authority received and reviewed all of appellant’s matters before he denied the request. (Convening Authority Memorandum “Request for Deferment and Waiver of Automatic Forfeitures - United States v. Specialist Malachi M. Temple” [Memo]; Action). Appellant is left with a vague claim of “unfair and negative connotations” that may have influenced the convening authority. (Appellant’s Specified Issue Br. 8). Appellant is correct that there is a “strong dissonance between word and deed” when it comes to his claims of being a good father and his actual request that amounted to a lack of support for all of his children, but that dissonance is present regardless of the Authorization Form as he only deemed his wife’s son worthy of support.⁴ (R.C.M. 1106 Submission; Appellant’s Specified Issue Br. 8). His choice, not any alleged error by the SJA, creates the very alleged prejudice he now highlights. Any error in Section B(6)(a) of the Clemency Advice does not create a “reasonable possibility” that the convening authority may have acted differently, rather the

⁴ Appellant did recognized his other sons in his unsworn statement and claimed he wanted to be a "father they can count on" but did not make provisions for their financial support. (R. at 90–92).

R.C.M. 1106 submissions fully support the action that was taken.⁵ *United States v. Emminizer*, 56 M.J. 441, 445 (C.A.A.F. 2002). The suggestion that the convening authority denied appellant's request based on the alleged mislabeling of this administrative document fails to meet appellant's required burden of a "colorable showing of possible prejudice." *Chatman*, 46 M.J. at 324.

Finally, in light of appellant's sentence to confinement versus his confinement credit, appellant served the entirety of that period in a "pay" status. (STR; R. at 99–100). As this court noted in *United States v. Hoefs*, "any retroactive [relief] would provide appellant with no additional benefit." ARMY 20200558, 2022 CCA LEXIS 406 (Army Ct. Crim. App. 2022) ([mem. op.](#)) at *12 fn. 4. There, the appellant's post-trial clemency request was never put before the convening authority. *Id.* This court held that although the convening authority would have been able to grant confinement relief, that relief would be meaningless because "at sentencing appellant had already served his entire sentence to confinement in pretrial confinement in a 'pay' status, and thus any retroactive confinement credit would provide appellant with no additional benefit." *Id.* Like *Hoefs*, appellant did not actually serve any post-trial confinement and therefore

⁵ Appellant raises here, for the first time, other alleged deficiencies with the SJA's advice related to issues other than Section B(6)(a). (Appellant's Specified Issue Br. 9). Those alleged errors were not included in appellant's first claim under *United States v. Grostefon* and are outside the scope of this court's specified issue and thus should not be considered.

was not out of a pay status during said confinement. (STR; R. at 99–100). The only punishment for appellant after trial was the BCD and rank reduction. (STR; R. at 99–100). By its very nature the BCD eliminated him from a “pay status” thus rendering any error with deferral of forfeitures moot. *See United States v. Smith*, 56 M.J. 271, 272–73 (C.A.A.F. 2002) (discussing that after a term of service expires “appellant’s entitlement to pay [is] terminated on the day that confinement [is] adjudged.”) Therefore, although Article 58b, UCMJ was triggered by the sentence, any error was harmless.⁶

3. Assuming error and prejudice, the case should be returned to the convening authority for consideration and action.


If this court disagrees that there was no error and there was no prejudice thereof then this court may provide meaningful relief or return the case to the Judge Advocate General of the Army for a remand to a convening authority for a new post-trial recommendation and action. *Wheelus*, 49 M.J. at 289. However, the

⁶Contrary to his claim here, appellant was subject to automatic forfeitures by operation of law under Article 58b, UCMJ. Appellant’s sentence included both a term of confinement greater than six months and a BCD. (Appellate Ex. IV; R. at 99). Therefore, appellant’s sentence would qualify under either subsection of Article 58b(a)(2), UCMJ. Appellant’s contention that Article 58b, UCMJ does not apply conflates confinement *served* with confinement *sentenced*. (Appellant’s Specified Issue Br. 7). Article 58b, UCMJ clearly considers the latter and not the former in determining if automatic forfeitures would occur. 10 U.S. Code § 858b. Further, even if this court agrees with appellant that he was sentenced to a term of confinement for six months or less, he still received a BCD and Article 58b(a)(2)(B) UCMJ would nonetheless be triggered. 10 U.S.C. § 858b.

government disagrees with appellant's assertion that this court should consider, in the alternative to returning the case to the Judge Advocate General, disproving the adjudged reduction. (Appellant's Specified Br. 11, n. 5). This would undercut and diminish material terms of the agreement between appellant and the convening authority and is not an otherwise appropriate remedy. (Appellate Ex. V); *Wheelus*, 49 M.J. at 289.


Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.



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