

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
KERN, YOB, and ALDYKIEWICZ  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Sergeant CARLOS A. RIVERAROSADO**  
**United States Army, Appellant**

ARMY 20090924

Headquarters, Fort Carson  
Mark Bridges, Military Judge  
Colonel Randy T. Kirkvold, Staff Judge Advocate

For Appellant: Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Laura Kesler, JA; Captain Jennifer A. Parker, JA (on brief).

For Appellee: Colonel Michael E. Mulligan, JA; Major Amber J. Williams, JA; Major Ellen S. Jennings, JA; Captain Stephen E. Latino, JA (on brief).

29 March 2012

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MEMORANDUM OPINION ON FURTHER REVIEW  
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*This opinion is issued as an unpublished opinion, as such, does not serve as precedent.*

Per Curium:

A military judge sitting as a special court-martial convicted appellant, contrary to his pleas, of three specifications of wrongful sexual contact and two specifications of assault consummated by a battery, in violation of Articles 120 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928 (2006) [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for seven months and reduction to E-1. The convening authority approved the sentence as adjudged.

On 29 August 2011, this court summarily affirmed the findings of guilty and sentence. *United States v. Riverarosado*, ARMY 20090924 (Army Ct. Crim. App. 29 August 2011). On 5 January 2012, our superior court granted appellant's petition for grant of review of this court's decision on appellant's assigned issue as to whether the military judge erred by using his findings of guilty for Specifications 2

and 3 of Charge I to find appellant guilty of the first specification of that same charge. The United States Court of Appeals for the Armed Forces set aside this court's decision and remanded to this court for our consideration of the assigned issue raised by appellant. In addition, our superior court ordered this court to obtain affidavits from the military judge and other appropriate persons who attended the bridging the gap session following the trial, limiting the reach of these affidavits to statements made by the military judge in that session.

Appellant's brief alleges, *inter alia*, that comments made by the military judge during the bridging the gap session potentially violated the spillover rule. In particular, it is alleged that the military judge's finding of guilt for some specifications improperly spilled over to Specification 1 of Charge I, resulting in a finding of guilt to that specification despite a factual impossibility defense raised regarding that same offense.

On 27 January 2012 we ordered appellate government counsel to obtain affidavits from all individuals who were present during the bridging the gap session following appellant's trial. The requested affidavits have been received.

This court determined that a fact-finding hearing pursuant to *United States v. Dubai*, 17 C.M.A. 147, 37 C.M.R. 411 (1967) is not necessary and would not assist the court based on the fact that only the military judge has a current recollection of what was said during the bridging the gap session. According to the military judge, the focus of the session was trial advocacy issues that he observed during the trial. He "never said anything about using the accused's guilt on some offenses to establish his guilt on specification 1 of the charge." Moreover, he "never said anything regarding his finding as to specification 1 of the charge." He recalled saying "something to the effect that this was a difficult case for the defense, given that there were so many alleged offenses." However, he said "this comment was simply a recognition of how difficult multiple victim, multiple offense cases are to defend." The military judge indicated that he "may have referenced specification 1 of the charge and the defense evidence regarding that offense, acknowledging that it was the strongest defense to any of the charged offenses," but he never said he was unable to find the accused "not guilty" of Specification 1 of the Charge because he believed the accused was guilty of the other offenses.

The two trial counsel who attended the bridging the gap session stated in their declarations that they do not recall anything the military judge said regarding the issue at hand. The two defense counsel in their affidavit and declaration also stated that they do not recall anything the military judge said in the bridging the gap session. Both defense counsel do, however, affirm the issue they raised in their clemency matters for the accused – a qualified allegation based on defense counsel's recollection of comments made by the military judge in the bridging the gap session

that he may have improperly found appellant guilty of Specification 1 of Charge I based on appellant's guilt to other offenses.

In light of the military judge's version of what was said during the bridging the gap session, the issue raised by appellant appears at most to be a misunderstanding by defense counsel of what the military judge said regarding Specification 1 of Charge I. Based on the military judge's declaration, we find that he did not err, nor did he do anything improper with regard to his findings in the case.

We have also considered appellant's other assignments of error, including matters raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them to be without merit.

On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and sentence are AFFIRMED.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.  
Clerk of Court