

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
GALLUP, CHIARELLA, and MAGGS  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Specialist JAMES A. SMITH**  
**United States Army, Appellant**

ARMY 20070488

Headquarters, 2nd Infantry Division  
Gregory Gross, Military Judge  
Lieutenant Colonel Walter M. Hudson, Staff Judge Advocate (trial)  
Lieutenant Colonel Kevin M. Boyle, Staff Judge Advocate (post-trial)

For Appellant: Colonel Christopher J. O'Brien, JA; Lieutenant Colonel Steven C. Henricks, JA; Major Sean F. Mangan, JA; Captain Alison L. Gregoire, JA (on brief).

For Appellee: Major Elizabeth G. Marotta, JA; Major Tami L. Dillahunt, JA; Captain Teresa T. Phelps, JA (on brief).

29 May 2008

-----  
MEMORANDUM OPINION  
-----

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of possessing child pornography and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for seven months, forfeiture of all pay and allowances, and reduction to the grade of E1. This case is before the court for review pursuant to Article 66, UCMJ.

Appellant asserts that the staff judge advocate (SJA) failed to mention in his recommendation (SJAR) to the convening authority that the trial judge recommended clemency by suspending the punitive discharge. Appellant requests that we disapprove his bad-conduct discharge. While we agree that the SJA erred in not advising the convening authority of the military judge's recommendation, we will

not disapprove his discharge. Instead, we will remand the case for a new SJAR and action. Given our decision as to this issue, it is not necessary for us to address appellant’s remaining assignment of error.

Rule for Courts-Martial 1106(d)(3)(B) requires the SJA to include in his or her SJAR any clemency recommendation made by the sentencing authority in conjunction with the announced sentence. In the instant case, there was no mention of the judge’s recommendation in the SJAR, nor did trial defense counsel bring it to the attention of the convening authority at any time during the post-trial processing of appellant’s case. Given appellant’s desire to remain in the military, the support of his immediate supervisor, and appellant’s need for continued medical treatment for a disability he incurred while serving in the military, the failure to include the military judge’s recommendation in the SJAR amounts to plain error. *See United States v. Lee*, 50 M.J. 296, 298 (C.A.A.F. 1999); *United States v. Clear*, 34 M.J. 129, 132-133 (C.M.A. 1992).

Accordingly, the action of the convening authority, dated 5 September 2007, is set aside. The record of trial is returned to The Judge Advocate General for remand to the same or a different convening authority for a new recommendation and action pursuant to Article 60 (c)-(e), UCMJ.



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