IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE
v.	**Docket No. 20050514**
Sergeant **HASAN K. AKBAR,** United States Army, Appellant	Tried at Fort Knox, Kentucky and Fort Bragg, North Carolina on 9 March, 10 and 24 May, 2 and 24 August, and 2 December 2004; 31 January, 4 March, and 1, 6-8, 11-14, 18-22, and 25-28 April 2005, by a general court-martial, appointed by the Commander, XVIII Airborne Corps and Fort Bragg, Colonels Dan Trimble, Patrick J. Parrish, and Stephen R. Henley, military judges, presiding.

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

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas,[1] of premeditated murder (two specifications) and attempted premeditated murder (three specifications), in violation of Articles 80 and 118 of the Uniform Code of Military Justice (UCMJ).[2] The panel sentenced appellant to death on 28 April 2005.[3] The convening authority approved the adjudged sentence on 16 November 2006.[4] Appellant's case was docketed with this Court on 6 December 2006.

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[1] R. 618.
[2] R. 2652; 10 U.S.C. §§ 880 and 918 (2002); Charge Sheet.
[3] R. 3181.
[4] Action.

Statement of Facts

The Government hereby incorporates the statement of facts from the Brief on Behalf of Appellee ("Government Reply Brief"), dated 29 November 2010. Any additional facts necessary for disposition of the supplemental assignments of error are set forth below.

Supplemental Assignment of Error I

THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN DURING SENTENCING HE FAILED TO INSTRUCT THE PANEL THAT IN CONDUCTING A VOTE FOR RECONSIDERATION, DEATH WAS NO LONGER A PERMISSIBLE PUNISHMENT.

Law and Argument

The Government relies on its response to Assignments of Error XXII and XXX, contained in the Government Reply Brief, to answer this supplemental assignment of error.[5]

[5] Government Reply Brief pp. 189-190; 195.

Supplemental Assignment of Error II

THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN, DURING SENTENCING, THE PANEL FAILED TO APPLY THE LAW OF THE CASE IN DETERMINING APPELLANT'S DEATH SENTENCE AND THE MILITARY JUDGE FAILED TO INQUIRE AND CORRECT THE PANEL'S MISAPPLICATION OF THE LAW.

Additional Facts

At the close of sentencing, the military judge instructed the panel on the capital sentencing procedures, including the four "gates" they must pass to impose the death penalty.[6] Having unanimously found appellant guilty of premeditated murder (the first gate),[7] the military judge instructed the panel on the remaining three gates.

Appellant's assignment of error focuses on the third gate. Here, the military judge informed the panel that in reaching a sentence, they "may not adjudge a sentence of death unless [they] unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances."[8] Throughout his instructions, the military judge generally used this conjunctive terminology - "extenuating and mitigating circumstances" - to describe the third gate.

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[6] R. 3078; *United States v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998).
[7] R. 2652.
[8] R. 3137.

After deliberating, the panel announced appellant's sentence to death, finding unanimously that "any extenuating or mitigating circumstances [were] substantially outweighed by the aggravating circumstances."[9]

Summary of Argument

On appeal, appellant asserts a two-fold assignment of error. First, he argues the panel failed to follow the military judge's instructions because the panel used "extenuating *or* mitigating" in announcing the sentence, instead of "extenuating *and* mitigating."[10] Second, he argues the military judge erred by failing to correct, *sua sponte*, the panel's sentence.[11]

Appellant's arguments lack merit because both the military judge's instructions, and the panel's sentence, were correct in law. Even though the panel's announced sentence differed slightly from the military judge's wording, use of the word "or" instead of "and" is irrelevant in this case because both terms are used conjunctively, and are interchangeable. Further, the wording of the panel's sentence is identical to the required language of R.C.M. 1004(b)(4)(C). Thus, the panel's sentence was proper, and the military judge had no duty to correct it.

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[9] R. 3181.
[10] Supplemental Brief on Behalf of Appellant (SAB) 10-11.
[11] SAB 10, 12.

Standard of Review

An issue raised for the first time on appeal is either forfeited or waived.[12] Here, appellant did not object at trial to the wording of the panel's sentence, nor did he object to the sentence worksheet, which the panel used to announce the sentence.[13] While this may not rise to the level of affirmative waiver, appellant's failure to object forfeited the issue and therefore this Court reviews for plain error. In order to prevail under a plain error analysis, appellant must show that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right."[14]

Law and Argument

As a starting point, appellant never states whether the military judge's instructions in this case were proper or improper. Rather, appellant argues that, regardless of whether the military judge's instructions were correct, they were the "law of the case" and the panel erred by not following them.[15] Even if this Court applies appellant's "law of the case" theory, there is no evidence the panel failed to follow the judge's instructions. Any variation between the judge's instructions and the panel's sentence is a distinction without a difference.

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[12] *See* Mil. R. Evid. 103(a)(1); *United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009)(stating that failure to object either waives or forfeits the issue).
[13] R. 3064; Appellate Exhibit (AE) 307, p. 2.
[14] *Harcrow*, 66 M.J. at 158 (C.A.A.F. 2008)(citing *United States v. Magyari*, 63 M.J. 123, 125 (C.A.A.F. 2008)).
[15] SAB 17.

Both the military judge's instructions, and the panel's sentence, were correct because the words "and" and "or" are interchangeable in R.C.M. 1004(b)(4)(C).

R.C.M. 1004(b)(4)(C) states, in relevant part, that "[d]eath may not be adjudged unless...all members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." Even though the rule uses the phrase "extenuating or mitigating," when he instructed the panel, the military judge used "extenuating and mitigating" which he believed to be the correct formulation.[16] In announcing appellant's sentence, the panel used "extenuating or mitigating," the language from R.C.M. 1004(b)(4)(C). Despite the differences, there was no error in the instructions, or the sentence, for two reasons.

First, the word "or" in R.C.M. 1004(b)(4)(C) is used in the conjunctive, making the two variations interchangeable. To be sure, as a general rule, the word "or" is presumed to be used in the disjunctive.[17] But, when introduced by *none* or *not*, as is the case here, the word "or" is normally conjunctive.[18] Thus, for example, to say that "none of the teachers or students will

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[16] R. 3162; AE 306, p. 6; R. 3137-3139.

[17] 82 C.J.S. Statutes § 442, Conjunctive and Disjunctive Words (available on Westlaw, CJS Statutes § 442); *see also* 1A Sutherland Statutory Construction § 21:14 (7th ed.)("The word [or] can be interpreted as a conjunctive in a given context."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise....)."

[18] *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 774 (6th Cir. 2010) (citing Huddleston & Pullum, *Cambridge Grammar of the English Language* 1298).

be at the school on July 4, does not mean that only one of those groups will be absent that day. It means that *both* groups will be."[19] The same logic applies to R.C.M. 1004(b)(4)(C). To say that death may not be adjudged unless any extenuating or mitigating circumstances are substantially outweighed, does not mean that only one of these must be outweighed, but rather both must be.

The second reason there was no error here is because this Court, the sister service Courts, and the Court of Appeals for the Armed Forces (CAAF), have used both formulations ("or" and "and") in articulating the requirements of R.C.M. 1004(b)(4)(C).[20] The CAAF has never held either formula to be incorrect. Rather, they are interchangeable because both versions accurately describe the third gate: the law requires unanimous concurrence from all members that the aggravating factors substantially outweigh both extenuating and mitigating

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[19] *Id.*; *see also* Bryan A. Garner, A Dictionary of Modern Legal Usage 597 (2nd ed.)(defining "nor"; "When on the witness stand at the trial of this case, however, he could not see the trial judge [or] the examiner who was five feet away.").

[20] *United States v. Loving*, 34 M.J. 956, 969 (A.C.M.R. 1992)(using the "and" formula to conduct Article 66 review); *United States v. Loving*, 41 M.J. 213, 233, 248 (C.A.A.F. 1994)(noting the military judge instructed the members that they were not permitted to adjudge death unless they found that any and all extenuating or mitigating circumstances were substantially outweighed; but describing RCM 1004 as requiring that extenuating and mitigating circumstances be weighed against aggravating circumstances.); *Loving v. Hart*, 47 M.J. 438, 442 (C.A.A.F. 1998) (third gate requires member to concur that extenuating and mitigating circumstances are substantially outweighed); *United States v. Curtis*, 33 M.J. 101, 107 (C.M.A. 1991)(using both formulas); *United States v. Simoy*, 46 M.J. 592, 612-13, 617 (A.F. Ct. Crim. App. 1996)(overruled on other grounds)(describing military judge's instruction using "and" formula; using the "or" formula for Article 66 review).

factors.[21] That is exactly how the military judge instructed the members, and that is what the members found when they announced the sentence.

Appellant argues that these two phrases are not interchangeable, and this is not a trivial distinction.[22] He argues that the "disjunctive" formulation (extenuating or mitigating, which is the language of the R.C.M.) is problematic because it "permits a scenario wherein a death sentence could be adjudged where the aggravating circumstances outweigh the mitigating circumstances, but do not outweigh the extenuating circumstances."[23] Appellant's logic is incorrect for several reasons.

First, as already noted, this is not a "disjunctive" formula. The word "or" is used conjunctively in R.C.M. 1004(b)(4)(C), meaning that both extenuating and mitigating circumstances must be substantially outweighed by the aggravator. Second, appellant's scenario requires this Court to read-in the word "either" into the R.C.M. That is, appellant's version of R.C.M. 1004(b)(4)(C) would read: "death may not be adjudged unless...all members concur that *either* any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." That is not the law, and not a

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[21] *Simoy*, 50 M.J. at 2.
[22] SAB at 16-17.
[23] SAB at 17.

reasonable interpretation of R.C.M. 1004(b)(4)(C). Moreover, reading-in the word "either" is inconsistent with the purpose of R.C.M. 1004, and would actually expand the class of death-eligible offenders.[24]

Finally, appellant's interpretation of the panel's sentence is flatly inconsistent with the whole of the military judge's instructions. A panel is presumed to understand and follow the judge's instructions,[25] and this Court "must evaluate the instructions in the context of the overall message conveyed to the jury."[26] Here, the message to the panel was clear: the military judge instructed that they must consider *all* evidence in extenuation and mitigation, and balance them against the aggravating circumstances.[27] Consequently, it is not reasonable to believe that the panel would conclude they could impose death if "the aggravating circumstances outweigh the mitigating circumstances, but do not outweigh the extenuating circumstances."[28]

In sum, appellant argues that the panel's use of the word "or" - instead of "and" - merits reversal of his death sentence. That is simply not the law. Here, both the judge's instructions

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[24] *Loving v. Hart*, 47 M.J. 438, 442 (C.A.A.F. 1998).
[25] *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001)(citing *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994)).
[26] *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)(citing *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011)).
[27] R. 3138; AE 306, p. 6.
[28] SAB at 17.

and the panel's sentence were proper and met the requirements of R.C.M. 1004(b)(4)(C). There was no error in this case, let alone plain error. Accordingly, this supplemental assignment of error lacks merit, and appellant is entitled to no relief.

Supplemental Assignment of Error III

ARTICLE 36, UCMJ, REQUIRES THAT THE PRESIDENT PROSCRIBE THAT THE R.C.M. 1004 CAPITAL AGGRAVATING FACTORS BE BOTH SPECIFIED IN THE CHARGE SHEET AND INVESTIGATED AT AN ARTICLE 32 INVESTIGATION.

The Government relies on its response to Assignment of Error III, contained in the Government Reply Brief, to answer this supplemental assignment of error.[29]

[29] Government Reply Brief, pp. 92-101.

Conclusion

None of appellant's supplemental assignments of error merit relief. The Government respectfully submits that this Honorable Court should affirm the approved findings and sentence.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a copy of the foregoing was delivered to appellate defense counsel and filed with this Honorable Court on 23 May 2011.

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