IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,
Appellee

BRIEF ON BEHALF OF APPELLANT

Docket No. ARMY 20090259

v.

Captain (O-3)
CHRISTOPHER GRAY
United States Army,
Appellant

Tried at Camp Henry, Republic of Korea, on 12 November 2008 and 22-28 March 2009, before a general court-martial convened by the Commander, Headquarters, 19th Expeditionary Sustainment Command, Camp Henry, Colonel Donna M. Wright, Military Judge, presiding.

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

Statement of the Case

On 12 November 2008 and 22-28 March 2009, a panel of officer court members, sitting as a general court-martial, convicted Captain Christopher Gray, contrary to his pleas, of premeditated murder and wrongfully disposing of a body, in violation of Articles 118 and 133, Uniform Code of Military Justice [hereinafter U.C.M.J.], 10 U.S.C. §§ 918 and 933. The members sentenced CPT Gray to forfeit all pay and allowances, to be confined for life with the possibility of parole and to be dismissed from the service.

On August 31, 2009, the convening authority approved the sentence as adjudged. His action, however, does not reflect

deferment or approval of forfeitures pursuant to Article 58b, UCMJ. Additionally, it fails to note that the punitive discharge cannot be executed until appellate review is completed.

Statement of Facts

CPT Christopher Gray was charged with murdering his wife, Lea, while serving duty in the Republic of Korea. The case was built upon circumstantial evidence. Although CPT Gray spoke to Special Agents of the Army Criminal Investigation Division (CID) on two separate occasions, he did not confess to the crime. On the other hand, his oral statements to the CID agents were used against him at trial and used to procure evidence against him, even though he was not initially advised of his rights under Article 31, UCMJ, when he was first interviewed on 25 April 2008.

A defense motion to suppress his statements and items of evidence that were seized based on his statements was denied at trial. In a subsequent custodial interview conducted on 1 May 2008, after Appellant was advised of his Article 31 rights, his invocation of the right to counsel shortly after the interview began was followed with more questioning. In other words, the interrogation was not terminated. A separate motion to suppress based on this constitutional violation was also denied by the military judge.

At trial, the defense sought to introduce testimony attacking the government's videotape evidence from a video and

broadcast expert, [redacted], who had been appointed to the defense team by the convening authority, but was denied the opportunity to do so because a trial counsel objection to [redacted] testimony was sustained by the military judge. Additionally, a defense objection to the opinion testimony of the government's pathology expert under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), was overruled by the military judge. [redacted] testified for the government and stated that the alleged victim died by "diphenhydramine poisoning." As argued, below, the defense contended that there is no reliable scientific basis or foundation for this opinion.

Finally, there are two issues involving the action on the record of trial. The convening authority's action on the record appears to have been signed before the clemency matters were submitted for his consideration. It is dated 31 August 2009, while the clemency matters were submitted on or about 8 September 2009. As a separate matter, the action fails to account for the prior approval of deferment of automatic forfeitures and adjudged forfeitures. It also fails to account for approval of the defense's request to waive collection of forfeitures for a period of six months.

Additional facts necessary for the disposition of the case are contained in the arguments, below.

Errors and Arguments

I

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENTS MADE ON 25 APRIL 2008 AND ALL EVIDENCE PROCURED BY USING HIS STATEMENTS WHICH WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AMENDMENT AND ARTICLE 31, UCMJ.

Standard of Review

In *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces articulated the standard of review as follows:

> When there is a motion to suppress a statement on the ground that right's warnings were not given, [this Court] review[s]the military judge's findings of fact on a clearly erroneous standard, and . . . conclusions of law *de novo*. [citations omitted]

63 M.J. at 49. In *United States v. Gallagher*, 66 M.J. 250,253 (C.A.A.F. 2008), the Court also noted that a ruling on a motion to suppress evidence is reviewed for abuse of discretion.

Facts and Argument

It is not contested in this case that [redacted] who questioned CPT Gray on 25 April 2008 failed to advise him of his Article 31, UCMJ, rights. (R. 43-121). The central issue is whether CPT Gray was considered a "suspect" at the time of the interview. *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006); *United States v. Swift*, 53 M.J. 439,

446 (CAAF 2000); *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). Appellant maintains that based on the information known by all the CID agents investigating the case before Appellant was interviewed Appellant was not only a suspect, but the "most likely" suspect at the time of the interview on 25 April 2008. (R. 176).

The defense motion is found in Appellate Exhibit XI. The government's response is Appellate Exhibit XII. The judge denied the motion at R. 311-312, but did not make a written ruling until after trial. (Appellate Exhibit LXXV). In this case, Appellant maintains that the Military Judge's factual findings and conclusions of law are not consistent with the testimony given by the CID agents and the logical inferences that flow from their testimony, which can be characterized as self-serving, given that their decisions were being challenged.

When [redacted] was reported as having been missing for days, the CID detachment was called in and mobilized to investigate her disappearance because of possible "foul play". (R. 60-61, 122-123). [redacted], her "so-called boyfriend" gave information to CID agent [redacted] in which he expressed concern for her safety based on domestic issues between CPT Gray and his wife. (R. 185-186). While other CID agents worked on aspects of the investigation, [redacted] and [redacted] worked together in performing the investigative legwork during the initial days

of the investigation; this included questioning CPT Gray and conducting the searches and seizure that took place. (63-65).

The following is some of what information was known *prior* to CPT Gray's initial verbal interview at the CID detachment on 25 April 2008, and what was admitted by the CID agents during the motion hearing:

(i) A CID case is not opened for a missing person report unless it is deemed suspicious and the disappearance is believed to have resulted from a crime - such as a kidnapping, injury or homicide. A CID case was immediately opened regarding [redacted] disappearance. (R. 60-61).

(ii) When a wife disappears, the husband is the primary suspect regarding possible foul play. (R.176).

(iii) [redacted] had been missing, without word to any family or friends, for five days. (R. 185-186).

(iv) [redacted] had been missing for those five days without her minor, biological daughter, [redacted], who was still residing at the Camp George apartment and who also had not heard from [redacted] during that time. (R. 58).

(v) [redacted] had been missing without her purse and identification (that was in the purse). (R. 58).

(vi) [redacted] and CPT Gray had previously had a domestic incident, which she reported to law enforcement as an assault, which resulted in a no-contact order being issued that prohibited contact between CPT Gray and his wife. In accordance with the no-contact order, CPT Gray had been moved out of the family apartment on Camp George to a BOQ room on Camp Walker. (R. 57).

(vii) [redacted] boyfriend, [redacted], informed CID [redacted] that [redacted] and CPT Gray had marital problems

and that he feared CPT Gray had done her harm. (R. 165, 184-185, 187).

(viii) CPT Gray's arm was injured and in a sling. (R. 59).

All of this information was known by CID agents prior to CPT Gray's 25 April 2008 interview by CID [redacted] - conducted without rights advisement. The Military Judge determined that CPT Gray was not a suspect at that time, and should not have been reasonably considered to be a suspect. These conclusions defy reason and common experience in the military justice system.

Even though it was not known whether [redacted] had been murdered at the time of Appellant's 25 April interview, [redacted] need not have suspected a homicide to be required to read CPT Gray his rights; he only needed to suspect that CPT Gray had committed some crime against [redacted] which resulted in her apparent disappearance. As a minimum, it was recognized that foul play was suspected.

Beyond looking just at the facts listed above, what happened next must be considered. [redacted] and [redacted], working in concert, took CPT Gray with them as they searched various locations, including CPT Gray's BOQ room on Camp Walker. The CID agents, prosecution and Military Judge ask that this Honorable Court accept as reasonable the proposition that while two trained CID agents ([redacted]) worked a missing

person investigation, [redacted] never informed his partner ([redacted]) that [redacted] had spoken with the missing wife's boyfriend who expressed concerns, based on past behavior, that CPT Gray had done his wife harm. [redacted] and [redacted] were working, literally, side by side on a hot case and [redacted] supposedly kept this key information to himself. This lacks any semblance of credibility, but it was claimed during the motion hearing in an effort to derail the defense point that CPT Gray was, in fact, a suspect at the time of his interview.

Without having to make subjective credibility determinations, however, this Honorable Court should simply look at the investigative paperwork associated with the searches conducted on the 25th of April - when CPT Gray was allegedly not a suspect and when he supposedly should not have been considered to be a suspect. The CID investigative paperwork - AIR, requests for search consent, evidence seizure forms - all refer to this investigation as a *crime scene investigation* and the items having been seized from a *crime scene*. (Appellate Exhibits XXIX, XXX). The CID agents attempted to explain away the repeated use of the term crime scene as being insignificant but, again, this explanation is entirely unbelievable. (R. 198-199). Curiously, the Military Judge's analysis fails to mention that the CID's own investigative documents refer to CPT Gray's residence as a crime scene.

If [redacted] truly believed [redacted] was missing of her own volition and was going to return alive and unharmed, why would the CID agents be searching CPT Gray's BOQ room on Camp Walker - where [redacted] supposedly had never been and did not have access to because of a no contact order - and why would they be searching locations such as under CPT Gray's BOQ sink? This search would not lead to clues as to [redacted] location after voluntarily absenting herself from the area for any reason other than foul play. If [redacted] truly believed [redacted] was missing of her own volition and was going to return alive and unharmed, why would [redacted] and [redacted] be searching CPT Gray's BOQ room, referred to as "crime scene", for [redacted] serological fluid? That would be evidence of a crime of violence, not information disclosing the whereabouts of a voluntarily absent individual.

As a final insult to common sense and the truth, the CID agents testified that although they discovered a receipt under CPT Gray's BOQ sink that detailed a PX purchase of sleeping medication, an enema, a boning knife, duct tape, trash bags and tarps, they considered this to be "suspicious" but they did not consider CPT Gray to be a "suspect". So, they continued to question him and search and seize evidence without ever advising him that he was a suspect.

In denying the motion to suppress evidence seized from the various locations, the Military Judge relied on Appellant's consent as the legal basis for these seizures. However, consent to search and seize cannot be knowingly and/or voluntarily given when the CID agents deliberately withhold notification to the individual that he is a suspect and what he is suspected of having done. Furthermore, when search authorizations were later obtained, after the seizures had already occurred, the authorizations were based on the statements made by CPT Gray during the 25 April tainted interview. (R. 149).

All of the information detailed above leads to the inescapable conclusion that the CID agents did consider CPT Gray to be a suspect of foul play in relation to his wife's disappearance and reasonably should have considered him to be a suspect. The problem with this conclusion, for the government, is that it would result in suppression of CPT Gray's statements and the evidence derived from them. This includes how CPT Gray's 25 April 2008 description of where he drove on the night of 20 April 2008 resulted in the CID obtaining roadway video footage from traffic cameras to then establish a search grid that ultimately resulted in locating [redacted] body.

After drawing the indefensible conclusion that CPT Gray was not, nor should he reasonably have been, a suspect on 25 April 2008, the Military Judge crafted two back-up arguments to justify

her ruling, attenuation of subsequent searches/seizures and inevitable discovery. (Appellate Exhibit LXXV).

First, the Military Judge claims that the search conducted by CID the very next day - 26 April 2008 - was "sufficiently attenuated" from the illegal questioning and search/seizure conducted a matter of hours previously. Although there is a date change between the two searches, not even an entire day elapsed between the two. More important than simply the brief chronological time that elapsed between the two searches is the fact that the searches on 26 April were based on the information, and conclusions drawn from it, which was illegally obtained the day before. Fourth and Fifth Amendments, U.S. Const., *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006); *United States v. Khamsouk*, 57 M.J. 282, 290 (C.A.A.F. 2002); *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002).

Next, the Military Judge crafted an inevitable discovery argument based on unsupported speculation, by simply backtracking what investigation took place based on the illegal activities of the CID and claiming this would have occurred even if they had not illegally interviewed CPT Gray without rights advisement, or illegally seized evidence during the course of the day on 25 April. While the Military Judge may claim that logical

investigative steps would have led, inevitably, to discovery of this evidence, her effort completely ignores the testimony of the CID agents that they found [redacted] body based on what Appellant told them during the 25 April interview. Speculation should not substitute for the actual testimony that appears in the record of trial.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside Appellant's conviction under Charge I and II and the Specifications thereunder, and set aside the sentence.

II

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENTS AND ALL EVIDENCE PROCURED BY USING HIS STATEMENTS MADE AFTER HE ATTEMPTED TO INVOKE HIS RIGHT TO COUNSEL DURING THE CID INTERROGATION CONDUCTED ON 1 MAY 2008.

Standard of Review

In *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces used an abuse of discretion standard in reviewing the ruling on a motion to suppress evidence, adding that "[i]t reviews findings of fact for clear error and conclusions of law de novo [citation omitted]".

Facts and Argument

It is not contested in this case that the CID agents who questioned CPT Gray on 1 May 2008 advised him of his Article 31,

UCMJ, rights. The central issue is whether Appellant's rights were violated when the CID agents failed to stop the interrogation by ignoring Appellant's stated and unambiguous desire to consult with counsel, which was expressed near the beginning of the interview. *United States v. Traum*, 60 M.J. 226, 230 (C.A.A.F. 2004)(interrogation must cease when individual indicates he wishes to remain silent); *United States v. Granda*, 29 M.J. 771, 773 (A.C.M.R. 1989)(exercise of right to counsel requires termination of interrogation). The defense motion is found in Appellate Exhibit XIII. The government's response is Appellate Exhibit XIV. The judge's ruling, denying the motion is Appellate Exhibit LXXV.

Because the interview was recorded, this Honorable Court is able to view the recording and reach the conclusion that CPT Gray's request for counsel was not ambiguous and that instead of asking more questions, [redacted] should have simply terminated the interview as the law requires.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside Appellant's conviction under Charge I and II and the Specifications thereunder, and set aside the sentence.

III

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS COMPUTER EVIDENCE SEIZED FROM APPELLANT'S CAMP GEORGE APARTMENT ON 1 MAY 2008 IN VIOLATION OF THE FOURTH AMENDMENT.

Standard of Review

In *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces used an abuse of discretion standard in reviewing the ruling on a motion to suppress evidence, adding that "[i]t reviews findings of fact for clear error and conclusions of law de novo [citation omitted]".

Facts and Argument

The defense moved to suppress computer evidence (data information) seized from computers taken from his Camp George apartment prior to 1 May 2008 on the basis that no consent was given and no warrant was obtained. (Appellate Exhibit XV). Fourth Amendment, U.S. Const.; *Horton v. California*, 496 U.S. 128 (1990)(plain view doctrine delineated), *United States v. Hester*, 47 M.J. 461, 463 (C.A.A.F. 1998). The government opposed the motion, although they could not deny that at the time the computers were seized there was no consent and no warrant. (Appellate Exhibit XVI). The military judge denied the motion on the basis that a warrant issued for the seizure of blood included the right to seize computers for non-blood evidence contained within the computers. (Appellate Exhibit LXXV, Conclusions of

Law, paragraph 2k.). There is no logical or lawful basis for the judge's decision. Clearly, the contents of a computer do not fall within the scope of such a warrant or any kind of exception that might otherwise apply under these facts and circumstances.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside Appellant's conviction under Charge I and II and the Specifications thereunder, and set aside the sentence.

IV

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS A RECEIPT AND OTHER ITEMS OF EVIDENCE THAT WERE SEIZED FROM APPELLANT'S RESIDENCE ON OR ABOUT 25 APRIL 2008 IN VIOLATION OF THE FOURTH AMENDMENT.

Standard of Review

In *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces used an abuse of discretion standard in reviewing the ruling on a motion to suppress evidence, adding that "[i]t reviews findings of fact for clear error and conclusions of law de novo [citation omitted]".

Facts and Argument

The defense moved to suppress evidence in the form of a receipt and other items, including items identified on the receipt seized from Appellant's residence on or about 25 April 2008. (Appellate Exhibit XI). Fourth Amendment, U.S. Const.; *Horton v. California*, 496 U.S. 128 (1990)(plain view doctrine

delineated), *United States v. Hester*, 47 M.J. 461, 463 (C.A.A.F. 1998). The military judge failed to articulate any justifiable legal or factual basis for her decision to admit the seized items in evidence. (Appellate Exhibit LXXV).

The government failed to produce a warrant authorizing seizure of these items and failed to establish that Appellant consented to the seizure of these items. Therefore, no basis in law or logic for denying the motion can be found in the record of trial.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside Appellant's conviction under Charge I and II and the Specifications thereunder, and set aside the sentence.

V

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE SUSTAINED THE TRIAL COUNSEL'S OBJECTION TO THE PROFFERED DEFENSE EXPERT WITNESS TESTIMONY REGARDING PROBLEMS WITH THE GOVERNMENT'S VIDEO EVIDENCE PRESENTED DURING THEIR CASE IN CHIEF.

Standard of Review

Rulings on the admissibility of evidence are reviewed by applying an abuse of discretion standard. *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009).

Facts and Argument

It is uncontested that [redacted] was funded and appointed by the convening authority to serve as a defense expert

in the area of video and broadcast engineering. At trial, the defense called [redacted] to testify as an expert witness for the purpose of rebutting portions of the government's case relating to video evidence purportedly capturing Appellant's image. (R. 1042). Specifically, he would have rebutted the testimony of [redacted] that Prosecution Exhibit 18 was obtained from a properly functioning video camera. (R. 1045, 1083). [redacted] would have testified that he examined the camera that produced P.E. 18 and expressed the opinion that it was malfunctioning at the time of the recording. (R. 1046-1048, 1083). [redacted] would have testified that the image was distorted because of the wide angle camera lens, which would account for a larger than normal appearance. (R. 1061).

Although the judge initially ruled that [redacted] could testify, which included an Article 39(a) session in which he testified, (R. 1048-1049, 1077-1079), after an overnight recess (R. 1079-1080), she changed her ruling on the basis of how he was appointed, which had nothing to do with his qualifications or the logical or legal relevancy of his testimony. Her final decision appears to be arbitrary in the face of defense counsel's explanations of how [redacted] was appointed and why [redacted] was being called to testify. (R. 1073, 1081-1087). Thus, the military judge abused her discretion in so ruling. The

problems she pointed out in making her ruling went to the weight of the evidence, not the admissibility.

Appellant has a constitutional right to present a defense. When a military judge excludes evidence without articulating how that evidence is inadmissible based on rules of relevance, it constitutes an abuse of discretion and the denial of Appellant's constitutional right to present a defense.

WHEREFORE, the findings of guilty of Charges I and II, the Specifications thereunder, and the sentence should be set aside.

VI

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE OVERRULED DEFENSE COUNSEL'S OBJECTION TO THE GOVERNMENT EXPERT WITNESS'S OPINION TESTIMONY REGARDING THE MECHANISM BY WHICH THE ALLEGED MURDER WAS PURPORTEDLY COMMITTED BY APPELLANT.

Standard of Review

Rulings on the admissibility of evidence are reviewed by applying an abuse of discretion standard. *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009).

Facts and Argument

At trial, the government was unable to establish the manner in which [redacted] was allegedly murdered. Through the expert testimony of [redacted], they posited the theory that CPT Gray killed his wife via Diphenhydramine poisoning. Even though none of the other scientific evidence in the case implicated CPT Gray, the toxicology testimony of [redacted] regarding levels of

Diphenhydramine in [redacted] body was key to the ultimate conviction. The defense motion, Appellate Exhibit XL, was denied by the Military Judge after receiving expert testimony from both sides. (Appellate Exhibit LXXVI). The government response to the defense motion is found in Appellate Exhibit XLI.

It is difficult to summarize the testimony of the experts presented in the *Daubert* hearing that was conducted before trial. Nonetheless, a careful reading of the motion testimony of [redacted] (government toxicology), [redacted] (government pathology) and [redacted] (defense toxicology) will reveal the merit in Appellant's argument that [redacted] opinion on Diphenhydramine poisoning lacks scientific credibility and reliability. Essentially, [redacted] relied on [redacted] opinion for the determination on a cause of death. In his long career, this is the *first* time [redacted] has ever testified about drug levels in decomposition fluid. The reason for this is that trying to draw scientific conclusions from drug levels in decomposition fluid is not supported by the scientific processes involved, the accuracy of the process cannot be tested and this attempted scientific process is not peer reviewed or accepted by the community of forensic toxicology.

To the extent the lengthy testimony can be summarized, the following points should suffice. Unlike blood, urine or other homogenous fluids normally tested by [redacted] and his government

lab (AFIP), decomposition fluid is a heterogeneous "muck". It is the breakdown of blood, tissue, fat, organs and fluids as the body decomposes. Its composition is different between individuals and as time progresses. Therefore, there are no decomposition fluid standards or controls the lab could use to calibrate their instruments. As such, the drug levels spit out by the lab instruments were meaningless, because there was no way to establish scientific standards for decomposition fluid to with which to compare the samples in this case.

In denying the defense motion, the Military Judge attributed the significant problems with the government's scientific methodology and conclusions as just a difference in opinion. It was much more than that. Beyond this being the first time in his career that [redacted] has ever testified about drug levels in decomposition fluid and his lab had no standards and controls they could use, [redacted] could not produce *one* peer reviewed article that was on point regarding testing decomposition fluid and extrapolating ante mortem drug levels from it. He admitted that the two articles he relied on in support of his opinion, one of which was written by him, were simply case observations, and did not stand for the accuracy of testing decomposition fluid and extrapolating ante mortem drug levels from it.

It is also important to note that the government did not rely on these two papers to refute the defense motion or argument

- because they did not support the government's scientific methodology or conclusions drawn from it. There is no acceptance within the forensic science community of what was done at the lab or testified to by [redacted], and that is what makes this much more than a simple disagreement - and is why [redacted] should never have been permitted to testify about drug levels in [redacted] remains.

Appellant primarily relies on the legal standards set forth in *United States v. Sanchez*, 65 M.J. 145, 149-150 (C.A.A.F. 2007)(applying Mil.R.Evid. 702 and citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 1999)), and *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). Additionally, for the proposition that a Military Judge should not rely on the *ipse dixit* of an expert witness, see *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997).

WHEREFORE, the findings of guilty of Charges I and II, the Specifications thereunder, and the sentence should be set aside.

VII

APPELLANT SUFFERED PREJUDICE WHEN THE CONVENING AUTHORITY TOOK ACTION ON THE RECORD OF TRIAL BEFORE CONSIDERING CLEMENCY MATTERS SUBMITTED BY APPELLANT.

Standard of Review

Whether harm occurs when an error is committed in connection with action taken on the record of trial by a convening authority is a legal question requiring *de novo* review. *United States v. Travis*, 66 M.J. 301 (C.A.A.F. 2008).

Facts and Argument

The Staff Judge Advocate's Addendum and the Convening Authority's Action are dated 31 August 2009. (Allied Papers). The defense's clemency submission memorandum, however, is dated September 8, 2009. (Allied Papers). There is no evidence explaining this discrepancy or whether the convening authority considered the matters submitted on or about September 8, 2009. The Addendum references clemency matters submitted by counsel for the accused, but fails to identify the particular documents in question by date or otherwise. There is no evidence clemency matters were submitted prior to 31 August 2009. (Allied Papers).

Without more, it cannot be concluded that the convening authority considered Appellant's clemency matters as required by Article 60(c)(2), UCMJ, R.C.M. 1107(b)(3)(A)(iii).

WHEREFORE, the record of trial should be returned to the convening authority for appropriate action.

VIII

APPELLANT SUFFERED PREJUDICE WHEN THE CONVENING AUTHORITY'S ACTION ON THE RECORD OF TRIAL FAILED TO REFLECT HIS PRIOR APPROVAL OF THE DEFENSE REQUEST TO DEFER AND WAIVE FORFEITURES OF PAY.

Standard of Review

Whether harm occurs when an error is committed in connection with action taken on the record of trial by a convening authority is a legal question requiring *de novo* review. *United States v. Travis*, 66 M.J. 301 (C.A.A.F. 2008).

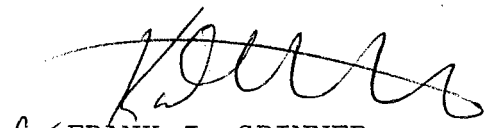
Facts and Argument

Following the trial in this case, on 6 April 2009, pursuant to Articles 57 and 58b, UCMJ, the defense submitted a request for deferment and waiver of the adjudged and automatic forfeitures in this case for the benefit of CPT Gray's family members. The defense was informed that the Staff Judge Advocate recommended approval of this request on 20 April 2009 and the Convening Authority approved the defense request on 20 April 2009. None of the documents referenced above are included in the allied papers and are being submitted to this Honorable Court by separate motion. The Convening Authority's approval, however, was not memorialized or otherwise referenced in the action taken on the record of trial.

According to a 3 June 2009 letter from the Defense Military Pay Office at Fort Leavenworth (Allied Papers, Clemency Submission, Tab G), the Convening Authority had not signed a

document executing deferral of automatic and adjudged forfeitures, so the defense request has still not been executed. There were several communications back and forth between the government and the defense, but the necessary documentation executing approval was never memorialized in any document provided to undersigned counsel, even though the Staff Judge Advocate's Recommendation, dated 21 July 2009, when referencing deferment and waiver of forfeitures, states: "Approved." (Allied Papers).

WHEREFORE, the record of trial should be returned to the convening authority for appropriate action consistent with the Staff Judge Advocate's Recommendation.



for FRANK J. SPINNER
Attorney at Law
P.O. Box 38463
Colorado Springs, CO 80937
(719) 576-1175

KATHLEENA SCARPATO
CPT, JA
Appellate Defense Counsel