IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Keith E. BARRY, Senior Chief Special Warfare Operator (E-8) U.S. Navy Appellant	))))))))))	APPELLEE'S MOTION TO CLARIFY POSITION IN RESPONSE TO QUESTIONS AT ORAL ARGUMENT Crim.App. Dkt. No. 201500064 USCA Dkt. No. 17-0162/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

The United States moves under Rule 30 for leave to file a Motion to Clarify the United States' position in response to questions at Oral Argument. Good cause exists: little or no precedent governs this situation where the convening authority's post-action statements demonstrate that notwithstanding receiving legally correct advice in the Addendum Staff Judge Advocate's Recommendation, and signing an unambiguous and legally correct Convening Authority's Action, he misunderstood his Article 60 powers and demonstrably considered matters outside the Record, arguably adverse to the accused, but disclosed none of them prior to taking Action.

1. 30:48[1]: in response to questions by Judge Stucky and Senior Judge Erdmann whether an "enunciated fear that this would be bad for the Navy and bad

[1] All cites are to Oral Argument, *United States v. Barry*, No. 17-0162/NA (C.A.A.F. argued Mar. 22, 2018) http://www.armfor.uscourts.gov/newcaaf/CourtAudio6/20180322B.wma

for the Judge Advocate General's Department" was an "appropriate" "basis" for consideration in taking convening authority's action under Article 60, the United States agreed that "whether the Navy would get in trouble" was an inappropriate consideration.

Article 60 prescribes no limitations on a convening authority's "unfettered" discretion.

And the plain language of R.C.M. 1107(b)(3) states that a convening authority may consider the record of trial, personnel records of the accused, and any "other matters the convening authority deems appropriate." The only limitation in the Rules prohibits consideration of a victim's character not presented at trial.[2]

This Court has never before judicially created limitations on the scope of permissible considerations.

However, this Court has only twice addressed the Rule-based circumstances where an appellant should be notified and permitted to rebut consideration of "matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable" under R.C.M. 1107(b)(3)(A). *See United States v. Harris*, 56 M.J. 480 (C.A.A.F. 2002) (service record book contents are matters

[2] This limitation is an addition to the most current version of the Rules for Courts-Martial. At the time of RADM Lorge's action, he was not proscribed from considering the Victim's character.

accused is "chargeable" with knowing, notification unnecessary under R.C.M. 1107, properly considered in taking action); *United States v. Anderson*, 53 M.J. 374 (C.A.A.F. 2000) (consideration of note by chief of staff, commenting on appellant's character never served on appellant, was R.C.M. 1107(b) error requiring remand for new staff judge advocate's recommendation and action); *see also United States v. Rodriguez-Rivera*, 63 M.J. 372 (C.A.A.F. 2006).

2. 35:20, 37:23, 37:45, 42:07, and 42:25: Judge Ryan asked different variations of the question that if "the error was . . . taking the action that he didn't want to take because he thought he might get in trouble or the Navy might look bad" "and so a correct convening authority action would be one that took the action that the original convening authority wanted to take." The United States responded "yes" and "it's possible."

To be clear: the United States' position is that the post-trial error in Appellant's case stems: (a) from the Convening Authority's misunderstanding of his "unfettered" authority under Article 60, (*see, e.g.*, J.A. 0602, 1039); and, (b) possibly also from failing to notify Appellant under R.C.M. 1107(b)(2)(B)(iii) that he was considering adverse matters that he "start[ed] to feel" and got "the feeling", (*see, e.g.*, J.A. 1029), prevented him from doing what he really wanted to do.[3]

[3] The United States does not believe that precedent or the Rules are clear that where a Convening Authority considers matters such as Congressional and public

Moreover, the exact remedy the Convening Authority might have granted was not clearly established. *See infra at 8.*

The *DuBay* judge's Finding that the Convening Authority "would have taken different action" that "likely [was] a new trial" supports Appellant's burden to produce a "colorable showing of prejudice" under *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), which establishes the test for Article 59(a) prejudice in post-trial processing cases.

But nothing in the Code or this Court's precedent supports the proposition that an error in post-trial processing that does not result in an incomplete, erroneous, or ambiguous convening authority's action under R.C.M. 1107 creates a right to a specific convening authority or specific result when a new action is ordered. *Cf. United States v. Bunting*, 4 C.M.A. 84, 87 (C.M.A. 1954) ("grant of authority is to the office, and not to the particular person who occupies the office at the time of the grant"). Appellants only have the right to new post-trial processing free of both legal error and the colorable showing of prejudice. This Court should

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scrutiny, "repetitive drumbeats" or the "gumbo," and uses those matters to deny Appellant relief, those matters are necessarily "matters adverse" that the accused is not "chargeable" with knowing, or that R.C.M. 1107(b)(2)(B)(iii) requires notification and the opportunity to respond. But this issue was not briefed and should not be resolved without an opportunity to do so. *See United States v. Cornwell*, 49 M.J. 491, 494-95 (C.A.A.F. 1998) (Effron, J., dissenting). Proper resolution of this issue under *Wheelus* is to remand for new post-trial advice and action.

not now create a right present nowhere in the Code, the Rules, or this Court's precedent.

To remedy a post-trial error, three options exist. First, "[w]hen the action of a convening authority is 'incomplete, ambiguous, or contains clerical error,' [a court] may 'instruct[]' the convening authority . . . 'to withdraw the original action and substitute a corrected action." *United States v. Mendoza*, 67 M.J. 53 (C.A.A.F. 2008) (quoting R.C.M. 1107(g), Manual for Courts-Martial (2006 ed.)[4] (citing *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981) (holding that where a second convening authority's action explicitly purports to implement the original convening authority's intent, communication between convening authorities is necessary). A court-directed modification is unavailable here, as the Convening Authority Action was not "incomplete or ambiguous" and did not "contain[] error." (J.A. 0599); R.C.M. 1107(g).

Second, where errors may be "corrected immediately" by the courts of criminal appeals, they may do so. *Cf. United States v. Lee*, 50 M.J. 296 (C.A.A.F.1999) ("When such errors are brought to our attention or to the attention of the Courts of Criminal Appeals, they should be returned promptly to the

[4] The current Manual for Courts-Martial (2016 ed.) modifies the language referring to "clerical error" by removing the word "clerical" and permitting modification where a convening authority's action is "incomplete or ambiguous or contains error."

convening authority for preparation of a new SJA recommendation and action. Otherwise, they should be corrected immediately by the Courts of Criminal Appeals, as envisioned in *Wheelus*"); *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998); *United States v. Diaz*, 40 M.J. 335 (C.A.A.F. 1994). Here, the *DuBay* Judge found only that the Convening Authority "likely" would have "taken different action" had he understood his powers and not considered the "gumbo." (J.A. 0603.)

Further, RADM Lorge made clear that he considered several different options, but nonetheless repeatedly returned to the incorrect belief that his Article 60 powers were narrower than Congress provides. (J.A. 1029.) He considered adding language to the Action communicating his reservations, (J.A. 599, 1039), ordering a post-trial session under Article 39(a) to "get more information about this thing," or taking some other action, regarding the military judge's temperament and also Appellant's mental health, (J.A. 0916-18, 1022, 1029, 1033), ordering a rehearing, (J.A. 1022, 1029), or dismissing the charges outright, (J.A. 1024, 1027). Some of these options the Convening Authority felt were "shut down" by his Staff Judge Advocate, furthering his confusion about his authority under Article 60. (J.A. 1029.) Without the confusion and indecision, both still evident during the *DuBay*, we cannot know what action he would have taken. Remand for action by a convening authority who understands and clearly acts within his or her powers—

not dismissal—is appropriate.

Finally, the "preferred method" of remedying post-trial error is to promptly remand to a new convening authority who may, complying with R.C.M. 1105, 1106, and 1107, receive advice and take an entirely new action, *See, e.g.*, *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006); *Wheelus*, 49 M.J. 283.

Here, the post-trial error represents a fourth type of error uncontemplated by *Wheelus*. The convening authority, despite being properly advised as to his authority under Article 60 by the staff judge advocate's recommendation, and despite the facially clear and correct convening authority action—nevertheless later testified that he legally misunderstood his Article 60 authority, and the range of options that he testified he would have considered taking demonstrates "colorable prejudice" under *Wheelus*.

The appropriate remedy is to remand for a new Staff Judge Advocate's Recommendation and Action by an informed Convening Authority, and, if the Convening Authority believes that he or she must consider outside matters such as the "gumbo" and a court or the Staff Judge Advocate believes they are directly adverse to or directly bear on how Action will be taken in Appellant's case, consider permitting Appellant a chance to respond under R.C.M. 1107(b)(3)(B).[5]

[5] *Cf. United States v. Gilbreath*, 57 M.J. 57, 62 (C.A.A.F. 2002) ("We will not speculate on what the convening authority would have done in this case had

3. 36:00: in response to a question by Judge Ryan as to whether the *DuBay* judge found that the original convening authority wanted to "disapprove the findings and sentence," the United States responded "yes."

This is incorrect. The *DuBay* judge found that "RADM Lorge would have taken *different* action in the case, *likely* ordering a new trial." (J.A. 0603 (emphasis added).)

The Record supports that RADM Lorge was conflicted, indecisive, considered different options, and misunderstood his Article 60 powers.

The Action, however, is clear: RADM Lorge did not disapprove the Findings. The Record does not reflect what choice, among many, RADM Lorge would have settled on had he understood his powers.

4. 39:18: Judge Ryan asked if "There is a finding by the *DuBay* hearing that Rear Admiral Lorge believed then and continues to believe the Appellant's guilt is not proven beyond a reasonable doubt at his court-martial, and if he

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defense counsel been properly served with the [new matters] and allowed to respond . . . we conclude that [the accused's] responses could have produced a different result and, accordingly, a new review and action are required."); *United States v. Anderson,* 53 M.J. 374 (C.A.A.F. 2000) (finding "new matter" in chief of staff's comment to convening authority that appellant was a "thug" and "lucky" he had not killed victim and remanding for new recommendation and action, and surveying "new matter" caselaw under analogous but distinct R.C.M. 1106 provision); *United States v. Young,* 9 C.M.A. 452, 453 (C.M.A. 1958) (unserved comment by staff judge advocate that appellant "forced on society the burden of caring for his illegitimate offspring" was new matter).

believes that, he can't approve the finding, can he?"

Nothing in the Code supports this. The only two actors under the Code required to be personally convinced of guilt beyond a reasonable doubt are the factfinder at trial under Article 51(c) and R.C.M. 918(c), and the courts of criminal appeals under Article 66(c). The convening authority is nowhere so bound by Congress.

So too, recent changes to Article 60 binding the convening authority's hands in certain cases illustrate the difference between this Court's judicial duty to "follow the law," and the convening authority's former "unfettered executive" discretion to act in courts-martial. And seven decades of precedent by this Court interpreting the Code support that this was always the case: a convening authority could have personally believed the record was "factually insufficient," yet declined to take any action on findings. Art. 60(c)(3)("Action on the findings of a court-martial by the convening authority . . . is not required."). The Code and this Court have, under the former version of Article 60, correctly avoided judicially restraining convening authorities' unfettered discretion to act—or not act—on findings, for no reason, for an equitable reason, and for any reason at all—assuming they correctly understand the scope of their Article 60 powers and actual unlawful influence under Article 37 is not the "proximate cause" of the action. *See, e.g., United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

Moreover, convening authorities need make no statement in the action as to whether the record is legally and factually sufficient, and this Convening Authority did not. (J.A. 236-37.) This Court consistently upholds Congress' unique grant of "clear unfettered discretion" and "command prerogative" to convening authorities by consistently interpreting the statute and rules to support that convening authorities can take *any* action under the former Article 60, for *any* reason, with the *sole* restriction that "matters adverse to the accused from outside the record" be first provided to the accused to comment on. *United States v. Nerad,* 69 M.J. 138, 145 (C.A.A.F. 2010); R.C.M. 1107(b)(3)(B)(iii).

This Court interprets both Article 60 and R.C.M. 1107(c) in *United States v. Nerad,* and quotes Article 60's explicit grant of power that the "authority . . . to modify the findings . . . of a court-martial is a matter of command prerogative involving the *sole* discretion of the convening authority." It is a logical corollary that the authority to *not modify* those same findings is a matter involving the sole discretion of the convening authority. R.C.M. 1107 implements this Congressional grant of power by directing that a convening authority's action can be guided by "any reason or no reason" "or on equitable grounds." *See Nerad,* 69 M.J. at 145-46.

Although RADM Lorge testified that he was not convinced of Appellant's guilt beyond a reasonable doubt, the United States believes this Court has never

directed disapproval of findings where the convening authority's action explicitly declined to do so, but where outside evidence supports that the convening authority had serious misgivings or doubts about the evidence. Even at courts-martial under the Uniform Code, military panels need not be unanimous in finding guilt beyond a reasonable doubt. This Court should not judicially restrain the unfettered discretion Congress granted to convening authorities.

5. 40:40: in response to a question by Judge Maggs about the "meaning of 'by unauthorized means'," the United States responded that there was no authority for Admiral Crawford to speak with the Convening Authority.

The United States position is, instead: a conversation is not "unlawful" under Article 37 simply because it is not explicitly authorized by the Code. Rather, a conversation is unlawful if it is specifically prohibited.

Additionally, it is appropriate for the Deputy Judge Advocate General to redirect or remind a Convening Authority that under Article 6, he should seek military justice advice from his staff judge advocates. (*See* Appellee Br. 23.) Article 37 explicitly permits "instructional" communications to convening authorities—nothing prevents the Deputy Judge Advocate General from interpreting Articles 6 and 37 to permit him to "redirect" RADM Lorge and "remind" him to "follow Article 6"—that is, use his assigned lawyers—in seeking advice on cases.

Conclusion

The United States respectfully requests this Court grant this Motion to Clarify and remand for new post-trial processing.

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I certify that a copy of the foregoing was delivered electronically to the Court and opposing counsel on April 2, 2018.

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