IN THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	)	7 August 2019
v.	)	ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS ON BEHALF OF THE UNITED STATES
	)	Dkt. No. 1466 Case No. CGCMG 0370 Before McClelland, Judge, and Brubaker
EVAN K. GOODELL Machinery Technician Chief (E-7), U.S. Coast Guard, Appellant	)	Tried at Norfolk, Virgina on 5 June and 7 September 2018 by general court-martial convened by Commander, Coast Guard Personnel Service Center

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 17 of this Honorable Court's Rules of Practice and Procedure.

STATEMENT OF STATUTORY JURISDICTION

This Honorable Court has jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

STATEMENT OF THE CASE

On May 30, 2018 then Seaman Recruit Goodell (Appellant) signed a Pretrial Agreement in which he agreed to plead guilty to conspiracy in violation of Article 81, UCMJ, and soliciting another to commit an offense in violation of Article 134, UCMJ. App. Ex. XIV. On June 5,

2018, Appellant pled guilty in accordance with a Pre-trial Agreement at a general court martial convened by Commander, Personnel Service Center on June 5, 2018 to conspiracy in violation of Article 81, UCMJ, and soliciting another to commit an offense in violation of Article 134, UCMJ. R. at 13-15. The military judge accepted Appellant's pleas, found him guilty of the offenses to which he plead guilty, and sentenced Appellant to four years confinement, a dishonorable discharge, a $10,000 fine, and reduction to E-1. R. at 14. The Pretrial Agreement signed by Appellant required that Appellant sign a Stipulation of Fact, admitting to and elaborating on the offenses to which he pled guilty. App. Ex. XIV at 6. Appellant signed a Stipulation of Fact on 30 May 2018. Pros. Ex.1.

The recording of the June 5th proceeding was lost, therefore a verbatim transcript of the proceeding was unable to be produced.[1] App. Ex. XVIII at 5. On August 2, 2018, under advisement from his staff judge advocate, Commander, Personnel Service Center ordered a rehearing in accordance with the requirements of Rule for Courts-Martial (RCM) 1103(f)(2). *Id.* On August 17, 2018 the Coast Guard Chief Trial Judge, who was also the military judge in the June 5, 2017 proceeding, requested the cross service detailing of a U.S. Navy judge with no knowledge of this case. *Id*. at 1. On the same day, CDR [redacted] JAGC, USN, was detailed to be the trial judge. App. Ex. XX.

The rehearing was held on September 7, 2018. R. at 347. Appellant was convicted again, pursuant to his pleas, of conspiracy in violation of Article 81, UCMJ and soliciting another to commit an offense in violation of Article 134, UCMJ. R. at 443. Appellant was sentenced to two years confinement and a bad conduct discharge. R. at 503.

[1] A recording did exist of an earlier Article 39(a) session held on 2 April 2018. That recording was subsequently transcribed and attached to the record as Appendix 3.

The Convening Authority took action on November 21, 2018 approving the sentence but suspended confinement in excess of 11 months for the period of confinement adjudged plus 12 months thereafter. R. at 4. The Convening Authority's actions were in accordance with the Pretrial Agreement dated May 30, 2018. App. Ex. XIV.

STATEMENT OF FACTS

This case began with Appellant's actions from June 2016 until January 2017 when he terrorized his wife, MK1 [redacted]. In June 2016, MK1 [redacted]. asked Appellant for a divorce. R. at 480, 810. A request, by Appellant's own admission, he did not want to accept. R. at 480. From June 2016 until January 2017, Appellant frightened and harassed MK1 [redacted]. through attempting to extort her for sexual intercourse, breaking into her home, posting revenge pornography in the form of nude photographs of MK1 [redacted] and identifying her as a U.S. Coast Guard member on the internet, and violating various Military Protective Orders (MPO). Pros. Ex. 1.

On May 26, 2017, Appellant pled guilty at a Special Court-Martial to the following:

Four specifications of violating lawful orders in the form of Military Protective Orders;

Three specifications of making false official statements;

One specification of stalking MK1 [redacted].;

Two specifications of extorting MK1 [redacted]

Two specifications of assault consummated by battery upon MK1 [redacted].; and

One specification of obstruction of justice. Pros. Ex. 1.

Appellant was sentenced to one year confinement, reduction in rate to E-1, and a Bad Conduct Discharge. *United States v. Goodell*, C.G.C.C.A. decision dated 04 July 2019, at 9 (*Goodell I)*. During the proceedings, MK1 [redacted] testified that she lived in perpetual fear of Appellant. App. Ex. XI at 96.

Conspiracy to Commit Aggravated Assault

MK1 [redacted] fear of Appellant was well founded. Three days before Appellant's Special Court Martial, the Air Force Office of Special Investigation notified CGIS that a USCG member at the Transient Personnel Unit (TPU) solicited for aggravated assault against his wife. Pros. Ex. 2 at 5. Appellant was the only USCG member at the TPU at the time. *Id*. at 6. U.S. Air Force Senior Airman James (hereinafter "James") reported that Appellant sought someone to "take care of" MK1 L.G. between 3 and 4 times during Appellant's pretrial confinement. Pros. Ex. 1 at 3; Pros. Ex. 2 at 6. James provided Appellant with a name of a cousin who James said would hurt MK1 [redacted] Pros. Ex. 1 at 3.

Any relief MK1 [redacted]. may have felt from Appellant's guilty plea and confinement at Naval Brig Charleston, SC was short lived because on June 12, 2017 MK1 [redacted]. and her Special Victims Counsel were informed of CGIS's investigation and the Baldwin County Sheriff's began extra patrols of her home. Pros. Ex. 2 at 11.

Appellant was not only searching for someone in TPU to harm MK1 [redacted]., but while in confinement in Jacksonville was simultaneously working with his mother, [redacted] to contract a hit on MK1 [redacted]. Pros. Ex. 1 at 2. After conversations with Appellant between January and March 2017, [redacted] solicited [redacted] to kill MK1 [redacted] in late

March 2017. *Id*. [redacted] offered [redacted] $2,000-$4,000 in money for travel and balance of the $20,000 after MK1 [redacted]. was killed. Pros. Ex. 2 at 13.

Neither attempt was carried out nor did Appellant pursue any further attempts on MK1 [redacted] life once he was transferred to the Naval Consolidated Brig in Charleston. *Id.*

Appellant's Appellate Leave

As the investigation into the Appellant's search for someone to hurt MK1 [redacted] continued, Appellant was released after the completion of his sentence to confinement on appellate leave in November 8, 2017. Pros. Ex. 1 at 1. In preparation for his release on appellate leave, Commander, Pay and Personnel Center issued an MPO. App. Ex. IX at 19. The provisions of this MPO were the direct result of Appellant's history of violating MPOs and his convictions, based on his own admissions, at special court martial for offenses against MK1 [redacted] *Id* at 20. The MPO, which was to remain in effect until Appellant left the Coast Guard, prohibited Appellant from: (1) conducting research or taking any steps to identify the home address or current duty station of MK1 [redacted]; (2) Entering the city limits of Mobile, AL; and (3) Entering the following Coast Guard/Air Force facilities: Keesler Air Force Base, Sector Mobile, Station Gulfport, Station Pascagoula, Station Dauphin Island, Station Pensacola, and Station Panama City. *Id*. The MPO also required Appellant to remain at least one mile away from MK1 [redacted] and their son G.G. *Id.* Appellant was permitted to be in MK1 [redacted] presence to attend court hearings in Alabama. *Id.* at 18. Appellant refused to sign the MPO. *Id* at 21. In fact, Appellant filed an Article 138, UCMJ, after he requested the Commanding Officer, Pay and Personnel Center to revise or revoke the MPO. App. Ex. XI at 42. The Commanding Officer responded on December 12, 2017 stating that the MPO would not be modified because of

Appellant's history with MK1 [redacted], the fact that Appellant had provided misleading information about a civilian protective order issued by the Baldwin County, AL court, and threatened to violate the MPO on two separate occasions. *Id.*

Pretrial Confinement

On January 16, 2018, Appellant was ordered into Pretrial Confinement by Commanding Officer, PPC after the CO found probable cause for ordering him into confinement. Pros. Ex. 1 at 1. On January 19, 2018, an Initial Reviewing Officer's hearing was conducted in accordance with RCM 305. App. Ex. IX at 10-12. The Initial Reviewing Officer found: (1) there was a preponderance of the evidence for violations of Article 81 and 82, UCMJ; (2) those offenses were triable by court martial; and (3) confinement was necessary because Appellant would engage in serious criminal misconduct if released from pretrial confinement. *Id*. On January 22, 2018, charges of violation of Article 81, UCMJ, (Conspiracy) and Article 134 (soliciting for murder) were preferred. R. 364. Those charges were then referred for trial by general court-martial, after a hearing conducted under Article 32, UCMJ, on 5 March 2018 by the Commander, Coast Guard Personnel Service Center. R. at 367.

Pretrial Agreement

On May 30, 2018, Appellant signed a Pretrial Agreement. App. Ex. XIV, XV. In the agreement, Appellant agreed to plead guilty to one specification of violating Article 81 and one specification of violating Article 134, UCMJ with the condition that "murder" be replaced with "aggravated assault." App. Ex. XIV at 2. In exchange for the guilty plea, the Convening Authority agreed to: (1) limit confinement to 11 months of confinement (with the remainder

suspended for the duration of the period of confinement plus 12 months); and (2) if a dishonorable discharge was adjudged, only approve a bad conduct discharge. App. Ex. XV at 1. Additionally, the pretrial agreement contained a revised MPO regarding MK1 [redacted]. which eliminated the geographic restrictions and permitted Appellant visitation with his son, [redacted] pursuant to a written court order. App. Ex. XIV at 6-7.

In his acceptance of the pretrial agreement, Appellant states that he is "entering into this agreement freely and voluntarily and no one has threatened or coerced me into entering this agreement." App. Ex. XIV at 2. In the next paragraph, Appellant attested that "There are no other agreements, written, oral or otherwise implied." *Id.*

Trial and Rehearing

On June 5, 2018, Appellant pled guilty before a military judge at a general court martial in accordance with his pretrial agreement. R. at 13. Appellant was sentenced to four years confinement, dishonorable discharge, a $10,000 fine, and reduction in rate to E-1. R. at 14. The trial counsel compiled a Report of Results. R. at 13-14.

Sometime between June 5 and August 2, 2018 the Convening Authority was made aware that a verbatim transcript of Appellant's could not be produced because a "loss of recording of the proceedings." App. Ex. XVIII at 5. Based on the advice of the PSC Staff Judge Advocate, the Convening Authority ordered a rehearing under RCM 1103. *Id*. On August 17, 2018 the Coast Guard Chief Trial Judge requested a cross service detailing from the Chief Judge, Navy-Marine Corps Trial Judiciary, for the rehearing on September 7, 2018. *Id*. at 1. A Navy judge was assigned the same day. App. Ex. XX.

On September 7, 2019, Appellant again plead guilty before a military judge at a general court martial in accordance with his pretrial agreement. R. at 368-69. Following Appellant's pleas, the trial judge reviewed the meaning and effect of a guilty. R. at 371. The explanation included the following exchange:

> MJ: Your plea of guilty will not be accepted unless you understand that by pleading guilty, you are admitting your guilt as to each and every element of the offense to which you are pleading guilty. Do you understand that?
> ACC: Yes, Your Honor.
> MJ: Now, the court will only accept your pleas of guilty if you are pleading guilty because you are, in fact, guilty and because you believe you are guilty. If you do not believe you are guilty, then you should not plead guilty for any reason. Now, even if you believe you are guilty, you still have a legal and moral right to plead not guilty. And in this instance, if you were to plead not guilty, then you would be presumed under the law to be innocent, and only by introducing evidence and proving your guilt beyond a reasonable doubt could the government overcome this constitutional presumption of innocence. Do you understand this?
> ACC: Yes, Your Honor.
> …
> MJ: Are you pleading guilty freely and voluntarily?
> ACC: Yes, Your Honor.
> MJ: Has anyone forced or threatened you to plead guilty?
> ACC: No, Your Honor.

R. at 371:12-22, 371:1-7, 373:16-19.

Following Appellant's guilty plea, the judge sentenced Appellant to two years confinement and a bad conduct discharge. R. at 503:10-13. This sentence was less than the June 5, 2018 trial in which Appellant was awarded four years confinement, a dishonorable discharge, reduction in rate to E-1, and a $10,000 fine. R. at 13-14.

Subsequent to his guilty plea in this case, this Court set aside the findings and sentence in *Goodell I* and authorized a rehearing. *United States v. Goodell*, C.G.C.C.A. decision dated 03 July 2019, at 9.

Argument

I. APPELLANT'S CASE WAS APPROPRIATELY SENT FOR A REHEARING UNDER RCM 1103(f)(2)

Standard of Review

Whether a record is complete and a transcript is verbatim are questions of law that is reviewed *de novo* on appeal. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

A. Appellant Waived Any Objection to Referral of His Case to a Rehearing

Appellant waived his objection to an improper referral when he did not raise the issue at trial before he entered his guilty plea. Appellant plead guilty to one specification of violating Article 81 (conspiracy to commit aggravated assault) and one specification of violating Article 134 (solicitation to commit aggravated assault) of the UCMJ. R. at 368-370. Pursuant to his Pre-trial Agreement (PTA), Appellant agreed "to waive all motions except motions filed under Rules for Courts-Martial 305(k) and Article 13 of the UCMJ and those that are otherwise non-waivable pursuant to RCM 705(c)(l)(B)." App. Ex. XIV at 6. Appellant did raise motions as agreed under Article 13 and Rules for Courts-Martial (RCM) 305(k) and was successful with regard to his RCM 305(k) motion. App. Ex. XIX.

RCM 705(c)(1)(B) does not permit a pre-trial agreement to deprive an accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, and the complete and effective exercise of post-trial and appellate rights. However, RCM 905(b)(1) requires an accused to raise any objection based on defects, other than jurisdictional defects, in the preferral, forwarding, or referral of charges prior to entry of pleas. Although the Court of Appeals for the Armed Forces (CAAF) has ruled that the requirement to a complete transcript is

jurisdictional and cannot be waived, in this case there is a complete transcript. *See United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014); *Henry*, 53 M.J. at 110.

Appellant contends that the process by which his case was sent to a rehearing to address the loss of recordings from the June 5, 2018 hearing of his guilty pleas did not comply with the Rules for Courts-Martial. App. Br. at 9. Thus, his argument is not that the record the Court has before it is incomplete, but that the process of rehearing his case under RCM 1103(f) was improper. However, when an appellant fails to raise the issue of improper referral of charges at trial before a guilty plea is entered, the issue is waived. *See* R.C.M. 905(e); *see also United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (Appellant failed to raise the issue of unreasonable multiplication of charges objection before entering his guilty plea and his PTA did not contain a provision specifically waiving the issue; the court held the issue was waived on appeal); *United States v. Sewell*, No. 201300432 WL 4292786, at *3-4 (N.M.Ct.Crim.App Aug. 23, 2014) (Holding that the issue of improper referral was waived by appellant when after the Convening Authority withdrew and re-referred the case to a lower court-martial pursuant to a guilty plea the appellant failed to raise the issue at all during his second court-martial).

Appellant had the opportunity to raise the issue of improper re-referral at trial. He did not object. He did not object at trial to the manner of the convening of the court-martial. He did not object to any of the perceived deficiencies in the referral process by which the charges were brought to the court-martial. He did not object, at least in part, because he agreed to waive objections to the forwarding or referral of charges in his PTA. Ultimately, Appellant elected to proceed to trial before military judge alone and was found guilty of the charges and specifications pursuant to his unconditional pleas of guilty. Thus, the matters raised in Assignments of Error I through III have been affirmatively waived by Appellant.

B. Appellant's Case Was Properly Referred by the Convening Authority for a Rehearing under RCM 1103(f)(2).

Appellant asserts that the Convening Authority improperly referred his case for a rehearing after the loss of the June 5, 2018 recordings because he did not first set aside the findings and sentence under RCM 1107(e)(2). App. Br. at 9. He also argues that the rehearing was improper because no summarized record of the proceedings from the June 5 hearing was prepared as required by his reading of RCM 1103. *Id.* Finally, Appellant claims that due to the loss of the recordings and other procedural infirmities, the Convening Authority was limited to the sentence limitations set out in RCM 1103(f)(1). *Id*. Appellant is incorrect as to these arguments advanced in AOEs I through III.

i. The Convening Authority was not required to follow the process set out in RCM 1107(e)(2) to properly order a rehearing under RCM 1103(f)(2).

After discovering the loss of recordings, and thus the inability to prepare a verbatim transcript for the June 5 hearing, the Convening Authority properly ordered a rehearing under RCM 1103(f)(2). RCM 1103(f) acts as a remedy in the event of a loss of notes or recordings of proceedings prior to authentication, precisely what occurred with the June 5 hearing. R. at 358. RCM 1103(f)(2) allows a Convening Authority to order a rehearing when there is an incomplete record of the proceedings, and therefore the findings and sentence from the proceeding are incapable of being acted upon. *See United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013) (explaining that the remedy within RCM 1103(f) is expressly limited to instances where a verbatim transcript cannot be prepared); *see also United States v. Howard*, 35 M.J. 763 (A.C.M.R. 1992) (noting the government's inability to produce a transcript does not necessarily

render the findings or sentence illegal, and when no verbatim transcript can be prepared RCM 1103(f) is an appropriate remedy).

In contrast, RCM 1107 only allows a rehearing when there is a complete, authenticated record, under the circumstances where Article 60(f)(3) permits a Convening Authority to alter the findings or the sentence. Therefore, Appellant's argument that the Convening Authority's failure to first set aside the findings and sentence per RCM 1107(e)(2) from the June 5 hearing rendered the September 7, 2018 rehearing's findings and sentence as invalid is incorrect.

Further, examining the purpose and procedure behind each rule shows the Convening Authority had the authority to order a rehearing. RCM 1103 and RCM 1107 are distinct and separate rules. The rules do not cross-reference each other to indicate that a rehearing ordered under RCM 1103(f)(2) must follow the processes set out in RCM 1107(e). There are several steps involved to reach a rehearing under RCM 1107(e), including having an authenticated record per RCM 1104(a). But with no recordings from which to produce a transcript, authentication of a record arising out of the June 5 hearing would have been impossible, and it is the authenticated record that must be forwarded to the Convening Authority for action. R.C.M. 1104(e). In addition, RCM 1104(c) refers to the loss of an authenticated record stating that where an authenticated record is lost or destroyed a new record may be prepared in compliance with the authentication procedures of R.C.M 1104 and RCM 1103. There is no mention of RCM 1107. Furthermore, to reach a rehearing under RCM 1107 in a general court-martial, an authenticated record is required for the Staff Judge Advocate to prepare a recommendation. R.C.M. 1106(a). RCM 1106(d)(1) requires the Staff Judge Advocate to review and use the record of trial (which must include a verbatim transcript) in preparation of the required advice.

R.C.M. 1106(d)(1) and R.C.M. 1103(b)(2)(B). Before the Convening Authority can act he must review the Staff Judge Advocate's recommendation. R.C.M. 1107(b)(3)(A)(ii).

In this case, with no verbatim transcript the Convening Authority was prohibited from acting under RCM 1107, leaving him with two options under RCM 1103(f) – (1) either approve a sentence that does not include a punitive discharge or more than six months of confinement; or (2) order a rehearing. The Convening Authority chose the second option under RCM 1103(f)(2), ordering a rehearing.

Appellant's sentence after the June 5 hearing was more than one year confinement and a dishonorable discharge, therefore a verbatim record was required. R.C.M. 1103(b)(2)(B)(i). But the recordings necessary to produce the verbatim record were lost. AE XVIII at 5. And since the recordings were lost no authenticated record could be produced. This fact necessarily prevents the Convening Authority from taking any action under R.C.M. 1107, since under 1104(e) it is the authenticated record which is forwarded for action. The required precursor steps leading to Convening Authority action under RCM 1107 in the form of setting aside the findings and sentence could not take place because there were no recordings and thus no verbatim transcript of proceedings could be prepared. Appellant is incorrect as to AOE I, and the Convening Authority properly relied on RCM 1103(f)(2) when he directed a rehearing.

Furthermore, RCM 1107 implements part of Article 60 and in subparagraph (c) limits the scope of when a Convening Authority may take action on findings, consistent with Article 60(c)(3), and in subparagraph (d) similarly limits Convening Authority action with regard to the sentence as limited by Article 60(c)(4). RCM 1107(e) deals with rehearings, but in subparagraph (e)(1) states that a rehearing may not be ordered where the adjudged sentence includes a punitive discharge or confinement of more than six months. In the Discussion following RCM 1107(e)(1)

the Manual points out that Article 60(c) forbids Convening Authorities from setting aside the findings and the sentence, which RCM 1107(e)(2)(B)(i) requires as a prerequisite for ordering a rehearing.

RCM 1103(f) contains no such restriction. This difference between RCM 1107 and 1103 reflects the different concerns that can cause a rehearing to be ordered, and the process permitted under RCM 1103(f) is consistent with Article 60. As noted above, the several required steps necessary under RCM 1107 to enable a Convening Authority to take action on the findings and sentence cannot occur where there is a loss of the recordings necessary to make a verbatim transcript. However, RCM 1103(f) allows a Convening Authority to make the decision to either move forward without a verbatim transcript, and accept the sentence limitations of RCM 1103(f)(1), or to order a rehearing that would enable the completion of an authenticated record under RCM 1103(f)(2). Although RCM 1103 and 1107 use the same term, rehearing, in the context of the individual rules, they achieve different ends and are distinct.

Additionally, a rehearing under RCM 1107(e) is not appropriate because based on Appellant's sentence, under both Article 60 in effect at the time of his trial and RCM 1107(e)(1), the Convening Authority could not set aside the findings and sentence for any reason. To order a rehearing under RCM 1107 the Convening Authority would have been required to first set aside the findings and sentence from the June 5 hearing. R.C.M. 1107(e)(2)(B)(i). The Army Court of Criminal Appeals recently confronted this issue in *United States v. Steele*, No. ARMY 20170303, 2019 WL 1076601 (A. Ct. Crim. App. Mar. 5, 2019). The procedural posture of *Steele* was different from Appellant's situation because there was an authenticated record upon which the Convening Authority had acted upon. *Id*. at *1.The argument before the court in *Steele* was whether there was a verbatim transcript. *Id*. at *2. The Court described the potential

conundrum created by RCM 1107 and Article 60, which governs action by the convening authority: "[i]f there is no verbatim transcript, the convening authority cannot *approve* a sentence with a punitive discharge. The convening authority also cannot *disapprove* the punitive discharge because Congress specifically removed this power. The convening authority also cannot order a rehearing because setting aside the sentence is a precondition to ordering a rehearing." *Id. at* *3 (emphasis in original). Although the Army Court recognized the difficulty Article 60 poses to ordering a rehearing, their interpretation that the conflict between Article 60 and RCM 1103(f) is irreconcilable is not inapplicable in this case because there was no record from the June 5 proceeding that could be authenticated. Accordingly, Appellant's AOE I and III is incorrect.

ii. A summarized report within the meaning of RCM 1103(b)(2)(C) was not required for the Convening Authority to order a rehearing under RCM 1103(f)

Appellant further argues in AOE II that prior to ordering a rehearing under RCM 1103(f) a summarized report within the meaning of RCM 1103(b)(2)(C) and Appendix 13 of the Manual for Courts-Martial was required to be prepared and authenticated. App. Br. at 11. Appellant is incorrect. A summarized report is required for action under RCM 1103(f)(1), not RCM 1103(f)(2).

RCM 1103(f)(2) uses a distinctly different phrase: "[d]irect a rehearing as to any offense of which the accused was found guilty <u>if the finding is supported by a summary of the evidence</u> contained in the record". R.C.M. 1103(f)(2) (emphasis added); *see also United States v. Crowell*, 21 M.J. 760, 760 (N-M. C.M.R. 1985) (court notes that RCM 1103(f)(1) requires a summarized record whereas RCM 1103(f)(2) requires a summary of the evidence). At the June 5 hearing, the Appellant pleaded guilty to several offenses. R. at 368-370. The record, which only

lacked a verbatim transcript, provided a summary of the evidence: the Stipulation of Fact (Pros. Ex. 1, dated May 30, 2018), the Report of Results of Trial (R. at 13-15, dated June 5, 2018), and the PTA (App. Ex. XIV and XV, signed May 30 and 31, 2018). Since Appellant plead guilty, the Stipulation of Fact is an accurate summary of what evidence was produced at the June 5 hearing. *See United States v. McAllister*, No. NMCCA 201100085, 2011 WL 6938428 (N-M. Ct. Crim. App. Dec. 29, 2011) (explaining that pursuant to RCM 1103(f)(2) the convening authority was provided an unauthenticated summarized record which contained evidence consistent with the stipulation of fact and the appellant's providence inquiry that supported the findings of guilty thus the rehearing was properly ordered). Therefore the Convening Authority, acting on a summary of the evidence, complied with RCM 1103(f)(2) when he ordered a rehearing of Appellant's case.

C. Appellant was not prejudiced by the Convening Authority's improper referred charges that had been previously withdrawn, and Even if There was an Error, the Error was Harmless.

Appellant argues that the Convening Authority improperly referred charges that had earlier been withdrawn or of which he had been acquitted at the June 5 hearing as one of the reasons he is entitled to relief, and that he was prejudiced. App. Br. at 12. However, in *United States v. Smead*, the court considered whether a rehearing that erroneously heard charges that had previously been dismissed at a prior trial where the accused plead guilty in accordance with a pre-trial agreement. *United States v. Smead*, 68 M.J. 44 (C.A.A.F. 2009). The court held that the accused's rights at a rehearing were not materially prejudiced by the incorrect reinstatement of charges previously dismissed with prejudice at his earlier trial, and the error was harmless. 68 M.J. at 65-66. Similarly, Appellant, in this case, was not prejudiced because he was only found guilty of the same offenses he had previously been found guilty of during the first hearing.

Furthermore, relief under Article 59(a) requires that any error of law to be found incorrect must materially prejudice the substantial rights of the accused. During the June 5 proceeding, Appellant pleaded guilty in accordance with a PTA and was sentenced to 4 years confinement, a $10,000 fine, reduction to E-1, and a dishonorable discharge. R. at 14. At the September 7 rehearing, which was before a different Military Judge from outside the Coast Guard, Appellant again pleaded guilty in accordance with the same PTA but he was sentenced to 2 years confinement and a bad-conduct discharge. R. at 27. Based on the sentence reduction alone Appellant was not prejudiced by the rehearing, and if there was error it was harmless.

Finally, Appellant also argues that CAAF has ruled that substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. App. Br. at 13; *Henry*, 53 M.J. at 111. But *Henry* and the other cases cited in it and in Appellant's brief, including *Davenport*, deal with situations where there was an authenticated record whose completeness, and therefore compliance with RCM 1103(b) and Article 54, was challenged. In this case, once the parties recognized the recordings of the June 5 hearing were lost and no record could be authenticated, a rehearing was ordered. Appellant cites to *Davenport* for the proposition that when a record of trial is incomplete, the range of remedies is limited. App. Br. at 13-14. But that range is defined by RCM 1103(f). *See Davenport*, 73 M.J. at 378–79. Appellant also claims that *Davenport* mandates that the record be remanded to the Judge Advocate General for return to the Convening Authority for action under RCM 1107 and then RCM 1103. App. Br. at 13-14. However, *Davenport* makes no mention of RCM 1107 at all. Its discussion of the appropriate framework to remedy an incomplete record refers solely to RCM 1103. The remedy for an inability to prepare a verbatim transcript and thus a complete record is

RCM 1103(f), which is the remedy the Convening Authority appropriately implemented when informed that the recordings of the June 5 hearing were lost.

II. APPELLANT'S PLEAS WERE PROVIDENT AND, AS HE ADMITTED DURING THE PROVIDENCY INQUIRY, THERE WAS NO *SUB ROSA* AGREEMENT

Standard of Review

"During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008) (citing to *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375, (C.A.A.F. 1996) (citing to *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). "Any ruling based on an erroneous view of the law . . . constitutes an abuse of discretion." *Inabinette*, 66 M.J. at 322 (citations omitted). Questions of law arising from a guilty plea are reviewed de novo. *Id*. Additionally, "[a] military judge abuses his discretion if he fails to obtain from the accused an adequate factual basis to support the plea – an area in which [the military judge is afforded significant deference]." *Id*. (citing to *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Due to the strong arguments in favor of affording military judges broad discretion in accepting pleas, when "reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test . . . the record as a whole [must] show 'a substantial basis in law [or] fact for questioning a guilty plea.'" *Id.* (citing *Prater*, 32 M.J. at 436). "A 'mere possibility' of [a substantial] conflict [between the plea and the accused's statements or other evidence of record] is not a sufficient basis to overturn the trial results." *United States v. Garcia*, 44 M.J.

496, 498 (C.A.A.F. 1996) (quoting *Prater*, 32 M.J. at 436). In the absence of ambiguous terms, military appellate courts interpret the provisions of a pretrial agreement giving the terms their plain meaning within the context of the entire agreement and the mutual understanding of the parties. *See United States v. Acevedo,* 50 M.J. 169, 172 (C.A.A.F. 1999).

A. Appellant's Pleas Were Provident

This is Appellant's second court-martial. *See United States v. Goodell*, C.G.C.C.A. decision dated 03 July 2019. Appellant's first court-martial was set aside based on issues not related to the merits of his case. *Id*. It is also his second attempt to challenge Military Protective Orders put in place to control his conduct towards his ex-wife, conduct that formed the basis for the charges in both cases. Unlike his first court-martial, in this case Appellant, in Paragraph 16.g of his pre-trial agreement, specifically agreed to waive all motions except "motions filed under R.C.M. 305(k) and Article 13, UCMJ and those that are otherwise non-waivable pursuant to R.C.M: 705(c)(l)(B)". App. Ex. XIV, at 6. In keeping with this Court's decision in Appellant's first case, he has waived all matters related to the Military Protective Order and his pre-trial agreement that do not impact the providency of his pleas. *United States v. Goodell*, C.G.C.C.A. decision dated 10 September 2018.

With regard to the specific allegation that there was a *sub rosa* agreement and, presumably, that the pre-trial agreement is invalid because R.C.M. 705(d)(2) requires that all parts of an agreement be written, this issue was specifically addressed in the providency inquiry twice. First, the military judge inquired of Appellant and his counsel whether the agreement was the entire agreement between he and the convening authority:

> MJ: Did you fully understand every provision of the entire agreement, before you signed it?
> ACC: Yes, Your Honor.
> MJ: Did you enter into this agreement freely and voluntarily?

ACC: Yes, Your Honor.
MJ: Do parts one and part two of the agreement contain all the understandings and agreements that you and the government have in this case?
ACC: Yes, Your Honor.
MJ: Has anyone made any promises to you that are not contained or not written into this agreement in an attempt to get you to plead guilty?
ACC: No, Your Honor.
MJ: Do counsel for both parties agree with that?
TC: Yes, Your Honor.
DC: Yes, Your Honor.
(R. at 417)

The Military Judge then discussed with both parties paragraph 16.h of the Pre-trial Agreement that contained Appellant's agreement to specified restrictions on his ability to interact with his ex-wife:

[MJ:] Government, is this military protective order already been issued or does this serve as the military protective order?
TC: Your Honor, this provision will serve as the military protective order.
MJ: Defense, do you agree with that?
ADC: [Conferring with co-counsel.] Your Honor, the government- excuse me, the defense agrees as long as the government is placing on the record, here before the court today that at the end of this court-martial today, this will be the only MPO in effect as it applies to Sen--MKl [redacted].
MJ: Well, that's what the court is trying to verify as this court does not have the authority to issue a military protective order in this case. I'm just seeking whether or not the Convening Authority in this case has issued a military protective order or if this simply serves as notice of what the--those terms are?
DC: And defense's understanding is that there is currently an MPO in place by the Convening Authority. The defense's reading of his pretrial agreement was that at the time of the completion of this pretrial agreement--this court-martial hearing, and upon adjudgment of the sentence by this court-martial, that that military protective order would no longer be in effect and that the terms as discussed in this pretrial agreement would then go into effect by issuance of the Convening Authority not by the military judge.
MJ: Right, and that's what the court's concern is, Government, is that I do not believe that I have the authority to make this into place, or order this to be so. I'm just seeking the parties' positions. As this is signed by the Convening Authority, is this an order that has been issued?
TC: That is the government's position, sir.
MJ: Okay. So Seaman Recruit Goodell, do you understand about what your counsel and the government has represented regarding the status of this military protective order as it relates to MKl Goodell?
ACC: Yes, Your Honor.

MJ: And you agree to abide by paragraphs one through seven of this specially negotiated provision as it relates to the military protective order against MKl [redacted]?
ACC: Yes, Your Honor.
MJ: And you understand that if you violate any one of those terms, the government could consider that to be a material breach of your pretrial agreement and the effects that we have already discussed could come into full force if the government so chose?
ACC: Yes, Your Honor.
(R. at 436-438)

Finally, the Pre-trial Agreement itself, in paragraph 2 states: "[t]his agreement (Parts I and II) constitutes all the conditions and understandings of both the government and me regarding the plea in this case. There are no other agreements, written, oral or otherwise implied." App. Ex. XIV, at 2.

Both the Pretrial Agreement and the providency inquiry show that there was no *sub* rosa agreement between the Appellant and the Government. The alleged *sub rosa* agreement had to do with the effect of Appellant's guilty plea on the Military Protective Order that had been previously issued. What the parties understanding of the impact of the order contained in Paragraph 16.h on something else, namely the Military Protective Order issued in November 2017, is not an agreement, *sub rosa* or otherwise, outside the agreement Appellant and the convening authority signed. As can be seen in these transcript excerpts, Appellant understood paragraph 16.h of the Pre-trial Agreement, understood that it was in place, and that he was required to abide by it. Appellant's trial defense counsel asserted that the guilty plea served to effectively cancel the previous Military Protective Order. Trial Counsel merely asserted that the order reflected in the Pre-trial Agreement was in place. The impact that the Pre-trial Agreement may have had on a pre-existing order was not relevant to whether Appellant agreed to the order reflected in the agreement, understood its terms, and understood that he was bound by that order.

In addition, Appellant asserts that the Military Judge did not know there was a pre-existing order in place. App. Br. at 17. Yet, besides the inquiry cited above, trial counsel offered the Military Protective Order as a Prosecution Exhibit in sentencing. R. at 458-460. The Military Judge reviewed the exhibit and sustained a defense objection to its use as evidence in aggravation. R. at 458-460. The issue is not that Military Judge did not did not know the prior Military Protective Order existed. It was presented to him. Nor did he misunderstand the terms of the order contained within the Pre-trial Agreement. The real issue is that based on the representation of the parties and the answers Appellant provided him, the Military Judge did not consider the previous Military Protective Order relevant. *Id*. Regardless of the impact, or not, of the order contained within the Pre-trial Agreement, on the order reflected in Prosecution Exhibit 7 for Identification, the Military Judge confirmed that the order set out in the Pre-trial Agreement was effective, that Appellant understood its terms, and that he agreed to be bound by it. If Appellant thought he was being impermissibly coerced he could have declined to enter into the agreement. The terms of the order are not ambiguous. *Acevedo,* 50 M.J. at 172. The parties understood the impact of paragraph 16.h. Appellant's pleas were provident.

B. The Provisions of the Pre-trial Agreement that Mentioned Appellant's Son did not Render the Plea Involuntary.

Under AOE IV in Appellant's Assignments of Errors, in addition to the *sub rosa* agreement argument, Appellant recycles, in slightly different form, the argument he made in his previous appeal from his previous court-martial that basically any provision in an order that touched on his ability to interact with his son rendered his plea improvident. This Court already ruled on this argument:

> Appellant notes that the military judge did not elicit a separate military purpose for the provisions pertaining to his son. Their son was, however, in his wife's custody, so we do not find that inconsistent with Appellant's stated purpose of the order, nor does it raise a

> substantial question about his pleas. Appellant was properly apprised of the law, freely and voluntarily admitted the orders were lawful and he violated them, and provided the military judge a sufficient basis to demonstrate that he was in fact and in law guilty. If, to the contrary, Appellant believed that the MPOs lacked a military purpose and unjustifiably deprived him of personal rights, he could have pleaded not guilty and challenged the Government's theory of lawfulness. He chose not to. Nothing presented raises a substantial basis in law or fact to question his guilty pleas and the military judge did not abuse her discretion in accepting them.
> *United States v. Goodell*, C.G.C.C.A. decision dated 10 September 2018, at 5.

In this case, Appellant does not directly challenge the lawfulness of the order contained in the Pre-trial Agreement as it was not involved in any of the charges to which he plead guilty. But he continues to object to the order, particularly as it pertains to his son. Yet the Military Protective Order put in place in November 2017 expressly prohibited him from having any contact with his son. Pros. Ex. 7 at 3. The order in this Pre-trial Agreement authorized Appellant to have visitation with his son in accordance with any applicable civilian court order and permitted him interaction with his ex-wife in order to effect any such visitation. App. Ex. XIV, paragraph 16.h(7), at 7. As this Court previously noted, if Appellant thought the terms of Paragraph 16.h of his Pre-trial Agreement unjustifiably deprived him of his personal rights he did not have to enter into it. He did, however, choose to enter into the agreement and to be bound by the terms of paragraph 16.h. There is nothing in the record to indicate a reason to question Appellant's guilty pleas and the Military Judge appropriately accepted them.

III. THE TERMS OF PARAGRAPH 16.H OF APPELLANT'S PRE-TRIAL AGREEMENT ARE NOT AGAINST PUBLIC POLICY.

R.C.M. 702(c)(2)(D) expressly permits terms in a Pre-trial Agreement where an accused promises to conform his conduct to certain conditions of probation. That is exactly what Paragraph 16.h of Appellant's Pre-trial Agreement does. Although the form of such conditions is most commonly stated in the form of a requirement an accused not engage in misconduct, and

Appellant's Pre-trial Agreement contains provisions from the model agreement in paragraphs 11 through 14. App. Ex. XIV, at 4-5. R.C.M. 702 does not limit the type of promise to conform conduct only to generally not engage in misconduct.

In addition, it is worth noting that in his first court-martial, Appellant plead guilty to four separate violations of Military Protective Orders. *United States v. Goodell*, C.G.C.C.A. decision dated 10 September 2018, at 1-3. He also plead guilty to stalking his ex-wife in violation of Article 120A, UCMJ. *Id.* In this court-martial he plead guilty to conspiring to solicit someone to commit an aggravated assault against his ex-wife and one specification of actually soliciting someone to commit aggravated assault against his ex-wife. R. at 3-5. It should not be overlooked, however, that the charges as referred to the court-martial accused Appellant of conspiring and soliciting to have his ex-wife murdered. R. at 364.

And yet at every opportunity, Appellant argued and continues to argue the Military Protective Orders placed against him were invalid. They were a central part of his arguments for relief to this Court in reference to his first court-martial. He filed a complaint under Article 138, UCMJ, against the officer who issued the November 2017 Military Protective Order that also is referenced in his arguments in his most recent Assignments of Error. Appendices to the Record A through C. His continued objection to being subject to Military Protective Orders form the basis of two of his Assignments of Error before this Court in reference to his second court-martial. In this context, the Government avers that it is inconceivable how making restrictions on Appellant's interactions with his ex-wife is against public policy, no matter how Appellant chooses to attempt to frame that argument. Particularly where such provisions are expressly permitted by R.C.M. 705. "[There is] no requirement that a commander determine that a member of the command intends to commit an improper act before prohibiting it. To the

contrary, the [MCM] recognizes that an order may have a preventive or protective function." *United States v. Padgett,* 48 M.J. 273, 278 (C.A.A.F. 1998). "The requirement for a valid military purpose is satisfied if the commander issues such a protective order, directing a servicemember to refrain from certain improper conduct, whether or not that servicemember has or intends to engage in such conduct." *Id; see also United States v. McDaniels,* 50 M.J. 407, 408-409 (C.A.A.F. 1999). If he really believed the orders so wronged him, he could have exercised his right to plead not guilty and challenged their appropriateness directly.

CONCLUSION

This Court should affirm the findings and sentence. The only mistake made in this case was the loss of the recording of the first guilty plea. That type of mistake is specifically addressed in the Rules for Court-Martial. R.C.M. 1103(f)(2) authorizes a convening authority to order a rehearing upon the loss of recordings, without first setting aside findings, before any Record of Trial is authenticated, and regardless of the adjudged sentence. Further, the record shows that all parties knew and understood the terms of Appellant's pretrial agreement. Finally, given Appellant's history of criminal behavior at the time the pretrial agreement was signed it did not violate public policy.

PRAYER FOR RELIEF

WHEREFORE, the United States prays this Honorable Court affirm the findings and the sentence in this case.

Respectfully submitted,

DATE: 07 August 2019

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 07 August 2019.

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