IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

	18 June 2019
UNITED STATES, Appellee	APPELLANT'S ASSIGNMENTS OF ERROR AND BRIEF
v.	Dkt. 1466 Case No. CGCMG 0370 Before McClelland, Judge, Brubaker
Evan K. Goodell Seaman Recruit Machinery Technician (E-1) U. S. Coast Guard, Appellant	Tried at Norfolk, Virginia by a general court-martial convened by Commander CG Personnel Service Center, on 5 June and 7 September 2018.

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

Statement of the Case and Jurisdiction

A military judge sitting as a general court martial convened by Commander, Personnel Service Center (PSC) tried Appellant, Seaman Recruit (SR) Evan K. Goodell, United States Coast Guard (USCG), at Norfolk, Virginia on 5 June 2018. (App. 1.) No record of trial was prepared following this hearing. On 2 August 2018, the convening authority directed a rehearing in the case. (Appellate Ex. XVII.) On 7 September 2018, a second military judge convicted SR Goodell, 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. 10 U.S.C. §§ 881, 934.

SR Goodell was sentenced to two years' confinement and a bad-conduct discharge. (Results of Trial.) The convening authority took action on 21 November 2018. SR Goodell was credited with 175 days' credit for pretrial confinement, fifty-nine days' credit for the confinement served between the first sentencing in this case and the rehearing, and twenty-seven

days' credit based on the military judge's ruling under RCM 305(k). The convening authority approved the sentence as adjudged and, with the exception of the-bad conduct discharge, ordered it executed. In accordance with the pre-trial agreement, confinement in excess of eleven months was suspended. (Convening Authority's Action.)

On 20 December 2018, the Judge Advocate General of the Coast Guard transmitted the case to the Coast Guard Court of Criminal Appeals (CGCCA) for review under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2018).

Statement of Facts

On 21 January 2017, SR Goodell's commanding officer ordered him arrested and confined to NAS Jacksonville, Florida for violating a military protective order (MPO). Sixty-two days passed before charges were preferred. *United States v. Goodell*, 78 M.J. 585 (C.G.Ct.Crim.App. 2018) (*Goodell I*).

While he was in pretrial confinement, the Coast Guard Investigative Service (CGIS) received a report originating with Air Force investigators about a "potential threat to harm" made by SR Goodell. (PHO Ex. 1 at 5.) This prompted an investigation that ultimately led to the charges that comprised SR Goodell's second court-martial, the case now being briefed to the CCA (*Goodell II*). On 25 May 2017, a military judge denied SR Goodell's speedy trial motion and SR Goodell pleaded guilty in *Goodell I,* a special court-martial where he received the maximum sentence authorized. He was then transferred to Naval Consolidated Brig Charleston to complete his sentence of confinement. (Pros. Ex. 6.)

A. SR Goodell's command issued a post-confinement MPO based on his previous misconduct.

In anticipation of SR Goodell's release from his sentence of confinement in *Goodell I*, his soon-to-be commanding officer issued an MPO to SR Goodell. The MPO was issued on 2

November 2017 and it stated as its basis the misconduct charged in *Goodell I*. It prohibited SR Goodell from entering within 50 miles of eight different locations in Alabama, Georgia, and Florida, including a major city and an Air Force base. This provision covered nearly 8,000 square miles between New Orleans, Louisiana, and Tallahassee, Florida and prohibited him from traveling over 300 miles of Gulf of Mexico coastline. In addition to these geographic limitations, the MPO prohibited SR Goodell from being within 5,280 feet of MK1 [redacted]. The order left blank the protected person's residence and place of employment. The order also prohibited SR Goodell from "[c]onducting any research or taking any steps to identify the current home address or current duty station of MK1 [redacted]" (Appellate Ex. XI at 61-62.)

The order also required SR Goodell to personally speak with the Executive Officer (XO) of the Coast Guard Pay and Personnel Center (PPC) on a weekly basis. No designated time to call was specified and if the XO was unavailable, SR Goodell was required to leave a voicemail message. He was also required to detail his travel plans and living arrangements for the first two weeks prior to his release from confinement. Unlike the MPO that was in place prior to his trial, the post-release MPO made no provision to accommodate the Alabama state custody order that remained in place, provided him with child visitation rights, and required the parties to inform each other of their residences. The MPO stated it will remain in effect "during the entire period that you are on appellate leave." (Appellate Ex. XI at 61-62.)

On 13 November 2017, just five days after Appellant's release from confinement, he submitted a written request for redress to the issuing officer of the MPO—the commanding officer of PPC—in accordance with the Military Justice Manual, COMDTINST M5810.1E, Chapter 7.A (CG MJM). Captain [redacted], the commanding officer of PPC, did not respond within the timeframe outlined in the CG MJM. For nearly 30 days, SR Goodell received no response.

On 11 December 2017, in accordance with the CG MJM and Article 138, UCMJ, 10 U.S.C. § 938, SR Goodell submitted a formal complaint of wrongs to Rear Admiral [redacted] Commander, USCG Personnel Service Center (PSC). On 12 December 2017, Captain [redacted], of PPC, responded to the Request for Redress: his response indicated that the MPO would remain in force as ordered and did not accommodate SR Goodell's request. (Appellate Ex. XI at 42.)

On 18 December 2017, SR Goodell filed his assignments of error and brief before this court in *Goodell I*. In his brief, SR Goodell asserted the MPO was an exercise of unlawful command influence over his appellate case and the order was so burdensome it amounted to additional punishment. *United States v. Goodell*, 78 MJ 585 (C.G.Ct.Crim.App. 2018).

On 26 December 2017, SR Goodell moved for expedited review based on the burden to his parental rights and freedom of movement resulting from the MPO.

On 16 January 2018, the Commanding Officer of CG PPC, CAPT [redacted] the same officer who issued the post-confinement MPO, ordered SR Goodell into pretrial confinement. (Appellate Ex. IX at 8.) On 7 March 2018, CAPT [redacted] sent SR Goodell a memorandum, subject: Final Response to Request for Redress, stating he "will not process" his Article 138 complaint and concluding that the "complaint is now moot, because your pretrial confinement is more restrictive than the MPO." (Appendix A.)

On 28 March 2018, trial defense counsel filed a motion for release from pretrial confinement. (Appellate Ex. IX.) The motion argued that the initial review officer abused his discretion in determining that less severe forms of restraint were inadequate because (1) SR Goodell had complied with the MPO issued to him and (2) he had committed no misconduct since he was released from the brig. The motion also argued that the commanding officer's confinement memorandum contained inaccurate information specifically that SR Goodell had

been subject to "CGIS surveillance" that had become too expensive to continue. (Appellate Ex. IX at 4-5.)

On 2 April 2018, SR Goodell was arraigned and the defense requested to argue its release motion. (App. 1 at 1, App.3 at 19.) The military judge denied this request and scheduled a motions hearing for 9 April. (App.3 at 24.) On 6 April, however, the defense withdrew the motion at the request of the convening authority, as part of plea negotiations. (App. 1.)

On 23 April 2018, SR Goodell submitted an Article 138 complaint directly to RADM [redacted], Commander, PSC. SR Goodell renewed his request that the MPO be revised to allow the full extent of contact with his son permitted by the order of the Alabama family court and noted that it continued to prevent him from communicating with his son while in pretrial confinement.

On 9 May 2018, CAPT [redacted] sent a memorandum purporting to forward SR Goodell's Article 138 Complaint dated 23 April—in fact SR Goodell submitted the complaint directly after CAPT [redacted] stated he would not forward it. Captain [redacted] recommended that RADM [redacted] deny SR Goodell's request to revise the MPO because doing so was "not a prudent course of action."

B. The pretrial agreement and the convening authority's promise to rescind the MPO.

On 30 May 2018, SR Goodell and the Convening Authority entered a pretrial agreement which included within it a "protective order," specifically called out as a "material term" of the agreement. (Appellate Ex. XIV at 6.) The pretrial agreement made no reference to the MPO issued by CAPT [redacted] on 2 November 2017.

SR Goodell's pretrial agreement included the following term:

> (h) I agree to the following protective order to protect MK 1 [redacted], which will be effective until I am discharged from the U.S. Coast Guard. I understand that this protective order is a material term of this agreement.
> I agree to the following terms of this protective order:

> . . . .
> (3) I agree to remain, at all times and places, at least 1000 feet away from my son, [], unless visitation is otherwise authorized by a civilian court pursuant to a written order from a court of competent jurisdiction.
> . . . .
> (6) I agree not to conduct any research, or take any steps, to identify the current home address or duty station of MK1 [redacted].
> (7) As an exception to subparagraphs (1) - (6) above, the government and I agree that I am authorized to be in the presence of MK1 [redacted] for the limited purpose of attending court hearings and to exchange custody of [my son], if such an exchange of custody is authorized by a civilian court pursuant to a written order from that court. If I exchange custody of [my son] with MK1 [redacted] pursuant to a court order, I agree to complete the exchange at a law enforcement facility, such as a police station. I also agree to minimize contact with MK1 [redacted] during those exchanges to only the minimum necessary to safely transfer [my son].

(Appellate Ex. XIV at 6-7.) (The omitted paragraphs under this specially negotiated term relate to MK1 LG). Prior to this agreement SR Goodell had no access to his child because of the existing MPO.

Concerned about the enforceability of the terms, the military judge at trial questioned whether the terms of a pretrial agreement could implement a protective order:

> 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.

(R. at 87.)

Subsequently, SR Goodell received another MPO. (Appendix E.) Unlike the terms of the "protective order" in the pretrial agreement, the MPO does not limit SR Goodell's interactions with his son, nor does it contain the requirement that he exchange custody at a police station. This last MPO also did not mention the pretrial agreement or the disparate terms.

C. The 5 June 2018 trial (*Goodell II*) and its inadequate post-trial processing.

An Article 39(a) session was held on 5 June 2018. The session began with arguments on

the defense motion for confinement credit based on SR Goodell's unduly harsh treatment in pretrial confinement. (Appellate Ex. VIII, App. 1.) The military judge ruled in favor of the defense and ordered twenty-seven days' credit. (Appellate Ex. XIX at 6.)

After this, SR Goodell pleaded guilty pursuant to the pretrial agreement and was sentenced by the military judge. This court-martial will be referred to as *Goodell II-A* (App. 1 at 1.) At some point after this, the recording of the trial 39(a) session was "lost" or "corrupted." (Appellate Ex. XVII at 1, 5.) In early August, the staff judge advocate provided an oral briefing on the outcome of *Goodell II-A* and advised the convening authority that he could order a rehearing under R.C.M. 1103. (App. 2 at 1.) Based on this oral briefing, the convening authority ordered a rehearing by a memorandum to trial counsel. (Appellate Ex. XVII at 5.) On 15 August, the trial judge, CAPT [redacted], prepared a written ruling, memorializing his 5 June 2018 confinement credit determination. (Appellate Ex. XIX.)

The record contains no document forwarding the convening authority's memorandum, but by 17 August CAPT [redacted], in his capacity as chief trial judge, submitted a request to the Chief Judge of the Navy-Marine Corps Trial Judiciary requesting the detail of a Navy military judge. (Appellate Ex. XVIII.)

On Friday, 7 September 2018, the detailed Navy judge received SR Goodell's pleas, entered findings, and sentenced him to two years confinement and a bad-conduct discharge. This proceeding will be referred to as *Goodell II-B*. The following Monday, 10 September 2018, this Court issued its opinion in *Goodell I*, relying the charges in *Goodell II A and B* to conclude that SR Goodell's claim of unlawful command influence over the appellate process based on the post-confinement MPO was moot. *United States v. Goodell*, 78 MJ 585 (C.G.Ct.Crim.App. 2018).

Summary of Argument

The requirement for a complete record of trial, written recommendation of the staff judge advocate, and convening authority's action all provide substantive protections to the accused in a court-martial. These protections were entirely circumvented in ordering a rehearing in this case. The post-trial processing requirements are non-discretionary and the failure to follow them was plain error. As a result, this Court cannot complete its review under Article 66 and may not affirm the findings or sentence based on the existing record.

SR Goodell's guilty plea was the product of a *sub rosa* promise by the convening authority to withdraw an MPO that prohibited SR Goodell from contacting his son and traveling to geographic areas that covered thousands of square miles. In such circumstances, his guilty plea was not voluntary.

Issues Presented

I.

WHETHER THE CONVENING AUTHORITY PROPERLY ORDERED A REHEARING WITHOUT SETTING ASIDE THE FINDINGS ALREADY MADE ON THE CHARGES AGAINST SR GOODELL.

II.

WHETHER THE CONVENING AUTHORITY PROPERLY ORDERED A REHEARING WHERE NO SUMMARIZED RECORD WAS PREPARED AND AUTHENTICATED BY THE DETAILED MILITARY JUDGE.

III.

WHETHER THE CONVENING AUTHORITY PROPERLY ORDERED A REHEARING WHERE THE ADJUDGED SENTENCE INCLUDES A DISHONORABLE DISCHARGE OR CONFINEMENT FOR MORE THAN SIX MONTHS.

IV.

WHETHER SR GOODELL'S GUILTY PLEA WAS VOLUNTARY WHERE IT WAS OBTAINED THROUGH A PROMISE TO RELAX AN ORDER PROHIBITING COMMUNICATION WITH HIS SON.

V.

WHETHER THE TERMS IN THE PRETRIAL AGREEMENT REGULATING SR GOODELL'S FUTURE PARENTAL VISITATION WITH HIS SON ARE VOID.

Argument

I.

ARTICLE 60(F)(3), UCMJ, AUTHORIZES CONVENING AUTHORITIES TO ORDER A REHEARING IF HE OR SHE DISAPPROVED THE FINDINGS. THE CONVENING AUTHORITY DID NOT DISAPPROVE THE FINDINGS ANNOUNCED BY THE MILITARY JUDGE ON 5 JUNE 2018. WAS THE REHEARING PROPERLY ORDERED?

Standard of review

Whether a record is complete is a question of law, reviewed *de novo* by this Court. *United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2013). Interpretation of the UCMJ, and the R.C.M. are questions of law this Court reviews *de novo*. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). Where the accused does not object, a convening authority's post-trial action is reviewed for plain error. *United States v. Voorhees*, 50 M.J. 494, 500 (C.A.A.F. 1999.).

Analysis

A. The UCMJ provides a process for convening authorities to order a rehearing: this process was circumvented after the 5 June 2018 trial (*Goodell II-A*).

The UCMJ mandates a process for bringing the findings and sentence of a court-martial into effect. This process implements substantive rights for the accused under Articles 54 and 60, UCMJ. Trial counsel, the staff judge advocate and the convening authority omitted each stage of this process following the 5 June hearing. To start, following the announcement in open session, the findings and sentence of a court-martial must be reported promptly to the convening authority. Article 60(a), UCMJ, 10 U.S.C. § 860(a). No results of trial report exists for the 5 June 2018 hearing, *Goodell II-A*.

A record of trial must be kept by each general court-martial. Article 54(a), UCMJ, 10 U.S.C. Trial counsel is responsible for the preparation of the record of trial. Article 38(a), 10 U.S.C. 838(a). When the notes or recordings required to prepare a verbatim transcript of the proceedings are lost or damaged, a summarized report of the proceedings must be prepared. R.C.M. 1103(f). The MCM outlines the required contents of the summarized report.[1] No summarized report of *Goodell II-A* was prepared. (Appendix E.)

The record of trial—a verbatim transcript or summarized report—must be personally authenticated by the signature of the military judge. *Id;* MCM, App. 13 at A13-12. As soon as the record of trial is authenticated, a copy must be provided to the accused, who then has ten days to submit matters for consideration by the convening authority. 10 U.S.C. 854(d); 10 U.S.C. § 860(b)(1). The record of trial is also provided to the staff judge advocate. 10 U.S.C. § 860(e). Neither the accused nor the staff judge advocate had a summarized report authenticated by the presiding judge after *Goodell II-A*.

In addition to considering matters submitted by the accused, the convening authority must obtain the written recommendation of the staff judge advocate. The staff judge advocate did not prepare a written recommendation on *Goodell II-A* to the convening authority. (App. E.)

The written recommendation is a prerequisite to the convening authority taking action on the findings and sentence. Article 60(e). The convening authority must rely on the summarized report to take such action. Among the actions authorized under Article 60, is ordering a rehearing "if he disapproves of the findings and sentence and states his reason for disapproval." *Id.* After reviewing the findings and sentence, the convening authority may order a rehearing on any offense that the report indicates was supported by the "summary of the evidence" and a

[1] Appendix 13 of the Manual for Courts-Martial outlines the contents of this summarized report.

finding of guilt. *Id*. The convening authority did not order a rehearing by taking action on the case. Rather, he circumvented the entire post-trial process described above, and directed the trial counsel to conduct a rehearing by memorandum. The complete omission of these mandatory procedures is plain error.

B. The omitted records were necessary to determine whether a rehearing could properly be ordered by the convening authority.

A rehearing may not be ordered on an offense of which the accused was acquitted at the first trial. *United States v. Culver*, 46 C.M.R. 141, 143 (1973). In the pretrial agreement for *Goodell II*, the convening authority promised to withdraw and dismiss Charge II, Specification 2, and to except murder as the object of the conspiracy and solicitation, and substitute aggravated assault. (Appellate Ex. XIV). The declarations attached by the government indicate that both parties complied with this pretrial agreement on 5 June 2018. If so, R.C.M. 1107(f)(5)(A) prohibited a rehearing on Charge II, specification 2, and the excepted language of the remaining specifications because no guilty finding was entered under them.

Without a record, the staff judge advocate and convening authority lacked the information on the disposition of the charges required to take any action on the case—rehearing included—under R.C.M. 1107. Likewise, the convening authority required the recommendation of his staff judge advocate prior to taking action on *Goodell II-A*. *See United States v. Finster*, 51 M.J. 185, 185 (C.A.A.F. 1999) (affirming N-MCCA order for new convening authority's action where recommendation was not prepared by the staff judge advocate). Neither are contained in the record and as a result, this Court has no reliable basis to evaluate whether a rehearing could be ordered.

C. A presumption of prejudice applies to the convening authority's order for rehearing without a summarized report of the prior proceeding.

A complete and accurate verbatim record facilitates appellate review and instills confidence in the military justice system. *United States v. Kulathungam*, 54 M.J. 386, 387 (C.A.A.F. 2001). Consequently, military appellate courts treat an incomplete record of trial as preemptively prejudicial to the appellant. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing *United States v. Boxdale*, 47 C.M.R. 351, 352 (1973)). This rule comports with logic: an incomplete record precludes this Court from conducting its Article 66 review and appellate counsel from assigning error to the proceedings.

The necessity for presuming prejudice is redoubled in this case because absolutely no effort was made to document basic information like the results of trial, the times and dates of proceedings, or parties and witnesses present. Nor does the record contain any reliable documentation of the circumstances or extent of the loss of the recordings. These two facts distinguish this case from *United States v. Stacy*, 45 C.M.R. 48, 49 (1972). In *Stacy*, the CMA relied specifically on the "certificate by the court reporter and one by the convening authority" documenting the reasons that a summarized record could not be prepared and on the information contained in an "abbreviated" record to conclude that the convening authority had sufficient information to support a decision to order rehearing on the charges. *Id.*

Because of the absence of any reliable information on what occurred at *Goodell II-A* and the complete omission of the post-trial process mandated by statute, this Court cannot affirm the findings and sentence that followed from it in *Goodell II-B.*

D. Relief.

The "remedial options are limited and definitively circumscribed" where the record of trial is incomplete. *United States v. Davenport*, 73 M.J. 373, 378 (C.A.A.F. 2014). Where the

record of trial is incomplete, this Court must remand the case to the Judge Advocate General for return to the Convening Authority for R.C.M. 1107 action consistent with R.C.M. 1103(f). *Id.* This Court should remand this case so that the convening authority can take action on the 5 June 2018 trial.

II.

A CONVENING AUTHORITY MAY NOT ORDER A REHEARING ON SPECIFICATIONS, OR LANGUAGE OF SPECIFICATIONS OF WHICH THE ACCUSED HAS BEEN ACQUITTED. ON 5 JUNE 2018, SR GOODELL WAS FOUND NOT GUILTY OF THE EXCEPTED LANGUAGE. WAS IT IMPROPER TO ORDER A REHEARING ON LANGUAGE FOR WHICH THERE WAS NO GUILTY FINDING ENTERED?

Standard of review

The standards of review under the first assignment of error also govern this issue.

Analysis

The findings of a court-martial are final once announced in open court. *United States v. Trew*, 68 M.J. 364, 367 (C.A.A.F. 2010). As discussed in the assignments of error above, a rehearing may not be ordered on an offense of which the accused was acquitted at the first trial. *United States v. Culver*, 46 C.M.R. 141, 143 (1973).

The absence of even the results of trial from 5 June 2018 requires SR Goodell to speculate on the basis and reasons for the convening authority's decision to order a rehearing. This situation alone violates Article 60(f)(3), which requires the convening authority to "disapprove[] the findings and sentence and state the reasons for disapproval of the findings"

before authorizing a rehearing. 10 U.S.C. § 860(f)(3).

Without the written decision, two possibilities are presented. The convening authority may have ordered a rehearing on the language that was excepted pursuant to the pretrial agreement, and the withdrawn and dismissed specification. Alternatively, the convening authority may not have complied with the terms of the pretrial agreement addressing the disposition of the specification and language to which SR Goodell did not plead guilty.

Under either scenario, the convening authority violated R.C.M. 1107(e)(2)(A), which limits his authority to order a rehearing of offenses for which a finding of guilty was entered. As discussed under the first assignments of error, this Court should remand this case so that the convening authority can take action on *Goodell II-A* that complies with R.C.M. 1103(f) and 1107.

III

A CONVENING AUTHORITY MAY NOT ORDER A REHEARING WHERE THE ADJUDGED SENTENCE INCLUDES A DISHONORABLE DISCHARGE OR CONFINEMENT FOR MORE THAN SIX MONTHS. ON 5 JUNE 2018 SR GOODELL WAS SENTENCED TO A DISHONORABLE DISCHARGE AND FOUR YEARS' CONFINEMENT. WAS THE ORDER FOR REHEARING IMPROPER?

Standard of review

The standards of review under the first assignment of error also govern this issue.

Analysis

Rule for Courts-Martial 1107 states "[a] rehearing may not be ordered by the convening authority where the adjudged sentence for the case includes a sentence of dismissal, dishonorable discharge, or bad-conduct discharge or confinement for more than six months." MANUAL FOR

COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(e)(1) (2018). This rule implements the statutory limitations on the convening authority's power to disapprove findings for non-qualifying offenses under Article 60(c)(4)(A). *Id*, discussion. Because the sentence adjudged on 5 June 2018 included a dishonorable discharge, the convening authority lacked the power to disapprove those findings and order a rehearing. As discussed under the first assignment of error, this Court should remand this case so that the convening authority can take action on the 5 June 2018 trial that complies with R.C.M. 1103(f) and 1107.

IV.

A CIVILIAN FAMILY COURT GRANTED SR GOODELL VISITATION WITH HIS SON. THROUGH AN MPO, THE CONVENING AUTHORITY UNILATERALLY PREVENTED SR GOODELL FROM EXERCISING HIS PARENTAL RIGHTS. MOREOVER, THE CONVENING AUTHORITY USED SR GOODELL'S PARENTAL RIGHTS TO OBTAIN A GUILTY PLEA BY OFFERING SR GOODELL ACCESS TO HIS SON IN EXCHANGE FOR A PLEA OF GUILTY IN A *SUB ROSA* AGREEMENT.

Standard of review

The military judge's legal conclusions in the providence inquiry are reviewed *de novo*. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005). A guilty plea will be set aside on appeal where there is a substantial basis in law and fact for questioning whether it was knowing and voluntary. *Id.*

Analysis

A guilty plea waives the bedrock constitutional protections of the accused. *United States v. Soto*, 69 M.J. 304, 306 (C.A.A.F. 2011). Because of the consequence of entering a plea of

guilty, the presiding judge must be satisfied that the accused enters his plea knowingly and voluntarily before it can be accepted. *Id*. This requirement is elaborated on by R.C.M. 910(d), which requires the following:

> The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and *not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705*. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

MCM, RCM 910(d) (2016) (emphasis added).

Military judges are held to a stricter standard for determining both that the plea is provident and that the pretrial agreement that produced them is both lawful and consistent with public policy. *United States v. Soto*, 69 M.J. 304, 306 (C.A.A.F. 2011). The military judge's discussion of the unwritten promise to rescind an MPO in exchange for SR Goodell's plea fell short of the requirements in RCM 910 and 705 on two fronts: (1) it countenanced promises apart from the pretrial agreement itself; and (2) it ratified the application of the convening authority's Article 90 authority to coerce SR Goodell's plea.

A. The MPO contained under paragraph (h) of the PTA were one-half of an impermissible *sub rosa* agreement.

When the military judge arrived at paragraph (h) in his inquiry on the pretrial agreement, he stated concern that it was beyond the power of the court-martial to implement a MPO. The military judge's discussions demonstrated he did not know that there was a preexisting MPO already in place and the less restrictive protective order terms in the pretrial agreement would replace them. (R. at 85-87.) Independent of whether the convening authority could plea bargain with the terms of an MPO, the absence of one-half of that bargain in the written terms of the agreement violated R.C.M. 705(d)(2). This requirement serves to avoid misunderstandings and

preclude unnecessary appellate litigation. *United States v. Mooney*, 47 M.J. 496 (C.A.A.F. 1997).

It also violated the merger clause contained in the pretrial agreement, which stated that the written document contained the entirety of this agreement. In this case, the *sub rosa* agreement was prejudicial because it precluded the military judge from fulfilling his obligation to reach a well-informed conclusion that the terms of the pretrial agreement were lawful and that SR Goodell entered into it voluntarily. This distinguished SR Goodell's guilty plea from *United States v. Mooney,* wherein the court memorialized the unwritten terms on the record. 47 M.J. 496 (C.A.A.F. 1997).

While the PTA mentions the MPO, the information provided by counsel was insufficient to allow the military judge to understand that the convening authority was offering to reduce the onerous restrictions in the MPO in exchange for SR Goodell's guilty plea. This was prejudicial to SR Goodell's right to plea voluntarily.

B. Leveraging the MPO terms that regulated SR Goodell's access to his son rendered SR Goodell's plea involuntary.

An MPO's authority is derived from the issuing officer's power to issue military orders under Article 90. A lawful order must relate to a military duty. These are the activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and are directly connected with the maintenance of good order in the service. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016), Part IV, Para.14.c.(d)(2)(a)(iv).

SR Goodell had no military duty to plead guilty. If the restrictions in place on SR Goodell's interactions with MK1 [redacted] and his son related to a military duty, his plea of guilty in this case should have had no bearing on the military need for that order. This combination of military authority with quasi-judicial court-martial convening authority "subvert[s] the military

justice system and render[s] courts-martial empty rituals." *United States v. Libecap*, 57 M.J. 611, 614 (C.G. Ct. Crim. App. 2002). A guilty plea under these conditions is involuntary and must be set aside. *Id.*

C. Requiring a service member to plead guilty in exchange for access to his children is contrary to public policy.

It is contrary to public policy to allow convening authorities to have access to family members as a bargaining chip in pretrial negotiations. Sanctioning this practice by approving this plea agreement would unfairly increase the bargaining power of a convening authority and usurp the role of the civilian family courts. Many parents will feel compelled to accept the terms of a pretrial agreement if it allows them access to their children. Convening authorities will be incentivized to issue MPOs in order to obtain more favorable PTA terms. This, in turn, separates parents from their children and deprives children of the important role of their parents. All of these undesirable results should be avoided and this Court should reject, as contrary to public policy, the injection, *sub rosa,* of MPO authority into plea bargaining.

D. Relief.

Where an error affects the voluntariness of the appellant's pleas, the findings and sentence should be set aside. *United States v. Libecap*, 57 M.J. 611, 617 (C.G. Ct. Crim. App. 2002). The *sub rosa* offer by the convening authority to reduce the scope of the MPO, after disregarding SR Goodell's Article 138 complaint and requiring him to withdraw his motion for release from pretrial confinement, produced an involuntary guilty plea. Doing so outside of the view of the military judge—whose role it is to ensure the terms of the agreement are lawful and consistent with public policy—was doubly impermissible and requires this court to set aside the resulting findings and sentence.

V.

THE TERMS OF A PRETRIAL AGREEMENT MUST BE LAWFUL AND CONSISTENT WITH PUBLIC POLICY. THE CONVENING AUTHORITY REQUIRED SR GOODELL TO AGREE TO LIMITATIONS ON INTERACTION WITH HIS SON BEYOND THOSE IMPOSED BY STATE COURTS. IS THIS TERM VOID AS AGAINST PUBLIC POLICY?

Standard of review

Whether a condition of a pretrial agreement violates R.C.M. 705 is a question of law reviewed *de novo. United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007).

Analysis

A pretrial agreement term violates public policy if it undermines public confidence in the integrity and fairness of the disciplinary process. *United States v. Libecap*, 57 M.J. 611, 615 (C.G.C.C.A. 2002) (quoting *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992)).

SR Goodell's son was not implicated in any of the misconduct alleged in this case. The pretrial agreement states no basis or military necessity for these terms. Rather, they amount to an overt use of convening authority power to prefer and withdraw charges under the UCMJ as a means of regulating SR Goodell's rights as a parent. Doing so drastically alters the bargaining positions of the two parties in a way that is clearly contrary to public policy: SR Goodell was required to treat the MPO as presumptively lawful. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, Para.14.c.(d)(2)(a)(iv) (2016). And when SR Goodell requested the convening authority relax the order based under Article 138, he received no response. Moreover, it allows the convening authority to regulate behavior through "consent" that is otherwise beyond the reach of his authority under Article 90. The convening authority thereby immunized the order

from challenge as unlawful. Ultimately, the term—in contrast with conditions of conduct recognized in military law—regulates lawful parental behavior through the threat of imposing suspended criminal punishment. Employing the convening authority's military justice authority to obtain objects otherwise beyond his control are fundamentally unfair and against public policy.

A term in a pretrial agreement that violates public policy will be stricken from the pretrial agreement and not enforced. *United States v. Edwards*, 58 MJ 49 (C.A.A.F. 2003). This Court should declare paragraphs (3), (6) and (7) under (h) of this pretrial agreement unenforceable.

Conclusion

WHEREFORE, Appellant so prays.

Respectfully submitted,

[redacted]

DATE: 18 June 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 18 June 2019.

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