IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE
	DOCKET No. ARMY 20110319
v.	
Command Sergeant Major (CSM) **ANDREW F. UNDERWOOD,** United States Army, Appellant	Tried at Fort McNair, Washington, D.C., on 26 April 2011 before a special court-martial convened by Commander, Headquarters, U.S. Army Military District of Washington, Lieutenant Colonel Steven J. Levin, Military Judge, presiding.

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

Statement of the Case

A military judge, sitting alone as a special court-martial, convicted appellant, pursuant to his pleas,[1] of false official statement (6 specifications), unauthorized wear (6 specifications), and false swearing, in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934 [hereinafter UCMJ].[2] The military judge sentenced appellant to be confined for twelve months and to be discharged from the service with a bad-conduct discharge.[3] The convening authority approved only so much of the sentence as provides for confinement for thirty days and a bad-conduct discharge.[4]

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[1] Record (R.) at 8.
[2] R. at 96-97.
[3] R. at 209.
[4] Action. The convening authority's action complied with the terms of the pre-trial agreement. Appellate Exhibits [AE] I, II.

Panel No. 2

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Statement of Facts

Appellant began his active duty career on 18 March 1986 as a military police officer, later becoming a military police investigator.[5] In May 1991, appellant began training to become a special agent in the Army Criminal Investigative Division (CID);[6] he remained in CID through 2010, moving through various units, and eventually rising to the rank of Command Sergeant Major (CSM).[7] In September 2003, he deployed to Afghanistan for less than three months with the Criminal Investigation Task Force (CITF).[8] This was appellant's only combat deployment throughout his career.[9]

Beginning as early as 2004, appellant began outwardly mischaracterizing his service. On 29 July 2004, appellant took a DA photograph in which he wore three overseas service bars that he was not authorized to wear.[10] This photograph was submitted with his promotion packet to the MSG board.[11]

On 3 May 2007, appellant certified his packet for the SGM promotion board. Appellant's Enlisted Record Brief (ERB) falsely claimed that he had served in Iraq for three months, Afghanistan for 12 months, and Bosnia for 12 months.[12] The ERB

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[5] Prosecution Exhibit [PE] 1 at 1.
[6] *Id.*
[7] PE 1 at 2.
[8] *Id.*
[9] PE 1 at 3, 5.
[10] PE 1 at 5.
[11] *Id.*
[12] PE 1 at 3.

also included the Iraq Campaign Medal (ICM), Kuwait Liberation Medal (KLM), and Southwest Asia Service Medal (SWASM).[13] Further, appellant's DA photograph that he submitted with his packet showed him wearing the ICM, KLM, SWASM, and the National Defense Service Medal (NDSM) with three service stars, none of which he was authorized to wear.[14]

Appellant again presented a falsified record to the CSM promotion board. On 30 April 2008, he certified his ERB, which again included the same false deployments and awards as the 3 May 2007 ERB.[15] Appellant also wore the same unauthorized awards in his 17 April 2008 DA photograph for the CSM board as he did in the 3 May 2007 photograph.[16]

Appellant did not limit his mischaracterization of his service history to his promotion packets or official photographs. In a biography prepared on 6 June 2008 for the change of responsibility at the 202d MP Group, appellant falsely claimed that he served on the elite Level 1 Drug Suppression Team, deployed in support of Desert Storm, Desert Shield, Operation Iraqi Freedom, and to Rwanda.[17] He falsely claimed that he received a Masters of Philosophy from the University of

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[13] *Id.*
[14] PE 1 at 5, 9-11 (appellant was authorized to wear the NDSM with two service stars).
[15] PE 1 at 3, 9-11.
[16] *Id.* Appellant wore the same unauthorized awards in a DA photograph dated 11 February 2010. PE 1 at 9-10.
[17] PE 1 at 4, 7.

Paris, Sorbonne, France.[18] Finally, he claimed that he had been awarded the ICM, KLM, and SWASM.[19]

In a second biography, submitted on 29 June 2009 for use on the 202d MP Group's website, appellant claimed everything within the 6 June 2008 biography, and falsely added that he had also served in Kosovo and had received a Master Degree in International Criminal Studies from Northwestern University.[20]

In a biography posted to the Army Knowledge Online (AKO) website, appellant falsely claimed on 23 March 2010 that he had served in Iraq, and had received Masters Degrees from Northwestern University and the University of Paris.[21]

Finally, appellant wore these unauthorized accoutrements in front of his fellow Soldiers. At a 15 October 2009 change of command ceremony, appellant was seen wearing the NDSM with three service stars (which he was not authorized), and at a 2 November 2009 change of command ceremony he was seen wearing the ICM, KLM, SWASM, five overseas service bars, and the 1st Armored Division (1AD) combat patch, despite having not deployed with 1AD.[22]

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[18] *Id.*
[19] *Id.*
[20] PE 1 at 4, 8.
[21] PE 1 at 4, 8.
[22] PE 1 at 3, 5, 9-11.

Assignment of Error I[23]

COMMAND SERGEANT MAJOR UNDERWOOD'S SENTENCE TO A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE BECAUSE THE RESULTING EFFECT OF THE PUNISHMENT OUTWEIGHS THE SEVERITY OF HIS CRIMES.

Standard of Review

This Court reviews sentence appropriateness de novo.[24]

Law and Argument

Courts of Criminal Appeals are conferred the power to "determine whether a sentence is correct in law and fact," as well as "the highly discretionary power to determine whether a sentence 'should be approved.'"[25] This grant of discretion to determine whether a sentence "should be approved" is based in law, not equity, and a court may only find a sentence to be inappropriate pursuant to principles of law.[26] In conducting this review, "sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[27]

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[23] The Government examined the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and submits they lack merit.
[24] UCMJ art. 66(c); *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).
[25] *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); (citing UCMJ art. 66).
[26] *See United States v. Nerad*, 69 M.J. 138, 146-147 (C.A.A.F. 2010).
[27] *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(citing *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

Determining sentence appropriateness should not be confused with the granting of clemency, however. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves."[28] "Granting mercy for any reason or no reason is within the purview of the convening authority"; not the CCA.[29]

Appellant's sole contention on appeal with regard to the appropriateness of his sentence is that his sentence to a bad-conduct discharge is inappropriately severe. Initially, appellant misstates the applicable rule for when a bad-conduct discharge is appropriate.[30] The Rules for Court-Martial [R.C.M.] make clear that "[a] bad-conduct discharge . . . is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. *It is also appropriate* for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary."[31]

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[28] *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).
[29] *Nerad*, 69 M.J. at 147 (citing *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).
[30] "A bad-conduct discharge is appropriate for repeat offenders when a punitive separation is deemed necessary." Appellant's Brief [AB] at 4, citing R.C.M. 1003(b)(8)(C), implying that bad-conduct discharges are only appropriate for repeat offenders.
[31] R.C.M. 1003(b)(8)(C) (emphasis added).

In *U.S. v. Smith*, the Air Force Court of Military Review (AFCMR) analyzed the appropriateness of an adjudged bad-conduct discharge for a senior NCO convicted of wrongful use and possession of marijuana. The AFCMR's analysis is instructive for this Court.[32] There, the AFCMR began:

> In assessing the appropriateness of a punitive discharge, certainly appellant's dedicated service and many distinguished accomplishments, together with the sacrifices and welfare of his family, must be duly considered. Sentencing must not take place in a vacuum; each offender is an individual and an appropriate sentence must be tailored to that individual and his crimes. *So too, however, must we consider his individuality in assessing the gravity of his offenses.*[33]

The AFCMR went on to point out that the accused was a senior NCO and a security officer, who occupied a vital position of leadership within his squadron.[34] The court noted, in affirming the accused's sentence, that the offenses, "committed as they were by a man of appellant's background and position, represent a senseless and inexcusable abdication of appellant's responsibility to obey the law, to uphold Air Force standards, and to fulfill an important leadership role within our community."[35]

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[32] *United States v. Smith*, 28 M.J. 863 (A.F.C.M.R. 1989).
[33] *Smith*, 28 M.J. at 864 (internal citations omitted)(emphasis added).
[34] *Id.*
[35] *Id.* at 865.

The facts of this case are similar to those in *Smith*. Undoubtedly, as demonstrated by appellant's sentencing case and evidence in mitigation, he had a long career that was distinguished at times, allowing him to rise to the rank of Command Sergeant Major.[36] However, anyone who rises to the rank of Command Sergeant Major (particularly in a specialized field such as CID), will likely be able to point to distinguished portions of his career and present witnesses and evidence demonstrating his good performance. This does not mean that he is therefore immune from being sentenced to a bad-conduct discharge for misconduct; punitive discharges are not reserved solely for junior enlisted Soldiers.

Appellant points to, as mitigating evidence, his "outstanding record" in his twenty-four year career which culminated in his promotion to Command Sergeant Major. However, this point serves to aggravate, not mitigate, the offenses in this case.[37] Appellant was not a junior enlisted Soldier trying to emulate other Soldiers around him by making a mistake and wearing a badge to garner respect. Appellant was a Command Sergeant Major in law enforcement, placed in a leadership

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[36] PE 1.

[37] *See, e.g., Cullen v. Pinholster*, 131 S. Ct. 1388, 1410, 179 L.E.2d 557 (2011)(evidence of substance abuse, mental illness, and criminal problems could be both mitigating and aggravating) (citing *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)(recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness)).

position of trust over other Soldiers, who willingly chose to couch his career in deceit and lies by wearing unauthorized badges and awards, and falsely claiming to have performed certain duties and received certain accolades.[38]

Appellant's "outstanding record" is founded in part on deceit and lies. As early as 2004, prior to his Master Sergeant Promotion Board, appellant was wearing three overseas service stripes when he was not authorized to wear any.[39] Additionally, appellant certified to the Sergeant Major and Command Sergeant Major promotion boards that his ERBs were correct, falsely indicating he had served in Iraq for three months, Afghanistan for 12 months, and Bosnia for 12 months, and claiming that he had been awarded the ICM, the KLM, and the SWASM.[40] Appellant compounded his misconduct in attempting to deceive the promotion boards by also wearing all of the unauthorized insignia in his official DA photographs for those boards.[41]

For over a quarter of appellant's career he was outwardly engaged in various levels of deceit regarding his career and service, and what he had actually accomplished. While there is no direct evidence that his false statements and unauthorized wear directly led to his promotions, there is no question that

[38] *See Smith*, 28 M.J. at 864 ("[Appellant's] age and experience freed him from the often powerful lure of peer pressure to which many of our young airmen unfortunately succumb.").
[39] PE 1, at 3.
[40] PE 1 at 3.
[41] PE 1 at 4.

appellant presented, to at least his Master Sergeant, Sergeant Major, and Command Sergeant Major promotion boards, falsified records.[42]

Appellant's remaining argument is that the offenses for which he was convicted themselves do not justify the imposition of a bad-conduct discharge.[43] However, had appellant not received the benefit of a pretrial agreement requiring his case be referred to a special court-martial, he would have faced a maximum penalty of reduction to E-1, total forfeitures of all pay and allowances, confinement for 36 years, and a dishonorable discharge. Compared to the maximum authorized sentence determined by the President, appellant's sentence is light.

Further, appellant implicitly agreed that a bad-conduct discharge was a reasonable sentence based on his offer to plead guilty.[44] The pretrial agreement allowed for a punitive discharge; thus, appellant received no more than he bargained for.

The President has determined that based on the seriousness of appellant's offenses (multiple false official statements, unauthorized wear, and false swearing) a discharge is an

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[42] PE 1 at 3-4.
[43] AB at 4-5 ("for offenses that would be minor, if even criminal, in the civilian world . . . these offenses are not grievous crimes that deserve life-altering punishment.").
[44] *See United States v. Hendon*, 6 M.J. 171, 175 (C.M.A.)(an "accused's own sentence proposal is a reasonable indication of its probable fairness to him.").

appropriate punishment. As it relates solely to the conviction for unauthorized wear, the President has determined that a bad-conduct discharge is an appropriate punishment because "this offense often involves deception."[45] Altogether, Appellant was convicted of serious offenses based on deceit and falsehoods and he deserves the bad-conduct discharge to which he was sentenced. Because these are military specific offenses, this military specific punishment is warranted.

Appellant's sentence to a bad-conduct discharge is appropriate as a matter of law. What appellant is really requesting is that this Honorable Court grant him clemency based on his career and service and the effect the discharge will have on his future life. The convening authority is the only individual with the power to grant clemency,[46] and he chose to bestow none. Appellant's decisions throughout his career were his own, and that he must now endure the consequences of those decisions does not render his sentence inappropriately severe as a matter of law.

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[45] Manual for Courts-Martial [MCM], Appendix 23, ¶113.
[46] *Nerad*, 69 M.J. at 146 (citing United States v. *Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

Assignment of Error II

THE SPECIFICATIONS OF CHARGE II FAIL TO STATE AN OFFENSE BECAUSE THEY DO NOT EXPRESSLY ALLEGE OR NECESSARILY IMPLY THE TERMINAL ELEMENTS OF ARTICLE 134, UCMJ.

Standard of Review

An appellant's claim that a specification fails to state an offense is reviewed de novo.[47] However, where an appellant fails to object at trial to a specification that does not allege an element of the offense, the issue is reviewed for plain error.[48] "In the context of a plain error analysis, appellant has the burden of demonstrating: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused."[49]

Law and Argument

The Court of Appeals for the Armed Forces (CAAF) has clarified that regardless of the context (either a contested case or a guilty plea), "it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication.[50] However, "[t]he guilty plea process within the military justice system . . . ensures that an appellant has

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[47] *United States v. Sutton,* 68 M.J. 455, 457 (C.A.A.F. 2010) (quoting *United States v. Crafter, 64* M.J. 209, 211 (C.A.A.F. 2006)).
[48] *United States v. Ballan,* __ M.J. __, slip op. at 14 (C.A.A.F. 1 March 2012).
[49] *United States v. Girouard,* 70 M.J. 5, 11 (C.A.A.F. 2011).
[50] *Ballan,* __ M.J. __, slip op. at 13. While CAAF implies that the terminal element may still be "necessarily implied," it points out that it cannot "'necessarily imply' a separate and distinct element from nothing beyond allegations of the act or failure to act itself." *Id.* at 12.

notice of the offense of which he may be convicted and all elements thereof before his plea is accepted, and, moreover, protects him against double jeopardy."[51] Where the military judge explains the elements of the offense for which an appellant is pleading guilty, properly defines those elements, and the appellant admits that his actions violated either of those elements following a sufficient factual recitation, an appellant cannot establish that he was prejudiced by the erroneous omission of the "terminal element" from the specification.[52]

Here, appellant did not object to the language of the charge at trial or in R.C.M. 1105 matters. Second, appellant chose to plead guilty to the charge after consultation with his defense counsel.[53] Third, appellant agreed and admitted over a month prior to his court-martial that his unauthorized wear and false swearing was prejudicial to good order and discipline and service discrediting.[54] Fourth, the military judge notified appellant seven times that the offenses included the elements of prejudice to good order and discipline and service discrediting conduct, and subsequently advised him of their meaning.[55] Fifth, appellant indicated he understood that the offenses included the

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[51] *Ballan*, __ M.J. __, slip op. at 16-17.
[52] *Ballan*, __ M.J. __, slip op. at 17-19.
[53] R. at 94; AE I.
[54] PE 1, at 9-12. The stipulation of fact was signed on 23 March 2011, and appellant's court-martial took place on 26 April 2011.
[55] R. at 44, 48, 52, 56, 61, 64-65, and 70.

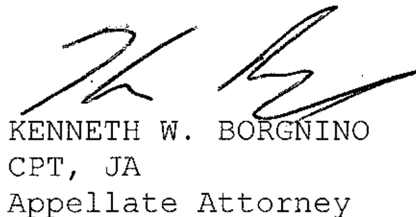
elements of prejudice to good order and discipline and service discrediting conduct, and described seven times how his conduct violated both of those elements.[56]

Finally, the charge and specifications clearly prevent appellant from being placed twice in jeopardy for the unauthorized wear and false swearing because the specifications state the narrow time frames and locations of the offenses.[57]

Based on the foregoing, appellant cannot establish prejudice based on the erroneous omission of the "terminal elements."

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the approved findings and sentence.



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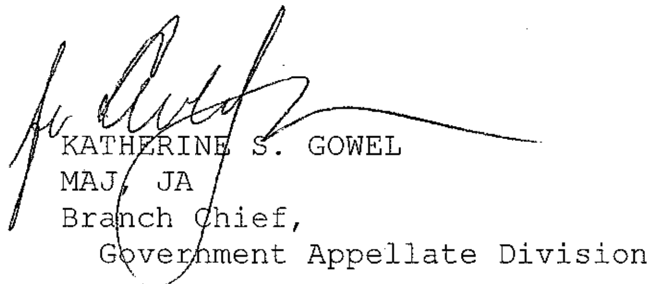

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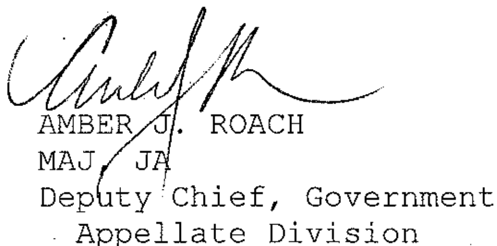

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[56] R. at 46, 51, 54, 59-60, 63-64, 68-69, and 75.
[57] *Ballan*, __ M.J. __, slip op. at 17.

CERTIFICATE OF SERVICE AND FILING

I certify that a copy of the foregoing was delivered to this Court and appellate defense counsel on the 30th day of March 2012.

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