

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHRISTOPHER UNTERRAINER  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000338  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 17 February 2010.

**Military Judge:** CAPT Bruce MacKenzie, JAGC, USN.

**Convening Authority:** Commanding Officer, Weapons Training Battalion, Training Command, Quantico, VA.

**Staff Judge Advocate's Recommendation:** LtCol J.L. Gruter, USMC.

**For Appellant:** CAPT Salvador Dominguez, JAGC, USN.

**For Appellee:** Capt Robert Eckert, USMC; Maj William Kirby, USMC.

**30 November 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his plea, of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

In his sole assignment of error, the appellant avers that the convening authority's action purports to execute the bad-

conduct discharge awarded at trial. In the same assignment of error he additionally contends that the court-martial order fails to suspend confinement in accordance with the terms of the pretrial agreement. We find merit in this assignment of error and in the interest of judicial economy, we will take appropriate corrective action in our decretal paragraph rather than directing the convening authority to do so. Following our corrective action, we conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### **Errors in the Court-Martial Order**

The appellant first argues that the language in the convening authority's action purports to execute the bad-conduct discharge. The convening authority approved the sentence, which included a bad-conduct discharge, and then stated, "In accordance with the UCMJ, Rules of [sic] Courts-Martial, applicable regulations, and this action, the sentence is ordered executed." Under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

The appellant also contends that the convening authority's action fails to suspend confinement per the terms of the pretrial agreement. We agree.

An accused who pleads guilty pursuant to a pretrial agreement is entitled to have the Government fulfill any promises made as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith* 56 M.J. 271, 272 (C.A.A.F. 2002). Here the court-martial order merely repeats the convening authority's obligation with regard to confinement, as stated in the staff judge advocate's recommendation. That portion of the court-martial order pertaining to the pretrial agreement states:

The adjudged confinement may be approved, but you have agreed to suspend all confinement in excess of 90 days for a period of 12 months from the date of trial at which time unless sooner vacated, the suspended portion will be remitted without further action.

The action in the court-martial order approves the sentence and orders it executed. This was error as the convening authority was required to suspend any confinement in excess of 90 days pursuant to the pretrial agreement. The confinement to be suspended (30 days), however, was not deferred by operation of

the pretrial agreement.<sup>1</sup> Even though the appellant does not complain that he served any additional confinement, his confinement time continued to run until the convening authority took action on the record of trial. Since more than 120 days elapsed from the date of sentencing (17 February 2010) to the convening authority taking action (27 May 2010), there was no unexecuted punishment left for the convening authority to suspend. We therefore find this error harmless. See *United States v. Lamb*, 22 M.J. 518, (N.M.C.M.R. 1986).

### **Conclusion**

The findings and sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>1</sup> The convening authority's action erroneously states that "[t]he deferment that was granted pursuant to the pretrial agreement is rescinded with this action."