

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

**Before
J.A. MAKSYM, J.R. PERLAK, D.R. LUTZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CARLOS J. MONTEZ
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100157
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 7 January 2011.

Military Judge: Col Michael Richardson, USMC.

Convening Authority: Commanding Officer, 3d Battalion, 1st Marines, 1st Marine Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

For Appellant: LCDR Anthony Yim, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

30 June 2011

OPINION OF THE COURT

**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, pursuant to his pleas, of an unauthorized absence, failure to obey a general order, the unauthorized sale of military property, using marijuana, and stealing military property, in violation of Articles 86, 92, 108, 112a, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 908, 912a, and 928. The appellant was sentenced to 6 months confinement, forfeiture of \$978.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged,

but suspended one month of confinement pursuant to a pretrial agreement.

No assignment of error was raised. However, after first approving the sentence as adjudged, the CA stated in his action, "In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment." To the extent that this language purports to direct anything, it is a legal nullity. Article 71 is permissive in its wording (a discharge "may not be" executed until after final action). It is not directive as is the language of the CA's action here ("will be executed"). The determination as to whether a discharge "will be" executed cannot be made until after judgment as to the legality of the proceedings following final appellate review or action by the Secretary concerned. If reference to execution after finality is desired, the better practice would be to mirror the language of the statute (although that construct would add nothing legally to the action), or to follow the recommended forms for action in Appendix 16 of the Manual for Courts-Martial.

We are convinced that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court