

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

**Before  
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, J.E. STOLASZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHRISTOPHER A. CLARK  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100655  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 7 September 2011.

**Military Judge:** LtCol Robert Palmer, USMC.

**Convening Authority:** Commanding Officer, Sixth Marine Corps District, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

**Staff Judge Advocate's Recommendation:** LtCol E.R. Kleis, USMC.

**For Appellant:** Maj Peter Griesch, USMCR

**For Appellee:** Capt Crista Kraics, USMC.

**26 April 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of violating a lawful general order (one specification for having an inappropriate social relationship with a recruit applicant and a second specification for improperly using his government cellular telephone for unauthorized purposes contrary to the

Joint Ethics Regulation), violating a military protective order, making a false official statement, adultery, obstruction of justice, and communicating a threat, in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The appellant was sentenced to confinement for 12 months, forfeiture of \$978.00 pay per month for 12 months, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) agreed to suspend confinement in excess of six months for the period of confinement served plus 12 months thereafter.

This case was submitted to this court without assignment of error. Our review of the record of trial revealed that, following a hearing conducted pursuant to RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), on 21 November 2011, prior to taking action, the CA determined the appellant violated a term of the pretrial agreement by committing further misconduct while in confinement. As such, on 30 November 2011, the CA issued a letter in which he "unilaterally" withdrew from the sentence limitation portion of the pretrial agreement. When taking action on 12 December 2011, the CA suspended confinement in excess of seven months, vice the six months under the terms of the pretrial agreement. However, the record of trial docketed with this court contained neither the record of the R.C.M. 1109 hearing, nor the general court-martial convening authority action on the vacation hearing. Thus, on 13 March 2012, this court issued an order requiring the Government to produce the record of compliance with Article 72, UCMJ and R.C.M. 1109, or, in the alternative, an affidavit from a brig official concerning the date of release of the appellant from confinement, if vacation procedures were not complied with.

The Government, in its response to the court's order, forwarded a compact disc recording of the R.C.M. 1109 proceeding held on 21 November 2009, with the exhibits presented to the CA at the hearing, and an affidavit from a brig official concerning the appellant's release date.<sup>1</sup> Essentially, the Government has acknowledged in its 27 March 2012 response to this court's Order that the CA failed to follow proper vacation procedures under Article 72 and R.C.M. 1109(d)(1)(d) by not creating a record of the vacation hearing and forwarding such record with the CA's recommendation to the officer exercising general court-martial jurisdiction over the appellant.

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<sup>1</sup> Although we note that the 17 November 2011 letter marked as "Exhibit 1," which served as the notification letter to the appellant for the hearing, lists as "Enclosure 1" the "Evidence Establishing the Misconduct," this court was not provided with "Enclosure 1."

R.C.M. 1109 requires that the results of a vacation hearing be forwarded to the officer exercising general court-martial jurisdiction over the appellant. *United States v. Smith*, 46 M.J. 263, 267 (C.A.A.F. 1997). In the appellant's case, only the officer exercising general court-martial jurisdiction could decide whether the appellant violated a condition of his suspension and, if so, whether to vacate a suspended sentence. R.C.M. 1109(d)(2)(a). Given the CA'S noncompliance with R.C.M. 1109, he had no authority to "withdraw" from the pretrial agreement based upon the appellant's alleged misconduct. The result of the CA's *ultra vires* action is that the appellant served an additional 17 days in confinement. We will take corrective action.

We affirm the findings of guilty and only so much of the sentence as provides for confinement for five months, forfeiture of \$978.00 pay per month for five months, reduction to pay grade E-1, and a bad-conduct discharge. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL  
Clerk of Court