

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SCOTT O. JOHNSON
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100629
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 29 August 2011.

Military Judge: Col G.W. Riggs, USMC.

Convening Authority: Commanding Officer, 2d Battalion, 9th
Marines, 2d Marine Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col T.M. Dunn,
USMCR.

For Appellant: CAPT Johnathan Bryan, JAGC, USN.

For Appellee: LT Benjamin Voce-Gardner, JAGC, USN.

5 April 2012

OPINION OF THE COURT

**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, pursuant to his pleas, of three specifications 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 90 days and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. Pursuant to a pretrial

agreement, the convening authority (CA) agreed to suspend all confinement in excess of 45 days "for the period of confinement served plus six months thereafter, to be remitted without further action unless sooner vacated. Thus the six months would commence running when the appellant was released from confinement.

The appellant alleges two assignments of error: 1) that the convening authority erred in taking his action by misstating the date the period of suspension of confinement would begin, and 2) that the convening authority erred in ordering the bad-conduct discharge executed.¹

An accused who pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government 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).

The CA, in taking his action, suspended confinement in excess of 45 days, ". . . from the date of this action and continue for the period of confinement served plus six (6) months thereafter." This is inconsistent with the terms of the pretrial agreement as detailed above since the appellant was released from confinement prior to the CA taking his action. Thus, the CA erred by failing to enforce the terms of the pretrial agreement. When a CA fails to take action required by a pretrial agreement, this court has authority to enforce the agreement. *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972). We will take corrective action in our decretal paragraph.

The convening authority's action also states: "In accordance with the Uniform Code of Military Justice, the manual for Courts-Martial, applicable regulations, and this action, the sentence is order executed." To the extent that the convening authority's action purported to execute the bad-conduct discharge, as asserted by the appellant, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

The findings and sentence are affirmed. The supplemental court-martial order shall indicate that the period of suspension runs for six months from the end of the period of confinement served. Following this correction, no error materially

¹ Appellant's Brief of 3 Feb 2012 at 1.

prejudicial to the substantial rights of the appellant remains.
Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court