

**UNITED STATES NAVY–MARINE CORPS  
COURT OF CRIMINAL APPEALS**

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**No. 201600272**

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**UNITED STATES OF AMERICA**

Appellee

v.

**JACOB T. WESLEY**

Corporal (E-4), U.S. Marine Corps

Appellant

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Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge: Lieutenant Colonel Eugene H. Robinson, Jr., USMC.

Convening Authority: Commanding General, 3d Marine Logistics  
Group, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Major Michael C. Evans,  
USMC.

For Appellant: Lieutenant Colonel Richard A. Viczorek, USMCR.

For Appellee: Major Kelli A. O'Neil, USMC; Lieutenant Robert J.  
Miller, JAGC, USN.

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Decided 20 April 2017

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Before MARKS, FULTON, and JONES, *Appellate Military Judges*

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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 general court-martial convicted the appellant, pursuant to his pleas, of one specification of sexual assault of a child, two specifications of sexual abuse of a child, one specification of indecent exposure, one specification of assault consummated by a battery, three specifications of soliciting a minor to produce and distribute child pornography, and one specification of possession of child pornography, in

violation of Articles 120b, 120c, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920b, 920c, 928, and 934 (2012). The military judge sentenced the appellant to six years' confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, a reprimand, and a dishonorable discharge. The convening authority (CA) approved the sentence.

The appellant raises two assignments of error (AOEs): (1) the military judge did not authenticate the record of trial; and (2) the CA purported to execute the appellant's discharge. The first AOE was resolved when the government provided this court the original authentication page, signed by the military judge.<sup>1</sup> We find no merit in the second AOE and, finding no error materially prejudicial to the appellant's substantial rights, affirm the findings and sentence. Arts. 59(a) and 66(c), UCMJ.

Although not raised by the parties, we note that: (1) the CA's promulgating order inaccurately reflects Charge II and its sole specification; and (2) the CA's action did not suspend all confinement in excess of 24 months, as required by the pretrial agreement. We order corrective action in our decretal paragraph.

## I. DISCUSSION

### A. Purported execution of the discharge

The CA took action in the appellant's case with the following pertinent language: "Subject to the limitations contained in the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed."<sup>2</sup>

The appellant argues that the CA purported to execute the appellant's dishonorable discharge with his action, necessitating a new promulgating order. We disagree.

Article 71(c)(1), UCMJ, states, "that part of the sentence extending to . . . a dishonorable . . . discharge may not be executed until there is a final judgment as to the legality of the proceedings" by a Court of Criminal Appeals.<sup>3</sup> A promulgating order purporting to execute a punitive discharge prior to final judgment is a legal nullity. *United States v. Bailey*, 68 M.J. 409, 409 (C.A.A.F. 2009) (summary disposition); *United States v. Tarniewicz*, 70 M.J. 543, 544 (N-M. Ct. Crim. App. 2011).

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<sup>1</sup> Appellee's Motion to Attach of 6 January 2017 contained the original authentication page, signed by the military judge on 24 May 2016, and a sworn affidavit from the review officer attesting to the page's authenticity.

<sup>2</sup> CA's Action of 26 Jul 2016.

<sup>3</sup> Art. 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1).

Here, the CA's action does not clearly exclude the punitive discharge from the punishments ordered executed by the CA, nor is it a model of clarity.<sup>4</sup> Regardless, even if the CA intended to execute the punitive discharge, that action would be a legal nullity which would not require corrective action.

**B. Errors in promulgating order**

The CA's promulgating order omits the language "sexually abuse a child, who had not attained the age of sixteen years," from the sole specification of Charge II.<sup>5</sup> The appellant is entitled to accurate court-martial records. *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998).

Additionally, the CA failed to suspend all confinement in excess of 24 months in his action, as required by the pretrial agreement.<sup>6</sup> The appellant is entitled to the benefit of his bargain. *See United States v. Olson*, 25 M.J. 293, 296 (C.M.A. 1987). This court can do what the convening authority was obligated to do under the pretrial agreement. *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972); *United States v. Carter*, 27 M.J. 695, 697 n.1 (N.M.C.M.R. 1988).

**II. CONCLUSION**

The supplemental promulgating order shall include the missing language in the sole specification of Charge II. We affirm the findings and the sentence and, in accordance with the pretrial agreement, suspend all confinement in excess of 24 months for a period of 12 months from 26 July 2016.

For the Court

R.H. TROIDL  
Clerk of Court



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<sup>4</sup> It does not follow the recommended form for executing a sentence contained within Appendix 16, MANUAL FOR COURTS-MARTIAL, UNITED STATES, (MCM) (2016 ed.): "In the case of \_\_\_\_\_, the sentence is approved and, except for the part of the sentence extending to . . . dishonorable discharge, will be executed." MCM, App. 16, at A16-3, ¶ 11.

<sup>5</sup> CA's Action at 1.

<sup>6</sup> *Id.* at 4.