

**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 3

UNITED STATES,
Appellee

v.

Matthew A. HARRIS
Lance Corporal (E-3)
United States Marine Corps,
Appellant

**APPELLANT'S BRIEF AND
ASSIGNMENT OF ERROR**

Case No. 201600207

Tried at Marine Corps Recruit Depot
Parris Island, South Carolina, on
9 September 2015, 29 October 2015,
and 19 January 2016, by a general
court-martial convened by
Commanding Officer, Marine Corps
Air Station Beaufort.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS**

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Issue Presented

TO REMEDY RCM 305(i)(2)(D) VIOLATIONS, RCM 305(k) REQUIRES THE MILITARY JUDGE TO AWARD DAY-FOR-DAY CONFINEMENT CREDIT FOR THE PERIOD OF NONCOMPLIANCE. THE GOVERNMENT ADMITTEDLY FAILED TO COMPLY WITH RCM 305(i)(2)(D) FOR 126 DAYS, BUT THE MILITARY JUDGE ONLY AWARDED LCPL HARRIS WITH 23 DAYS OF CONFINEMENT CREDIT. WAS THE MILITARY JUDGE'S REFUSAL TO ORDER DAY-FOR-DAY CONFINEMENT CREDIT AN ABUSE OF DISCRETION?

Statement of Statutory Jurisdiction

The Convening Authority (CA) in this case approved a court-martial sentence that includes a dishonorable discharge and confinement for over one year, triggering this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ),¹ jurisdiction.

Statement of the Case

A military judge, sitting as a general court-martial, convicted Lance Corporal (LCpl) Matthew A. Harris, United States Marine Corps, pursuant to his pleas, of one specification of arson in violation of Article 126, UCMJ, one specification of desertion in violation of Article 85, UCMJ, and one specification of attempted robbery, in violation of Article 80, UCMJ.² The military judge

¹ 10 U.S.C. § 866(b)(1) (2012).

² 10 U.S.C. §§ 926, 885, 880 (2012); R. at 275.

sentenced LCpl Harris to reduction to pay grade E-1, confinement for eight years, forfeiture of all pay and allowances, and a dishonorable discharge.³ The Convening Authority (CA) approved the adjudged sentence and, pursuant to a pretrial agreement, suspended confinement in excess of seventy-two months. The CA then, subject to the limitations of his action, ordered the sentence executed, except for the punitive discharge.⁴

Statement of Facts

On 12 May 2015, LCpl Harris was placed in pretrial confinement.⁵ On 20 May 2015, the initial reviewing officer (IRO) conducted a hearing in accordance with Rule for Courts-Martial (RCM) 305(i)(2) to review LCpl Harris's pretrial confinement.⁶ At the conclusion of the hearing, the IRO approved the continuation of pretrial confinement.⁷ He then prepared a written memorandum, which included his factual findings.⁸ The IRO did not provide a copy of the factual findings to LCpl Harris.⁹

At the outset of the court-martial, the military judge issued a trial management order that set 25 September 2015 as the deadline for the Defense

³ R. at 421.

⁴ Commanding Officer, Marine Corps Air Station Beaufort, General Court-Martial Order No. 016-10, Jun. 3, 2016.

⁵ R. at 397.

⁶ *Id.*

⁷ Appellate Ex. XVIII at 34.

⁸ R. at 397.

⁹ Appellate Ex. XIX at 20.

discovery request, 29 October 2015 as the date of the first Article 39(a) session, and 2 December 2015 as the date of the second Article 39(a) session.¹⁰ On 15 September 2015, the trial defense counsel filed a timely discovery request that requested, among other things, a copy of the IRO's memorandum and factual findings.¹¹

On 7 October 2015, the trial counsel agreed to provide the Defense with a copy of the "7-day review officer's memorandum detailing his conclusions regarding any continued pretrial confinement,"¹² but failed to follow through and actually provide the requested documents.¹³ During the Article 39(a) session on 29 October 2015, neither party mentioned trial counsel's duty to provide the Defense with a copy of the IRO's memorandum and factual findings.¹⁴ And the parties agreed to forgo the Article 39(a) session scheduled for 2 December 2015 in light of pre-trial agreement negotiations.¹⁵

On 17 December 2015, the Convening Authority and LCpl Harris entered into a pre-trial agreement (PTA).¹⁶ During the PTA negotiations, the Defense both informed the Government they wanted to bring a motion for confinement credit

¹⁰ Appellate Ex. I.

¹¹ Appellate Ex. XVIII at 12.

¹² Appellate Ex. XVIII at 28.

¹³ R. at 395.

¹⁴ R. at 11-215.

¹⁵ R. at 217-18.

¹⁶ Appellate Ex. XX at 7.

and ensured the language in the agreement permitted them to do so.¹⁷

Subsequently, in accordance with the timeline set forth in the PTA, the trial defense counsel filed a motion on 12 January 2016 for confinement credit under RCM 305(k). The motion cited the Government's failure to provide the Defense with a copy of the IRO's memorandum and factual findings as the basis for relief.¹⁸ In response, the trial counsel provided the Defense team with the IRO's factual findings on 18 January 2016—126 days after the initial request.¹⁹

Lance Corporal Harris's court-martial started on 19 January 2016, and the parties addressed the issue of confinement credit in an Article 39(a) hearing.²⁰ At the outset of the hearing, the trial counsel conceded that the Government failed to provide a copy of the IRO's factual findings to trial defense counsel and thus violated RCM 305(i)(2)(D).²¹ Despite this admitted violation, however, the trial counsel argued that under RCM 305(k) a remedy of day-for-day confinement credit for the entire period of the violation was not warranted.²²

Prior to announcing the sentence, the military judge ruled that as a result of the Government's violation of RCM 305(i)(2)(D), LCpl Harris was entitled to

¹⁷ R. at 394.

¹⁸ Appellate Ex. XVIII.

¹⁹ R. at 494.

²⁰ R. at 393.

²¹ R. at 395.

²² R. at 401.

confinement credit, but only twenty-three days of it.²³ The military judge reasoned that LCpl Harris should only receive day-for-day credit from 7 October 2015—the day the trial counsel said they would provide the memorandum and factual findings—to 29 October 2015—the date of the first pretrial Article 39(a) session.²⁴ Even though the Government took 126 days to provide LCpl Harris with the IRO’s factual findings, the military judge stated day-for-day confinement credit beyond twenty-three days was not warranted because “the onus is on the defense to tell [the Government if] a page is missing from discovery.”²⁵

Summary of Argument

Despite LCpl Harris’s clear entitlement to a copy of the IRO’s memorandum under RCM 305(i)(2)(D), the Government failed to provide him with a copy until 126 days after he asked for it. Under RCM 305(k) and *United States v. McCants*,²⁶ the remedy for the Government’s dereliction is clear and non-discretionary: day-for-day confinement credit for the entire period of noncompliance.

The military judge, however, ignored the plain language of RCM 305 and binding case law, rested his ruling on the incorrect legal standard of “good conscience,” and awarded only twenty-three days of confinement credit. In so doing, the military judge abused his discretion.

²³ R. at 419.

²⁴ R. at 419.

²⁵ R. at 420.

²⁶ 39 M.J. 91 (C.A.A.F. 1994).

Argument

TO REMEDY RCM 305(i)(2)(D) VIOLATIONS, RCM 305(K) REQUIRES THE MILITARY JUDGE TO AWARD DAY-FOR-DAY CONFINEMENT CREDIT FOR THE PERIOD OF NONCOMPLIANCE. THE GOVERNMENT ADMITTEDLY FAILED TO COMPLY WITH RCM 305(i)(2)(D) FOR 126 DAYS, BUT THE MILITARY JUDGE ONLY AWARDED LCPL HARRIS WITH 23 DAYS OF CONFINEMENT CREDIT. THE MILITARY JUDGE’S REFUSAL TO ORDER DAY-FOR-DAY CONFINEMENT CREDIT WAS AN ABUSE OF DISCRETION.

Standard of Review

The sufficiency of a military judge’s award of confinement credit under RCM 305(k) is reviewed for an abuse of discretion.²⁷ The “Court defers to a military judge’s findings of fact unless they are clearly erroneous,” and reviews de novo the legal question of whether established facts entitle an appellant to additional confinement credit.²⁸

Discussion

“Within 7 days of the imposition of pre-trial confinement, a neutral and detached officer” (the initial reviewing officer or IRO) must review “the probable

²⁷ *United States v. Williams*, 68 M.J. 252, 253 (C.A.A.F. 2010) (holding the military judge abused his discretion for failing to award additional confinement credit under RCM 305(k)).

²⁸ *Id.* (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002); *United States v. Adcock*, 65 M.J. 18, 21-22 (C.A.A.F. 2007)).

cause determination and necessity for continued pretrial confinement.”²⁹ After conducting the review, the IRO must set forth his or her conclusions, including factual findings, in a written memorandum.³⁰ The IRO must maintain a copy of the memorandum and all documents. Upon request, the accused is entitled to a copy.³¹

For noncompliance with RCM 305(i), RCM 305(k) requires the military judge to award confinement credit “computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance.”³² As the Court of Appeals for the Armed Forces (CAAF) has explained, the remedy under RCM 305(k) is clear: “for violations of any part of RCM 305(i)[,] Appellant receives 1 day of credit for each day of noncompliance.”³³

A. The trial counsel did not turn over the IRO’s memorandum and factual findings for 126 days.

It took the Government 126 days to provide the trial defense counsel with a

²⁹ Rule for Courts-Martial (RCM) 305(i)(2).

³⁰ RCM 305(i)(2)(D); *United States v. Kallon*, 2009 CCA LEXIS 681, *3-4 (N-M. Ct. Crim. App. 2009) (affirming the military judge’s decision to assign 70 days of confinement credit to the accused when the IRO failed to prepare a written memorandum).

³¹ RCM 305(i)(2)(D).

³² RCM 305(k); *see also Kallon*, 2009 CCA LEXIS 681 at *3-4 (noting the military judge was required to award confinement credit under RCM 305(k) for the entire period of noncompliance).

³³ *McCants*, 39 M.J. at 94. Of note, the CAAF did not make an accused’s receipt of confinement credit following an RCM 305(i) violation contingent upon the likelihood of a successful challenge absent the Government’s noncompliance. Instead, the CAAF imposed a straightforward formula for military judges to use when remedying violations of RCM 305(i): days of noncompliance with RCM 305(i) = days of confinement credit.

copy of the IRO's factual findings,³⁴ which the IRO listed in the memorandum as an enclosure.³⁵ At some point prior to the motion for confinement credit under RCM 305(k), the trial defense counsel came into possession of the IRO's memorandum, but not the factual findings.³⁶ Neither the trial counsel nor the trial defense counsel could recall when the Defense received a copy of the memorandum.³⁷ The document did not have a Bates stamp, and the trial counsel did not have a record of providing the memorandum to the trial defense counsel.³⁸

Furthermore, while the trial counsel was quick to recount the opportunities the trial defense counsel had to inform the trial counsel of the Government's noncompliance with RCM 305(i)(2)(D), the trial counsel failed to describe what steps, if any, the Government took to provide the requested memorandum and its enclosed factual findings. In fact, there is no evidence in the record of trial describing any steps the Government took to comply with RCM 305(i)(2)(d). Instead, the trial counsel simply acknowledged ignorance—"the government with the big-G failed to recognize that these factual findings were . . . not provided . . . to the defense"—complained that trial defense counsel should have reminded them

³⁴ RCM 305(i)(2)(D) ("The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum.").

³⁵ R. at 394; Appellate Ex. XIX at 17.

³⁶ R. at 398.

³⁷ *Id.*

³⁸ R. at 402-03.

to comply with RCM 305(i)(2)(D) after making the initial request, and asked the military judge to ignore the requirements of RCM 305(k).³⁹

In the end, however, both parties agreed that the Government failed to provide the trial defense counsel with a copy of the IRO's factual findings prior to January 18, 2016, and that the Government's failure constituted a violation of RCM 305(i)(2)(D).

B. The military judge abused his discretion when he refused to award day-for-day confinement credit for the Government's noncompliance.

In assessing the number of days of RCM 305(k) credit, the military judge substituted a novel legal standard that ignored both the plain language of RCM 305, as well as binding case law. In short, he abused his discretion.

First, the plain language of RCM 305(k) makes a distinction between confinement credit the military judge "shall" award, and confinement credit the military judge "may" award. For noncompliance with RCM 305(i)(2)(D), RCM 305(k) plainly states the military judge "shall" award day-for-day credit for the period of noncompliance.

Case law reinforces this straightforward rule. The CAAF has expressly interpreted RCM 305(k) as requiring a military judge to award day-for-day credit for the entire period of noncompliance prior to trial. In *United States v. McCants*, the appellant requested additional pretrial confinement credit when the magistrate

³⁹ R. at 397-401.

failed to provide a copy of his “decision memorandum” to defense counsel.⁴⁰ The requested amount of confinement credit reflected the number of days that elapsed between trial defense counsel’s request and the date of trial.⁴¹ After reviewing the Government’s violation of RCM 305(i), the CAAF held the appellant was entitled to fifty-five days of additional confinement credit, which reflected day-for-day credit for the time that elapsed between defense counsel’s request and the first day of trial.⁴² The CAAF then went on to pointedly interpret RCM 305(k) as requiring day-for-day confinement credit for violations of “any part of RCM 305(i).”⁴³

Despite this clear law, in the case at hand the military judge erroneously arrogated “conscientious” discretion to deny full RCM 305(k) credit. Reasoning that the Government’s noncompliance was unknown to the trial counsel and that trial defense counsel would not likely be able to successfully challenge LCpl Harris’s pretrial confinement, the military judge went beyond the outer contours of RCM 305(k) because of his personal misgivings about awarding LCpl Harris day-for-day confinement credit: “I can’t in good conscience, award a windfall for the

⁴⁰ *McCants*, 39 M.J. at 93-94.

⁴¹ *Id.* at 94.

⁴² *Id.*

⁴³ *Id.* This Court has also recognized the compulsory nature of RCM 305(k) confinement credit: “[the military judge is] required, not permitted, by RCM 305(k) to assign administrative credit for the period during which [a] memorandum [does] not exist.” *Kallon*, 2009 CCA LEXIS 681 at *3.

defense from September 15 until today’s trial.”⁴⁴

To side-step the perceived windfall, the military judge imposed an additional, unwritten, and unjustified burden on LCpl Harris—requiring the Defense to make repeated requests for a copy of the IRO’s memorandum and factual findings in order to receive day-for-day credit under RCM 305(k). The military judge even went so far as to characterize this requirement as an “affirmative duty,” stating “[t]his court believes the defense had an affirmative duty . . . to bring it to the court’s attention on 29 October.”⁴⁵ Contrary to the military judge’s ruling, however, neither RCM 305(i)(2)(D) nor RCM 305(k) require an accused to make repeated requests, or to make a request followed by a pretrial motion to compel discovery. Nor do they impose an affirmative pretrial duty to inform the military judge of missing discovery, or to give the trial counsel a courtesy call informing them of the continuing nature of the Government’s noncompliance.

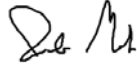
The military judge’s decision to only award twenty-three days of confinement credit ignored the plain language of RCM 305(k) and binding precedent from the CAAF. In sum, his decision was an abuse of discretion that denied LCpl Harris 103 days of confinement credit.

⁴⁴ R. at 420.

⁴⁵ R. at 417.

Conclusion

Accordingly, the Court should order that LCpl Harris be credited with an additional 103 days of confinement credit under RCM 305(k).



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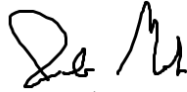
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I certify that a copy of the foregoing was delivered to the Court and to
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