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

Before
J.F. FELTHAM, F.D. MITCHELL, R.E. VINCENT
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILLIE A. BRADLEY
SEAMAN (E-3), U.S. NAVY

NMCCA 200501089
GENERAL COURT-MARTIAL

Sentence Adjudged: 17 August 2004.
Military Judge: LCDR C.D. Conner, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT E.S. White JAGC, USN.
For Appellant: LT Darrin S. MacKinnon, JAGC, USN; LT Heather L. Cassidy, JAGC, USN.
For Appellee: Maj Robert M. Furher, USMC; LT Jessica M. Hudson, JAGC, USN.

25 November 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

The appellant pled guilty at a general court-martial to assault with a means likely to cause grievous bodily harm and reckless endangerment by discharging a firearm, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The appellant was sentenced to confinement for 48 months and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's assignments of error,[1] and the Government's response.[2] For the reasons set forth below, we find the appellant's guilty pleas were based in part upon a belief that his plea did not waive his right to appeal the military judge's denial of his motion to remove the trial counsel from his case due to a violation of *Kastigar v. United States,* 406 U.S. 441 (1972). After considering the military judge's ruling, we find that he abused his discretion and have concluded that the findings and the sentence must be set aside. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Factual Background

During the early morning hours of 2 October 2003, the appellant, Master-at-Arms Second Class (MA2) Townsend, MA2 Griffith, and Damage Controlman Second Class (DC2) Brown were involved in a "drive-by shooting" of Dentalman (DN) T. The attack was in retaliation for DN T's alleged assault of Operations Specialist Third Class (OS3) M, the female cousin of MA2 Townsend's girlfriend. DN T was injured when a bullet fired from MA2 Townsend's gun struck him in the ankle.

Earlier that evening, the appellant met his former shipmate, MA2 Griffith, at a nightclub in Virginia Beach, Virginia. MA2 Griffith brought his friend, MA2 Townsend, whom the appellant did not know. While at the club, MA2 Townsend received a telephone call from his girlfriend informing him that DN T had assaulted OS3 M at the residence MA2 Townsend shared with his girlfriend. The three Sailors drove to MA2 Townsend's apartment where the police were investigating the reported assault. After seeing OS3 M's bruised face, MA2 Townsend became upset. He telephoned DN T to arrange a meeting with him in a motel parking lot. DC2 Brown, who was then romantically involved with OS3 M, joined the other three Sailors in a caravan to meet DN T. MA2 Townsend left the residence in his Chevrolet Suburban, accompanied by MA2 Griffith. DC2 Brown followed in his car, and the appellant followed DC2 Brown in his own vehicle.

En route to the motel, the Sailors stopped at a railroad crossing where MA2 Townsend, MA2 Griffith, and the appellant fired their guns in the air as a train passed, and boasted about

---

[1]

I. THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE MOTION TO DISMISS ALL CHARGES WHEN THE GOVERNMENT MANIPULATED A GRANT OF IMMUNITY TO APPELLANT IN A COMPANION CASE TO PUT ITSELF IN A BETTER POSITION THAN IF APPELLANT HAD CLAIMED THE PRIVILEGE AGAINST SELF-INCRIMINATION.

II. THERE IS A SUBSTANTIAL BASIS IN LAW [AND] IN FACT TO QUESTION APPELLANT'S GUILTY PLEA TO "ASSAULT WITH A MEANS LIKELY TO CAUSE DEATH" WHEN THE DEFENSE OF DURESS WAS SO PLAIN.

[2] Both assignments of error are moot because of our corrective action.

the capability of their weapons. They then drove onto Interstate 564, where MA2 Townsend and MA2 Griffith fired out the window of MA2 Townsend's Suburban.[3]

At the motel parking lot, DC2 Brown and the appellant joined the other two Sailors in the Suburban. DC2 Brown sat in the driver's seat with the appellant in the front passenger seat. MA2 Townsend and DC2 Griffith sat in the back seats. Once they spotted DN T sitting with two other Sailors in a Mitsubishi Gallant, MA2 Townsend fired his gun repeatedly from the right rear window, and yelled for the appellant to also shoot. The appellant fired his pistol three times in the vicinity of the Gallant. DN T was the only one injured in the incident.

The next day, while on pre-approved leave, the appellant threw his gun into the Delaware River while driving across the Delaware Memorial Bridge on his way to New Jersey. Meanwhile, Naval Criminal Investigative Service (NCIS) agents interrogated the other three co-actors, who each made sworn statements claiming they had acted in self-defense. A few days later, the appellant was interrogated by NCIS when he returned from leave. In an unsworn statement, he denied involvement in the shooting, and told the agent interrogating him that he had exited the Suburban when he saw MA2 Townsend chamber a round in his pistol.

Despite the co-actors' claims to the contrary, investigators collected evidence indicating they had not acted in self-defense. Spent shell casings were recovered from the motel parking lot, but only from the area where the Suburban was located at the time of the shooting. Gunshot residue was found inside the Suburban, but not the Gallant. Finally, the victim, DN T, and the other two Sailors in the Gallant denied shooting at the Suburban or its occupants.

A. Grant of Immunity

On 9 March 2004, the Government referred charges of attempted murder, conspiracy to commit murder, and reckless endangerment against all four of the co-actors. On that same day, the appellant and the CA signed a pretrial agreement containing a provision that, if given a grant of testimonial immunity, the appellant would cooperate with investigators and testify on behalf of the Government in the courts-martial of the other co-actors. Although the investigation of the appellant's involvement in the shooting was not yet closed, the CA granted the appellant testimonial (use) immunity. According to the

[3] The appellate defense counsel mistakenly contends that "Appellant told prosecutors that the group *shot at the victim's vehicle previously* in the evening on I-564." Appellant's Brief of 17 Jul 2006 at 2 (emphasis added). The record does not reflect that the shots fired on I-564 were at the victim's vehicle. Record at 341-42.

defense motion to dismiss, the grant of immunity and order to testify stated in part:[4]

> In accordance with Section 6002, Title 18 of the United States Code, no testimony or other information given by SN Bradley in the above proceedings . . . or information directly or indirectly derived from such testimony or other information, can be used against him in any criminal case, except a prosecution for perjury, giving false statement, or otherwise failing to comply with this order.

Appellate Exhibit XI at 2.

The Government neglected to try the appellant prior to obtaining immunized information from him, and failed to establish separate investigations and prosecution teams for each of the co-accused. AE XLIV (military judge's essential findings of fact). Instead, the Government immediately sought information from the appellant over the course of five separate interviews. The appellant fully cooperated by providing a detailed account of the group's involvement in the shooting.

The Government conducted further investigation based upon the appellant's immunized disclosures. NCIS agents and members of the prosecution team accompanied the appellant to the railroad tracks, where he described the firing of their weapons prior to the shooting at the motel. The investigators searched the area for spent shell casings. The appellant also reviewed photographs of the crime scene while explaining the group's criminal conduct.

During an interview, the appellant told the trial counsel, Lieutenant (LT) Keeton, that he had not intended to injure anyone, and had only fired his weapon because he was afraid of MA2 Townsend, who had "made motions" with his loaded gun while ordering the appellant to "shoot mother****** shoot." Record at 342-43. LT Keeton told the appellant to discuss his inability to plead providently to attempted premeditated murder with his attorney, and then personally informed the appellant's defense counsel of his conversation with the appellant.

At MA2 Townsend's trial in March 2004, the appellant was the only co-actor to testify for the Government. The other co-actors' attorneys were present in the courtroom during the appellant's incriminating testimony, and subsequently reported the substance of the testimony to their clients. MA2 Townsend was convicted of attempted unpremeditated murder and reckless endangerment, and sentenced to a dishonorable discharge and

[4] In our review of the record of trial, we were unable to locate the grant of immunity and order to testify provided to the appellant. In the defense motion for appropriate relief, the civilian defense counsel quoted the order to testify, and the trial counsel did not dispute the accuracy of the quoted language. Therefore, we assume the language is correct.

confinement for 10 years. *United States v. Townsend*, No. 200501197, 2007 CCA LEXIS 23, unpublished op. **(**N.M.Ct.Crim.App. 12 Jan 2007), *aff'd*, 65 M.J. 460 (C.A.A.F. 2008).

Shortly after MA2 Townsend's conviction, the appellant released his civilian defense counsel, hired a new civilian counsel, and subsequently withdrew from his pretrial agreement. To prepare for a contested trial against the appellant, LT Keeton, the same prosecutor exposed to disclosures made by the appellant under his grant of immunity, met with the CA's deputy staff judge advocate (DSJA) to recommend pretrial agreements with sentence limitations for two of the co-actors, MA2 Griffith and DC2 Brown, and clemency for MA2 Townsend, in exchange for their testimony against the appellant.[5]

The DSJA testified at the hearing on the appellant's motion to dismiss the charges and specifications, on the grounds that the Government improperly used his immunized statements and testimony. He said that the CA did not base the decision to prosecute the appellant on this information because the charges against all of the co-actors, including the appellant, were referred prior to any witness being granted immunity. Nevertheless, the DSJA admitted on cross-examination that, after first granting the appellant testimonial immunity to testify against the co-actors, and convening MA2 Townsend's court-martial, the CA later granted the co-actors' requests for pretrial agreements and clemency in exchange for their testimony against the appellant. The DSJA also testified that, in the normal course of business, the CA would have been briefed on why this significant change in prosecution strategy was necessary.

Prior to MA2 Townsend's court-martial, and while the appellant was in pretrial confinement in the same confinement facility as MA2 Townsend, MA2 Townsend attempted to intimidate the appellant into retracting his statements and trial testimony. As a result, the prosecutor twice ordered the appellant placed in protective custody. After MA2 Townsend was convicted and the appellant withdrew from his pretrial agreement, MA2 Townsend bragged that he had now become the Government's main witness against the appellant. DE W (MA2 Townsend's handwritten letter to the appellant). MA2 Townsend told the appellant to retract his trial testimony against all of the co-actors, and to claim

[5] DC2 Brown was convicted, in accordance with his pleas, of a violation of Article 128 (aggravated assault with a dangerous weapon), Article 81 (conspiracy to commit assault with a dangerous weapon), and Article 134 (reckless endangerment). He received a sentence of confinement for 42 months, reduction to pay grade E-1, and a dishonorable discharge. DC2 Brown's pretrial agreement required the suspension of all confinement in excess of 18 months. AE VII. MA2 Griffith was not tried prior to the appellant's court-martial, but received a pretrial agreement limiting the forum to a special court-martial. *Id.* at 2.

they had only acted in self-defense. The appellant did not comply with MA2 Townsend's demands.

The appellant's prosecutors used excerpts from the appellant's earlier immunized testimony to refresh the co-actors' recollection of the events surrounding the shooting, and to prepare them for their testimony against the appellant. In fact, the co-actors only admitted their full criminal culpability after being confronted with the appellant's immunized admissions incriminating them.

B. Trial Developments

At trial, the appellant moved to dismiss the charges and specifications on the grounds that the Government improperly made use and derivative use of his immunized statements and testimony against him in a criminal prosecution. AE XI; *see Kastigar*, 406 U.S. at 441, and RULE FOR COURTS-MARTIAL 907(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). LT Keeton, the prosecutor who conducted five interviews with the appellant and prepared the appellant to testify against the co-actors, then served as a trial counsel against the appellant at his *Kastigar* hearing. The military judge properly stopped the prosecutor from cross-examining the appellant at the *Kastigar* hearing, but allowed LT Keeton to testify as a witness for the Government at the hearing. Although he readily admitted that the Government failed to maintain separate investigations and separate trial teams for each of the co-actors, LT Keeton testified that such measures were not required because the appellant's immunized statements were unimportant to the Government's case, and because the Government would not use any evidence derived from the immunized statements at the appellant's court-martial.[6]

The military judge denied the motion to dismiss,[7] but forbade the Government from mentioning immunized information that

[6] Despite his testimony that he agreed not to use the appellant's immunized disclosures, the prosecutor nonetheless attempted to cross-examine the appellant by using information gained from the appellant's compelled cooperation. We also note that after the appellant pled and was found guilty, LT Keeton, the same trial counsel exposed to the immunized statements, also attempted to testify about information he learned from the appellant's immunized disclosures during the hearing concerning the appellant's motion for additional pretrial confinement credit. AE XLVIII; Record at 543-45. The civilian trial defense counsel objected to the trial counsel's testimony as information derived from the appellant's immunized statements, and moved for a mistrial on sentencing. The military judge denied the motion, but refused to allow the trial counsel to testify about this immunized information or to consider evidence of it. Record at 545.

[7] The military judge made the following essential findings about the Government being exposed to the appellant's compelled statements:

> [T]he prosecution team had immediate access to the immunized statements made by Seaman Bradley. The NCIS team investigating Seaman Bradley also knew details about immunized statements made by Seaman Bradley. The Chinese wall was never conceived, planned

he determined was not known to the Government before the appellant was granted immunity to include: the two prior shooting incidents; a discussion among the co-actors about the possibility of robbing the victim; and the appellant's revelation that he had disposed of his firearm by throwing it into the Delaware River. AE XLIV; Record at 431-40. The military judge allowed the exposed prosecutors to remain on the case and to cross-examine the appellant if he chose to testify.

The military judge denied the motion to dismiss after determining that the Government had met its burden, by a preponderance of the evidence, of showing that it had not derived a benefit from the appellant's compelled testimony, and that the statements of the co-actors were based on their own truthful recollections of the events. The military judge acknowledged that DC2 Brown retracted part of his prior sworn testimony after the trial counsel confronted him with excerpts from the appellant's testimony,[8] but determined that the appellant did not suffer prejudice from DC2 Brown's retraction since the appellant could use the inconsistency to challenge DC2 Brown's credibility at trial.

C. Providence Inquiry

After the military judge denied his motion to dismiss, the appellant changed his pleas to guilty of a violation of Article 128 (assault with a means likely cause grievous bodily harm), a lesser included offense of the originally-charged offense of attempted premeditated murder, and guilty of a violation of Article 134 (reckless endangerment). Although the appellant acknowledged that the pleas were unconditional, his civilian defense counsel argued that he had not waived that portion of the motion to dismiss which objected to the trial counsel's continued participation in the case. The military judge did not resolve the appellant's contention that his guilty pleas did not waive all of the objections raised in his motion to dismiss. Indeed, the military judge seemed uncertain as to which issues he believed were preserved for appeal, and which he believed were waived by the pleas, as indicated by the following colloquy in which he engaged the trial counsel and the civilian defense counsel:

> MJ: I believe that Seaman Bradley's plea of guilty also means that he gives up his right to appeal the

---

> nor created. The investigators and prosecutors never attempted to maintain separate investigations. The government did not create a separate prosecution team for each accused. The files were not kept separately.

Record at 436; AE XLIV at 6.

[8] In DC2 Brown's signed stipulation of fact dated 25 May 2004 (AE XXXII), he lied by stating that he was "surprised" when the appellant began shooting because he did not know that the appellant had a gun with him. Record at 325.

decision I made on his motion to dismiss. Does the government agree with that?

TC: That is the government's understanding, sir.

CDC: We agree that the motion to dismiss has been waived. *However, we don't believe that your—the alternative relief we requested was denied, just facing the trial counsel had been waived.*

MJ: I'm sorry, what is the other issue?

CDC: The other issue--the alternative relief that we requested that you also denied was the trial counsel should not participate further in the case. We think that has not been waived.

MJ: So is Seaman Bradley entering a conditional guilty plea?

CDC: No, sir

TC: Excuse me, sir.

MJ: Yes.

TC: I guess we'd like to hear why the defense believes that hasn't been waived. It seems like that it certainly would be pursuant to this guilty pleas if it's not a conditional plea. *I guess we're just wondering what the reason is behind that and maybe we can, you know, try to figure out, you know, whether or not this is truly a conditional or unconditional plea if they feel like they haven't waived that right.*

CDC: *Because sir, the Kastigar case was—has been held to invalidate guilty pleas where prosecution was initiated as a result of the use of the immunized testimony of an accused*.

MJ: Yes, but I think that the Manual requires that if you wish to preserve any issue for appeal----

CDC: *Any issue, sir? I don't think that's true.*

MJ: *That may be where you're right. Only certain issues need to be in the form of a conditional guilty plea*. Is that your point?

CDC: Yes, sir. We have clearly waived the motion with respect to the motion to dismiss. I agree with that. *But the alternative relief we requested, which was the further participation of the trial counsel, that does not depend on your ruling. I mean, the further moving in this case and forward does not rely on your ruling. It's not—I mean he can providently plead guilty if you're right about that. Trial counsel obviously is appropriately here. But I don't believe that we waive that.*

MJ: But we are establishing for the record that----

CDC: It is an unconditional plea, sir

MJ: ----it is an unconditional plea.

CDC: Yes, sir.

MJ: And only those issues that don't require a conditional plea would be preserved for appeal, correct?

CDC: Correct, sir.

Record at 457-58 (emphasis added). Without ever resolving the waiver question with respect to the denial of the motion to remove the trial counsel from the case, the military judge accepted the appellant's guilty pleas.

Waiver

R.C.M. 910(j) provides that, in the absence of a conditional plea, "a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." Similarly, MILITARY RULE OF EVIDENCE 304(d)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), provides that, except for cases involving a conditional plea, "a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense . . . ." Under R.C.M. 907(b)(2)(D)(ii), a motion to dismiss on grounds of immunity from prosecution is considered waivable. *See United States v. Allen*, 59 M.J. 478, 483 (C.A.A.F. 2004).[9] A conditional plea preserves appellate review of an "adverse determination of any specified pretrial motion." R.C.M. 910(a)(2).

By pleading guilty, the appellant clearly waived appellate review of the military judge's ruling denying his motion to dismiss, as it pertained to the Government's use of his compelled testimony. He and his counsel clearly understood the waiver and that the appellant was not entering a conditional plea under R.C.M. 910(a)(2).

It is equally clear that the appellant and his counsel believed that the appellant's guilty pleas did not waive his right to appeal the military judge's denial of that part of his

[9] We are aware that our sister service court found plain error analysis appropriate in a *de facto* immunity case, when the appellant pled unconditionally guilty, and the issue was fully litigated and denied before pleas. *United States v. Lebaron*, 2005 CCA LEXIS 422 at 11, unpublished op. (A.F.Ct.Crim.App. 2005)(citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998) and *Allen*, 59 M.J. at 483). However, in *Lebaron*, the Air Force Court of Criminal Appeals did not actually use the plain error analysis because the military judge and the parties at trial agreed to a conditional plea, thereby not waiving the immunity issue for appeal despite the pretrial agreement provision to the contrary.

motion pertaining to removal of the trial counsel from his case. We conclude that the military judge's ambiguous advisement with regard to waiver, combined with the civilian defense counsel's belief that the issue was preserved for appellate review, were material factors in the appellant's decision to plead guilty. Ordinarily, the only alternative at this juncture would be for us to determine that the plea was improvident, set aside the findings and the sentence, and authorize a rehearing. However, under the unique facts of this case, we have concluded that the appellant is entitled to appellate review of his motion to dismiss and we decline to apply waiver. *See United States v. Stewart*, 43 C.M.R. 112, 114 (C.M.A. 1971)(guilty plea did not preclude appellate review where law officer's comments supported an erroneous impression by the civilian defense counsel that, because of the statutory provisions for appellate review of courts-martial, a guilty plea in this instance would not waive the issue).

Waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). "[W]here bedrock constitutional rights are at issue and are waived, we should not settle for inference and presumption when certainty is so readily obtained." *United States v. Hansen*, 59 M.J. 410, 413 (C.A.A.F. 2004). We review the "combination of all the circumstances" to determine if a waiver was "informed and voluntary." *Id*.

Since the appellant did not intentionally abandon his right to appeal the ruling by the military judge concerning the continued participation of the trial counsel, we find that a *de facto* conditional plea existed as to that issue, even though the trial counsel did not expressly consent to a conditional plea on the record. *Stewart*, 43 C.M.R. at 114; *United States v. Carroll*, No. 95 02201, unpublished op. (N.M.Ct.Crim.App. 23 Dec 1996) (since the military judge's erroneous explanation of the law of waiver and the appellant's belief that he preserved a speedy-trial issue on appeal were material factors in the decision to plead guilty, this court held that the context in which the military judge's advisement took place constituted a *de facto* conditional plea, and determined that the most appropriate course of action was to review the military judge's ruling on the appellant's speedy-trial motion on its merits).[10] Here, the military judge's comments at most supported the defense counsel's impression that the appellant's objection to the exposed trial counsel's participation was not waived, and at least failed to resolve the issue. *Stewart,* 43 C.M.R. at 114. There being no waiver, we consider whether the military judge abused his discretion in denying the motion to remove the trial counsel.

[10] Although the trial counsel never expressly authorized a conditional plea, we note that he never objected to the military judge's improper advisement on the effect of waiver with regard to the motion to dismiss on the immunity issue. *See Carroll*, 1996 CCA LEXIS 525, at 3.

Use of Appellant's Immunized Statements

Our superior court has summarized the applicable military law on the use of immunized statements, as follows:

> In *Kastigar ...* the Supreme Court held that prosecutorial authorities may not use testimony compelled by a grant of immunity. We have construed "use" to include non-evidentiary use such as the decision to prosecute. *See United States v. Olivero*, 39 M.J. 246, 249 (CMA 1994), *citing United States v. Kimble*, 33 M.J. 284 (CMA 1991). Other federal appellate courts have construed *Kastigar* to hold that the Government may not "alter its investigative strategy" based on immunized testimony. *See United States v. Harris*, 973 F.2d 333, 336 (4th Cir. 1992). Finally, the Government may not use the testimony of a witness which was influenced by the immunized testimony. *United States v. North,* 285 U.S. App. D.C. 343, 910 F.2d 843, 860 (D.C. Cir.), *modified in part*, 287 U.S. App. D.C. 146, 920 F.2d 940, 942 (1990).

United States v. McGeeney, 44 M.J. 418, 422-23 (C.A.A.F. 1996).

Although, as noted earlier, the appellant waived his right to appeal the military judge's ruling concerning the alleged *Kastigar* violations made prior to the entry of pleas, he did not waive it as to the use of his immunized statements during the remainder of his trial. Accordingly, the Government could not use the information gained directly or derivatively from the immunized statements in any way to prosecute the appellant. *United States v. Mapes,* 59 M.J. 60, 67 (C.A.A.F. 2003). Indeed, the military judge seemingly recognized this principle in his ruling when he wrote "the government is on notice they may not use any fact learned through the immunized testimony of the accused at trial." AE XLIV at 9.

Unfortunately, the military judge immediately undercut this restriction when he refused to remove the trial counsel from the case. We agree with the military judge's essential findings of fact that the Government had made no attempt to construct a "Chinese wall," or in any way separate the prosecutors from being exposed to the appellant's immunized statements. Furthermore, it is also evident from the record that the trial counsel were deeply involved in the investigation and prosecution of the charges against the co-actors, to include interviewing the appellant prior to his trial. Therefore, we find it inconceivable that the trial counsel in this case, no matter how intent on not using the appellant's immunized statements against him, could identify direct or derivative information attributable to the appellant's immunized statements, and then not use that information. As a result, we find that the military judge abused his discretion when he did not disqualify the prosecutors from

further participation in the case and that their continued participation resulted in a *Kastigar* violation. *Mapes,* 59 M.J. at 69.

Conclusion

Accordingly, the findings and the sentence are set aside, and the record is returned to the Judge Advocate General of the Navy. A rehearing may be ordered.

Senior Judge MITCHELL and Senior Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court