United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 39531**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel N. LEE	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

Appellant was tried by a general court-martial composed of officer and enlisted members on 21–22 and 26–28 March 2018 at Robins Air Force Base, Georgia. Appellant was found guilty of two specifications of dereliction of duty, one specification of abusive sexual contact, one specification of indecent exposure, and one specification of assault consummated by a battery in violation of Articles 92, 120, 120c, and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 920, 920c, 928. With the exception of the violation of Article 128, UCMJ, all of these offenses took place prior to June 2014. The court-martial sentenced Appellant to a bad-conduct discharge, confinement for six months and one day, and reduction to the grade of E-4.

The staff judge advocate's recommendation (SJAR) to the convening authority dated 13 July 2018 advised, *inter alia*, that the convening authority did not have the authority to disapprove the findings of guilt and could not "disapprove, commute, or suspend, in whole or in part, the adjudged sentence of a punitive discharge or confinement." The staff judge advocate (SJA) recommended the convening authority approve the adjudged sentence. Trial defense counsel submitted a memorandum to the convening authority dated 19 July 2018 that identified six alleged legal errors at the trial and requested unspecified clemency for Appellant; however, trial defense counsel did not address the accuracy of the SJA's advice regarding the limits of the convening authority's clemency power. Two addenda to the SJAR dated 27 July 2018 and 2 August 2018 reiterated the SJA's initial recommendation and did not modify the initial advice that the convening authority could not alter the findings, bad-conduct discharge, or confinement. On 2 August 2018 the convening authority approved the adjudged sentence.

Appellant submitted his assignments of error to this court on 13 February 2019. Appellant raises seven issues for our review, the seventh of which is that the SJA provided incorrect advice with respect to the power of the convening

authority to act on the findings and sentence in his case. On 5 April 2019 the Government submitted its answer. With respect to the alleged SJAR error, the Government stated it "does not oppose Appellant[']s request for new post-trial processing with conflict free counsel."* On 12 April 2019, Appellant submitted a reply to the Government's answer that, *inter alia*, noted the Government's concession but "respectfully submit[ted] that this Court should complete its review pursuant to Article 66(c), UCMJ, before deciding whether to remand the case" for a new post-trial process and action.

"The proper completion of post-trial processing is a question of law the court reviews de novo." *United States v. Zegarrundo*, 77 M.J. 612, 613 (A.F. Ct. Crim. App. 2018) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Failure to comment in a timely manner on matters in the SJAR forfeits a later claim of error; we analyze such forfeited claims for plain error. *Id.* (citations omitted). "To prevail under a plain error analysis, Appellant must persuade this Court that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *Kho*, 54 M.J. at 65) (additional citation omitted). "To meet this burden in the context of a [SJAR] error, whether that error is preserved or is otherwise considered under the plain error doctrine, an appellant must make 'some colorable showing of possible prejudice.'" *Id.* at 436–37 (quoting *Kho*, 54 M.J. at 65).

The National Defense Authorization Act for Fiscal Year 2014 modified Article 60, UCMJ, 10 U.S.C. § 860, and limited the convening authority's ability to grant clemency. Pub. L. No. 113–66, § 1702, 127 Stat. 672, 955–58 (2013). The effective date of the change was 24 June 2014. *Id.* at 958. The modified Article 60, UCMJ, now permits the convening authority to set aside or change a finding of guilty only with respect to "qualifying offenses," specifically offenses for which the maximum imposable term of confinement does not exceed two years and where the sentence adjudged does not include a punitive discharge or confinement for more than six months. 10 U.S.C. § 860(c)(3)(B), (D) (2016). With respect to sentences, the pertinent text of the modified Article 60, UCMJ, now reads: "[T]he convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." 10 U.S.C. § 860(c)(4)(A) (2016).

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* We note that on appeal Appellant asserts his trial defense counsel were ineffective. *See generally United States v. Carter*, 40 M.J. 102 (C.M.A. 1994) (addressing conflicts of interest involving post-trial allegations of ineffective assistance of counsel at trial).

However, where a court-martial conviction involves an offense committed before 24 June 2014 and an offense committed on or after 24 June 2014, the convening authority has the same authority under Article 60 as was in effect before 24 June 2014, except with respect to a mandatory minimum sentence under Article 56(b), UCMJ, 10 U.S.C. § 856(b). Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113–291, § 531, 128 Stat. 3292, 3365 (2014). Specifically, in such cases the convening authority retains the authority to set aside any finding of guilty or to change it to a finding of guilty to a lesser included offense, to disapprove or mitigate the sentence in whole or in part, or to change a punishment to one of a different nature, so long as the severity is not increased. Exec. Order 13,730, 81 Fed. Reg. 33,331 (26 May 2016).

Most of the offenses of which Appellant was convicted were committed before 24 June 2014. Therefore, the convening authority had the power to set aside any of the findings of guilty, as well as the power to disapprove, mitigate, or modify the sentence in whole or in part. The advice in the SJAR to the contrary was plainly erroneous, and we find Appellant has demonstrated a colorable showing of possible prejudice from the error. *See Scalo*, 60 M.J. at 436–37 (quoting *Kho*, 54 M.J. at 65). We further find it appropriate to remedy this error before adjudicating the remaining issues Appellant raises and completing our review pursuant to Article 66, UCMJ, notwithstanding Appellant's suggestion to the contrary.

Accordingly, it is by the court on this 3d day of May, 2019,

ORDERED:

The action of the convening authority is **SET ASIDE**. The record of trial is returned to The Judge Advocate General for remand to the convening authority for new post-trial processing with conflict-free defense counsel consistent with this order. Article 66(e), UCMJ, 10 U.S.C. § 866(e) (2016). Thereafter, the record of trial will be returned to this court for completion of appellate review under Article 66, UCMJ, of any findings and sentence approved by the convening authority, including review of the remaining issues Appellant has raised which remain pending before the court. On **3 July 2019**, counsel for the Government will inform the court in writing of the status of compliance with this

order unless the record of trial has been returned to the court prior to that date.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court