

Wednesday, 11 January 2012

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United States v. Simmons

En Banc

For Appellant: CAPT Diane L. Karr, JAGC, USN

For Appellee: Maj Paul M. Ervasti, USMC

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two offenses involving general orders (specifically, a DoD uniform instruction and the DoD JER) and one offense involving the General Article, respective violations of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934.

The factual basis for the charges was the appellant's appearance in several commercial, pornographic videos that included shots of him wearing his Marine uniform items. At one point in a video, he also mentioned that he was a Marine. Out-takes from the videos were used to advertise the videos on a website and one of those out-takes showed the appellant wearing the Marine dress blue coat.

The convening authority approved only so much of the court-martial's sentence as extended to confinement for ninety days, a fine of \$10,000.00, and a bad-conduct discharge.

In an unpublished opinion, the Court affirmed the finding of guilt as to the Article 134 offense, but set aside and dismissed the findings on the two Article 92 specifications. The sentence was set aside, and a rehearing on sentence was authorized; however, no punitive discharge was authorized, nor was any monetary penalty in excess of the equivalent of forfeiture of 2/3 pay per month for four months authorized.

This case is being reconsidered in accordance with the Government's request for *en banc* reconsideration. The issues to be argued before the Court are as follows:

- I. *UNITED STATES V. FERGUSON* AND *UNITED STATES V. BROCE*
ESTABLISH THAT AN UNCONDITIONAL GUILTY PLEA WAIVES ANY OBJECTION RELATED TO THE FACUTAL ISSUE OF GUILT. THE PANEL WAS NOT SATISFIED THAT APPELLANT WAS ACTING IN AN OFFICIAL CAPACITY OR THAT HIS ACTIONS CREATED AN INFERENCE OF

SERVICE ENDORSEMENT AND, THEREFORE, SET ASIDE APPELLANT'S GUILTY PLEA TO ARTICLE 92. DID THE PANEL ERR IN NOT FINDING THAT, BY ADMITTING CERTAIN FACTS AT TRIAL AND PLEADING GUILTY, APPELLANT WAIVED HIS RIGHT TO CONTEST THE GOVERNMENT'S THEORY ON APPEAL?

II. THE PANEL FOUND THAT APPELLANT NEVER WORE A COMPLETE UNIFORM SO THE GENERAL PUBLIC COULD NEVER RECEIVE VISUAL EVIDENCE OF THE AUTHORITY AND RESPONSIBILITY VESTED IN THE INDIVIDUAL BY THE UNITED STATES GOVERNMENT. DID THE PANEL ERR BY DRAWING A DISTINCTION BETWEEN WEARING A COMPLETE UNIFORM AND WEARING UNIFORM ITEMS?

Tuesday, 17 January 2012

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United States v. Parker

**Panel Two - J.A. MAKSYM, J.K. CARBERRY, M.D. MODZELEWSKI,
Appellate Military Judges**

For Movant: LT Ritesh K. Srivastava, JAGC, USN

For Defense: Maj Kirk Sripinyo, USMC

The Government has moved the Court for a third Enlargement of Time in which to answer the Appellant's brief and assignment of error.

Friday, 20 January 2012

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United States v. Kilariski

**Panel Two - J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN,
Appellate Military Judges**

For Appellant: LT Daniel LaPenta, JAGC, USN

For Appellee: Maj Paul Ervasti, USMC

A panel of members sitting as a special court-martial convicted the appellant, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. 912a (2006). The members sentenced the appellant to

confinement for two months, reduction to pay grade E-2, forfeiture of \$1096.00 pay per month for two months, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and ordered it executed.

The issues to be argued before the Court are the following:

- I. UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION, AN ACCUSED HAS THE RIGHT "TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM." A RECENT SUPREME COURT DECISION, *BULLCOMING V. NEW MEXICO*, RULED THAT SURROGATE TESTIMONY OF A SCIENTIST WHO DID NOT CERTIFY A FORENSIC LABORATORY REPORT INTRODUCED INTO EVIDENCE VIOLATES THE CONFRONTATION CLAUSE. HERE, DESPITE THE DEFENSE'S REQUEST FOR THE CERTIFYING SCIENTIST'S TESTIMONY, THE MILITARY JUDGE PERMITTED A SURROGATE TO TESTIFY. DID THE MILITARY JUDGE ERR?

- II. AFTER INSPECTING CORPORAL KILARSKI'S URINE SAMPLE, THE LABORATORY ACCESSIONS TECHNICIAN HANDWROTE A DISCREPANCY CODE ON THE SPECIMEN CUSTODY DOCUMENT. BEFORE TRIAL, THE DEFENSE ARGUED THE CONFRONTATION CLAUSE REQUIRED THE ACCESSIONS TECHNICIAN'S TESTIMONY, BUT THE MILITARY JUDGE DENIED ITS MOTION. DID THE MILITARY JUDGE ERR?