

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**CHARLES Wm. DORMAN**

**C.A. PRICE**

**R.C. HARRIS**

**UNITED STATES**

**v.**

**Stephen D. EVANS  
Intelligence Specialist First Class (E-6), U.S. Navy**

NMCCA 200401405

Decided 21 July 2005

Sentence adjudged 18 December 2003. Military Judge: S.B. Jack. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commandant, Naval District Washington, Washington Navy Yard, Washington, D.C.

LT LUIS P. LEME, JAGC, USN, Appellate Defense Counsel  
LT C.C. BURRIS, JAGC, USNR, Appellate Government Counsel  
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was tried before a general court-martial composed of a military judge, sitting alone. Consistent with his pleas, the military judge convicted the appellant of making a false official statement, three specifications of committing indecent acts on divers occasions upon a female under the age of 16 years old, and receiving child pornography on divers occasions. As a result, the appellant stands convicted of violating Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934, and 18 U.S.C. § 2252A. The adjudged and approved sentence consists of confinement for 28 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. In taking action on 8 September 2004, the convening authority (CA) suspended all confinement in excess of 10 years for a period of 2 years. This action was taken to comply with the terms of the pretrial agreement.

The appellant has raised a single assignment of error, alleging error in the staff judge advocate's recommendation

(SJAR). The appellant alleges that the staff judge advocate (SJA) erred in advising the convening authority that the appellant's character of service was "unsatisfactory." We have reviewed the record of trial, the appellant's brief and assignments of error, and the Government's response. Following that review, we conclude that the findings and sentence are correct in law and fact, and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### **Erroneous Advice in the SJAR**

RULE FOR COURTS-MARTIAL 1106(d)(3)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) requires the SJA to advise the CA in the SJAR of the appellant's character of service. The rule does not provide guidance on how to characterize service. We agree with the appellant that the SJA erred when he first characterized the appellant's service as "other than honorable," and that he erred when he modified that advice to reflect the appellant's character of service as "unsatisfactory" after the appellant's trial defense counsel challenged the initial characterization in response to the SJAR. The trial defense counsel suggested that the characterization should read, "IS1 Evans served honorable from August 1990 through August 1999 and less than honorably after that time." Response to SJAR dated 6 May 2004. In his addendum the SJA stated his disagreement with the trial defense counsel, but noted that he had pen changed the SJAR to reflect that the appellant's character of service had been "unsatisfactory." We find that all three characterizations are erroneous. They are all based upon the appellant's conviction of the current offense, rather than his service up to the time of the CA's action. They all presume that the CA is going to approve the conviction.

To enable the CA to make an informed decision of what action he should take in relation to a particular case the SJA should advise the CA of an accused's character of service without regard to the current conviction. Other portions of the SJAR report the facts of the conviction to the CA.

The appellant raised this issue before the SJA, and the CA was aware of the appellant's concerns at the time he took action on the case. In fact the CA specifically addressed the issue in the Action. We have no doubt that the CA made an informed decision. Furthermore, the appellant was given an opportunity to comment on the Addendum to the SJAR and did so on 25 August 2004. In that response, the appellant did not object to the new characterization of service. Because this issue was fully vetted before the CA, we conclude that the appellant has made no colorable showing of possible prejudice as a result of the SJA's erroneous characterization. *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998). Accordingly, we decline to grant relief.

**Conclusion**

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL  
Clerk of Court