

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class CHRISTOPHER S. BARRETT
United States Air Force**

ACM 35790 (f rev)

21 March 2007

Sentence adjudged 12 April 2003 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrea M. DeCamera, Major Sandra K. Whittington, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Major Stacey J. Vetter.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

This case is before us for further review following remand by our superior appellate court. *United States v. Barrett*, No. 06-0571/AF (Daily Journal 3 Nov 2006). By way of background: the appellant was tried before a panel of officer and enlisted members at Kadena Air Base, Japan, and convicted, in accordance with his pleas, of divers wrongful uses of marijuana. He was charged with divers wrongful distributions of Percocet, but convicted, despite his not guilty plea, of a single distribution.¹

¹ The drug use and distribution offenses were charged under Article 112a, UCMJ, 10 U.S.C. § 912a.

On his initial appeal before this Court, the appellant argued his distribution conviction could not stand in light of the decision of the Court of Appeals for the Armed Forces in *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003).² The government disagreed. We concurred with the government's analysis and affirmed the findings and sentence. *United States v. Barrett*, ACM 35790 (A.F. Ct. Crim. App. 28 Feb 2006) (unpub. op.). At the next level of review, however, the government changed its position by conceding the very error it had contested before this Court.

Our superior appellate court, relying on the government's newly-minted concession, reversed the appellant's conviction for wrongful distribution of Percocet and returned the record to us to reassess, or order a rehearing on, the appellant's sentence. It is to this task we now turn our attention. If we are able to determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can do so in this case. We find that the members would have imposed a sentence of no less than confinement for two months and reduction to the grade of E-1. We further find this sentence to be appropriate for this appellant and the remaining offense.

The findings, as modified by our superior appellate court, and sentence, as reassessed herein, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the modified findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

² *Walters* was decided after the announcement of the appellant's sentence, but prior to the military judge's authentication of the appellant's record of trial.