UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2011-02**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
DARREN N. HATHORNE,	)	
USAF,	)	
Appellee	)	**Special Panel**

On 5 May 2011, counsel for the United States filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure. This case is before this Court because the military judge granted the trial defense counsel's motion to dismiss with prejudice the single charge and specification alleging the appellee's wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge dismissed on the grounds that the appellee's confession to using cocaine was given under a grant of testimonial immunity and that his Fifth Amendment and Article 31, UCMJ, privilege against self-incrimination were violated by the government's subsequent improper use of his immunized confession in prosecuting him. We find that the military judge's decision to dismiss the charge and specification was an abuse of discretion. We, therefore, grant the government's appeal.

Jurisdiction and Standard of Review

The United States may appeal an "order or ruling of the military judge which terminates the proceedings with respect to a charge or specification" in cases in which a punitive discharge may be adjudged. Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A); Rule for Courts-Martial (R.C.M.) 908(a) and (b). The military judge's dismissal of the charge and specification meets this jurisdictional requirement of Article 62. In ruling on an appeal under Article 62, this Court "may act only with respect to matters of law." Article 62(b), UCMJ, 10 U.S.C. § 862(b); R.C.M. 908(c)(2). We review *de novo* the military judge's conclusions of law and will reverse for an abuse of discretion if the judge's decision is incorrect or influenced by an erroneous view of the law. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004); *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App 2008). On matters of fact, we are bound by the military judge's factual determinations unless they are unsupported by the record or they are clearly erroneous. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1984) (citation omitted).

Factual Background

In making her ruling, the military judge made detailed findings of fact and conclusions of law. The findings of fact are supported by the record and are not clearly erroneous. The essential facts are these: The appellee, SrA AF, and A1C JF were roommates at an off-base residence in Alamogordo, New Mexico. They also permitted a civilian, Mr. R, to live there as well. As part of an investigation into A1C JF's illegal drug activity, agents from the Air Force Office of Special Investigations (AFOSI) interviewed the appellee as a potential witness. On 5 November 2010 and on 4 January 2011, the appellee provided sworn written witness statements to the AFOSI about A1C JF. The appellee himself was not under suspicion of criminal activity. On 20 January 2011, a paralegal tasked by the trial counsel conducted a witness interview of the appellee in preparation for the pending court-martial of A1C JF. The paralegal told the appellee that he would probably have to testify at A1C JF's trial, that he should be available for more interviews by members of the legal office, and that he should be honest and not hold anything back.

As part of a continuing effort to collect evidence to prosecute A1C JF, the trial counsel conducted an interview of Mr. R on 31 January 2011, pursuant to a grant of use immunity issued by the local district attorney's office. During the interview, Mr. R confirmed A1C JF's use of drugs and added that he had witnessed SrA AF and the appellee use cocaine. Until this point, the government did not suspect drug involvement by SrA AF or the appellee. Based on the interview of Mr. R, the trial counsel now was concerned that SrA AF and the appellee might invoke their rights against self-incrimination and refuse to testify in A1C JF's court-martial. As a result, the wing staff judge advocate (SJA) forwarded a memorandum, dated 1 February 2011, through the special court-martial convening authority (SPCMCA) to the general court-martial convening authority (GCMCA) requesting testimonial immunity for SrA AF and the appellee in the case of *United States v. A1C JF*.

The GCMCA approved a "Grant of Testimonial Immunity and Order to Testify" in a "MEMORANDUM FOR AIRMAN FIRST CLASS DARREN N. HATHORNE" dated 3 February 2011. The memorandum at paragraph 2 stated:

> By the authority vested in me in my capacity as a general court-martial convening authority under Rule for Courts-Martial 704(c)(1), Manual for Courts-Martial, I hereby grant you testimonial immunity and order you to answer any questions posed to you by investigators and counsel in the case of *U.S. v. A1C [JF]*, and to testify at any proceedings held pursuant to the Uniform Code of Military Justice concerning any offenses alleged against A1C [JF].

Although the SJA's memorandum requesting immunity contained language about the immunity and order becoming "effective upon receipt" by the witness, the 3 February 2011 memorandum signed by the GCMCA granting immunity did not contain this

language. In grants of immunity issued subsequent to the appellee's, the language of the GCMCA's memorandum was modified to expressly reflect that immunity was effective upon receipt by the witness and required acknowledgement by written endorsement. The GCMCA's signed memorandum was transmitted by electronic mail to the wing legal office at Holloman AFB after the close of business on 3 February 2011.

On 4 February 2011, the appellee was notified by his squadron's first sergeant to report to the legal office. The appellee assumed this was related to A1C JF's case. The appellee was taken to the trial counsel's office for an interview. The trial counsel, who also served as the Chief of Military Justice, was concerned not only with the prosecution of A1C JF, but now, with the information obtained from Mr. R, he also wanted to preserve the government's ability to prosecute the appellee.

At the time of the appellee's interview, the trial counsel had full knowledge of the GCMCA's grant of immunity and order to the appellee to answer questions; however, the trial counsel made a decision not to give the appellee the GCMCA memorandum or inform him of its existence. Instead, the trial counsel read the appellee his rights under Article 31, UCMJ, in an effort to gain additional evidence to use in a prosecution of the appellee. At the beginning of the interview, the trial counsel identified himself to the appellee as a prosecutor in the A1C JF case. After briefly exchanging pleasantries and briefly touching upon the appellee's knowledge and relationship with A1C JF, the trial counsel informed the appellee that he had knowledge of the appellee's own cocaine use and was required to read him his rights.

The trial counsel then read the appellee his Article 31, UCMJ rights from the standard rights advisement card. The appellee orally waived his rights and indicated he had no problem answering questions and that he would cooperate. He also told the trial counsel he did not wish to consult a lawyer because he didn't think one was necessary because the interview was about the A1C JF case. The appellee then confessed to a single use of cocaine during the summer of 2010. He also responded to questions about A1C JF, SrA AF, and Mr. R. Throughout the interview, the appellee was calm and cooperative. At the conclusion of the interview, the trial counsel told the appellee that he would be testifying in the A1C JF court-martial, but that the trial counsel would not read him his Article 31 rights at trial because his statements could not be used against him. The word "immunity" was never mentioned.

The appellee did not learn of the GCMCA's memorandum granting testimonial immunity until A1C JF's defense counsel provided him with a copy during an interview on 8 February 2011. A1C JF was tried by a special court-martial on 9 February 2011. The appellee was not required to testify because a plea agreement was negotiated in that case. The appellee did not seek legal representation or assistance until after the charge and specification alleging his single use of cocaine was preferred against him on 9 March 2011.

The Military Judge's Conclusions and Application of the Law

The military judge concluded that based on "normal grammatical construction" the wording of the GCMCA's 3 February 2011 memorandum made it effective upon his signature, thereby giving the appellee immediate testimonial immunity. The military judge found that in this particular case, "[t]he grant of immunity [did] not require an invocation of rights to become effective."

In addition, the military judge determined that the appellee's statement was not voluntarily given. She found that "[w]hile technically the rights advisement was correct under the Constitution and Article 31, it did not truly provide the [appellee] with an understanding of his situation and prevented him from making an informed choice as to his decision to waive those rights." She concluded that the rights advice was "inadequate" because the trial counsel should have informed the appellee of the grant of immunity and the order to answer questions in conjunction with the reading of the Article 31 rights. She summarized her findings stating, "[a]fter reviewing the totality of the circumstances, I find that the [appellee's] waiver of his right against self-incrimination was not knowing and voluntary. I further find that the statement provided on 4 February 2011 was given while a grant of immunity was in effect."

Finally, because the military judge found that the appellee's confession was given under immunity, she performed a *Kastigar*[1] analysis to determine if the government had proven by a preponderance of the evidence the non-use of the appellee's immunized statement, that is, was the prosecution of the appellee independent of his statement? She found it was not. In granting the defense motion the military judge concluded that the facts "create an image which leads to only one conclusion that is consistent with the law and fundamental notions of fairness. That conclusion requires an extreme remedy"—dismissal of the charge and specification with prejudice.

Discussion

The military judge found that from the moment the GCMCA signed the grant of testimonial immunity on 3 February 2011, the appellee's statements were cloaked with immunity despite the fact that the appellee was unaware of the immunity and order, did not rely upon it, and after being read his Article 31 rights, waived his right against self-incrimination and confessed his use of cocaine to the trial counsel. The military judge also found that the trial counsel's failure to advise the appellee of the grant of immunity

[1] "This burden of proof… is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

by the convening authority rendered his confession involuntary. In addition, the appellee contends this failure to communicate the grant of immunity constituted improper interference with the convening authority's command authority under R.C.M. 704. In analyzing these issues, we consider the nature and purpose for grants of testimonial immunity, the provisions of R.C.M. 704, the language of the GCMCA's memorandum granting testimonial immunity, the actions of the trial counsel, and the circumstances under which the appellee was interviewed.

The Nature and Purpose of Immunity

The Constitution does not preclude a witness from incriminating him or herself. In fact, "admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977). Both the Fifth Amendment and Article 31, UCMJ, guarantee that a service member will not be *compelled* to give self-incriminating testimony. U.S. Const. amend. V; *United States v. Mapes*, 59 M.J. 60, 65-66 (C.A.A.F. 1977). Balanced against this most important privilege, the Supreme Court also recognizes society's necessary interest in the government having the power to compel testimony from its citizens. *Kastigar v. United States*, 406 U.S. 441, 444 (1972). "The tension between the governmental power to compel testimony and a citizen's right to protection against self-incrimination is reconciled in immunity statutes." *Mapes*, 59 M.J. at 66.

Immunity statutes are essential to the effective enforcement of our criminal laws. *Kastigar* 406 U.S. at 447; *United States v. Villines*, 13 M.J. 46, 53 (C.M.A. 1982). "Simply stated, an immunity statute permits the Government to compel a citizen to provide information but prevents governmental use of the information to prosecute the citizen." *Mapes* 59 M.J. at 66-67 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 54, (1964)). Because testimonial immunity eliminates the danger of criminal liability from the government's use of a witness's incriminating statement, it is coextensive with the privilege against self-incrimination and therefore eliminates the witness's right to refuse to answer on grounds of the privilege. *Kastigar,* 406 U.S. at 453; *Mapes*, 59 M.J. at 66.

The case law clearly demonstrates that the purpose of the government in granting testimonial immunity is not to create witness amnesty. The purpose is to lawfully overcome a witness's refusal to answer incriminating questions in order to obtain information from the witness the government could not otherwise obtain. Testimonial immunity is not intended to provide a windfall for the witness but is instead utilized so the government can more effectively enforce its criminal laws.

We find that because the appellee never invoked his privilege against self-incrimination and willingly agreed to answer the trial counsel's questions after being advised of his Article 31 rights, there was no refusal for the immunity to overcome and no need for the appellee to be ordered by the convening authority to provide that information. The grant of immunity and order, although available, were unnecessary and

did not operate to protect the appellee or to govern his conduct under these circumstances. Moreover, nothing in R.C.M. 704 or in the language of the convening authority's memorandum requires a different result.

R.C.M. 704

R.C.M. 704 regulates the authority and procedure for grants of immunity in courts-martial. Consistent with the practice under the federal immunity statute (18 U.S.C. § 6001-6005), a GCMCA "may grant a servicemember immunity from the use of testimony, statements, or any other information derived directly or indirectly from such immunized testimony or statements in a subsequent court-martial." *Mapes*, 59 M.J. at 66 (referencing R.C.M. 704 as being consistent with the federal practice for granting immunity); *Villines* 13 M.J. at 53, 57 (a pre-R.C.M. 704 case analogizing the GCMCA's authority to grant immunity to that contained in the federal immunity statute).

Unlike a number of previous federal laws that contained separate immunity provisions and were interpreted by the courts as automatically granting immunity to a witness who merely appeared pursuant to a subpoena and answered questions at a proceeding,[2] the current federal immunity statute requires a witness to invoke the privilege against self-incrimination before he or she will be ordered to give testimony and provided testimonial immunity.[3] Once such an order is communicated to the witness, the witness may no longer refuse to comply on the basis of self-incrimination. 18 U.S.C. § 6002; *See*, H.R. REP. No. 91-1549, at 11 (1970). "The witness must claim the privilege to receive immunity. "[Section 6002] *is not an immunity bath*" and is "no broader than" the Fifth Amendment privilege. Id. at 12. (emphasis added) "Refusal to testify *following communication* of the immunity order warrants contempt proceedings." Id. (emphasis added).

Likewise, R.C.M. 704 is not an "immunity bath," and we do not construe the convening authority's grant of immunity, which is derived from the Rule, as creating one for the appellee.[4] Similar to its federal counterpart, the discussion to R.C.M. 704 provides in part:

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[2] *See*, e.g., *United States v. Monia*, 317 U.S. 424, 427 (1943) (the Supreme Court found that under the language of the Sherman Act a witness's testimony was immunized without having to first claim the privilege against self-incrimination.) *See generally*, Annotation, *Necessity and sufficiency of assertion of privilege against self-incrimination as condition of statutory immunity of witness from prosecution*, 145 A.L.R. FED. 1416 (1943).

[3] A district court order compelling such testimony or information can be requested by a United States attorney, with appropriate approvals from senior Justice Department officials, when it may be necessary to the public interest and the individual has refused or is likely to refuse to testify or provide information on the basis of his self-incrimination privilege. 18 U.S.C. § 6003(b).

[4] The appellee cites a pre-R.C.M. 704, Army Board of Review case, *United States v. Layne*, 21 C.M.R. 384 (A.B.R. 1956), in support of the position that the immunity took effect when it was signed by the convening authority notwithstanding non-delivery to the appellee. While this case

> Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, *and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination* . . . . A person who has *received* a valid grant of immunity from a proper authority may be ordered to testify. In addition, a servicemember who has *received* a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant.
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> R.C.M. 704 (a), (d), Discussion (emphasis added).

The provisions of R.C.M. 704, therefore, contemplate the following procedures: In anticipation of a witness likely exercising his or her privilege against self-incrimination or where a witness has already exercised the privilege, the trial counsel may seek from the GCMCA a grant of testimonial immunity and an order for the witness to provide information and testify. Once granted in writing by the convening authority, the next step is the communication of the grant of immunity and the order to the witness for the purpose of overcoming the witness's refusal or likely refusal to answer questions, either in a preemptory fashion or after the witness actually invokes the privilege.

Like its federal counterpart, R.C.M. 704 does not envision an automatic or self-executing immunity being created simply because the trial counsel preemptively obtains a grant of immunity and an order compelling the witness to answer. To hold otherwise, under circumstances where the witness is without knowledge of the immunity and order, and who is voluntarily answering questions not under compulsion of the order and in reliance upon the immunity, is to contravene the very purpose for which a convening authority grants testimonial immunity—that is to obtain what cannot be obtained without the immunity so as to promote the effective enforcement of the UCMJ and the needs of good order and discipline.

The Language of the Grant of Immunity

Using "normal grammatical construction" the military judge interpreted the wording of the convening authority's 3 February 2011 grant of immunity ("I hereby grant you testimonial immunity and order you to answer any questions…") as immediately conveying immunity upon any statements the appellee made in response to those later "questions by investigators and counsel in the case of [*U.S. v. A1C JF*]." She reached this conclusion because "[t]he term 'hereby' is commonly defined as 'by this act' or

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has similarities it is distinguishable from the case before us both on the facts and law because the Army Board relied upon the statutory view of immunity espoused in *Monia* which was later replaced by the federal immunity statute and its military counterpart R.C.M. 704. *Monia*, 317 U.S. at 427.

'through this document'." We do not, however, find that the plain language of the convening authority's memorandum requires this result, and we find that the military judge's determination that it did was error. [5]

The language does not expressly indicate the grant of immunity as having immediate effect. The military judge imputed that meaning to it, an implication contrary to the authorities we have discussed above. In the context in which it was written (i.e. the authority and procedures of R.C.M. 704 and the well established legal reasoning underlying grants of testimonial immunity), the convening authority's grant of immunity and order to testify, as worded, must be interpreted as only having operative effect upon communication of the grant and order to the appellee or upon his being compelled to answer questions, and not before.

Also, we reject the arguments that because the SJA specifically requested the immunity become effective only upon receipt by the witness or because subsequent grants of immunity to others expressly made the immunity effective upon receipt, that the *absence* of this language from the appellee's grant of immunity somehow implies its immediate operative effect. Although expressly making a grant of immunity effective upon communication to or receipt by the witness may promote greater clarity, we find no requirement under R.C.M. 704 to include this as an express condition in a written grant of immunity in order to prevent its automatic and immediate application upon signature of the convening authority.

The Actions of the Trial Counsel

The appellee also posits that trial counsel was required to deliver the grant of immunity to the appellee, and that his intentional withholding of the immunity wrongfully usurped the authority of the GCMCA. Military law makes clear that only the GCMCA has the authority to grant immunity. "Within the armed forces, only an officer authorized to serve as a GCMCA may grant immunity." R.C.M. 704(c). "The President has not constrained the GCMCA from using a subordinate to convey an offer of immunity . . . [t]he GCMCA, however, may not delegate the authority to grant immunity." R.C.M. 704(c)(3). *United States v. McKeel*, 63 M.J. 81, 83 (C.A.A.F. 2006).

There is no dispute that the GCMCA personally approved a grant of testimonial immunity intended for the appellee and left it to the trial counsel to actually convey the immunity and order to the appellee. There was therefore no delegation of the GCMCA's authority. We fail to see, however, how the actions of the trial counsel in this case improperly impinged upon or interfered with the command authority of the GCMCA or

[5] We note that the language used in this memorandum mirrors the "Sample Grant of Immunity and Order to Testify" proscribed by Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, Figure 6.7. This suggested format is used by convening authorities throughout the Air Force.

constituted a violation of the provisions of R.C.M. 704. Although immunity is discretionary and the convening authority decides whether or not to authorize immunity, the trial counsel decides how best to prepare and try the case to meet the prosecution's burden of proof. R.C.M. 704, Discussion and R.C.M. 502(d)(5), Discussion. In this respect, a grant of immunity is a tool the convening authority may make available to the prosecutor so that the enforcement of the criminal law is not thwarted. *Villines*, 13 M.J. at 53, 55.

Here, the GCMCA approved a grant of testimonial immunity for use by the trial counsel in anticipation of the appellee potentially invoking his privilege against self-incrimination. We find that although the trial counsel could have offered the grant of immunity before questioning the appellee he was not required to do so. Trial counsel was not acting outside his authority by first waiting to see whether the appellee would answer questions without being compelled by an order from the convening authority. As it happened, the appellee waived his right against self-incrimination and agreed to answer questions. The tool of immunity was not needed. The underlying purpose for which the convening authority had approved immunity, to overcome the appellee's refusal and to compel answers, never arose. Under these circumstances, we find that the trial counsel's failure to convey the immunity prior to questioning the appellee did not contravene the GCMCA's authority to approve immunity or otherwise interfere with his command authority, and was not inconsistent with the provisions of R.C.M. 704.

Voluntariness of Confession

Finally, we address the voluntariness of the appellee's confession. The military judge found that the Article 31 rights advisement was inadequate because the appellee was not informed of the grant of immunity and order. She reasoned that under the totality of circumstances the confession was not knowingly and voluntarily made because the appellee's decision to waive the privilege was "not based on a full understanding of the circumstances." We disagree. Under the facts of this case a "full understanding of the circumstances" as proscribed by the military judge would result in an involuntary confession. Had the trial counsel informed the appellee of the grant of immunity and order prior to advising him of his rights, the immunity would have taken effect thereby nullifying the appellee's expressed intent to give a voluntary statement.

The government is prevented from using a confession that is obtained as a result of coercion, unlawful influence, or unlawful inducement. Article 31(d), UCMJ, 10 U.SC. § 834; see also Mil. R. Evid. 304 and 305. "Consequently, an accused's confession must be voluntary to be admissible into evidence." *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002), citing *Dickerson v. United States*, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L.Ed2d 405 (2000).

We find no authority for the proposition that a suspect is entitled to be informed of a grant of immunity as part of a rights advisement under either Article 31(b) or the Fifth

Amendment. There is little doubt that a suspect would desire to know about a grant of immunity in deciding whether to invoke his or her right against self-incrimination; however, this is not the test. "Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right . . . . we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (citations omitted) (holding that a failure of the police to inform a suspect of a call from an attorney, retained by a relative but not requested by the suspect, did not deprive the suspect of information essential to his ability to knowingly waive his rights under *Miranda*).[6] See also, *United States v. Kelley*, 48 M.J. 677, 680 (Army. Ct. Crim. App. 1998) ("[The Fifth Amendment] does not mandate that police give suspects any and all information that suspects could find helpful in deciding whether to remain silent or speak." (citations omitted)).

Similarly, because the appellee was ignorant of the grant of immunity, it could not have influenced his ability to make a knowing waiver of his rights. Nor do we find that by withholding information about the grant of immunity and order he was deprived of information essential to his ability to knowingly waive his right against self-incrimination. The rights advisement as recited by the trial counsel was sufficient under Article 31, UCMJ, and the Constitution. We acknowledge, as noted by the military judge, that the appellee's statement was inevitable because the trial counsel had the immunity and order in his "hip pocket" to override, if necessary, the appellee's invocation of his privilege. However, the inevitability of his statement is not material to our decision because at the moment the appellee decided to speak the decision was entirely his, made after a proper rights advice and knowing full well that he could refuse to answer questions. As the facts demonstrate, the appellee was not influenced by or induced by the immunity to waive his privilege—it clearly played no role at all in his decision process. "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Washington* 431 U.S. at 188. Furthermore, in examining the totality of circumstances surrounding the rights advice and the interview, and after considering the characteristics of the appellee and the details of the interview, we find that the appellee's confession was knowing and voluntary. *Ellis*, 57 M.J. at 378-379.

Conclusion

We find that the military judge was incorrect as a matter of law in finding that the appellee's confession was involuntary and obtained under a grant of testimonial immunity. Based on this erroneous conclusion, the military judge then erred in finding the government had improperly used the confession in its prosecution of the appellee.

[6] *United States v. Miranda*, 384 U.S. 436 (1966).

We hold, therefore, that the military judge abused her discretion in dismissing the charge and specification. We set aside the decision of the military judge and remand the case to the trial court for further proceedings.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 4th day of October, 2011,

ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **GRANTED**.

BRAND, Chief Judge; ORR, Senior Judge; and WEISS, Judge concur.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court