UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Master Sergeant RICHARD S. WINCH
United States Air Force

ACM 35234

19 August 2004

Sentence adjudged 14 February 2002 by GCM convened at Brooks Air Force Base, Texas. Military Judge: Patrick M. Rosenow.

Approved sentence: Confinement for 18 months, a $2000.00 fine, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Maria A. Fried, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Steven R. Kaufman.

Before

PRATT, STONE, and GENT
Appellate Military Judges

PER CURIAM:

We examined the record of trial, the assignments of error, the government's answer, the appellant's reply thereto, and a declaration from trial defense counsel. For our convenience, we address the assignments of error in reverse order.

The appellant asserts, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the evidence is legally and factually insufficient to sustain the findings of guilty to Specifications 2, 3, and 5 of Charge II. We considered this issue and find it without merit.

The appellant also alleges the staff judge advocate erred by failing to serve on the defense an addendum to the staff judge advocate's recommendation (SJAR) that contained new matter. We review this issue de novo. *United States v. Key*, 57 M.J. 246,

248 (C.A.A.F. 2002). The government concedes the addendum contained "new matter." Rule for Courts-Martial 1106(f)(7) and its Discussion. We agree. We also find that the defense has made a colorable showing of possible prejudice by stating what it would have submitted to deny, counter, or explain the new matter. *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997); *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). We further find that the defense counsel's proffered response to the unserved addendum could have produced a different result. *United States v. Gilbreath*, 57 M.J. 57, 61 (C.A.A.F. 2002) (citing *United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000)). Under the circumstances, "We will not speculate on what the convening authority would have done in this case had defense counsel been properly served with the addendum and allowed to respond." *Gilbreath*, 57 M.J. at 62. *See also United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). We hold that a new SJAR and action are required.

The findings are affirmed. The action of the convening authority is set aside. The record is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court