

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230313

Staff Sergeant (E-6)
DAVID L. HUNTER,
United States Army,

Appellant

Tried at Fort Cavazos, Texas, on 16
February and 1 June 2023, before a
general court-martial appointed by the
Commander, III Corps and Fort
Cavazos, Lieutenant Colonel Maureen
A. Kohn, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

**I. WHETHER A DISHONORABLE DISCHARGE FOR A
STIPULATED NEGLIGENT AND UNINTENTIONAL ACT
IS INAPPROPRIATELY SEVERE WHEN THE MILITARY
JUDGE HAD NO DISCRETION AS TO THE DISCHARGE**

**II. WHETHER A DICTATED DISHONORABLE
DISCHARGE TERM VIOLATED THE PLAIN WORDING
OF R.C.M. 705 AND ARTICLE 53A**

**III. WHETHER A TERM IN THE PLEA AGREEMENT IS
LEGAL AND ENFORCEABLE WHEN IT ATTEMPTS TO
CURTAIL THIS COURT’S AUTHORITY AND IS
CONTRARY TO R.C.M 705(e)(4)(B)**

**IV. WHETHER THE DILATORY POST-TRIAL
PROCESSING OF THIS CASE WARRANTS RELIEF**

**V. WHETHER APPELLANT WAS PREJUDICED
WHEN BOX 6A SHOULD HAVE STATED “YES”
WHEN APPELLANT’S COUNSEL SUBMITTED THE**

**NECESSARY PAPERWORK FOR WAIVER TO THE
CONVENING AUTHORITY BUT THE STAFF JUDGE
ADVOCATE INFORMED THE CONVENING
AUTHORITY THAT APPELLANT HAD REFUSED TO
PROVIDE THE PAPERWORK**

Statement of the Case

Appellant filed his brief on 14 December 2024. After obtaining this Court's permission, Appellant submitted an additional assignment of error on 27 December 2023. The Government responded on 29 March 2024. This is Appellant's reply brief filed in accordance with the one-week extension.

Argument

The government's brief acknowledges/does not dispute many of Appellant's arguments, but overall, attempts to set up straw man arguments, misstates/omits key facts, and misapplies non-binding precedent.

A. A Dishonorable Discharge is inappropriately severe in this case

The government, both in the stipulation of fact and seemingly on appeal, agrees that at most, Appellant's actions were only negligent and "unintentional." (Gov't Br. at 6). It also, without using the word, concedes they cannot find a single case where a negligent homicide ever resulted in a dishonorable discharge (DD) even in cases with more egregious facts.¹ The question presented here is whether a

¹ The government's only citation, from what looks to be extensive research given their sole source, is not available online through Lexis and is an "involuntary

dishonorable discharge for a stipulated unintentional act in light of Appellant's overall service as made clear by "a robust sentencing case, [with] nine witnesses" is what justice requires. (Gov't Br. at 23, n.8).

Recently, the C.A.A.F. also reaffirmed that not only should this Court look to the sentence as a whole, but each individual part of the sentence. *United States v. Flores*, __ M.J., __, 2024 CAAF LEXIS 162 (C.A.A.F. 2024) (Article 66 "require[s] a CCA to review the appropriateness of *each punishment* in the adjudged sentence). In answering the question regarding the DD in this case, the government loses the forest for the trees; the specific circumstances of this case do not warrant the Army's most severe punishment even without looking at decades of precedent.

In trying to justify why a DD is appropriate for an accident with no malice, the Government misstates key facts and appears to set up a straw man argument. First, the government twice says Appellant accidentally collided with the victim when she was "squarely in front" of Appellant. (Gov't Br. at 4, 7). This is not supported by the stipulation, the video, or the pictures and the government cites

manslaughter" case confirming Appellant's argument. (Gov. Br. at 9, n.1). However, the facts of that case are, as Appellant noted in its original brief, markedly different since that involved more than negligence and involved more reckless acts. Indeed, Appellant noted that no case for negligent homicide has previously received a DD, and even ones that receive a bad-conduct discharge (BCD) always involve excess speeding and/or drug or alcohol use (or now, texting and driving). The government's citation confirms this point.

nothing in the record for this proposition. It is undisputed that Appellant was completing a turn and simply did not see the victim. There was no argument or indication that Appellant was accelerating, intoxicated, or looking away as the car frame/divider from the door to the windshield is located in the position the victim would be in during significant portions of the turn. In fact, the government does not attempt to argue Appellant was even accelerating to try and find any additional aggravating evidence, they just say the collision took place “with enough velocity.” (Gov’t. Br. at 4, 7).

The government also seems to miss the primary points of both the facts and plea negotiations. Appellant immediately took responsibility, offered to plea within a month, and was willing to take virtually anything *the government* demanded to avoid causing more pain to the victim’s family. (R. 180-87). Rarely do accused take so many actions at their own peril to try and ‘right’ a situation. However, the government repeatedly misstates that the DD was Appellant’s idea and not a dictated term from the government when in fact it was a term the government required to try an attempt to achieve victim support for a plea. (Gov’t Br. at 13).

The government also tries to distinguish recent cases this Court has heard/is hearing by mistating that Appellant “was left with no such injuries.” (Gov’t Br. at 11-12). It is likely the government is overstating this position and cabining

“injuries” to just physical trauma since there is ample evidence in the record of the mental anguish Appellant and his wife felt and still feel. (R. 181-82, 183, 185-87).

Appellant is not asking for sentence comparison. Appellant is arguing for an appropriate sentence in line with purpose of Article 66 to fulfill the “uniformity” in sentence (App. Br. at 16-17 (citing *United States v. Tardif*, 57 M.J. 219, 226 (C.A.A.F. 2002) (internal citations omitted))), and to cure the convening authority’s involvement in removing the “individualized consideration” of this case. Appellant is also citing precedent illustrating where this case falls on the spectrum of malice/intent and results – not asking for specific factual comparisons. In doing so, justice does not require this severe of a discharge given that all victims in involuntary deaths are important to their respective families.

The government also does not address that this Court can also take the convening authority’s actions, including the withholding of the vehicle, post-trial delay, and incorrect clemency advice in the Staff Judge Advocate’s Recommendation. This silence indicates their lack of dispute on this issue which also reenforces the justification for relief.

B. Improper Plea Term – the convening authority’s added new authority to withdraw if this Court exercises any sentencing discretion

The government concedes that R.C.M. 705 lays out specific conditions where a convening authority can withdrawal from a plea agreement. (Gov’t Br. at

25-27). It also concedes that this Court exercising its discretion for sentence appropriateness is not one of those listed conditions. (Gov't Br. at 25-27).

However, the government then attempts to argue that the rule does not expressly state that the convening authority cannot add a new ability to withdrawal, or that at least, the ability to withdrawal because of a change in the adjudged sentence is “analogous” to that of findings. (Gov't Br. at 28). In supporting this argument, the government incorrectly states that an unpublished Air Force opinion addressed this question and allowed it. (Gov't Br. at 25-26). However, that case does not stand for the government's position.

In *Goldsmith*, the Appellant did have a term that discussed the “findings and sentence,” however, the Appellant was asking that his plea be “recast” so that when a charge/specification is dismissed at trial, it is “with prejudice”. *United States v. Goldsmith*, 2023 CCA LEXIS 8, *6, 10-11 (A.F. Ct. Crim. App. 11 Jan. 2023) ([unpublished](#)). The court was not persuaded and stated “we see no obvious reason why a convening authority may not agree to dismiss specifications with prejudice so long as the remaining *specifications* are upheld during appellate review.” *Id.* at *11 (emphasis added). The analysis was not regarding the Court's sentencing relief or the ability of the convening authority to withdrawal based on only a change in the sentence, but rather, whether its permissible for the convening authority to condition prejudice upon appellate review.

Moreover, this Court’s recent *en banc* opinion in *United States v. Kibbler*, supports the Appellant’s reading about when it is appropriate to send a case back to the convening authority and the effect of the withdrawal provision. Army 20220245, 2023 CCA Lexis 468 (A. Ct. Crim. App. 2023) (*en banc* opinion of the court upon reconsideration). *Kibbler* repeatedly discusses the ability to withdraw when a “finding” is set aside, and even then, it is contingent on what this Court does with the case (sending it back or reassessing the sentence). Since Appellant has expressly not asked, nor does he desire, this Court to overturn or review the findings to avoid, there is simply no authority for the convening authority to try and later bring more charges if this Court grants sentencing relief.

The government’s expansion of this power also has significant policy concerns. This would disrupt the very core of Article 66 review and sentence appropriateness, something that is statutorily given to this Court. *Tardif*, 57 M.J. at 224 (“the power and duty” of a CCA “to review sentence appropriateness under Article 66(c) is separate and distinct from [a CCA’s] power and duty to review a sentence for legality.”). It would undercut, the purpose of Article 66 sentence review, which C.A.A.F. stated “ensure[s] that there was a uniform Code because they would examine courts-martial sentences from throughout the world ‘to establish *uniformity* of sentences throughout the armed forces.’” *Id.* at 226 (internal citations omitted) (emphasis added).

C. Dictated Specific Sentences were not Permissible Before the Recent Amendment to R.C.M. 705(d).

In arguing that the *previous* version of R.C.M. 705(d) allowed for specific sentences despite that wording being effective only after the events in this case, the government again sets-up a straw man argument as well as ignores the legislative history and military justice review group's guidance as to "ranges."

First, the government argues that during the period of time where R.C.M. 705(d)(4) did not exist, that not allowing for specific sentences would mean that the government/accused could not agree to terms like "no other punishment will be adjudged" or "no confinement will be adjudged." (Gov't Br. at 11). The inability to punish is not the same as mandating a specific sentence. That is a straw-man argument and comparing to dissimilar events. Nothing in Appellant's brief suggests that the government was prohibited in "limiting" what punishments are available, as that is the exact language of the statute that R.C.M. 705(d) is based on. The government's argument also highlights the common-sense meaning of the statutory language as Appellant originally argued.

Second, the government, citing a *Navy* case which did not go over the language of the statute, similar statutes on the same subject, or the MJRG's advice to the President, argues that a mandatory DD is really just a minimum sentence. As Appellant pointed out and the MJRG highlights, the emphasis is on "ranges" for the previous version of R.C.M. 705(d). Placing the minimum, where it is not

statutorily mandated, to the same as the maximum is effectively dictating a specific sentence regardless of what label the government tries to place on that. Specific Sentences or portions thereof are *now* expressly authorized in the rule, however, it was not at the time of this case. The government does not attempt to explain why this change was needed if it was already included. Neither do the sister service courts adequately address this change.

D. Post-Trial Delay.

Despite this Court's recent opinion and reaffirmation in *Gale*, the government continues to miss the mark: "In *Winfield*, we encouraged the government to move with alacrity at *all* states of the post-trial process, and to *document* any significant delays. Despite that clear guidance, the government asserts that no explanation is necessary in this case, because it contends no delay has occurred, let alone excessive delay." *United States v. Gale*, Army 20230142, 2024 CCA LEXIS 128 (A. Ct. Crim. App. 21 Mar. 2024) ([summ. disp.](#)) (finding excessive delay for 124 total days of delay with an unexplained gap of three month, but not granting relief as Appellant did not allege any form of prejudice).

Here, the government still has not offered a reason for the delay despite Appellant's demand for speedy-post trial processing. While the government has often obtained an explanation after the fact when none was included in the record, it has not in this case. The government also ignores the OSJA's simultaneous

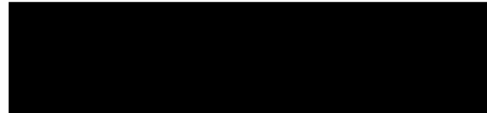
withholding of Appellant's vehicle, despite not needing it further, and conditioning its release not on the finality of the case, but on Appellant's brief and what specific request was in it. This created a financial issue that the government controlled the timeline of by delaying/not prioritizing this case despite a speedy-trial request. Unlike other cases where losing property permanently can be seen as a collateral consequence, as the unopposed affidavits make clear here, the truck was released after Appellant submitted its brief. This indicates there was no need for the OSJA to create this situation – one in which there is ample evidence they knew was exacerbating the harm on a new mother/military spouse. This illustrates the connection of both of the OSJA's actions and direct impact to the Appellant's post-trial issues as well as his family, their finances, and the compounding stress of that created all of which was unnecessary with either efficient processing or releasing the vehicle in a timely manner.

Conclusion

For the foregoing reasons, this court should grant meaningful and appropriate sentence relief under both the Due Process Clause and Article 66 affirming only the sentence to confinement.



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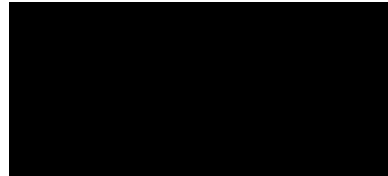


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² Colonel Philip Staten was unavailable to sign at the time of this brief.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals, the respondent, the Government Appellate Division, and the Defense Appellate Division on 12 April 2024.



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