

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**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**

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Statement of the Case

On 1 June 2023, a military judge sitting as a general court-martial convicted appellant, Staff Sergeant David Hunter, in accordance with his plea (which plea took place on 16 February 2023), of one specification of negligent homicide in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [UCMJ]. (R. at 12, 55; Charge Sheet). The military judge sentenced appellant to nine months of confinement, no reduction in rank or forfeitures despite a request from the trial counsel, and in accordance with the dictated term in the Plea Agreement, a dishonorable discharge. (R. at 194, 199; Statement of Trial Results).

On 13 June 2023, the convening authority disapproved appellant's request for deferment and waiver of automatic forfeitures for appellant's wife and twenty-three day old son without explanation and took no action on the findings and sentence. (Action). On 19 June 2023, the military judge entered judgment (Judgment) and shortly thereafter, appellant requested speedy post-trial processing (Speedy Trial Request). On 30 October 2023, this court docketed appellant's case. (Referral).

Statement of the Facts

The underlying facts stem from a low-speed traffic accident where the Appellant, while he was leaving the military hospital for back pain treatment, did

not see Ms. [REDACTED] and unintentionally hit her with his truck as she crossed the street. (R. at 26; Stipulation of Fact (Stip.) 9-11).

The Appellant left the hospital after being treated for back pain the morning of the accident. (R. at 26; Stip. at 7). Appellant failed to fully come to a complete stop at a stop sign and was “distracted by multiple issues, including the pain in his back that he had just been in treatment for, thinking about work tasks and deadlines, and reflecting over an incident that had just occurred on the hospital elevator regarding a young child who got stuck in front of the closing door that the [Appellant] stopped from closing on the child.” (Stip. At 7-8; R. at 26, 30).

As Appellant made a left-hand turn at a four-way intersection where no other vehicles were present, Ms. [REDACTED] was legally walking in the cross-walk away from the medical center across the left-most lane perpendicular to Appellant. (R. at 26; Stip. at 8).¹ Appellant struck Ms. [REDACTED] at low speed near the end of his turn and never saw her. (R. at 26-27; Stip. at 10-11). Due to the truck’s size, Ms. [REDACTED] went under the vehicle and its tires. (R. at 26-27; Stip. at 10-12).



Witnesses heard what had happened and saw the Appellant brake and immediately attempt to render aid to Ms. [REDACTED] (Stip. at 11-12; R. at 26)). As others arrived to assist, the Appellant hyperventilated, cried, and had a panic attack which required his admittance to the hospital. (R. at 26, 82-83; Stip. at 12). The witnesses who assisted the Appellant render first-aid recalled Appellant repeatedly saying “I didn’t see her.” (Stip. at 12). Ms. [REDACTED] was pronounced dead within twenty minutes. (Stip at 5, 12).

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

Facts Relevant to Assignment of Error

The Appellant immediately entered into plea discussions and admitted fault to investigators and later did again by pleading guilty in February 2023. (R. 181-82, 183, 185-87). He never attempted to shirk responsibility and has always apologized profusely for his unintentional actions including writing a letter to Ms. AMA’s family. (R. 130, 134, 181-82, 183, 185-87).

The convening authority included a term in the Plea Agreement that usurped the discretion from the military judge and mandated the judge sentence the accused to a dishonorable discharge regardless of the mens rea, mitigation, or extenuation. (Plea Agreement at 3; R. at 48-49). Appellant accepted this request because he did

not want to put Ms. [REDACTED] family through any hardship, even an Article 32 preliminary hearing or “not knowing” what would happen; he wanted to accept responsibility. (Def. App. Sub; R. 188, 130, 134, 181-82, 183, 185-87).

When recommending that plea agreement, the chain of command noted that appellant “does not deserve a dishonorable discharge based on his entire service.” (Transmittal).² Appellant’s leadership testified during pre-sentencing and still ranked him the “#1 of 15 NCOs” and the “#1 E-6” the First Sergeant had worked with in twenty years. (R. 147; 157). Multiple officers and senior NCOs desired for appellant to remain in the service (*See e.g.*, R. 100, 103, 118, 131-32, 147, 157); even government witnesses who did not know Appellant asked for leniency. (R. 83-84). Witnesses went as far to note the mandatory discharge was “a mistake” for the Army. (R. 131-32).

Appellant’s sentencing case and exhibits were filled with support. He is from a wholesome background, a small town (population under 500), and has served for more than a decade. (Def. Ex. A, p. 4-6). He has deployed multiple times to the Middle East including spending time in Iraq, Syria, and Afghanistan. (Def. Ex. A., p 5, 64, 70-71; Def. Ex. B). He volunteered for a Korea and Germany rotations/deployments, and has done multiple NTC rotations. (Def. Ex. A., p 5, 64,

² The trial counsel’s “recommendation” that the Plea transmittal references was not provided to this Court for review despite its requirements under R.C.M. 701(a)(1); (2); and (6).

70-71; Def. Ex. B). He also earned Soldier of the Quarter more than once, and specifically during his deployment to Iraq. (Def. Ex. A., p. 72-74).

Multiple letters of support also wished for appellant to remain in the service. (*See e.g.*, Def. Ex. A, p. 9, 10, 13-14). He educated and mentored officers, senior NCOs, peers, and subordinates. (*See e.g.*, Def. Ex. A, p. 9, 10, 13-14; R. at 99, 103, 114-16, 123-129, 137, 147-150, 157). He repeatedly volunteered for deployments, extra duties, and was a compassionate educator. (*See e.g.*, Def. Ex. A., p. 6, 9-10, 13-14, 45-46, 49, 53; R. at 99, 103, 114-16, 123-129, 137). He supported victims of Hurricane Harvey and earned the Humanitarian Service Medal. (Def. Ex. A, p. 53, 55-56). During his deployments, he received a device for eliminating enemy combatants, but only recently sought counseling due to a Korea deployment and covid. (Def. Ex. A, p. 62, 64; R. 172-188). He was a certified Equal Opportunity Leader and Master Resilience Trainer without mentioning his other computer, fiber optic, and martial arts specialties/certifications. (Def. Ex. A, p. 76-82).

The photos alone show, more than most “Good Soldier Books,” a man dedicated to the Army, the community, and family. (Def. Ex. A, p. 84-112). He received the Volunteer service medal for assisting in the community to USAG Grafenwoehr with blood drives and assisting at elementary schools and Easter egg hunts despite not having children of his own. (Def. Ex. A, p. 66-69). It was clear to

his co-workers that he loved children and longed to have a family and be a father. (R. at 128-35, 164-65).

After getting married, his wife had trouble conceiving due to her age, so the two paid out of pocket to undergo IVF. (Def. Ex. A., p.6; R. at 178-79; R.C.M. 1106 matters, p 3; Def. App. Sub). Just one-week after the tragic accident, the couple learned that their repeated and emotional bouts of IVF with daily injections, paid off; appellant's wife was pregnant. (Def. Ex. A., p.6; R. at 177). Mrs. [REDACTED] gave birth to their first and only child (baby [REDACTED]) just eleven days before Appellant was sentenced, but due to complications in the high-risk pregnancy, had to undergo surgery at the Carl R. Darnall Military Hospital. (R. 176-78; Def. Ex. A; RCM 1106 matters, p. 1-3; Def. App. Sub).

Despite the military judge not adjudging either forfeitures or rank reduction (even though the trial counsel requested it (R. at 194)) and that automatic forfeitures kicked in solely due to the convening authority's dictated discharge, the convening authority denied the appellant's request to defer and waive automatic forfeitures leaving the recovering first-time mother/military wife completely without the ability to work or provide for herself initially. (RCM 1106, p. 1-3; R. at 175-188; Def. App. Sub.).

Making matters worse (specifically for AE 4), the convening authority (or a designee) has not authorized the appellant's vehicle's release from CID despite the

guilty plea being complete, and having the registration, photos, and accident video. (Stip. 5-12; R.C.M. 1106 matters, p 1-3; Def. App. Sub). This forced the [REDACTED] to obtain another vehicle and make two car payments so Mrs. [REDACTED] could attend medical appointments, buy diapers/groceries, and anything a first-time mother may need who is recovering from surgery. (Def. App. Sub). Likewise, the convening authority did not provide any explanation for refusing to defer and/or waive automatic forfeitures to support an eleven-day old child. This has caused severe financial hardships. (Def. App. Sub). Mrs. [REDACTED] has attempted to mitigate it by going back to work earlier than is medically advisable and repeatedly contacting CID, Fort Cavazos, and the appellant's defense and appellate defense counsel while the government surpassed both the *Brown* and *Moreno* clocks (despite a speedy trial request). (Def. App. Submission; Speedy Trial Request).

Standard of Review

Under Article 66, UCMJ, the Courts of Criminal Appeals [CCAs] review sentence appropriateness de novo. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). In “exercising this statutory mandate, a CCA has discretion to approve only that part of a sentence that it finds ‘should be approved,’ even if the sentence is ‘correct’ as a matter of law.” *Id.* (quoting *United States v. Nerad*, 69 M.J. 138, 142) (C.A.A.F. 2010)).

Law

A. This Court has carte blanche authority to ensure the sentence is appropriate to the particular Soldier and may only affirm sentences that are appropriate under all the circumstances.

This Court has nearly unfettered discretion in reviewing a sentence to correct inappropriate outcomes. *Kelly*, 77 M.J. at 406 ((The CCAs have “‘carte blanche to do justice.’”) (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). Article 66(d), UCMJ, provides that this Court “may affirm only . . . the sentence or *such part* or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.”

The Court of Appeals for the Armed Forces (C.A.A.F.) has consistently held that “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.” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Before it may affirm, the CCA must be satisfied that the sentence is “(1) ‘correct in law,’ and (2) ‘correct in fact.’ Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it determines, on the basis of the entire record, should be approved.” *Id.* In *Jackson v. Taylor*, the Supreme Court concluded that CCAs must affirm only so much as they found to be “justified by the whole record,” and to set aside all or part of a sentence, “either because it is illegal or because it is inappropriate.” 353 U.S. 569, 576-77 (1957).

The C.A.A.F. has also concluded that this Court has “the responsibility to, ‘in the interests of justice, substantially lessen the rigor of a legal sentence.’” *Tardif*, 57 M.J. at 223 (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (1955)).

There are many reasons for this wide discretion which are applicable here. First, the power to modify sentences “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 (Crawford, C.J., dissenting) (citing Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., at 1187 (1949) (the “Hearings”)). This is reinforced by Professor Morgan's commentary:

The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish *uniformity of sentences throughout the armed forces*.

Tardif, 57 M.J. at 226 (citing *Uniform Code of Military Justice: Text, References and Commentary* based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense, at 94 (1950)) (emphasis added).

A second reason is to “eliminate command influence” such as the convening authority sending a case for a particular sentence or outcome. *Tardif*, 57 M.J. at 226 (citing Hearings at 608). This is why CCAs have the authority to examine questions of fact, and not just law. *Tardif*, 57 M.J. at 226; *see also Kelly*, 77 M.J. at

407 (this power “has no direct parallel in the federal civilian sector,” and no other federal appellate court, including the CAAF, possesses this power) (quoting *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)).

The third reason for this “sweeping Congressional mandate [is] to ensure ‘a fair and just punishment for every accused.’” *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted).

In wielding this discretion, this Court determines “whether it [personally] finds the sentence to be appropriate.” *Baier*, 60 M.J. at 384. In reviewing sentence appropriateness, it is a “widely adopted view ‘that the punishment should fit the offender and not merely the crime.’” *United States v. Mack*, 9 M.J. 300, 317 (C.M.A. 1980) (quoting *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949)). This requires “‘individualized consideration’ of the particular appellant ‘on the basis of the nature and seriousness of the offense and character of the offender.’” *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Among other factors, the sentence needs to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, promote adequate deterrence of misconduct, protect others from further crimes by the accused, and rehabilitate the accused. R.C.M. 1002(f)(3)(A)-(F); *United States v. Watlington*, 2023 CCA LEXIS 426, *27-28 (N-M.C.C.A. 2023). To analyze

those factors, this court can look to the entire record, including matters submitted in clemency. *United States v. Martinez*, 76 M.J. 837, 841-42 (A.C.C.A. 2017); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

B. Dishonorable Discharges for Negligent Acts are almost non-existent and have *never* been adjudged absent *other* egregious misconduct.

Dishonorable Discharges (DD) are practically unheard of when the sole underlying crime is a negligent act. *Compare United States v. Chambers*, 54 M.J. 834, 834 (N-M.C.C.A. 2001) (Sentenced to 18 months, total forfeitures, and reduction to E-1, but no punitive discharge for a negligent homicide resulting from drunk driving with a .191 BAC) *with United States v. McDuffie*, 65 M.J. at 631, 638 (A.F.C.C.A. 2007) (setting aside a Bad-Conduct Discharge (BCD) for a negligent homicide where Appellant crossed a center line in the United Kingdom and struck a car killing a British Citizen and her unborn child).

When the only underlying offense is a traffic violation like here, the overwhelming majority of cases either do not adjudge *any* punitive discharge, or set aside the BCD (because a DD was never even considered). *See e.g., McDuffie*, 65 M.J. at 638; *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). To date, Appellant's counsel has not found a single case where a DD has been adjudged for a negligent homicide due to a traffic violation without alcohol/drug-use, and there

are not even a handful of cases where a DD is adjudged when alcohol/drugs are at issue or for involuntary manslaughter (which is a more significant mens rea).

Even when there is additional misconduct such as intentionally choking, the negligent use of firearms, or driving while intoxicated/drugged, virtually all accused receive a BCD and not a DD.³

³ See e.g., *Chambers*, 54 M.J. at 837 (No punitive discharge adjudged for negligent homicide where E-5 fell asleep while driving (with a BAC of .191) and the ensuing flip/crash resulted in the passenger's death); *United States v. Dedolph*, 2022 CCA Lexis 658, *7 (N-M.C.C.A. 2022) (discussing three co-conspirator cases for a negligent homicide of a Soldier from a prank-gone-wrong involving a headlock/strangling and a cover-up where all three co-conspirators either *did not receive a punitive discharge*, or had it remitted/set-aside by the convening authority); *United States v. Conforti*, 26 M.J. 852, 856 (A.C.M.R. 1988) (BCD [not DD] was appropriate for a firearm involved involuntary manslaughter, however no confinement was adjudged and a dissenting judge would have disapproved the BCD due to "the circumstances that totally foreclose the possibility of criminal intent or malice."); *United States v. Lenard*, 27 M.J. 739, 741 (A.C.M.R. 1998) (BCD [not DD] appropriate for a negligent homicide where E-6 put the victim in a choke hold causing death, but the Army Court *repeatedly* noted that the Soldier could still receive his Veterans Administration (VA) Benefits when it affirmed); *United States v. O'Leary*, 2001 CCA Lexis 245 (N-M.C.C.A. 2001) (BCD [not DD] was appropriate for a negligent homicide due to gunshot where Appellant intentionally pointed his weapon at another Marine during change of guard and had a trend of pointing weapons at other Marines as jokes); *United States v. Tucker*, 82 M.J. 553, 557 (C.G.C.C.A. 2022) (setting aside a BCD for death of an individual and other misconduct); *United States v. Green*, 2021 CCA LEXIS 701, *18-19 (N-M.C.C.A. 2021) (finding a BCD [not DD] was appropriate for a negligent homicide where the Appellant abused his position as a military policeman to leave post drunk and then hit and killed a host-nation national while drinking-driving); *United States v. Strong*, 83 M.J. 509 (A.C.C.A. 2023) (*rev. granted* by 2023 CAAF LEXIS 426 (C.A.A.F., 23 June 2023) (finding a BCD [not a DD] appropriate for a traffic accident where the Soldier flipped a military vehicle while using a cell-phone on a narrow road killing another Soldier/passenger); *United States v.*

One of the few cases where a DD was adjudged (and affirmed) shows just how egregious the conduct must be to warrant a DD. *United States v. Henderson*, 23 M.J. 77 (C.M.A. 1986). In *Henderson*, the accused was convicted of involuntary manslaughter, false swearing, sale of cocaine, and transfer of cocaine. *Id.* The CCA affirmed the DD, holding that the appellant supplied the cocaine that killed the victim and that he was culpably negligent (he was charged with involuntary manslaughter). *Id.* On top of the false swearing and other sales of cocaine that warranted the military's most severe punishment short of death, the appellant "unlawfully made cocaine available to the victim, permitted the victim to use defendant's room, encouraged the victim to 'get fired up,' was present during the cocaine's consumption, and knew of the victim's propensity to use cocaine excessively and recklessly." *Id.* at 77. In short, a DD was warranted when he knew what would happen and encouraged it while committing other felonies. *See id.*

Melbourne, 58 M.J. 682 (N-M.C.C.A. 2003) (BCD [not DD] was appropriate where appellant, while intoxicated, drove his car at a high speed into a bay resulting in the drowning death of his passenger); *United States v. Martinez*, 42 M.J. 327, 329 (C.A.A.F. 1995) (BCD [not DD] and confinement for E-6 involved in a negligent vehicular homicide where everyone was highly intoxicated and on the way to another disco in Spain at 0300); *United States v. McClellan*, 2000 CCA Lexis 27 (N-M.C.C.A. 2000) (BCD [not DD] was appropriate for drunk driving and negligent homicide conviction where Appellant was intoxicated, crossed the center line, and hit a passenger bus head); *United States v. McGhee*, 33 M.J. 763 (A.C.M.R. 1991), *aff'd*, 35 M.J. 194 (1991) (No DD for negligent homicide as a result of severe child neglect). Every case just quoted did not adjudge a Dishonorable Discharge which the convening authority forced upon the military judge here.

C. For traffic fatalities where the underlying negligent act is a an otherwise minor traffic infraction, the majority of cases do not adjudge or approve *any* punitive discharge.

When the misconduct, like here, is simply a traffic accident without other egregious misconduct like a high rate of speed, drinking, or cell-phone use, the majority of cases do not even adjudge a BCD (or set it aside). *Compare Chambers*, 54 M.J. at 834 (no punitive discharge for a negligent homicide resulting from drunk driving with a .191 BAC) *with McDuffie*, 65 M.J. at at 638 (setting aside a Bad-Conduct Discharge (BCD) for a negligent homicide where Appellant crossed a center line and struck a car killing a British Citizen and her unborn child).

For example, in *Joyner*, the military judge sentenced appellant to a BCD and one year of confinement, but strongly urged the convening authority to permit appellant to enter the “return to duty program.” *Id.* at 966.⁴ The SJA concurred with the military judge’s recommendation, and the convening authority’s action made it possible. *Id.* However, the accused refused to participate. *Id.*

The majority found that the BCD should not be set aside *because* of the accused’s refusal to participate in the program (which it italicized). *Id.* at 967. Appellant’s refusal struck the court since it was in spite of the “veteran military

⁴ Successful completion of the return to duty program “would have given appellant an opportunity to earn an honorable discharge.” *Joyner*, 39 M.J. at 966.

judge crafted [] sentence which permitted appellant to retain his rank and his pay . . . and earn an honorable discharge.” *Id*

Despite the accused’s refusal to earn an honorable discharge or participate in the program, two judges would still have set aside the BCD. *Id.* at 967-68. The judges noted that there is no mathematical precision to what punishment a particular accused deserves, but that in the military, “sentencing is an individualized process, taking into account the nature and seriousness of the offense and the character of the offender.” *Id.* at 968 (citing *Snelling*, 14 M.J. at 268; *Mamalui*, 27 C.M.R. at 180-81).

In applying the sentencing principles from the two C.A.A.F. cases just cited, the judges noted that CCAs conceptually locate the offense along an imaginary spectrum of offenses, from the most trivial to the gravest, and the offender along the full spectrum, from those who “walk on water” to the most depraved and incorrigible. *Id.* at 968. In doing so, a truly negligent act is not commensurate with a punitive discharge given the rationale behind imposing a punitive discharge. *Id.*

The analysis the judges put forward is strikingly similar to this situation:

In assessing the relative gravity of this particular negligent homicide, we note first that alcohol was not a factor. Had it been, the appellant most likely still would have been guilty of no more than negligent homicide. [string cite omitted]. We note also that many reported negligent homicide cases deal with offenses which generally are viewed as a greater affront to society's norms than negligent operation of a motor vehicle. [string cite

omitted]. The evidence in this case shows that appellant was a generally careful driver. There is no indication of a pattern of neglect for the safety of others; only a lapse of judgment, which had tragic results. The evidence further shows that appellant had a good military record with no prior offenses, and was held in high esteem by his supervisors and his peers. In short, neither the nature and seriousness of the offense nor the character of the offender place this case near the aggravated end of the spectrum for sentencing purposes.

Id. at 969. The two judges admonished the majority for not setting aside the discharge which the majority upheld due to the appellant's refusal to participate in the program. The appellant's refusal to participate was italicized and consumed a significant portion of the majority's justification (even without the two judges noting their discussions in conference/deliberations when they indicated the reason the majority based its decision on).

They stated: "A punitive discharge in this case is either appropriate or not; if not, it is not rendered appropriate by the fact that the appellant may be given the opportunity to 'work it off' later." *Id.* *Joyner* is the only case where any punitive discharge was adjudged and later affirmed for *solely* a traffic infraction negligent homicide like here (even then, it was not a DD). Otherwise, they are practically unheard of. Even the recent oral argument on 11 December for *United States v. Coley* where the appellant was traveling over 100 mph in a residential zone did not result in a DD.

D. Since the implementation of the new RCM 705 and Plea Agreements, CCAs should look even closer for sentence appropriateness when a convening authority attempts to remove the judiciary's discretion

Despite the repeated guidance from the C.A.A.F. and this Court regarding the need for a particularized sentence looking at the entire record, mitigation, and extenuation, convening authorities have attempted to remove that discretion from veteran military judges through dictated sentences. That has caused a CCA to be *more* prone to question the sentence's appropriateness, provide relief, and, set aside punitive discharges. *See e.g., United States v. Kerr*, 2023 CCA LEXIS 434, *7-8 (N-M.C.C.A. 2023) (setting aside the BCD for an appellant's theft of military property (including munitions) and stealing another Marine's vehicle (damaging it and losing the Marine's issued equipment forcing the victim to pay for items)).

In *Kerr*, the CCA noted that the judge *should have rejected the plea deal* altogether since it mandated a discharge that was inappropriate given the appellant's background. *Id.* ("The military judge could have, and should have, simply rejected the plea agreement in its entirety"). The court concluded "Given the current plea agreement process, where minimum and maximum punishments are often the same, the role of trial judges (and appellate judges) as ultimate assessors of sentence appropriateness has become all the more important." *Id.*

Argument

This Court should reassess the Appellant's dishonorable discharge by giving the "'individualized consideration' of the particular appellant 'on the basis of the nature and seriousness of the offense and character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *Mamaluy*, 27 C.M.R. at 180-81). In short, something the military judge was barred from doing by the convening authority.

Whatever the intention of the convening authority imposing the military's most severe sentence short of death, "it will result in the appellant carrying the life-long stigma of a punitive discharge."⁵ *Joyner*, 39 M.J. at 969. That stigma is not to be taken lightly: "A punitive discharge is both a badge of dishonor and a practical disability." *Id.* It was "designed to sever a service member from the military community and to place a mark upon him which would make it difficult for him to reenter the civilian society and economy." *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989) (quoting *Lance*, A Criminal Punitive Discharge - An Effective Punishment, 79 Mil. L. Rev. 1, 17 (1978)). "By design," a punitive discharge "imposes social and economic hardships" beyond rehabilitation; it is an intentional means to forever punish. *Id.*

⁵ Regardless of the convening authority's intention for the mandatory DD (or even if he considered the new baby/recovering spouse in denying waiver), the convening authority's intent has never mattered to a sentence appropriateness review especially whereas here, he includes prohibited terms (Ass. Err. III).

It is clear from the record that the imposition of the *bad-conduct* discharge accomplishes no useful purpose other than to satisfy an abstract concept of punishment for punishment's sake or perhaps to deter similar conduct in others (a concept that I believe has little application in cases of this type). I find that imposition of the bad-conduct discharge is, in the absence of useful purpose, inappropriate.”).

Conforti, 26 M.J. at 856 (firearm involved involuntary manslaughter).

All negligent homicides involve a death. What makes this case the most egregious case in military history given the severity of a DD? It was not alcohol or drug use like in the majority of military cases (which almost universally result in no worse than a BCD). *See supra* n.3. Even in those cases, many BCDs were often set aside. *Compare Chambers*, 54 M.J. at 834 (no punitive discharge for a negligent homicide resulting from drunk driving even with a .191 BAC) *with McDuffie*, 65 M.J. at 638 (setting aside a BCD for a negligent homicide where appellant crossed a center line and struck a car killing a British Citizen and her unborn child). Likewise, it was not choking another person, the use of a gun, or pranks-gone-wrong – all of which resulted in no worse than a BCD. *See supra* n.3. It was not cell phone use, falling asleep, or any other wrong other than simply not seeing a person at an indirect angle that coincided where the truck's frame is located between the driver side-window and the windshield.

Even though Appellant conceded that the victim was an asset to her husband/family, that is not distinguishing in light of the British citizen and her

unborn child (*McDuffie*, 65 M.J. at 638 (setting aside a BCD for a negligent homicide)) or multiple other cases where the victim was an asset to the community\military. *See e.g., Joyner*, 39 M.J. at 967-968. For a negligence-based offense, the CCAs often “do not believe the status of the victim should significantly add to or detract from the seriousness of the offense.” *Id.* While it is a factor, “if appellant had fortuitously struck and killed an escaping bank robber instead of a devoted family [person], should we consider his conduct any less serious? “Legally,” we think not.” *Id.*

Here, the circumstances “totally foreclose the possibility of criminal intent or malice.” *Conforti*, 26 M.J. at 856. Numerous witnesses and exhibits recommended not to give *any discharge* (even calling it a mistake) and commented that they would have favored retention in the service. (*See e.g., R.* 100, 103, 118, 131-32, 147, 157; Def. Ex. A, p. 9, 10, 13-14). “It is clear from the record that the imposition of the [] discharge accomplishes no useful purpose other than to satisfy an abstract concept of punishment for punishment's sake.” After all, have punitive discharges deterred careless driving to the greater community? And in this situation, unlike other cases, there is no history or pattern of Appellant being a reckless driver or even being on a cellular device. The military judge did not even reduce the appellant to E-1 or adjudge forfeitures, which is generally seen where a punitive discharge is adjudged. (*R.* at 199).

The underlying facts were a tragic accident where appellant simply did not see a person, and ironically, himself had just saved a child from imminent harm. (Stip. At 7-8; R. at 26, 30). Any person who has glanced away from the road due to a kid spilling a drink, a spouse's comment, a sneeze, or changing the radio could have been in the same position. It is hard to even say this is "bad conduct" as has been defined by caselaw; it was a negligent and unintentional act even though it had a tragic outcome.

Appellant was devastated, attempting to render aid, crying, and then hyperventilating and passing out. (R. at 26, 82-83; Stip. at 12). Appellant rushed to plead guilty not quibbling on a sentence because he was mortified about his behavior. (R. 188, 130, 134, 181-82, 183, 185-87; Def. App. Sub). This is evident by his immediate plea in February, but then all parties delaying the actual hearing until May. *Id.* This was in part due to the birth of Appellant's only child and his wife's extremely high-risk pregnancy that was the product of in-vitro fertilization. Appellant is not a drug dealing, lying, killer encouraging others to take cocaine like one of the only cases in military history where a DD was adjudged for an involuntary death. *See Henderson*, 23 M.J. 77 (C.M.A. 1986) (involuntary manslaughter).

Appellant is a family man, new-father, decade long veteran with multiple deployments, and was still considered the #1 NCO by his First Sergeant and

Company Commander during sentencing. ((R. 147; 157; R.C.M. 1106 matters). His wife gave birth eleven days before the trial including undergoing surgery due to complications from the pregnancy, and the family was forced to make payments on multiple vehicles. (R.C.M. 1106; R. at 171-185; Def. App. Sub). Despite that, the convening authority denied deferment and/or waiver of automatic forfeitures.

On balance, a punitive discharge does not serve a useful purpose here. Everyone's lives were tragically altered that day; "justice" in all its forms, is not made whole by "the badge of dishonor and permanent disability" of a punitive discharge, especially after serving a nine-month prison sentence and the prejudice of the financial strain here. *Joyner*, 39 M.J. at 969. (Def App. Sub).

Appellant is not asking for his conviction to be set aside, nor does he want to put Ms. [REDACTED] family through that (Def. App. Sub.); however, the discharge is disproportionate and unprecedented. There is simply no explanation given that all victims in involuntary deaths are important to their respective families. In short, there was no "individualized consideration" because the convening authority removed that ability from the military judge.

While this court should reassess the punitive discharge to fulfill the purpose of "uniformity" and curing the convening authority's involvement in the outcome that Congress, the Supreme Court, and the C.A.A.F. stated was the purpose of the CCA's unique discretion, this Court should set aside the DD. Then, this court

should truly consider whether the acts, as described here, in light of all the circumstances (including post-trial actions by the government) actually warrant the severity of a punitive discharge, as opposed to an administrative. Is this “bad conduct” as defined by caselaw, or simply an unintentional mistake that had tragic results?

By itself that detailed look is warranted since *Joyner* is the only case where a punitive discharge was upheld for a minor traffic violation that resulted in a death. However like *Kerr*, this is even more warranted given the convening authority’s efforts to completely remove the judiciary’s discretion here and in Assignment of Error III where it tried to limit this Court’s review.

Conclusion

For the foregoing reasons, this court should affirm, at most, only 9 months confinement given the facts/post-trial, surrounding precedent, and other assignments of error.

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

Facts Relevant to Assignment of Error

Appellant immediately entered plea discussions and admitted guilt. The convening authority included a term in the Plea Agreement that usurped the discretion from the military judge and forced the judge to sentence the accused to a

dishonorable discharge without any analysis of the mens rea, mitigation, or extenuation. (Plea Agreement at 3; R. at 48-49). The military judge had zero discretion in sentencing appellant to a DD – an incongruous result to history and precedent. There was no adjudged forfeitures or rank reduction despite a request from the trial counsel. (R. at 194, 199).

Standard of Review

The interpretation of a Manual for Courts-Martial provision, including a RCM, is a matter of law to be reviewed de novo. *United States v. Rendon*, 58 M.J. 221, 224 (C.A.A.F. 2003) (citing *Tardif*, 57 M.J. 219).⁶

Law and Argument

At the time of this Plea Agreement, RCM 705 did not contain a subsection “(d)(1)(D)” which *now* allows for “a specified sentence or *portion* of a sentence.” (emphasis added); Manual for Courts-Martial, 2019 ed. The change to add that language allowing for a “specified . . . portion of a sentence” became effective on 28 July 2023. *See* Exec. Order. No. 14103 (Annex 1 effective date); 88 FR 50535

⁶ The standard to determine whether a plea agreement’s terms violate the RCM is de novo. *See United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (applying de novo review in the case of pretrial agreements). If this court determines the specific provision is improper, then it follows that the plea agreement’s term may violate RCM 705. However, this could be cured through sentence reassessment in this case for AE 1. This question need not be reached if the court sets aside Appellant’s discharge.

of Jul 28, 2023. Prior to that change, R.C.M. 705 did not contain language permitting a ‘specific’ ‘portion’ of a sentence.

“Limitations” according to Black’s Law Dictionary, is limiting “the quality, state, or condition of being limited [or] a restriction.” *Limitations*, Black’s Law Dictionary, 11th ed. p. 1114 (2019). This is very different from the definition of “specific” which the Federal Rules use, but the military chose (at the time of this agreement), not to include: “Of, relating to, or designating a *particular* or *defined* thing; explicit.” *Id.* at p. 1686 (emphasis added).

Ordinary rules of statutory construction apply in interpreting the RCM. *Hunter*, 65 M.J. at 401 (citing *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005)). Ordinary rules start off by looking at the “plain language of the MCM.” *United States v. Muwwakkil*, 74 M.J. 187, 194 (C.A.A.F. 2015); *United States v. Kohlbeke*, 78 M.J. 326, 331 (C.A.A.F. 2019) (“It is a general rule of statutory construction that if a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use its plain meaning and apply it as written”). “[T]he basic and unexceptional rule [is] that courts must give effect to the clear meaning of the statute as written.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

Beyond just the words’ meaning, when Congress or the President includes particular language in one area but omits it in another related area, it is generally

presumed that they act intentionally and purposely in the disparate inclusion or exclusion. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *see also United States v. Cline*, 29 M.J. 83, 86 (C.M.A. 1989) (“‘expressio unius est exclusio alterius’ (the inclusion of one is the exclusion of others)”). Importantly here, Congress wrote and maintains the Federal Rules which use the term “specific” repeatedly. But Congress did not include that language in Article 53a despite both involving laws regarding plea sentences and negotiations. *See United States v. Rodriguez*, 49 M.J. 528, 530 (A.C.C.A. 1998) (discussing Congress role in the Federal Rules and what authority it gave the President who then cannot act “contrary to or inconsistent with” the UCMJ). They specifically did not use the word “specific”, but chose “limitations.”

When a court moves beyond the plain language and specific placement of words, there are a few factors that provide a framework for engaging in statutory interpretation. *See e.g., Rendon*, 58 M.J. at 224; *Muwwakkil*, 74 M.J. at 194; *Tardif*, 57 M.J. at 226 (Crawford, C.J. dissenting). These factors include the contemporaneous history of the statute; the contemporaneous interpretation of the statute; and subsequent legislative action or inaction regarding the statute. *Tardif*, 57 M.J. at 226 (Crawford, C.J. dissenting); *see also Chesapeake & O.R. Co. v. Miller*, 19 W. Va. 408 (1882), *aff’d*, 114 U.S. 176 (1885).

Those factors provide a background of the existing customs, practices, and rights and obligations against which to read the statute. *Rendon*, 58 M.J. at 224. Other factors include looking to the drafter’s analysis (*Rendon*, 58 M.J. at 224) and the provision’s object and surrounding policy. *Muwwakkil*, 74 M.J. at 194.

In looking at each of the factors, courts assume that both Congress and the President *are aware* of existing laws and provisions when either creates new rules, law, or provisions. *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (internal quotation marks omitted) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)); *see also United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021).

Given that the Court assumes the President (and drafters) were aware of other existing laws, at the time of writing R.C.M. 705(d)(1)-(3), it is telling that the Federal Rules of Criminal Procedure contained language allowing for “specific” sentences – but the President/drafters chose not to use that language. *See* Fed. R. Crim. Proc. 11(c)(1)(C); 11(c)(3). The rules of statutory construction show that the failure to utilize that language was intentional in picking both the wording of Article 53a and the version of R.C.M. 705 at issue here.

To be sure, the Report of the Military Justice Review Group – Part I, when discussing amendments to Article 53a, goes through the Federal Rules and specifically notes in the “Relationship to Federal Civilian Practice” Section that in the *Federal Rules*, “the parties can bargain on sentence by agreeing that ‘a specific

sentence or sentencing range is appropriate.” Report of the Military Justice Review Group – Part I: UCMJ Recommendation, Legislative Report – B. Statutory Review and Recommendations, Article 53a (New Provision) – Plea Agreements, p. 485. (Leg. Rep.).

Despite noting the existence of that provision in the Federal Rules, one page later in the “Recommendation and Justification” section, the Report notes “Part II of the Report will provide implementing rules for this proposed statute, with particular emphasis on the opportunity for negotiated sentencing *ranges*.” (Leg. Rep. at 486) (Emphasis added). The use of the word “range” is highlighted since the language the Report just quoted a page earlier regarding “specific” sentence is absent and instead replaced by “sentencing range or sentence limitation.” *Id*; *See Cline*, 29 M.J. at 86 (the inclusion of one is the exclusion of others).

“Limitations” and “specific”, as noted above, are very different and have different legal meaning. The analysis should stop there. However, if this Court thinks those words and inclusion/exclusion are somehow ambiguous, this Court should be guided by the Report’s emphasis of “ranges.” Given that Article 53a does not contain words like “specific,” but only the word “limitations,” and that Congress is in charge of the Federal Rules that deliberately use the word “specific”, basic statutory construction hints that it made that determination for a reason. *See Cline*, 29 M.J. at 86 (the inclusion of one is the exclusion of others).

The President also chose to highlight “ranges” and did not, at the time applicable here, include language for specific sentences (or portions thereof) in RCM 705.

To be sure, the language in the *Federal Rules* that guided the drafting of the R.C.M. 705(d) contains language for both ranges and specific sentence: “a particular sentence or sentencing range” (Fed. R. Crim. Proc. 11(c)(1)(B)) and “a specific sentence or sentencing range.” (Fed. R. Crim. Proc. 11(c)(1)(C)). The fact that the President did not include similar language, when a workable example existed and was cited by the drafters, makes this interpretation stronger.⁷

“The particular emphasis on the opportunity for negotiated sentencing ranges” makes more sense in light of recent changes, both before and after, curtailing the convening authority’s other powers. While this court would only consider those recent/surrounding changes if the language and history noted above was ambiguous, the surrounding statutes reenforce this outcome. *Tardif*, 57 M.J. at 226 (analysis considers contemporaneous history; the contemporaneous interpretation of the statute; and subsequent legislative action or inaction).

So, the idea a dictated portion of a sentence is permissible stands at odds with other legislative acts surrounding the enactment to RCM 705 at issue here.

⁷ The later amendment to add section (d)(1)(D) which *now* allows for “a specified sentence or *portion* of a sentence” reenforces this earlier omission, especially in light of the timing in relation to standing up the Office of Special Trial Counsel in the same Executive Order which is discussed below.

Given the fear of unlawful command influence (UCI) and the convening authority's decisions in Article 120 cases, the surrounding history does not support Congress or the President bestowing unfettered/unchecked authority to the convening authority to dictate precise outcomes in courts-martial.⁸

After the enactment of the relevant provisions, Congress and the President went even further to show their distrust of convening authorities with the Office of Special Trial Counsel which completely removed the convening authority's influence and ability to dictate terms for virtually all felony cases. Put simply, the overwhelming trend was to check and limit the convening authority's discretion and power over the criminal justice process; not enhance it. *See supra* n.8.

To be sure, RCM 705(d)(4) (allowing for "specific sentences or portions" thereof) was only recommended *contemporaneous with* the creation of the Office of Special Trial Counsel and the Convening Authority's authority stripped in most

⁸ For example, just prior to the enactment of Article 53a and the updated RCM 705, Congress and the President had severely curtailed the convening authority's clemency powers, and ability to refer/not-refer cases dependent on a Staff Judge Advocates Article 34 advice (forcing higher level reviews). These multiple curtailing examples do not even take into account the numerous new databases, mandatory reporting requirements, and tracking mechanisms that Congress, the President, and Service Secretaries placed on convening authorities to ensure transparency of convening authorities' handling of sexual harassment, equal opportunity, and other investigations. Simply put, Congress did not trust convening authorities and all trends reenforce that.

felony level cases.⁹ *See* Exec. Order. No. 14103 (Annex 1-3). That does not seem to be a coincidence given the trends noted above and in footnote 8.

The version of RCM 705 that controlled at the time of Appellant’s plea did not contain a provision allowing for a specific “portion” of a sentence, but instead contained limitations that applied to sentence *ranges*. The emphasis on ranges is in line with the terms the Military Justice Review Group noted were also its “emphasis.”

At the relevant time here, plea agreements could include promises by convening authorities to “limit” the sentence which may be adjudged. R.C.M. 705(b)(2)(E). Such limits fell into only three categories: a limitation on the maximum punishment (i.e., no worse than); a limitation on the minimum punishment (i.e., no less than); or both. R.C.M. 705(d)(1)-(3). In each of those limitations, there was always some sort of range: either a floor up to the maximum punishment; a ceiling down to the minimum punishment (including mandatory minimums); or a range between a floor and ceiling.

⁹ Appellant’s brief does not analyze the “empty ritual”, Unlawful Command Influence, and separation of powers arguments (especially as those would violate the updated version of AR 27-10 like in [United States v. Griffin, ARMY 20220211, 2023 CCA LEXIS 459, *2](#) (A.C.C.A. 2023) (Sum. Disp.)). *See* LTC Brad Bigler, *Army Lawyer, A new Paradigm for Plea Agreements Under the 2016 MJA*, 2019 Army Law. 49, *55-58. However, there are cases currently coming to this Court that will present that issue where *all* discretion has been stripped from the military judge with a sentence that has zero discretion. *See e.g., United States v. Specialist Kristian B. Padgett*, Army 20220169.

Recently, the Army Court of Criminal Appeals found a dictated portion of a sentence inappropriate in *Griffin* based on the wording of R.C.M. 705 and a *previous* version of Army Regulation 27-10. See [Griffin, ARMY 20220211, 2023 CCA LEXIS 459, *2](#) (“We agree the now-contended term was violative of Army policy”). However, since this was the previous version of the Manual regarding Pretrial Agreements, the opinion did not analyze or comment on whether Congress or the President actually allowed for that authority in Article 53a or R.C.M. 705, respectively. In short, *Griffin* could be decided based upon the Service Secretary not allowing for a specific sentence in that situation in AR 27-10. *Id*; cf *United States v. Harvey*, [2023 CCA LEXIS 16](#), *4-5 (N-M.C.C.A 2022) (per curiam); *United States v. Geier*, [2022 CCA LEXIS 468](#), *1 (A.F.C.C.A. 2022) (Unpub. Op.) *rev. den.* by 2022 CAAF LEXIS 778 (C.A.A.F. Nov. 2, 2022) (both sister CCAs did not analyze the text of Article 53a in terms of Congress’ other product’s— the Federal Rules of Criminal Procedure – that contained the word “specific” or discuss the drafter’s analysis).

Finally, the judiciaries discretion has also been frequently protected by the courts, even when the Federal Rules specifically state that “specific sentences” are allowed. See *e.g.*, *United States v. Padilla*, 2023 U.S. Dist. LEXIS 152127 (N.M.D. 2023) (citing *Gall v. United States*, 552 U.S. 38, 51-53 (2007)).

“The power to sentence criminal defendants lies with the [trial] court, not the parties themselves.” *Padilla*, 2023 U.S. Dist. LEXIS 152127, *6-7 (referencing *Gall*, 552 U.S. at 51-53). Sentence bargaining, as done here, severely “implicates judicial discretion by limiting the sentencing power of the [trial] court.” *United States v. Robertson*, 45 F.3d 1423, 1437 (10th Cir. 1995) (noting specific sentence plea agreements “attempt to completely curtail that discretion, [and] a district court’s decision to preserve that aspect of judicial power is not an abuse of discretion”). The Court is within its purview to reject an agreement when it “unduly cabin[s]” its sentencing discretion. *See United States v. Sabit*, 797 Fed. Appx. 218, 221 (6th Cir. 2019) (citing *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007)).

In this case, RCM 705 did *not* contain the section that allowed for a “specific” “portion of a sentence.” The later change to add that language suggests that the previous version of RCM 705 (which is applicable here), did not allow for a Convening Authority to usurp a military judge’s discretion for a “specific portion” of the sentence, especially to the most severe part of a sentence. “As we see it, the question of whether or not to impose a punitive discharge as a part of the sentence in a court-martial is always a significant sentencing issue, and often is the most strenuously contested sentencing issue.” *United States v. Libecap*, 57 M.J.

611, 615-616 (C.G.C.C.A. 2002) (not enforcing a provision that makes an accused request a BCD at trial). If there was a range, this would be a different story.

It is also questionable, given that Congress knew (and drafted) the Federal Rules of Crim. Proc. which contain a “specific sentence”, that choosing to use the word “limitations” somehow intended to mean the same thing as “specific.” Those are different in definition, form, and function. Basic rules of statutory construction, including surrounding legislation both before and after, cast doubt that Congress trusted convening authorities with almost unfettered discretion as to any part of the court-martial. Therefore, it is questionable if Congress even gave that power to the President given the language it chose to use.

However, even if Congress did, the version of RCM 705 at issue here, did not contain language for a “specific” “portion” of a sentence like the convening authority attempted with the mandatory DD. To be sure, the Mil. Jus. Rev. Group noted the “specific sentence” language in the Federal Rules, and then chose not to copy it. They actually did the opposite stating the “emphasis is on range”. The *later* adoption of the “specific sentence or portion of a sentence” that now exists suggests even more that it did not exist at the time. This makes sense and cures the disparity between the different service secretaries on this issue.

The President/Congress also know both the Supreme Court and Federal Circuit Courts’ opinions (for purpose of this analysis) on the importance of the

judiciary’s discretion to prevent UCI. While military justice is different than federal criminal justice, that gap has quickly eroded to where now even the Supreme Court does not believe there is almost any meaningful difference). *See Ortiz v. United States*, 138 S. Ct. 2165, 2174-2176 (2020) (“The military justice system’s essential character – in a word, judicial – provides no reason to make that distinction”).

Conclusion

For the foregoing reasons, this court should find the dictated dishonorable discharge term, as applied here, violated Article 53a and R.C.M. 705 and reassess the sentence in light of the entire record as discussed in AE I.

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)

Facts Relevant to Assignment of Error

The convening authority included a term in the Plea Agreement that allows the convening authority to withdraw from the agreement if this Court provides any sentence relief for any reason. (App. Ex. III, para 7.a.). The relevant portion of that term reads:

After announcement of the sentence by the Military Judge, the withdrawn charge and specification will be dismissed by the Convening Authority without prejudice, to ripen into prejudice upon completion of appellate review in which the findings *and sentence have been upheld*. (emphasis added).

This provision was not covered well during the plea colloquy. (R. at 46-48).

Although the military judge read the term out loud to orient Appellant, in explaining it, the judge notes three times that the condition for the convening authority to withdraw applies when the appellate court does not “uph[o]ld[s] your plea.” (R. at 47). The judge states, “However, if for some reason your *plea of guilty* at any time becomes unacceptable, the trial counsel would be free to proceed on all charges and their specifications.” (R. at 47) (emphasis added). The judge does not discuss the effects of any sentence relief on the plea or convening authority’s ability to withdraw.

The charge/specification that was dismissed was involuntary manslaughter covering the same factual scenario. (Charge Sheet).

Standard of Review

The standard to determine whether a plea agreement’s terms violate the Rules for Courts-Martial is de novo. *See Hunter*, 65 M.J. at 401. Likewise, the interpretation of a Manual for Courts-Martial provision, including a RCM. is also de novo. *Rendon*, 58 M.J. at 224.

Law and Argument

Prohibited or involuntary plea agreement terms, and terms that are against public policy, shall not be enforced. R.C.M. 705(c)(1)(A); *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003) (“To the extent that a term [] violates public policy, it will be stricken from the pretrial agreement and not enforced.”). There are two general categories of terms that are unenforceable: prohibited terms as defined by R.C.M. 705(c)(1), and terms that are against public policy. R.C.M. 705(e)(1) (“Either [side] may propose any term or condition that is not prohibited by law or public policy”); *see also Edwards*, 58 M.J. at 52; *United States v. Clark*, 53 M.J. 280, 283 (C.A.A.F. 2000); *United States v. Tate*, 64 M.J. 269, 270 (C.A.A.F. 2007).

The first category, prohibited terms, includes when the convening authority attempts to deprive a Soldier of certain rights. R.C.M. 705(c)(1)(B). The listed right in that provision that is at issue here is the: “the complete and effective exercise of post-trial and appellate rights.” Unlike many other terms, that clause is qualified with the words “complete” and “effective” indicating it is robust.

R.C.M. 705(e)(4) limits when the convening authority can withdrawal from a plea agreement. R.C.M. 705(e)(4) allows for the convening authority to withdraw when “*findings* are set aside because of a plea of guilty entered pursuant to the agreement is held improvident on appellate review.” *Id.* (emphasis added). The

President did not include language regarding when portions of the *sentence* are set aside as a reason the convening authority can withdraw. *See Rodriguez*, 480 U.S. at 525 (including language in one section of a rule but omitting it in another is generally presumed intentional/purposeful); *see also Cline*, 29 M.J. at 86 (the inclusion of one is the exclusion of others). In that same rule, the President lays out “sentence limitations” in multiple sections which indicates the failure to include the word “sentence” in a convening authority’s ability to withdraw was intentional. *See e.g.*, R.C.M. 705(d) (“Sentence limitations”); R.C.M. 705(b)(2)(E) (“Limit the sentence that may be adjudged”). The section directly before also uses the word “sentence”. R.C.M. 705(e)(4)(A).

Regarding the second category (public policy), the Supreme Court calls it “well established” that a promise, whether in a contract or a plea agreement, “is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *United States v. Dawson*, 10 M.J. 142, 144-45 (C.M.A. 1981) (*quoting Newton v. Rumery*, 480 U.S. 386, 392 (1987)). Despite the mutual assent of parties, the propriety of a particular agreement provision and its operation in a case “must be assessed in view of the basic tenets of the military justice system.” *Id.* Therefore, plea agreements in courts-martial are not always governed by ordinary rules of contract, although

“plea bargain law” has drawn heavily on contract law analogies. *United States v. Koopman*, 20 M.J. 106, 110 (C.M.A. 1985) (internal citations omitted).

From the foregoing, the following principle emerges: plea agreement provisions are contrary to “public policy” if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process.¹⁰

In this case, the convening authority included a term that is not contained in the listed reasons of RCM 705(e)(4)(B). Since the President limited the convening authority’s ability to withdraw to only “findings” being set aside, statutory construction instructs that the convening authority did not have the authority to include this term extending his power to withdraw simply because this court provides even a single dollar of sentencing relief.

Likewise, this term is contrary to public policy as stated in both R.C.M. 705 and undermining the public’s faith and confidence in the system. First, R.C.M. 705(c)(1)(B) notes the convening authority cannot limit the robust “complete and effective exercise of post-trial and appellate rights.” By effectively nullifying this

¹⁰ See *United States v. Mitchell*, 15 M.J. 238, 240-241 (C.M.A. 1983); *United States v. Green*, 1 M.J. 453, 456; *United States v. Foust*, 25 M.J. 647, 649 (A.C.M.R. 1987); *United States v. Jones*, 20 M.J. 853, 855 (A.C.M.R. 1985); *United States v. Callahan*, 22 C.M.R. 443, 448 (A.B.M.R. 1956); *United States v. Libecap*, 57 M.J. 611, 614-615 (C.G.C.C.A. 2002).

Court's Article 66 review for sentence appropriateness, which the AE I notes has a storied history for both legislative and policy reasons, it is against public policy.

One example, applicable here, illustrates that situation. If a case was simple guilty-plea with no issues and a short transcript where the convening authority dismissed multiple charges in exchange for a plea, but the government took 2,000 days to get it to this court for review simply because it could, that would warrant some relief under existing case-law. *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) ("*Toohey II*"). It likely would rise to a level of delay that is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Id.* However, under the term the Convening Authority included here, if this Court provided a single day, dollar, or rank of relief, the convening authority could withdraw from previous sentence limitations and try the accused for more crimes just because this Court found the same convening authority's actions violated precedent and public trust/policy. Effectively, it is the convening authority's attempt to make engaging in the appellate process so risky that many appellant's would waive the process.

But even if this Court found the term was valid and enforceable, here, the military judge did not properly explain its effects to Appellant. The military judge believed the term only applied to the "plea" as a whole; meaning "findings." (R. at 47). Of the three times the judge goes over the term, she always uses the word

“plea” and does not discuss “the sentence”. The only mention of it was when she simply read the provision out loud to direct Appellant to the specific area that they would discuss in the colloquy. (R. at 46). Therefore, this portion should not be given any other meaning and effect than as to findings especially where government counsel did not intervene to show its materiality/omission.

Finally, in looking to public policy and the perception of the military justice system, the literal terms of the plea agreement (whether against policy or not) have been carried out by each of the parties: Appellant entered a plea of guilty which the trial judge accepted and which served as the basis of the conviction; the convening authority, through the trial counsel, dismissed the other charge and every portion of the deal has taken place. Appellant has served his confinement and will be released on or about 2 January 2024. Appellant should not be penalized or placed at greater risk for letting this Court do its job especially, whereas here, the Appellant asks this Court to uphold his conviction and will have served the confinement term.

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

Facts Relevant to Assignment of Error

From start to finish for post-trial, over 150 days passed before the case was referred for counsel on 30 October 2023. (Referral and Designation of Counsel). The chief of justice elected not to explain the reason for delay despite violating the previous *Brown* and *Moreno* deadlines. The transcript is under 200 pages with a

portion of the plea taking place four months prior where the Appellant entered a plea of guilty. (R. at 13, 199).

The military judge sentenced appellant on 1 June 2023. (R. at 199). The appellant submitted his post-trial matters *immediately*. (RCM 1106 Matters; Def. App. Sub). Due to the financial strain from the vehicle payments, the convening authority's denial of deferral/waiver of automatic forfeitures, and the convening authority's representative not releasing appellant's vehicle, appellant requested Speedy Post Trial Processing on 14 July 2023 (Memo "Demand for Speedy Post-Trial Processing"; Def. App. Sub.; R.C.M. 1106, p. 3). There are multiple emails, phone calls, and requests for the vehicle all that were not granted. (Def. App. Sub.)

Despite the request for speedy post-trial processing, the transcript was not certified until 3 October 2023 and then it took until 30 October to get the file to this court and referred for designation of counsel (Referral and Designation of Counsel). That is a total of 152 days without explanation.

Standard of Review

Unreasonable post-trial delay claims are reviewed de novo. *United States v. Winfield*, 83 M.J. 662, 665 (Army Ct. Crim. App. 2023).

Law

Service members have a right to timely review of their appeals rooted in both the Due Process Clause of the Fifth Amendment and Article 66, UCMJ. *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004) (“*Toohey I*”). Both are violated here.

Even without specific prejudice, this court can still grant relief in cases where there is unreasonable and unexplained post-trial delay. *Toohey II*, 63 M.J. at 362. However, here there is prejudice.

A. Due Process Violation

Recognizing that an inordinately delayed appeal is “a meaningless ritual” akin to not having effective post-trial counsel, this Court and the C.A.A.F. hold that the Due Process Clause guarantees a service-member’s right to timely appellate review. *Toohey I*, 60 M.J. at 102; *Winfield*, 83 M.J. at 665. To warrant a Due Process review, CCAs must initially see if there is a “facially unreasonable delay.” *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2005). This can be a total period of elapsed time, or in practice, as few as sixty (60) days of inactivity (especially if unexplained). Compare *United States v. Morris*, [ARMY 20210624](#), [2023 CCA LEXIS 197](#), *2-3 (A.C.C.A. 8 May 2023) (Summ. Disp.) (pet. Denied, No. 23-0173/AR, 2023 CAAF LEXIS 409 (C.A.A.F. 2023)) (finding *both* a Due Process and Article 66(d)(2) violation for a sixty-day (60) period of inactivity) *with*

United States v. Brown, 81 M.J. 507, 510 (A.C.C.A. 2021) (finding a 350-day delay for a 121-page transcript warranted a Due Process analysis).

When a facially unreasonable delay is present, this court moves on to a full analysis, and “scrutinize[s] even more closely the unit-level explanations for post-trial processing delays.” *Winfield*, 83 M.J. at 665.¹¹ This court will “broadly focus on the totality of the circumstances surrounding the post-trial processing timeline” balancing between factors such as chronology, complexity, and the unit's memorialized justifications for any delay. *Id.*

In looking at the unit's justification, this court has stated: “Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency.” *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38, at *3 (A.C.C.A. 10 Feb. 2020) ([summ. disp.](#)) (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (A.C.C.A. 2001) (granting relief for excessive post-trial delay in light of government's failure to provide adequate reasons). In recent practice, if the government fails to explain or puts forth

¹¹ Previously, an unreasonable delay was presumed if either (1) the convening authority failed to act within 120 days of trial, (2) the record of trial was not docketed within thirty days of the convening authority's action, or (3) appellate review was not completed within eighteen months of docketing. *Moreno*, 63 M.J. at 142. In light of the changes implemented by the Military Justice Act of 2016, this court combined one and two above changing the presumption to 150 days between final adjournment and docketing with this court. *Brown*, 81 M.J. at 510. *Winfield* overruled *Brown*'s presumption changing the standard to a case-by-case determination. *Winfield*, 83 M.J. at 665.

incorrect facts, a due-process violation is more likely to be found. *See e.g., Jefferson*, 2023 CCA Lexis 382; *Pulley*, 2023 CCA Lexis 289; *Morris*, 2023 CCA Lexis 198; *United States v. Baylor*, ARMY 2010576 (A.C.C.A. 2023) (setting aside 307 days of confinement for a due process violation due to a poor explanation and unexplained delay).

This Court undertakes this closer scrutiny by using the four factors set out in *Barker v. Wingo*: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice.” 407 U.S. 514, 530 (1972); *Moreno*, 63 M.J. at 135. No single factor is determinative or required. *Barker*, 407 U.S. at 533. However, all are met here.

The C.A.A.F., when performing a *Barker* balancing test, “look[s] at how much the delay was under the Government’s control . . . assess[ing] any legitimate reasons for the delay, including those attributable to the appellant.” *United States v. Anderson*, 82 M.J. 82, 86 (C.A.A.F. 2022) (citing *Moreno*, 63 M.J. at 136). This includes analyzing delays in creating transcripts or authenticating the record and “ministerial task[s] such as the timetable for transmission of the record between various entities at installations.” *Winfield*, 83 M.J. at 667 (Smawley, C.J. concurring) (citation omitted).

In determining prejudice for a Due Process violation, the burden shifts to the government to disprove prejudice beyond a reasonable doubt: “If a [due process]

error is nonstructural, then under [this court’s] precedent, the Government must prove that the error was harmless beyond a reasonable doubt[.]” *United States v. Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022) (emphasis added).

Regarding prejudice, if an appellant fails to demonstrate actual prejudice, this court may still find a violation if “in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Toohey II*, 63 M.J. at 362; *see also Morris*, 2023 CCA Lexis 197, *2-3 (finding *both* a Due Process and Article 66(d)(2) violation for a sixty-plus day period between the trial counsel’s completion of the “precertification review” and the judge’s authentication because of the lack of any explanation for that period). Additionally, if there are other assignments of error that warrant relief, the delay in being able to obtain that remedy is a factor that compounds prejudice. *See Moreno*, 63 M.J. at 139 (noting that appellant’s position regarding other substantive appeal grounds is a consideration for prejudice).

For example, in *Jefferson*, the government took a total of 164 days for a 170-page transcript and attempted to blame the military judge for 60 days of delay (which the Judge disputed). *United States v. Jefferson*, [ARMY 20220448](#), [2023 CCA LEXIS 382](#), *1-2 (A.C.C.A. 6 July 2023) (Summ. Disp.). This court found both a Due Process Violation and an Article 66 violation and mitigated the

sentence finding the improper excuse by the government showing sixty days of inactivity was enough for a Due Process Violation. *Id*; see also *Morris*, 2023 CCA Lexis 197, *2-3. No prejudice was alleged.

Similarly, in *Garrigus*, the appellant pleaded guilty to sexually abusing, strangling, and beating his spouse. *United States v. Garrigus*, [ARMY 20220259](#), [2023 CCA LEXIS 352](#) (A.C.C.A. 9 August 2023) (Summ. Disp.). Exactly 164 days elapsed between the entry of judgment and submitting the 232-page transcript to the judge for authentication. *Id.* at *2. While the court was split on if there was a Due Process violation due to the lack of prejudice (no other assignments of error were raised and no prejudice was asserted), the court still found that delay violated Article 66 and granted sentence relief. *Id.* at *2-3.

B. Article 66, UCMJ

Irrespective of a Due Process violation, this court is authorized to grant relief for post-trial delay under two provisions of Article 66, UCMJ: Article 66(d)(1) and Article 66(d)(2). Article 66(d)(1) provides “broad authority” to review and modify sentences. *Tardif*, 57 M.J. at 224. This includes granting relief for post-trial delay *without* a prejudice showing. *Id.*

In analyzing claims under Article 66, this court considers “all the facts and circumstances reflected in the record.” *Id.* Comparable to a Due Process analysis, these facts balance the interplay between factors such as chronology, complexity,

and the unit's memorialized justifications for any delay. *Winfield*, 83 M.J. at 666. Similarly, Due Process and Article 66 note that "personnel and administrative issues" are not "legitimate reasons" to excuse the delay. *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011).

For example, in *United States v. Hotaling*, this Court set aside the appellant's bad-conduct discharge when the Government took 350 days for a 417 page transcript including nearly 200 days waiting for an administrative step.

[ARMY 20190360](#), [2020 CCA LEXIS 449](#), *4 (A.C.C.A. 2020) (Mem. Op.).

Likewise, in *United States v. Sepulveda*, the Court found that 100 days of nonmovement on a record was a violation of Article 66(d)(2) warranting sentence relief where the accused was convicted of sexual abuse of a child. [ARMY 20220241](#), [2023 CCA LEXIS 223](#) (A.C.C.A. 5 May 2023) (Summ. Disp.); *see also* *United States v. Bionaz*, [ARMY 20220247](#), [2023 CCA LEXIS 233](#), *1-2 (A.C.C.A. 2023) (Summ. Disp.) (finding no movement for 100 days out of 182 to forward a 212-page transcript warranted sentence relief for an appellant convicted of sexual assault and abusive sexual contact).¹²

¹² In all cases just cited, the government at least attempted to explain the delay unlike the situation here where the government offered no explanation and failed to release the appellant's truck after the plea.

Argument

This Court should grant meaningful sentencing relief given the government failed to explain why it violated both the previous *Brown* and *Moreno* clocks, seemingly disregarded appellant's request for speedy post-trial processing, and the appellant suffered prejudice both financially and emotionally in the form of the appellant's spouse and child's dire financial situation.¹³ Additionally, delaying the potential relief from this court's analysis on the first three assignments of error also counts as prejudice under *Moreno*.

Both the Due Process clause and Article 66 support substantial relief in this case, which sets it apart from almost every case decided post *Winfield*. The amount of delay, for Article 66 purposes, is similar to at least six recent decisions from this court post *Winfield*.¹⁴ However, unlike *every* one of those cases, here there is a

¹³ Both the financial strain and emotional strain was exacerbated by convening authority denying waiver without explanation as appellant's wife recovered from surgery and had to return to work before medically advisable.

¹⁴ This amount of time, *without any explanation*, is on par with many of the recent cases where the Court has granted relief. *See e.g., Jefferson*, 2023 CCA Lexis 382 (finding a Due Process violation for a 170-page transcript that took 164 days resulting in a reduction of the sentence); *United States v. Pulley*, [ARMY 20220494](#), 2023 CCA LEXIS 289 (A.C.C.A. 6 July 2023) (Summ. Disp.) (finding a Due Process violation for a 106 page transcript that took 154 days before appellate docketing); *United States v. Jobes*, [ARMY 20210394](#), 2023 CCA LEXIS 268 (A.C.C.A. 26 June 2023) (Summ. Disp.) (finding 195 days for a 621 page transcript warranted relief and reducing the sentence); *Bionaz*, 2023 CCA Lexis 233 (finding 182 days to forward a 212-page transcript violated Article 66(d)(2) and reducing the appellant's sentence); *Morris*, 2023 CCA Lexis 197, (finding *both*

demand for speedy post-trial processing, other assignments of error, and claims of prejudice supported by tangible evidence.

For a Due Process claim, the overall test weighs in appellant's favor, and the Article 66 violation also follows from the same factors/analysis. The government violated the appellant's Due Process right when it consumed over 150 days for a transcript that was under 200 pages. It then did not even try to justify the inaction. This amount of facially unreasonable delay triggers a full *Barker* analysis.

A. The Length of Delay

Under this court's precedence both before and after *Winfield*, this post trial delay is excessive when no explanation is provided. During large periods of time, such as forwarding the case after certification, nothing happened. There is no explanation of the backlog (if any), post-trial priorities in light of the speedy-trial request, or even when the transcript itself was complete. Similar gaps have been found to be Due Process violations in *Morris* (60 days), *Jefferson* (64 days), and *Pulley* (154 days). Simply put, this factor weighs in favor of the appellant.

a Due Process and Article 66(d)(2) violation for a sixty-plus day period of inactivity); *United States v. Sepulveda*, ARMY 20220241, 2023 CCA Lexis 223 (A.C.C.A. 2023) (Sum. Disp.) (finding that 100 days of inactivity to be a violation under Article 66(d)(2) warranting a sentence reduction for an appellant convicted of sexual abuse of a child).

B. The Reasons for the Delay

The government ignored this court's precedent in both timing and the lack of explanation. This reason also weighs in favor of the appellant.

C. Appellant's Request for Expeditious Post-Trial Processing

Appellant turned in his post-trial matters *immediately* and demanded speedy post trial processing shortly thereafter due to the continued financial strain for his wife and newborn child. (Def. App. Sub; RCM 1106 matters, p 3).

Likewise, *every* case but one where Due Process violations were found, *every* case cited in footnote 14, and *every* case but one since *Winfield* where a Due process claim may have been supported in a concurring/dissenting opinion (such as where Article 66 relief was granted instead such as *Winfield*), no appellant requested expeditious post-trial processing. The sole exception where a Soldier requested speedy post trial processing resulted in the entire term of confinement being set aside. *Baylor*, 2023 CCA LEXIS 462, *10 (307 days). All were still granted relief. Here, appellant did. This factor weighs heavily in appellant's favor.

D. Prejudice – The Appellant has been unable to have this court weigh in on the first three assignments of error and has incurred substantial emotional and financial hardship above normal confinement due to the government's inaction/decisions

Unlike virtually every case since *Winfield*, Appellant continues to suffer prejudice by the completely discretionary and illogical decisions of the convening authority. As noted in the 1106 matters, the defense's speedy trial request, and Def.

App. Sub., the government seized appellant's truck, and to date, has been unwilling to release the vehicle from evidence. This is despite having access to the vehicle registration, multiple pictures of the vehicle (that are contained in the Stip.), and the video of the accident. (Pros. Ex. 2 contains ten pictures and the Government admitted a video of the accident in Pros. Ex. 3 and 4). There is no need to keep the vehicle "as evidence" until the completion of appellate review especially when the government is on notice of the surrounding strain it is causing an innocent military spouse and newborn child.

With the vehicle impounded, it cannot be sold or utilized, but the Appellant still must make payments. (Def. App. Sub; RCM 1106 matters, p 3). As Appellant's leadership noted, after the accident, Appellant was still expected to be at work, and performed above all his peers even after the accident. (R. 147; 157). Likewise, Appellant had his own medical appointments for multiple issues, including the chronic pain he was treated for the day of the accident and mental health assistance. (R. at 175-188; Pros. Ex. 2; Def. App. Sub.). Meetings with defense counsel bolstered the need for an available vehicle. (Def. App. Sub.).

Mrs. [REDACTED] was a high-risk pregnancy and had repeated medical appointments. (RCM 1106 matters, p 3; Def. App. Sub.). Those two competing interests alone necessitated the [REDACTED] obtaining another vehicle. (Def. App. Sub.) Even the additional vehicle they purchased has caused a massive financial hardship

to make monthly payments on *all* vehicles. (RCM 1106 matters; Def. App. Sub.). Mrs. [REDACTED], on behalf of appellant, has attempted numerous times to obtain relief calling officials at Fort Hood and going back to work before medically recommended. (Def. App. Sub.). She also immediately got rid of their other vehicle upon Appellant's confinement. (Def. App. Sub). Additionally, Appellant's assigned TDS counsel made multiple efforts as well via email, calls, and in person. (Def. App. Sub.). This is not the case where inaction by Appellant (or his spouse) contributed to the prejudice; the [REDACTED] tried repeatedly to clear up the situation and mitigated it by selling the extra vehicle and going to work before medically cleared; and this was brought to the attention of the government multiple times.

This hardship was compounded when, after having surgery and giving birth less than two weeks before trial, the convening authority denied his request to defer and/or waive automatic forfeitures for the family's benefit. The military judge saw there was no justification in adjudging forfeitures/rank reduction (despite a request by the trial counsel), and did not do so. (R. at 194, 199). But for the convening authority's decree of a dishonorable discharge, there may not be automatic forfeitures. While granting waiver is a discretionary act, this court looks to the government's action (whether discretionary or not), such as prioritizing caseloads, in determining both Due Process and Article 66. Therefore, the

government's decision in holding the vehicle and failing to waive are ripe for consideration in determining whether the Appellant suffered prejudice.

Every day it took for the transcript to reach this Court was another day of interest/payment the Appellant endured. The compounded stress of not being able to support his wife during her recovery (while she endured the hardships of being a first-time mom and going back to work before medically recommended), combined with reduced income, added a unique stress above and beyond normal confinement. (Def. App. Sub.). This was enhanced as the government did not speed up the processing, nor provide a rational explanation for the waiver's denial or the vehicle's retention. This caused a greater and different degree of stress than normal. The strain was so much that the Appellant contemplated waiving the appellate process just to relieve that stress including reaching out to Defense Appellate Division prior to being assigned an attorney indicating they were unequivocally waiving the process due to the financial strain. (Def. App. Sub.).

Likewise, unlike the other cases post-*Winfield*, here there is potential compounded error given the convening authority's intrusion into judicial discretion and his dictating an unprecedented sentence for this type of case. *See Moreno*, 63 M.J. at 139 (noting that appellant's position regarding other substantive appeal grounds is a consideration for prejudice).

E. Tolerating the Delay would Undermine the Fairness and Integrity of the Military Justice System

If this court determines that the Government can disprove prejudice beyond a reasonable doubt, this court should still grant relief based on the above because tolerating this delay “would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Toohey II*, 63 M.J. at 362.

First, appellant was not a malicious or evil person; he was not intoxicated or even on his cell phone during the accident. Second, there is no argument the Appellant’s wife, or his eleven-day old baby, committed any misconduct or even refused to cooperate with any investigation. The convening authority’s decision leaving a military spouse to go back to work in violation of Military Medical Officers’ recommendations and making that financial strain worse every day as she recovers from her cesarean section is a poor look at any time, but especially during a recruiting crisis when the Army is putting “People First.” (Def. App. Sub.).

In short, the convening authority and his representatives handled every aspect of the post-trial process inappropriately with each decision further hurting the Appellant’s financial strain which not only affected him, but his spouse and new baby. This caused a different financial and emotional strain than normal confinement, especially for someone who loves the Army as much as the Appellant. (Def. App. Sub.). These cold choices including not prioritizing the post-

trial processing, warrant additional relief above and beyond what this Court may grant for the first three assignments of error.

Conclusion

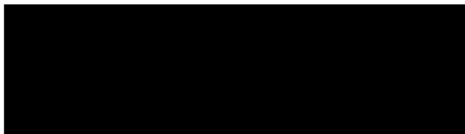
For the foregoing reasons, this court should grant meaningful and appropriate sentence relief under both the Due Process Clause and Article 66 for the post-trial delay affirming, at most, only 9 months confinement. It should also consider providing other appropriate sentence relief similar to *Baylor* given the convening authority's specific choices in plea terms and post-trial actions.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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