IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Staff Sergeant (E-6) **DAVID L. HUNTER,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20230313 Tried at Fort Cavazos, Texas, on 16 February and 1 June 2023, before a general court-martial convened by the Commander, III Corps, Fort Cavazos, Colonel Maureen A. Kohn, Military Judge, presiding.

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

Assignment of Error I[1]

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.

Assignment of Error II

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

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 4

Assignment of Error 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).

Assignment of Error IV

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

Assignment of Error V

WHETHER APPELLANT WAS PREJUDICED WHEN THE STAFF JUDGE ADVOCATE INCORRECTLY ADVISED THE CONVENING AUTHORITY THAT APPELLANT HAD FAILED TO SUBMIT THE NECESSARY INFORMATION FOR THE CONVENING AUTHORITY TO CONSIDER APPELLANT'S REQUEST FOR WAIVER OF AUTOMATIC FORFEITURES WHEN IN FACT APPELLANT HAD SUBMITTED THE NECESSARY INFORMATION.

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Statement of the Case

On 1 June 2023, a military judge, sitting as a general court-martial, convicted appellant, in accordance with his plea, of one specification of negligent homicide, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2019) [UCMJ]. (R. at 55; Statement of Trial Results [STR]). On 1 June 2023, the military judge sentenced appellant, in accordance with his plea agreement, to nine months confinement and a dishonorable discharge. (R. at 199; STR). On 13 June 2023, the convening authority disapproved appellant's request for deferment and waiver of automatic forfeitures and took no action on the findings or sentence. (Action). On 19 June 2023, the military judge entered judgment. (Judgment).

Statement of Facts

On 9 September 2022, appellant was operating a GMC Sierra SLT pickup truck with a custom lift. (Pros. Ex. 2, pp. 2–3, 7–9). While driving from the military treatment facility on Fort Cavazos, appellant disregarded a posted stop sign and was traveling with enough velocity to strike Mrs. [redacted] and run her over with both axles of his vehicle before coming to a stop. (Pros. Ex. 2, p. 11). Mrs. [redacted] was positioned squarely in front of appellant's vehicle in the middle of a crosswalk when he struck her. (Pros. Ex. 2, p. 10). Exactly what appellant was doing when he struck Mrs. [redacted] is unclear, but it was evident that he was operating

his vehicle with culpable negligence and that he only engaged his brakes after the second impact of his back tires running over Mrs. [redacted]. (Pros. Ex. 2, p. 11). Mrs. [redacted] died as a result. (Pros. Ex. 2, p. 12).

1. The impact.

The accident had profound impacts on every person who witnessed the event. (R. at 58–85). Multiple witnesses spoke of ongoing trauma that they experienced from witnessing appellant hit Mrs. [redacted] and the "crunching sound" as he ran over her body and skull. (R. at 62, 70, 75, 80; Pros. Ex. 2, p. 11).

Both of the victim's surviving children spoke of the devastation of losing their mother and her grandchildren losing their grandmother. (R. at 86–93). Mrs. [redacted] left behind three children, two grandchildren, and her husband of forty-years, for who she was the sole caretaker of. (R. at 87). Mrs. [redacted]'s husband, Sergeant First Class [SFC] (ret.) [redacted], was exposed to Agent Orange while in Vietnam and experienced "numerous health issues," which his daughter feared he now must "suffer alone without [her] mother at his side." (R. at 88). Mrs. [redacted]'s son, Lieutenant Colonel [LTC] [redacted] stated that while he knew there would be "repercussions for [appellant's] actions," to include the legal repercussions of these proceedings, appellant would get to move on with his life and that was something his mother would not have. (R. at 93).

2. The plea agreement.

Appellant's submitted a plea agreement to the convening authority on 12 January 2023. (App. Ex. III, p. 1). Appellant agreed to plead guilty to The Specification of Charge II, negligent homicide. (App. Ex. III, p. 1). In exchange for his plea of guilty, the convening authority agreed to the following: 1) to withdraw and dismiss Charge I, involuntary manslaughter without prejudice. (App. Ex. III, p. 3; Charge Sheet). Appellant and the convening authority agreed that the dismissal would ripen into prejudice if the findings and sentence was upheld on appeal. (App. Ex. III, p. 3). The convening authority agreed to limit confinement to between six and twelve months and a dishonorable discharge. (App. Ex. III, p. 3). The agreement also delayed any trial date until after the birth of appellant's child. (App. Ex. III, p. 3). Appellant was sentenced to nine months confinement and a dishonorable discharge. (R. at 199).

Assignment 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.

Standard of Review

Sentence appropriateness is reviewed de novo. *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018).

Law and Argument

This court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Kelly*, 77 M.J. at 406. While this court has a great deal of discretion in determining whether a particular sentence is appropriate, no authority exists to "engage in exercises of clemency." *United States v. Vega*, ARMY 20190009, 2020 CCA LEXIS 206, *14 (Army Ct. Crim. App. 8 Jun. 2020) (mem. op.) (citing *United States v. Nerad*, 69 M.J 138, 146–48 (C.A.A.F. 2010)). In determining whether a sentence "should be approved" a CCA's authority to grant relief is not without limits. As the Court of Appeals for the Armed Forces [CAAF] stated in *United States v. Nerad*, "Article 66(c), UCMJ, empowers the CCAs to 'do justice,' with reference to some legal standard, but does not grant the CCAs the ability to 'grant mercy.'" 69 M.J. at 146 (quoting *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998)).

When determining sentence appropriateness, this court may consider the following factors: "the sentence severity; the entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez*, 76 M.J. 837, 841–42 (Army Ct. Crim. App. 2017). "While the power to review a case for sentence appropriateness is highly discretionary, it is intended to assure 'that justice is done

and that the accused gets the punishment he deserves.'" *United States v. Christensen*, ARMY 20190197, 2021 CCA LEXIS 159, *6 (Army Ct. Crim. App. 29 Mar. 2021) (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

1. Appellant bargained for and received benefits of his plea agreement.

As this court found in *United States v. Cowan*, although "sentence limitations made as part of a pre-trial agreement do not control our sentence appropriateness review, they do inform it." 2017 CCA LEXIS 633, *14 (Army Ct. Crim. App. 28 Sep. 2017). Appellant received substantial benefits in exchange for his guilty plea. (App. Ex. III, p. 3–4). Appellant significantly reduced his punitive exposure by dismissing Charge I and its Specification of involuntary manslaughter. (App. Ex. III, p. 3; Charge Sheet). The maximum sentence for such an offense is ten years confinement. *Manual for Courts-Martial*, United States (2019 ed.) [*MCM*], pt. IV, para. 57.d.(2).

This court has found, though not dispositive, comparing percentages of potential maximum punishments is a useful consideration. *Martinez*, 76 M.J. at 841. The CAAF, even when comparing the sentences of co-actors, found that sentences that were "relatively short compared to the maximum confinement" were a factor that weighed in favor of affirming the sentence. *See United States v. Lacy*, 50 M.J. 286, 289 (C.A.A.F. 1999).

Here, the remaining charge that appellant pleaded guilty to carried a

maximum sentence of three-years confinement and appellant's plea agreement further limited that term to one-year of confinement. (R. at 34; App. Ex. III, p. 3). Appellant ultimately received nine months confinement—one quarter of the maximum confinement he could have received under the charge he was found guilty (Charge II, negligent homicide) and less than one thirteenth the amount he could have received under the charge that was dismissed (Charge I, involuntary manslaughter). *Compare MCM*, pt. IV, para. 57.d.(2) *with* para. 103.d. Lastly, appellant was thoroughly advised of the ramifications of a dishonorable discharge yet specifically agreed it was his "expressed desire to be discharged from the service with a dishonorable discharge to get what [he] believe[d] to be a favorable plea agreement." (R. at 49). As this court stated in *United States v. Griffin*, an appellant's voluntary inclusion of this provision in his plea agreement likely "worked to his favor by helping induce the convening authority to accept the proposed confinement limitation." ARMY 20220211, 2023 CCA LEXIS 459, *2–3 (Army Ct. Crim. App. 26 Oct. 2023), *rev. den.*, 2024 CAAF LEXIS 111 (C.A.A.F. 26 Feb. 2024).

2. Appellant's sentence was not inappropriately severe.

Appellant's sentence was not inappropriately severe when considering: the "seriousness" and "circumstances" of appellant's conduct. *Martinez*, 76 M.J. at 841–42. Although appellant's acts were unintentional, the seriousness of their

repercussions were evident from the record of trial. The gruesomeness of the tragic accident had profound impacts on every person who witnessed the event. (R. at 58–85). Multiple witnesses spoke of recurring nightmares or trauma that they experienced from witnessing appellant hit Mrs. [redacted] and the "crunching sound" as he ran over her body. (R. at 62, 70, 75, 80; Pros. Ex. 2, p. 11).

Appellant disregarded a posted stop sign and was traveling with enough velocity to strike Mrs. [redacted] and run her over with both axles of his vehicle before coming to a stop. (Pros. Ex. 2, p. 11). Mrs. [redacted] was positioned squarely in front of appellant's vehicle in the middle of a crosswalk when he struck her; meaning he was operating his vehicle with such little regard that he did not see Mrs. [redacted] positioned directly in his line of sight. (Pros. Ex. 2, p. 10). Exactly what appellant was doing when he struck Mrs. [redacted] is not clear, but what was abundantly clear was that he was operating his vehicle with culpable negligence when he disregarded the posted stop sign and struck and proceeded to run over Ms. [redacted]. (Pros. Ex. 2).

Both of the victim's surviving children spoke of the devastation of losing their mother and her grandchildren losing their grandmother. (R. at 86–93). Mrs. [redacted]'s death clearly had a lasting impact on her family who relied upon her, to include her husband, children and grandchildren. (R. at 87–88, 93). Appellant's plea agreement specifically accounted for the birth of appellant's child and returning home from confinement within the first year of his child's life. (App. Ex.

III, p. 3). Appellant received the benefit of that bargain. These factors alone establish that appellant's sentence was not inappropriately severe.

3. Sentence comparison is not required or helpful.

Appellant argues that his punitive discharge was inappropriately severe based on other sentences for crimes where the underlying conduct resulted in death through culpable negligence. (Appellant's Br. 19). This argument is misguided and fails to consider the appropriate standard when engaging in sentence comparison. Unless the cases are closely related, "[t]he appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases." *United States v. LeBlanc*, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015) (en banc) (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). This court is only "required . . . to engage in sentence comparison with specific cases '[] in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *Lacy*, 50 M.J. at 288 (quoting *Ballard*, 20 M.J. at 283).

A. The cases appellant cited are not closely related.

Cases are "closely related" when they involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id*. This court has "broad latitude" to determine whether cases

are closely related. *United States v. Behunin*, 83 M.J. 158, 162 (C.A.A.F. 2023). Appellant's argument does not establish that there are any closely related cases, merely that other cases involving the same or a similar charge did not receive a dishonorable discharge. (Appellant's Br. 20–21). This argument fails to consider cases that were summarily affirmed and the fact that the maximum punishment for negligent homicide has only included a dishonorable discharge since 1994. *Infra* n.2; *United States v. Chambers*, 54 M.J. 834, 836 n.7 (N.M. Ct. Crim. App. 2001) ("A 1994 amendment to the MCM increased the maximum confinement to three years to 'eliminate the incongruity created by having the maximum punishment for drunk driving resulting in injury that does not necessarily involve death exceed that of negligent homicide where the result must be the death of the victim.'").

The thrust of appellant's argument for the first assignment of error can best be summarized as, this court should grant relief because "Dishonorable Discharges [] are practically unheard of when the sole underlying crime is a negligent act."[1] (Appellant's Br. 19). Appellant's argument fails for two reasons: 1) the cases appellant cites for his proposition have material differences; and 2) his argument

[1] Contrary to appellant's assertions, cases exist and have been affirmed by this court, in which a vehicular homicide through culpable negligence resulted in a dishonorable discharge. *United States v. Ranes*, ARMY 20200301 (Army Ct. Crim. App. 24 Feb. 2021) (sum. op.) (affirming in short form the appellant's finding and sentence of twenty-seven months confinement and a dishonorable discharge for involuntary manslaughter).

fails to consider that appellant's dishonorable discharge mitigated what could have been a longer period of confinement—which is exactly why he agreed to the punitive discharge in the first place. (R. at 49).

B. Even if this court were to compare sentences, appellant's sentence was not inappropriately severe.

Even the cases appellant cited for the proposition that a dishonorable discharge is inappropriately severe support that a higher term of confinement is likely for a conviction of the same or similar offense.[2] *See Chambers*, 54 M.J. at 834 (sentencing appellant to eighteen months confinement, total forfeitures, and reduction to E-1). Notably, the victim in *Chambers* was the appellant's passenger, who was drinking with the appellant all night, then chose to drive with the appellant from Louisiana to Mississippi without wearing a seatbelt. *Id.* at 834–35.

[2] Appellant cites a plethora of authorities to support his argument regarding sentence appropriateness; however, only seven of those cases involve the negligent operation of a vehicle. (Appellant's Br. 20–21, n.3). None of the cases cited by appellant stand for the proposition that a dishonorable discharge is inappropriate for a case involving a negligent act resulting in death, but merely that a bad conduct discharge was appropriate or other relief was warranted. (Appellant's Br. 20–21, n.3). All of the cases appellant cited are distinguishable in either the facts of the case or the punishments received (e.g. more confinement). *E.g.*, *United States v. Strong*, 83 M.J. 509, 511–12 (Army Ct. Crim. App. 2023) (sentencing appellant to a bad conduct discharge, confinement for three years, and reduction to the grade of E-1 for preventing an authorized seizure of property and negligent homicide); *United States v. Martinez*, 42 M.J. 327, 329 (C.A.A.F. 1995) (affirming appellant's findings and sentence of a bad-conduct discharge for negligent homicide where appellant gave his car keys to his friend who was intoxicated and crashed the vehicle dying from his injuries).

Although the appellant in *Chambers* did not receive a punitive discharge, he received twice as much confinement. *Id.* Here, appellant was motivated to secure a lower period of confinement based on the birth of his child. (App. Ex. III, p. 3). If appellant wanted a higher amount of confinement in exchange for a lessor or no punitive discharge, it was incumbent upon him to negotiate that term prior to his pleadings.

Appellant's reliance on *United States v. McDuffie* is similarly misguided. (Appellant's Br. 19). In *McDuffie*, the appellant was sentenced to one-year confinement, a bad conduct discharge, and reduction to E-2. 65 M.J. 631, 632 (A.F. Ct. Crim. App. 2007). The Air Force Court found appellant's conviction for involuntary manslaughter factually insufficient, but guilty of the lessor included offense of negligent homicide. *Id.* at 637. Thus, the court reassessed appellant's sentence and affirmed all, but the bad-conduct discharge. *Id.* Appellant McDuffie had significant mitigating circumstances such as suffering from sleep apnea (which likely was the cause of the accident), he was traveling the speed limit, legally driving an American-made car in England, which required him to drive on the opposite side of the road, and the accident left appellant "severely injured" as well. *Id.* at 632.

Here, appellant's negligence did not result in the death of his friend who assumed certain risks by riding in a vehicle with a known intoxicated driver and

without a seatbelt. *Chambers*, 54 M.J. at 834–35. Appellant was left with no such injuries from the accident as the appellant in *McDuffie* and had no medical condition that mitigated his culpable negligence. 65 M.J. at 632. Importantly, appellant bargained for and received less confinement than each of the above referenced appellants. (App. Ex. III, p. 3; R. at 199).

Similar to the appellant in *United States v. Strong*, appellant had no significant mitigating circumstances—other than his willingness to immediately take responsibility. 83 M.J. at 511–12; *supra* n.3. However, unlike the appellant in *Strong*,[3] appellant received significantly less confinement. (R. at 199); *Id.*; *see also United States v. Melbourne*, 58 M.J. 682, 683 (N.M. Ct. Crim. App. 2003) (sentencing appellant to twenty months confinement, total forfeitures, reduction to E-1, and a bad-conduct discharge). Appellant spends a significant portion of his brief dedicated to the rationale in the dissent of *United States v. Joyner*, 39 M.J. 965, 967–70 (A.F. Ct. Crim. App. 1994) (Kean, J., dissenting). However, when analogizing his case to *Joyner*, appellant failed to mention that the maximum

[3] Appellant relies on *Strong* and *United States v. Green*, No. 202100032, 2021 CCA LEXIS 701, *5 (N.M. Ct. Crim. App. 29 Dec. 2021) to support his argument that his dishonorable discharge was disparate. (Appellant's Br. 20, n.3). However, just as the appellant in *Strong* (who was also convicted of interfering with the law enforcement investigation), the appellant in *Green* also received more confinement—fifteen months, and a bad conduct discharge, all while pleading guilty in exchange for the convening authority dismissing the charge of involuntary manslaughter. *Green*, 2021 CCA LEXIS at *3, 5.

sentence available for the offense of negligent homicide at that time was one-year confinement and a bad-conduct discharge. *Id.* at 966. The appellant in *Joyner* received one-year confinement and a bad-conduct discharge, the maximum sentence allowed,[4] which was deemed appropriate because as the court reasoned, "[t]he killing of another human being, even if caused by negligence, is a serious matter." *Id.* at 967.

C. Individualized consideration is the appropriate standard.

Ultimately, however, "[s]entence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Healy*, 26 M.J. at 395. This requires "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (cleaned up). By affirming appellant's sentence, this court is not saying that

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[4] Appellant's argument that his sentence makes his case the "most egregious case in military history" is misguided because it fails to consider that a dishonorable discharge was only added as the maximum punishment for negligent homicide since 1994. Moreover, this requirement for a dishonorable discharge in the plea agreement was based on appellant's request to the convening authority when he submitted his offer to plead guilty. Appellant also informed the military judge that it was his "expressed desire to be discharged from the service with a dishonorable discharge to get what [he] believe[d] to be a favorable plea agreement." (R. at 49). *Chambers*, 54 M.J. at 836, n.7 ("A 1994 amendment to the MCM increased the maximum confinement to three years to 'eliminate the incongruity created by having the maximum punishment for drunk driving resulting in injury that does not necessarily involve death exceed that of negligent homicide where the result must be the death of the victim.'").

"this is the sentence we would have adjudged had we been the sentencing authority" but rather that it is not an inappropriately severe sentence for appellant to have bargained for based on the seriousness of the loss of life. *Joyner*, 39 M.J. at 966. Here, appellant negotiated for a particular and individualized punishment based on the facts of his case; that punishment was not inappropriately severe considering the seriousness of the loss of life, and appellant received the benefit of his bargain. (App. Ex. III, p. 3). To the extent that comparing sentences is at all relevant to this court's determination, the case law supports the notion that appellant received a lessor term of confinement in exchange for a more severe punitive discharge. For those reasons, the sentence should be affirmed.

Assignment of Error II

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

Assignment of Error 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).

Additional Facts

Appellant "having examined the charges and specifications preferred against [him] and all the supporting evidence thus far provided by the Government, [] offer[ed] to enter into the following Plea Agreement[:] . . . to enter a plea of guilty

at a General Court-Martial . . . [t]o Charge II and its Specification." (Appellate Ex. III, p. 1). In exchange for appellant's plea of guilty, he requested a sentence limitation of no less than six-months and no more than twelve-months confinement with a mandatory dishonorable discharge. (Appellate Ex. III, p. 3). The convening authority agreed to withdraw and dismiss without prejudice Charge I (involuntary manslaughter) in exchange for appellant's plea. (Appellate Ex. III, p. 3). The agreement stated that the dismissed charge would "ripen into prejudice upon completion of appellate review in which the findings and sentence have been upheld." (Appellate Ex. III, p. 3).

The military judge went through every provision of the plea agreement with appellant. (R. at 35–52). The military judge expressly read the term of the agreement regarding the dismissed Charge I ripening into prejudice upon completion of appellate review in which the findings and sentence have been upheld. (R. at 47). The military judge explained that once appellant's plea of guilty was upheld at the appellate court, the government would be "barred from going forward on [] Charge I." (R. at 47). The military judge twice asked appellant if he understood this term of the agreement and appellant stated that he did. (R. at 47).

The military judge thoroughly explained the potential repercussions of a dishonorable discharge on appellant. (R. at 48). Appellant stated that he

understood and that he discussed this with his counsel. (R. at 49). Appellant agreed that it was his "expressed desire to be discharged from the service with a dishonorable discharge to get what [he] believe[d] to be a favorable plea agreement." (R. at 49). Appellant confirmed that he had time to discuss the agreement with his counsel, that he entered into the agreement on his own free will, that he understood all terms of the agreement, and that he pleaded guilty because he hoped to receive a lighter sentence and because he was in fact guilty. (R. at 51–52).

Standard of Review

"The interpretation of provisions of the R.C.M., and whether a term in a [plea agreement] violates the R.C.M., are questions of law that [this court] review[s] de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citing *United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007).

Law

The Military Justice Act of 2016, enacted through the National Defense Authorization Act for Fiscal Year 2017, brought several changes to include the addition of Article 53a, UCMJ, 10 U.S.C. § 853a. This article explains that an accused and convening authority may enter into an agreement for "limitations on the sentence that may be adjudged for one or more charges and specifications." Article 53a(a)(1)(B), UCMJ, 10 U.S.C. § 853a(a)(1)(B).

The President implemented Article 53a, UCMJ, in R.C.M. 705. Plea agreements may include promises by convening authorities to limit the sentence which may be adjudged. R.C.M. 705(b)(2)(E). These limitations may include a minimum and maximum punishment which may be imposed, which the military judge is bound by.[5] R.C.M. 705(d)(1). Either party may propose any term or condition not prohibited by law or public policy. R.C.M. 705(e)(1), (3)(A). "If a plea agreement contains limitations on the punishment that may be imposed, the court-martial . . . shall sentence the accused in accordance with the agreement." R.C.M. 910(f)(5).

"To ensure that the record reflects the accused understands the pretrial agreement and that both the Government and the accused agree to its terms, the military judge must ascertain the understanding of each party during the inquiry into the providence of the plea." *United States v. Smith*, 56 M.J. 271, 272–73 (C.A.A.F. 2002)). A military judge must reject any plea agreement, or strike any provision, which "is prohibited by law," "is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements," or "violates public policy." Articles 53a(b)(4) and

[5] "Whereas, previously, under subparagraph (c)(4)(C) of the old Article 60, UCMJ, any agreement between the parties regarding sentence was effectuated through the convening authority's action, such terms are now known to and binding on the military judge when imposing a sentence." *United States v. Rivero*, 82 M.J. 629, 632 (N.M. Ct. Crim. App. 2022).

53a(b)(5), UCMJ, 10 U.S.C. §§ 853a(b)(4), (5); *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003) (citations omitted).

"[A] court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces . . . ." Article 56(c)(1), UCMJ, 10 U.S.C. § 856(c)(1). Pretrial agreements which have the effect of transforming sentencing proceedings into "an empty ritual" are impermissible. *E.g.*, *United States v. Davis*, 50 M.J. 426, 429 (C.A.A.F. 1999). "A term or condition in a plea agreement shall not be enforced if it deprives the accused of . . . the right to complete presentencing proceedings" and "the complete and effective exercise of post-trial and appellate rights." R.C.M. 705(c)(1)(B).

"A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority." *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006). "In a typical pretrial agreement, the accused foregoes certain 'constitutional rights . . . in exchange for a reduction in sentence or other benefit. As a result, when interpreting pretrial agreements, 'contract principles are outweighed by the Constitution's Due Process Clause protections for an accused.' In a criminal context, the government is bound to keep its constitutional promises . . . ." *Id*. (cleaned up).

"At trial, the military judge must ensure that the accused understands the pretrial agreement, the parties agree to the terms of the agreement, the agreement conforms to the requirements of R.C.M. 705, and the accused has freely and voluntarily entered into the agreement and waived constitutional rights." *Id.*

Argument

Appellant argues that the plain text of Article 53a and R.C.M. 705 render the plea agreement, which required an adjudged dishonorable discharge, impermissible. Further, that such an interpretation is supported by the tenets of statutory construction, legislative history, and implications from Supreme Court precedent. This argument ignores the plain meaning of Article 53a and R.C.M. 705, which specifically allows for limitations on maximum and minimum sentences. At least two other courts of criminal appeal [CCA], who have addressed this specific issue, agree. Appellant's plea agreement was lawful, did not violate public policy, and did not deprive appellant of the right to complete presentencing proceedings or the effective exercise of post-trial and appellate rights. This court should affirm appellant's sentence based on a plain reading of the statute and in accordance with the findings of other service courts.

1. Appellant's plea agreement is not prohibited by law.

The Military Justice Act of 2016 expressly allowed provisions to limit the sentence which may be adjudged, to include a minimum punishment which may be

imposed. R.C.M. 705(d)(1). Here, appellant and the convening authority agreed that the minimum punishment included a dishonorable discharge. (Pros. Ex. III, p. 3). As the Air Force CCA found in *United States v. Kroetz*, "[t]his agreement is now permissible pursuant to R.C.M. 705(d)(1)."[6]

The Navy-Marine CCA took that rationale a step further finding that the plain language of the statute clearly contemplates a "specific sentence." *United Rivero*, 82 M.J. at 634. "[E]ven if the terms of the plea agreement had removed all discretion in sentencing (e.g., had required a sentence of confinement and forfeitures where the minimum and maximum terms were identical), this would not have rendered the presentencing proceedings meaningless." Both CCA's findings are consistent with the plain language of the statute, which says nothing that would suggest a prohibition on a specific sentence or a sentence that includes a minimum of a dishonorable discharge.

Appellant argues that an agreement limiting the minimum punishment to a dishonorable discharge (and six-months confinement) is prohibited by a contextual interpretation of the statute. (Appellant's Br. 33–34). Appellant acknowledges that the analysis begins with the plain language of the statute, but seemingly skips

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[6] No. ACM 40301, 2023 CCA LEXIS 450, *9 (A.F. Ct. Crim. App. 27 Oct. 2023); *see also United States v. Geier*, No. ACM S32679, 2022 CCA LEXIS 468, 4 (A.F. Ct. Crim. App. 2 Aug. 2022), *rev. den*., 2022 CAAF LEXIS 778 (C.A.A.F. 2 Nov. 2022); *United States v. Rivero*, 82 M.J. 629, 634 (N.M. Ct. Crim. App. 2022).

over this step and argues that a contextual reading of the statute suggests a prohibition, and that a "range" is required. (Appellant's Br. 33–34). Specifically, that a more recent version of R.C.M. 705 allowing for a "specific sentence" and the fact that Congress did not use the term "specific sentence" in the applicable version of the R.C.M. suggests that Congress intended to prohibit one. (Appellant's Br. 33–34). Appellant's argument is flawed for two reasons.

First, it erroneously equates a minimum sentence of a dishonorable discharge as a "specific sentence" rather than a "limitation on the minimum punishment." This is contrary to the Secretary's reading of the rule,[7] and the interpretation of both CCA's who have addressed this exact issue. *Supra*, n.7. Additionally, appellant's interpretation "would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). By appellant's logic, any specifics in a plea agreement could qualify as a "specific sentence" to include an agreement for no confinement, or no punishment. *See Rivero*, 82 M.J. at 632. Congress plainly intended "[a]ny other term or condition that is not contrary to or inconsistent with [R.C.M. 705]" to be available to the parties, to include "a limitation as to other authorized punishments as set forth in R.C.M. 1003." R.C.M. 705(c)(2)(G), (d)(3). Here, the terms limiting the minimum punishment to a dishonorable discharge and six months confinement is expressly permitted. *Id.*

[7] *Infra*, para. 2.

Second, appellant assumes that the existence of the "specific sentence" or "range" language in other statutes means Congress and the President intended a "specific sentence" to be prohibited by the applicable version of R.C.M. 705. The Navy-Marine CCA, when addressing this same argument, found "no practical difference between [the language cited by the appellant] and that of R.C.M. 705(d)." *Rivero*, 82 M.J. at 633. As the Navy-Marine CCA stated, "the plain language of the rule does not require such ranges" and "it is unnecessary to read a requirement for a 'range' into the limitations specifically allowed under [the rule]." *Id.* at 632. For the aforementioned reasons, this term of the plea agreement is expressly permitted by the rule.

2. The agreement is not prohibited by policy.

The R.C.M. 705(a) authorizes the service secretaries to establish limits on pretrial agreements. Contrary to the limits on pretrial agreements for offenses occurring prior to 1 January 2019, a "plea agreement pursuant to RCM 705(d)(2) may include an agreement for a specific sentence provided that the agreement . . . [does not] deprive an accused of complete sentencing proceedings." Army Reg. 27-10, Legal Services: Military Justice, para. 5-27(b), 5-28(b)(c) (20 Nov. 2020) [AR 27-10]. Although a service secretary certainly could not diminish the congressional protections afforded by Congress, the Secretary's interpretation of

R.C.M. 705 via AR 27-10 certainly is a persuasive authority to this court. *See Griffin*, 2023 CCA LEXIS 459 at *2.

Appellant suggests that such an agreement provides a convening authority with an unchecked power, or one that degrades judicial discretion. (Appellant's Br. 38–41). Appellant willingly, voluntarily, and with qualified counsel (who he does not allege was deficient), entered into an agreement with the convening authority to get the benefit of this deal. (Pros. Ex. 2; R. at 48–49). Appellant's plea agreement did not hide substantive terms of the agreement from the military judge, nor did they preclude appellant from presenting a case in extenuation and mitigation.[8] *See generally United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002); *United States v. Soto*, 69 M.J. 304 (C.A.A.F. 2011); *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999). Here, appellant's "expressed desire [was] to be discharged from the service with a dishonorable discharge to get what [he] believe[d] to be a favorable plea agreement." (R. at 49).

3. The agreement is not prohibited by Supreme Court precedent.

Appellant argues that civilian Federal precedent and Supreme Court precedent "rigorously guard" judiciary discretion and thus this court should reject an agreement that "unduly cabins" sentencing discretion. (Appellant's Br. 3, 40–

[8] In fact, appellant did put on a robust sentencing case, calling nine witnesses and providing an unsworn statement, resulting in three months less confinement than authorized and no other authorized punishments. (R. at 95–189, 199).

41). Appellant relies on *United States v. Padilla* for the proposition that "[t]he power to sentence criminal defendants lies with the [trial] court, not the parties themselves." __F.Supp.3d__, 2023 U.S. Dist. LEXIS 152127, *7 (N.M. Dist. Ct. 29 Aug. 2023). However, *Padilla* stood for the proposition that the agreement between the government and appellant was insufficient because the appellant's sentence was vastly *less* than the minimum sentencing guidelines created by Congress. *Id.* at *5. In other words, *Padilla* held that the parties cannot come to an agreement that undermines or disregards the express intent of Congress. That is not what occurred here.

Importantly, the Supreme Court has expressly held, "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991) (citing *Ex parte United States*, 242 U.S. 27, 37 (1916)). In fact, "[d]eterminate sentences were found in this country's penal codes from its inception." *Id.* (citing *United States v. Grayson*, 438 U.S. 41, 45–46 (1978). Thus, appellant's suggestion that an agreement to a specific sentence is contrary to Supreme Court precedent or public policy is without merit. (Appellant's Br. 3, 43).

4. The plea agreement does not curtail this court's authority.

Appellant asserts that the term of his plea agreement, which allows the withdrawn charge to ripen into prejudice upon the completion of appellate review

upholding the finding and sentence, is unenforceable. (App. Ex. III, p. 3; Appellant's Br. 45). Appellant argues that this provision is unenforceable because it is contrary to public policy and because the military judge failed to ensure appellant was provident to this term of the agreement. (Appellant's Br. 45–46, 48–49). Appellant's argument is flawed because his interpretation of the R.C.M. is unsupported and the military judge's explanation was adequate.

A. The provision is not prohibited by law or policy.

A provision in a plea agreement depriving an appellant of "complete and effective exercise of post-trial and appellate rights" is unenforceable. R.C.M. 705I(1)(B). However, the discussion section of R.C.M. 705(b)(2)(C), expressly contemplates a convening authority's withdrawal and dismissal of a charge without "bar[ring] later restitution of the charges," unless "jeopardy has attached." Nothing in the rule suggests that the convening authority is prohibited from dismissing specifications with prejudice so long as the remaining specification's finding and sentence is upheld on appellate review. The only other service court who has dealt with this exact same provision has found the same. *United States v. Goldsmith*, 2023 CCA LEXIS 8 (A.F. Ct. Crim. App. 11 Jan. 2023).

As the Air Force CCA found in *United States v. Goldsmith*, "such an agreement operates to an appellant's benefit, as it creates the opportunity for that appellant to see withdrawn specifications dismissed with prejudice." *Id.* at *11. In

other words, appellant received the benefit of this bargain because "[i]n the absence of such an agreement, a convening authority would be free to simply dismiss specifications without prejudice and allow them to be revived at some later date." *Id.* Thus, appellant received the benefit of the charges being dismissed with prejudice, while accepting the risk that this benefit may never vest depending on the appellate process.

Appellant's argument that this provision of the plea agreement deprived appellant of his complete and effective exercise of post-trial and appellate rights is without merit. (Appellant's Br. 47). First, appellant is actively exercising those rights before this court. Nothing in the agreement prevents appellant from exercising his right, he clearly was not deterred by the provision from raising this issue with this court, and the court's rights to review and grant relief are similarly not curtailed. The impact of this provision is merely that a contingency of the withdrawn charge ripening into prejudice will not be met based on the findings of this court. This was a risk that appellant and his counsel willingly and voluntarily assumed to get the benefit of the bargain. (R. at 47).

Appellant's suggestion that because R.C.M. 705 does not expressly state that a convening authority may withdraw from an agreement based on an appellate court's affirmance of the sentence is unpersuasive. (Appellant's Br. 45–46). First, as discussed *supra*, the rule permits the reinstatement of withdrawn and dismissed

charges unless jeopardy has attached. R.C.M. 705(b)(2)(C), Discussion. Second, the rule contemplates allowing "[a]ny other term or condition that is not contrary to or inconsistent with this rule." *Id.* at (c)(2)(G). Thus, the argument that the absence of the express language allowing the convening authority to withdraw based on the affirmance of the sentence in R.C.M. 705(e)(4)(A) is similarly without merit.

B. The term of the provision does not constitute withdrawal.

Additionally, that argument assumes that this term constitutes the convening authority's withdrawal from the plea agreement. (Appellant's Br. 47). This is not so. Rather than a mechanism for withdrawal, this provision of the agreement represented a potential benefit that may or may not vest depending on the appellate process. This is clear considering this provision in the agreement is not located in the section discussing conditions for withdrawal and does not require any action by either party. (Appellate Ex. III, pp. 1–2). The convening authority agreed to "direct the Trial Counsel to withdraw the charge and specification." (Appellate Ex. III, p. 3). That term of the agreement was fulfilled. (R. at 47). The second action by the convening authority was that the withdrawn charge would be dismissed without prejudice. (Appellate Ex. III, p. 3). That term of the agreement was fulfilled as well. (R. at 47). The last clause of this provision of the agreement was not an action to be completed by either party, but rather a legal effect that

would potentially vest based on the outcome of the appellate proceedings—the dismissed charge may ripen into dismissal with prejudice. (Appellate Ex. III, p. 3).

However, even if this court were to interpret this provision of the agreement as a mechanism for withdrawal, R.C.M. 705(e)(4)(A), as appellant points out, clearly contemplates a convening authority's ability to withdraw from an agreement based on the appellate court affirming the *findings*—an analogous circumstance to this term of the agreement. (Appellant's Br. 45). Therefore, a term or condition permitting the convening authority to withdraw from the agreement based on the appellate court's decision not to uphold the sentence is clearly "not contrary to or inconsistent with this rule." *Id.* at (c)(2)(G).

C. There is no policy concern.

Similarly, this provision would not undermine the public's faith and confidence in the military justice system. (Appellant's Br. 47). The Supreme Court has made clear, the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973). "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow." *Id.* (citations omitted).

Military appellants are afforded many appellate safeguards that are "unparalleled in the civilian sector." *Diaz v. JAG of the Navy*, 59 M.J. 34, 38 n.5 (C.A.A.F. 2003). Despite those additional safeguards, an appellant may waive "a broad swath of rights" by pleading guilty, which the courts and lawmakers have found does not interfere with their complete and effective exercise of appellate rights.[9] *Goldsmith*, 2023 CCA LEXIS 8 at *11–12. This includes the agreement to knowingly waive all waivable motions, *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009), and certain constitutional rights, *Lundy*, 63 M.J. at 301, in exchange for certain benefits. Here, appellant secured the benefit of the convening authority withdrawing and dismissing a more serious charge and significantly reducing his confinement exposure, while accepting the risk that the more serious charge may fail to ripen into prejudice upon appellate review. (Appellate Ex. III). Appellant offered this provision in his plea agreement to the convening authority and makes no claim that he did so without the advice of competent counsel.

[9] For example, "all nonjurisdisctional defects at earlier stages of the proceedings," *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018); "any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt," R.C.M. 910(j); the denial of discovery requests, *United States v. Jones*, 69 M.J. 294, 296 (C.A.A.F. 2011); the denial of a motion to disqualify trial counsel, *United States v. Bradley*, 68 M.J. 279, 282 (C.A.A.F. 2010); most multiplicity issues, *United States v. Campbell*, 68 M.J. 217, 220 (C.A.A.F. 2009); and virtually all motions to suppress, Mil. R. Evid. 311(d).

D. The military judge's explanation was adequate.

"The military judge shall inquire to ensure [] that the accused understands the agreement; and [] that the parties agree to the terms of the agreement." R.C.M. 910(f)(4)(A). "If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties." *Id.* at Discussion. In this case, the military judge explained that the convening authority was withdrawing the specifications, "[w]hat this means is that Charge I and its Specification will be withdrawn, that is, taken off the charge sheet," but that once the findings and sentence[10] were upheld on appeal, then the specifications would be dismissed with prejudice, meaning "the government will be barred from going forward . . . on Charge I." (R. at 47). The military judge twice asked Appellant if he understood, and Appellant answered both times that he did.[11] Nothing about

[10] The military judge explicitly refers to the findings and sentence initially, but then refers to them thereinafter as appellant's "plea of guilty." (R. at 47). Appellant argues in his brief that the term "plea of guilty" only applied to the findings and that the military judge had a heightened duty to explain that a modification of the sentence could result in the withdrawn charge failing to ripen into prejudice. (Appellant's Br. 48). However, this is contrary to the plain language used in the agreement that the military judge clearly referenced. It defies commonsense that the military judge would read the words "findings and sentence" and erroneously only apply that term to findings, and likewise that appellant would have such an understanding of this provision.

[11] "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).

this term—"findings and sentence"—was ambiguous, and thus did not require further inquiry. R.C.M. 910(f)(4)(A), Discussion.

E. There was no prejudice.

"A military judge's failure to inquire into all of the relevant terms of a plea agreement is tested for prejudicial error under Article 59(a), UCMJ." *United States v. Felder*, 59 M.J. 444, 446 (C.A.A.F. 2004). Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea "materially prejudice[d] the substantial rights of the accused." Article 45(c), UCMJ.

Even if the military judge's inquiry was insufficient, appellant has not demonstrated a "material prejudice to a substantial right." *Id*. Appellant has not asserted that he did not actually understand the provision at the time of his plea, that he was misled as to its legal effect, or that this provision was generated by anyone other than him and his counsel. *Hunter*, 65 M.J. at 403 ("Where there is 'no evidence or representation before this Court that Appellant misunderstood the terms of his agreement, that the operation of any term was frustrated, or that Appellant's participation in agreement was anything other than wholly voluntary' we will not find prejudice.").

The language used is not ambiguous, complex, or hyper technical—"to ripen into prejudice upon completion of appellate review in which the findings *and*

sentence have been upheld." (Appellate Ex. III, p. 3). Nothing in the record supports the claim that appellant did not understand this term or agreed to this provision against his will. Appellant does not contest the plain meaning of the term in the agreement or assert that he interpreted the term to mean something different, nor does he seek to withdraw from the agreement or aver that he would have done anything differently absent the term's inclusion. *See United States v. Baylor*, 2023 CCA LEXIS 462, *5–6 (Army Ct. Crim. App. 30 Oct. 2023). Thus, even if the military judge erred in failing to further inquire into this term, appellant has failed to demonstrate any prejudice resulting from this error. 10 U.S.C. § 859(a); *Felder*, 59 M.J. at 446.

Assignment of Error IV

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

Additional Facts

Appellant was sentenced on 1 June 2023. The staff judge advocate [SJA] provided R.C.M. 1106 matters and his clemency advice to the convening authority on 13 June 2023. (Action). The convening authority signed the action that same day. (Action). Notice of the action was forwarded to the military judge on 19 June 2023. The military judge signed the entry of judgment that same day. (Judgment). Trial counsel and the chief of justice pre-certified the record of trial on 21 and 22

August 2023, respectively. (Pre-certification). On 24 August 2023, the military judge received the record of trial for authentication. (Judge Certification). The military judge authenticated the record on 26 September 2023. On 29 September 2023, the court reporter on record was unavailable to certify the record of trial, so the military judge certified the record in her stead. (Certification). On 3 October 2023, the record of trial was forwarded to this court. (Chronology). A total of 124-days elapsed from the announcement of sentence until the record of trial was forwarded to this court for docketing. (Chronology). On 30 October 2023, this court referred the case and designated counsel. (Referral and Designation of Counsel). Thus, a total of 151-days elapsed from the announcement of sentence.

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83, M.J. 662, 666 (Army Ct. Crim. App. 2023).

Law

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution, and determining sentence appropriateness under Article 66(d), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

1. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right under the Fifth Amendment to post-trial processing without unreasonable delay. *Diaz*, 59 M.J. at 38. In order to analyze post-trial delays and due process, appellate courts analyze four factors: "(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." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Moreno*, 63, M.J. 129, 135 (C.A.A.F 2006).[12] The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *United States v. Toohey*, 63 M.J. 353, 361 (*Toohey II*) (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533).[13] The *Barker* analysis, however, is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

In situations where an appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, "in balancing the

[12] Additionally, CCAs will also further examine prejudice in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 139–40.

other three factors, [the post-trial] 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*, 63 M.J. at 362. If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Id*. This analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id.* Under this review, the court considers "the totality of the circumstances" based on the "entire record." *Id.* The court "will not presume prejudice from the length of the delay alone," but instead requires "evidence of prejudice in the record." *Id.*

2. Sentence appropriateness.

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA "may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record." Because

Article 66(d)(2), UCMJ, does not define "excessive delay," "in considering whether a delay is excessive this court will broadly focus on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay." *Winfield*, 83 M.J. at 666. Even if there is excessive delay, "Article 66(d)(2) dictates [that this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Id*.

Argument

The government did not violate appellant's due process rights because the length of the delay was minimal and there was no prejudice. Considering the totality of the circumstances in this case, appellant does not deserve relief under a sentence appropriateness analysis because appellant did not suffer prejudice, his sentence is appropriate, and there is no harm to correct. Furthermore, appellant has not demonstrated error or excessive delay under Article 66(d)(2), UCMJ. Therefore, this court should affirm the findings and sentence as adjudged.

1. The *Barker* factors do not warrant relief.

From the date appellant's court-martial adjourned to when the case was referred to counsel by this court, 151-days elapsed. (R. at 199; Chronology). The

record of trial is 199-pages. The only period of delay that exceeded two weeks prior to forwarding the record of trial to this court was the amount of time it took for the record of trial to be certified after entry of judgment—106 days. (Chronology). In that time, the court reporter had to generate the record of trial and three separate parties reviewed and authenticated the record of trial. This amount of time is not unreasonable, and thus the first factor weighs in favor of the government. Because the length of time was reasonable, any explanation or claim of prejudice should be given little weight.

In overturning *Brown's* 150-day timeline, this court stated that it would "scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing." *Winfield*, 83 M.J. at 665. Here, although no explanation was provided, no unreasonable delay occurred at any point in the post-trial processing. (Chronology). That being said, this factor weighs in favor of appellant.

Turning to the third *Barker* factor, appellant demanded speedy post-trial processing. Therefore, this factor favors appellant. *Moreno*, 63 M.J. at 138.

Finally, appellant states that he experienced additional stress and financial hardship based on the government's retention of the vehicle that appellant was driving when he struck and ran over the victim. (Appellant's Br. 60). However, appellant has failed to show that his stress and financial hardship is

"distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140.

Ultimately, a total of five-months elapsed during appellant's post-trial processing and only three and one-half months where there was some unexplained delay. Even assuming that the car payments constitute the prejudice contemplated under *Barker*, no appropriate remedy exists for this court to give for such a claim. *See Barker*, 407 U.S. at 534 (finding that "living for over four years under a cloud of suspicion and anxiety," "spend[ing] 10 months in jail before trial," and "very minor lapses" in witnesses' memories only constituted "minimal" prejudice to the appellant that did not warrant relief). Even assuming *arguendo* that an outstanding debt of somewhere between one to four payments of $892.64 constitutes prejudice under *Barker*, no meaningful relief is available. The seizure of property used in the commission of a crime, especially one in which someone lost their life, is a foreseeable consequence that does not warrant sentence relief in this case.[14]

[14] The fact that appellant had pending payments on the vehicle is, at best, a foreseeable and collateral consequence of the crime committed. *See United States v. Yebba*, 2019 CCA LEXIS 338, *10 (A.F. Ct. Crim. App. 23 Aug. 2019) (holding that "the DFAS-generated official debt against Appellant to recoup overpayment" was a "collateral consequence of the crime committed"). As it is an inappropriate consideration at the trial level to consider collateral consequences during sentencing, this court should give little weight to such a tangential and collateral consequence when determining the appropriateness of that sentence. *See United States v. Talkington*, 73 M.J. 212, 215–16 (C.A.A.F. 2014).

2. The delay does not impugn the integrity of the military justice system.

Appellant has failed to show that the 151-day delay was so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system" and overcome the absence of prejudice. As such, the "difficult and sensitive balancing process" of the facts of this case show that appellant did not suffer a due process violation. *Id.*, at 145. Even in cases where a court has found a due process violation, courts have found the due process violation to be harmless beyond a reasonable doubt in the absence of *Barker* prejudice. *See United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (holding that seven-year post-trial delay due process violation was harmless beyond a reasonable doubt); *see also United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008) (holding that appellant did not suffer detriment to his legal position in his appeal as a result of an almost seven-year delay between adjournment and completion of appellate review).

3. Appellant does not merit relief under an Article 66(d)(2) analysis.

Under the specific facts of this case, the delay was not excessive. If this court finds excessive delay, however, Article 66(d)(2) "dictates [this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Winfield*, 83 M.J. at 666. Appellant asks this court to grant "additional relief above

and beyond what this Court may grant for the first three assignments of error." (Appellant's Br. 64). No relief is appropriate in this case. Setting aside appellant's dishonorable discharge is not appropriate in this case and would be a windfall to appellant considering the nature of the charge to which he pleaded guilty. *Winfield*, 83 M.J. at 666; s*ee generally United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) (pronounced qualitative difference between confinement and punitive discharge).

Appellant pleaded guilty to negligent homicide. (R. at 55; Charge Sheet). Based solely on the specification appellant pleaded guilty to, he faced a maximum sentence to confinement of three years and a dishonorable discharge. *MCM*, pt. IV, para. 57.d.(2). Appellant's plea agreement limited appellant's confinement to a maximum of twelve-months, a fraction of the maximum sentence he was facing before he entered into a plea agreement. (App. Ex. III, p. 3). Furthermore, Appellant's plea agreement specifically bargained for a dishonorable discharge and dismissed the more serious charge of involuntary manslaughter. (App. Ex. III; Charge Sheet). Any sentence relief is inappropriate in this case based on those facts and the length of the delay.

Assignment of Error V

WHETHER APPELLANT WAS PREJUDICED WHEN THE STAFF JUDGE ADVOCATE INCORRECTLY ADVISED THE CONVENING AUTHORITY THAT APPELLANT HAD FAILED

TO SUBMIT THE NECESSARY INFORMATION FOR THE CONVENING AUTHORITY TO CONSIDER APPELLANT'S REQUEST FOR WAIVER OF AUTOMATIC FORFEITURES WHEN IN FACT APPELLANT HAD SUBMITTED THE NECESSARY INFORMATION.

Standard of Review

The CAAF has "establish[ed] the following process for resolving claims of error connected with the convening authority's post-trial review." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Once an appellant has alleged a "legal error or deficiency" at the CCA, he "must allege prejudice as a result of the error." *Id.*; *United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F. 2016). Lastly, "an appellant must show what he would do to resolve the error if given such an opportunity." *Wheelus*, 49 M.J. at 288. "If an appellant meets this threshold, then it is incumbent upon the Courts of Criminal Appeals, given their plenary review authority under Article 66(c), . . . to remedy the error and provide meaningful relief." *Id.* When determining whether to grant relief, the standard of review is de novo. *Kelly*, 77 M.J. at 407.

Additional Facts

On 1 June 2023, appellant was found guilty and sentenced to nine-months confinement and a dishonorable discharge in accordance with his pleas and his plea agreement. (Appellate Ex. III, p. 3; R. at 55). That same day, appellant's trial defense counsel allegedly provided R.C.M. 1106 matters along with a fund transfer

authorization form to the special victim prosecutor. (Def. App. Ex. A). The SJA provided all substantive R.C.M. 1106 matters to the convening authority who subsequently disapproved the request for deferment and waiver of automatic forfeitures. (Post-Trial Matters; staff judge advocate's recommendation (SJAR)). The SJA seemingly failed to provide the convening authority with the "necessary information for transferring forfeitures for benefit of dependents," the fund transfer authorization form. (SJAR). Appellant's expiration of term of service [ETS] was on 31 May 2023. (Post-Trial Matters). Appellant's ETS was extended based on the preferral of charges and the pending court-martial until 4 November 2023. (Post-Trial Matters).

Law and Argument

"Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id.* (quoting *United States v. Chatman*, 46 M.J. 321, 324 (C.A.A.F. 1997)). "By definition, assessments of prejudice during the clemency process are inherently speculative. Prejudice, in a case involving clemency, can only address possibilities in the context of an inherently discretionary act." *United States v. Hasan*, _M.J._, 2024 CAAF LEXIS 127, *141–42 (C.A.A.F. 4 Mar. 2024). Once an appellant has made a showing of error and material prejudice resulting from that error, "the Court of

Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post-trial recommendation and action." *Wheelus*, 49 M.J. at 289.

However, "there are those cases where an appellant has not been prejudiced, even though there is clearly an error in the post-trial proceedings. If that be the case, then the Courts of Criminal Appeals preferably should say so and articulate reasons why there is no prejudice." *Id.*

1. Assuming error, appellant has not shown prejudice.

Assuming that appellant submitted the fund transfer authorization form and that form was not provided to the convening authority, appellant cannot show prejudice. The fund transfer authorization form is an administrative document, devoid of any substantive matters. The substantive documents necessary for the convening authority's informed decision to grant clemency were provided and properly considered by the convening authority. (Post-Trial Matters). Appellant's R.C.M. 1106 memorandum, his letter from his wife, and photographs of their newborn child were all presented for the convening authority's consideration. (Post-Trial Matters). Any suggestion that the convening authority denied appellant's request based on the absence of this administrative document fails to meet appellant's required burden of a "colorable showing of possible prejudice." *Chatman*, 46 M.J. at 324.

2. Assuming the convening authority would have granted relief, appellant was not entitled to relief by operation of law.

Whether an appellant is entitled to pay *after the expiration of their service obligation* is a decided matter—in such a case, an "appellant's entitlement to pay [is] terminated on the day that confinement [is] adjudged." *Smith*, 56 M.J. at 275 (C.A.A.F. 2002); *see also United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005). *Smith* is dispositive on this issue.[15] Because appellant's service obligation ended on 31 May 2023 and he was involuntarily extended based on the preferral of charges, his "enlistment had expired and he was in a legal-hold status," which was terminated upon the imposition of his confinement. *Smith*, 56 M.J. at 275; Dep't of Defense, Financial Management Regulation, para. 4.2.7.3. (Apr. 2023) ("Enlistment Expires Before Trial. An enlisted member retained in the Military Service for the purpose of trial by court-martial is not entitled to pay for any period after the expiration of the enlistment unless acquitted or the charges are dismissed, or the member is retained in or restored to a full-duty status.").

Therefore, even if appellant is correct that the convening authority would have granted him clemency had he received the fund transfer authorization form, no meaningful relief could have been granted by operation of law.

[15] Despite the passage of time, the regulation uses the exact same language that the CAAF analyzed in *Smith* when deciding this exact issue. *Compare Smith*, 56 M.J. at 276, *with* Dep't of Defense, Financial Management Regulation, para. 4.2.7.3.

Therefore, even if appellant is correct that the convening authority would have granted him clemency had he received the fund transfer authorization form, no meaningful relief could have been granted by operation of law.

If this court disagrees—assuming some authority that appellant's status is not controlling regarding this alleged error and that appellant has shown prejudice—then this court may provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post-trial recommendation and action. *Wheelus*, 49 M.J. at 289. However, the government disagrees with appellant's assertion that meaningful relief would constitute reducing or vacating appellant's punitive discharge and reducing his period of confinement under six months. (Appellant's Supp. Br. 6). This would undercut and diminish material terms in the agreement between appellant and the convening authority and is not an otherwise appropriate remedy. (Appellate Ex. III, p. 3).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government
Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

CHASE C. CLEVELAND
MAJ, JA
Brank Chief, Government
Appellate Division

APPENDIX

United States v. Baylor

United States Army Court of Criminal Appeals

October 30, 2023, Decided

ARMY 20210576

Reporter
2023 CCA LEXIS 462 *; 2023 WL 7271147

UNITED STATES, Appellee v. Specialist KALEB O. ***BAYLOR***, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Liberty. Troy A. Smith, Military Judge. Lieutenant Colonel Megan Wakefield, Acting Staff Judge Advocate (pre-trial). Colonel Warren L. Wells, Staff Judge Advocate (post-trial).

Counsel: For Appellant: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Rachel M. Rose, JA (on brief).

For Appellee: Lieutenant Colonel Jacqueline J. DeGaine, JA; Lieutenant Colonel Anthony O. Pottinger, JA; Major Justin L. Talley, JA (on brief).

Judges: Before PENLAND, MORRIS, and ARGUELLES[1], Appellate Military Judges. Senior Judge PENLAND and Judge MORRIS concur.

Opinion by: ARGUELLES

Opinion

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of assault on an intimate partner, in violation of *Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928* [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and confinement for 307 days. The convening authority took no action on the sentence.

The case is before this court for review pursuant to *Article 66, UCMJ*. Appellant raises one assignment of error, dilatory post-trial processing, which merits both discussion and relief.

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[1] Judge ARGUELLES decided this case while on active duty.

In addition, although not raised by appellant, based on our independent review **[*2]** of the record, we find that the military judge failed to conduct a meaningful inquiry into all of the terms of the Plea Agreement. For the reasons that follow, however, this error merits discussion but no relief.[2]

BACKGROUND

After appellant and his girlfriend had consensual sex, he urinated in her vagina even though she told him not to. When confronted by the victim immediately after the incident, appellant laughed, and when later interviewed by CID, stated that he didn't care and that he did it because he was hoping the victim would get a yeast infection. The victim contracted a urinary tract infection as a result of appellant's conduct.

In discussing the terms of the Plea Agreement with appellant during the plea colloquy, the military judge failed to discuss those provisions of the agreement pertaining to appellant's right to withdraw his plea, the right of the convening authority to withdraw, appellant's waiver of his right to produce witnesses, and the implications of any other potential misconduct not charged.

Although the Record of Trial (ROT) was only 82 pages, a total of 637 days elapsed between adjournment and our receipt of the case. Of note, there was a delay. of 123 days between **[*3]** the date the sentence was entered on 7 June 2021 and the Entry of Judgment was signed. Another 274 days passed until the ROT was first forwarded to the military judge. It then took the Office of the Staff Judge Advocate (OSJA) another 126 days before they reached out to the military judge to inquire about the delay in receiving his authentication. Specifically, there is an email in the file showing, although the ROT was originally emailed to the military judge on 7 July 2022 and despite getting no response, the OSJA waited until 9 November 2022 to contact the military judge again. In response to the court reporter's email, the military judge stated he did not recall ever receiving the first email and returned his authentication to her the same day. Finally, after the military judge authenticated the record, another 92 days elapsed before the ROT was certified by the court reporter.

While there was a "Post-Trial Processing Timeline" Memorandum ("memo") in the file, we note at the outset that its subject line incorrectly states that this was a Special Court-Martial. A subsequent paragraph incorrectly lists the name of another appellant. Given these glaring errors, it is obvious the memo **[*4]** was most likely the result of a "cut and

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[2] Although the Plea Agreement in this case called for a mandatory punitive discharge, Block 24 of the Statement of Trial Results incorrectly states that a bad-conduct discharge was mandated. We will exercise our discretion to correct this error. See Rule for Courts-Martial 1111(c)(2); *United States v. Pennington, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021)* (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents .... ").

paste" from a different case, which causes us to question its accuracy. Moreover, while the memo generally describes the significant turnover of court reporters over the period in question, it does not clearly state how many court reporters were actually present at the installation on any given date, or even during any given month. As such, we cannot accurately gauge the impact of the limited court reporter availability as it pertains to each of the significant delays in this case. Although the memo does not mention any court reporters by name, we are further troubled by the privacy implications of stating that one or more court reporters "left the service due to a medical evaluation board." Finally, the memo does not describe any effort on the part of the OSJA to seek court reporter assistance from other installations, and/or to hire temporary civilian court reporters.

LAW AND DISCUSSION

A. Plea Colloquy Error

A military judge has a duty to conduct a meaningful inquiry into the terms of a pretrial agreement. *United States v. Felder, 59 M.J. 444, 446 (C.A.A.F. 2004)* ("The accused must know and understand not only the agreement's impact on the charges and specifications which bear on the plea, the limitation **[*5]** on sentence, but also other terms of the agreement, including consequences of future misconduct or waiver of rights"); *United States v. Williams, 60 M.J. 360, 362 (C.A.A.F. 2004)* ("We have long emphasized the critical role that the military judge and counsel must play to ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between an accused and the convening authority."). *See also* Rule for Courts-Martial 910(f)(4)(A)(i) ("The military judge shall inquire to ensure: , that the accused understands the agreement"). A military judge's failure to inquire into all of the relevant terms of a plea agreement is tested for prejudicial error under *Article 59(a), UCMJ*. *Felder, 59 M.J. at 446*.

As noted above, there were multiple provisions in the plea agreement about which the military judge made no effort to ensure that appellant was cognizant, much less that he knew and understood what they meant. Nevertheless, appellant did not seek to withdraw from his plea agreement either at trial or on appeal, and we note that at the end of the plea colloquy, the military judge confirmed that appellant had enough time to go over the agreement with his counsel and that he fully understood its terms. As such, the military judge's error in failing to cover all of the terms of the plea agreement is **[*6]** harmless. *See United States v. Hunter, 65 M.J. 399, 403 (C.A.A.F. 2008)* ("Where there is 'no evidence or representation before this Court that Appellant misunderstood the terms of his agreement, that the operation of any term was frustrated, or that Appellant's participation in agreement

was anything other than wholly voluntary' we will not find prejudice") citing *Felder, 59 M.J. at 446*.

B. Post-Trial Delay

We review allegations of unreasonable post-trial delay de novo. *United States v. Anderson, 82 M.J. 82, 85 (C.A.A.F. 2022)* citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

Since at least 2002, the Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the *Due Process Clause of the Fifth Amendment*; and (2) the statutory basis under *Article 66* when there is no showing of "actual prejudice." *See United States v. Grant, 82 M.J. 814, 819 (Army Ct. Crim. App. 2022)* ("Absent a due process violation, we still have authority under *Article 66, UCMJ*, to grant relief 'when appropriate under the circumstances'") citing *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*; *Toohey v. United States, 60 M.J. 100, 101-02 (C.A.A.F. 2004)* (holding the right to timely appellate review has both statutory roots under *Article 66* and constitutional roots under the *Due Process Clause*).[3]

In *Toohey*, the CAAF adopted the four-factor balancing test from *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, to determine whether the post-trial delay constitutes a due process violation: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion **[*7]** of his right to a timely appeal; and (4) prejudice to the appellant. *60 M.J. at 102*.

With respect to the length of the delay, in *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*, the CAAF established a presumption of reasonableness for post-trial processing where the convening authority took initial post-trial action within 120 days of trial, and the case was docketed with this court 30 days later. In light of the changes implemented by MJA 2016, we modified the Moreno timeline in *United States v. Brown* by holding that "this court will presume unreasonable delay in cases where more than 150 days elapse between final adjournment and docketing with this court." *81 M.J. 507, 510*

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[3] Prior to the implementation of the *Military Justice Act of 2016 (MJA 2016) in January 2019, Article 66(d)(1), UCMJ* granted this court the statutory authority to "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." *MJA 2016* amended *Article 66, UCMJ*, to add a new *section (d)(2)*, which provides in pertinent part that this court "may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of a court-martial after the judgment was entered into the record .... " There is nothing, however, in the plain language of *Article 66(d)(2)* indicating or in any way suggesting that Congress sought to: (1) overrule *Toohey* or otherwise alter the use of the *Barker* test to analyze a Due Process claim as set forth below; or, (2) overrule CAAF precedent recognizing our discretion to afford relief under *Article 66(d)(1)*. *See Am. Tobacco Co. v. Patterson, 456 U.S. 63, 75, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982)* (holding that going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously).

(Army Ct. Crim. App. 2021). In Brown, we also reiterated that "just as it was under the old procedures, staff judge advocates are advised to explain post-trial processing delays .... " *Id. at 511*.

In *United States v. Winfield*, we overruled Brown's 150-day time limit, finding instead that some cases might justifiably take longer than 150 days to process for review, and that others should take significantly less time. *83 M.J. 662, 665 (Army Ct. Crim. App. 2023)*. Instead of imposing a bright-line time limit, we reaffirmed the requirement for an explanation as set forth in Brown and held that in determining the reasonableness of the delay, "we will scrutinize even more closely **[*8]** the unit-level explanations for post-trial processing delays." Id. Because this is a case that should have taken significantly less than 150 days to process, the length of the post-trial delay weighs heavily in favor of appellant.

Likewise, with respect to the purported reasons for the delay, given the deficiencies in the memo as noted above, this factor also weighs heavily in favor of appellant. *See United States v. Arriaga, 70 M.J. 51, 56 (C.A.A.F. 2011)* ("[P]ersonnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay"); *Winfield, 83 M.J. at 665-66* ("Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal"); *United States v. Jackson, 74 M.J. 710, 719 (Army Ct. Crim. App. 20 15)* (rejecting the government's explanation for the delay based on "court reporter shortages and high number of cases tried"). Along the same lines, and further highlighting the OSJA's lackluster approach to post-trial processing, we are also troubled by the fact that the court reporter waited four months to reengage with the military judge after he did not respond to her initial email transmitting the ROT for authentication.

As to the third *Barker* factor, because **[*9]** appellant did not assert his right to a timely appeal, this factor weighs in favor of the government.

In assessing the fourth Barker factor of prejudice, we consider three sub-factors: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Moreno, 63 M.J. at 138-39*, quoting *Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980)*. The first sub-factor is directly related to the success or failure of appellant's substantive appeal, and the second sub-factor requires appellant to show particularized anxiety that is distinguishable from the normal anxiety of waiting for an appellate decision. *Id. at 139-40*. Applied in this case, because appellant does not raise any substantive issues on "appeal other than post-trial delay, and has not

demonstrated any "particularized" anxiety, the fourth *Barker* factor also weighs in favor of the government.

When there is no finding of prejudice under the fourth *Barker* factor, as is the case here, a due process violation only occurs when "in balancing the three other factors, the delay is so egregious **[*10]** that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson, 82 M.J. at 87* citing *Toohey, 63 M.J. at 362*. This is such a case. In balancing the four *Barker* factors, we find that given the extreme length of the delay, taken in combination with government's conduct and unavailing purported justification, relief is warranted under the *Due Process Clause*. Moreover, given the unique facts and circumstances of this case, we cannot conclude the post-trial delay was harmless beyond a reasonable doubt. *See United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006)* ("If we conclude that an appellant has been denied the due process right to speedy post-trial review and appeal, 'we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless'") (quoting *Toohey, 63 M.J. at 363*).

For all of the same reasons, we find that relief is also warranted under both *Article 66(d)(l)* and *66(d)(2), UCMJ*.

CONCLUSION

Upon consideration of the entire record, the finding of guilty is AFFIRMED. While we are confident that appellant deserved the confinement imposed on the day he was sentenced, the government's egregious failure to diligently process the case post-trial now merits the setting aside of his entire period of confinement. As such, only so much of the sentence **[*11]** extending to a bad conduct discharge is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored.

Senior Judge PENLAND and Judge MORRIS concur.

End of Document

United States v. Christensen

United States Army Court of Criminal Appeals

March 29, 2021, Decided

ARMY 20190197

Reporter
2021 CCA LEXIS 159 *; 2021 WL 1235921

UNITED STATES, Appellee v. Lieutenant Colonel MARK W. CHRISTENSEN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Christensen, 2021 CAAF LEXIS 492, 2021 WL 2324542 (C.A.A.F., May 26, 2021)*

Motion granted by *United States v. Christensen, 2021 CAAF LEXIS 497 (C.A.A.F., June 1, 2021)*

Motion granted by *United States v. Christensen, 2021 CAAF LEXIS 589, 2021 WL 2944251 (C.A.A.F., June 23, 2021)*

Petition denied by *United States v. Christensen, 2021 CAAF LEXIS 750 (C.A.A.F., Aug. 12, 2021)*

Prior History: [*1] Headquarters, 1st Special Forces Command (Airborne). Fansu Ku, Military Judge, Lieutenant Colonel Jason M. Elbert, Acting Staff Judge Advocate.

Counsel: For Appellant: Major Kyle C. Sprague, JA; Patrick J. Hughes, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Anthony A. Contrada, JA (on brief).

Judges: Before BURTON, RODRIGUEZ, and FLEMING, Appellate Military Judges. Judge RODRIGUEZ and Judge FLEMING concur.

Opinion by: BURTON

Opinion

MEMORANDUM OPINION

BURTON, Senior Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of a single specification of assault consummated by battery,[1] in violation of Article 128, Uniform Code of Military Justice, *10 U.S.C. § 928* [UCMJ]. The panel sentenced appellant to a dismissal, confinement for three months, forfeiture of $4000.00 for six months, and a reprimand. The convening authority approved the sentence as adjudged.

Appellant raises three assignments of error. We address all three, and grant relief in our decretal paragraph.

BACKGROUND

On the evening of 16 June 2017, appellant and his wife, CC, argued and fought after an evening of drinking with their **[*2]** friends. The altercation began in their bedroom, then moved to the main living area of their home before spilling outside.

CC testified at trial about only one occasion where she was pushed in the chest by appellant.[2] Describing this event, CC testified appellant pushed her through a set of glass French doors that were located in the main living area of the home and separated that area from a bedroom. CC testified appellant pushed her into these doors so hard that at least one of the doors "broke off the hinges onto the floor." CC testified her fifteen-year-old son, NF, was standing "literally right there," and observed appellant push her through these doors.

When called to testify, NF did not confirm CC's version of events. Instead, NF testified when he came out of his room to see why appellant and CC were arguing, he only saw them walking outside. NF then turned around and went back into his room to look out the window at what was happening outside. When asked, NF unequivocally testified that he did not see CC get pushed through the French doors, and that he did not see a French door broken off the hinges.

At the conclusion of trial, the panel found appellant guilty of a single **[*3]** specification of assault consummated by battery for shoving CC "in the chest with his hands" and striking CC on the hand with a door.[3] After the adjournment of appellant's trial, the government

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[1] The panel convicted appellant of the following specification: "In that [appellant], U.S. Army, did, at or near Spring Lake, North Carolina, on or about 16 June 2017, unlawfully shove [CC] in the chest with his hands [and] strike [CC] on the hand with a door."

[2] CC testified about several other instances in which she says she was shoved or grabbed by appellant. However, in each of those instances, CC testified she was shoved or grabbed in the neck, not in the chest. As such, these instances cannot support the finding of guilty for shoving CC in the "*chest* with his hands" contained in Specification 2.

[3] The panel acquitted appellant of aggravated assault by strangling CC with his hands, as well as assault consummated by battery by grabbing CC by her hair with his hands.

took over thirteen months to process appellant's case post-trial. The addendum to the Staff Judge Advocate's Recommendation (SJAR) recognized that trial defense counsel raised the issue of excessive post-trial delay, but neither this document nor any other in the record provides an explanation for the delay.

LAW AND DISCUSSION

A. Factual and Legal Sufficiency

We review questions of legal and factual sufficiency de novo. *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)*. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez, 73 M.J. 172, 175 (C.A.A.F. 2014)* (citations and internal quotation marks omitted). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario, 76 M.J. at 117 (C.A.A.F. 2017)* (citations and internal quotation **[*4]** marks omitted).

In reviewing the evidence contained in the record for factual sufficiency, we are concerned by the lack of evidence supporting the panel's finding of guilty to that portion of the specification alleging appellant shoved CC in the chest with his hands.[4] In the present case, CC's limited testimony regarding the alleged event is the only proof it occurred, and her testimony was directly contradicted by eye-witness testimony and physical evidence.

CC unequivocally testified that NF saw appellant shove her into the French doors. But NF was just as unequivocal that he saw nothing of the sort. This contradicting eye-witness testimony alone gives us serious concern with the panel's finding of guilty.

This concern is magnified by our review of the physical evidence in the record. According to CC's testimony, as a result of appellant shoving her into the French doors, one of the glass doors "broke off the hinges onto the floor." When asked to clarify by government counsel moments later, she again testified "[t]he door broke off the hinges onto the floor," and that appellant "knocked the door off the hinges." Yet the record indicates the door in question could not have fallen onto **[*5]** the floor for several reasons. First, NF testified the door never fell off the hinges onto the floor. In fact, none of the four other people[5] who

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[4] Notably, Specification 2 of the Charge also contains language alleging appellant struck CC "on the hand with a door." We have given full and fair consideration to whether this language is factually and legally sufficient, and conclude based on the record before us that it is.

saw the doors close in time to the alleged event testified they were on the floor or damaged. Second, given that the doors described in the record were interior French doors and would have fallen onto a hardwood floor, we would have expected to see considerable damage had they fallen as CC describes, but the photographic evidence in the record show no such damage.

Given the direct contradictions between CC's testimony and the accompanying eye-witness testimony and physical evidence, we are left with at best a cloudy picture of what happened in front of the French doors. Weighing all the evidence in the record now before us, and making allowances for not having personally observed the witnesses, we are not convinced beyond a reasonable doubt that appellant shoved CC in the chest with his hands. *See* *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. Accordingly, we find that portion of appellant's conviction factually insufficient, and grant relief in our decretal paragraph.

B. Sentence Appropriateness

We next turn to whether appellant's sentence is appropriate for the remaining offense of which **[*6]** appellant was convicted—striking CC on the hand with a door. We conclude that it is, as we discuss below.

We review sentence appropriateness de novo. *United States v. Bauerbach, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)*. "When we conduct a sentence appropriateness review, we review many factors to include: the sentence severity; the entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017)*; *see also* *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)*. While the power to review a case for sentence appropriateness is highly discretionary, it is intended to assure "that justice is done and that the accused gets the punishment he deserves." *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*.

When an accused is retirement eligible and faces a punitive discharge, the sentencing authority may consider evidence of estimated lost retirement pay as a matter in mitigation to lessen the punishment. *United States v. Luster, 55 M.J. 67, 70-71 (C.A.A.F. 2001)*; *see also* *United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001)*. "[I]n reality, the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single most important sentencing matter to that accused and the sentencing authority."

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[5] These people include NF, a friend of CC's who arrived at the home immediately following the incident, and first responders who provided medical treatment to CC. We also note that one of CC's friends who, saw the doors the day after the events in question, testified they were still on the hinges.

United States v. Hall, 46 M.J. 145, 146 (C.A.A.F. 1997) (quoting *United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988))*.

Appellant argues that his sentence—specifically, the panel's imposition of a dismissal—is inappropriately severe. Appellant argues, *inter* ***[*7]*** *alia*, that this court cannot be assured the panel adjudged an appropriate sentence because during deliberation on sentence, it had evidence before it of the offenses of which appellant was acquitted.

We disagree and will focus our discussion on appellant's dismissal, the component appellant avers is too severe. The military judge properly instructed the panel to vote on a sentence based only upon the offense for which appellant was found guilty, and to not adjudge an excessive sentence. Furthermore, the military judge instructed the panel to consider the stigma associated with a punitive discharge, as well as any extenuation and mitigation evidence—including the copy of appellant's retirement benefits calculation the panel had in its possession as it deliberated. Appellant has provided no evidence that the panel did not understand or follow these instructions, and in the absence of evidence to the contrary, the panel is presumed to have followed the judge's instruction. *United States v. Carter, 79 M.J. 478, 482 (C.A.A.F. 2020)* (citations omitted); *see Lakeside v. Oregon, 435 U.S. 333, 340, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978)*.

Next, appellant argues the juxtaposition of appellant's overall service record with the crime for which he was convicted makes his discharge inappropriately severe. Again, we disagree, as appellant **[*8]** paints too narrow a picture of the record now before us. Appellant has a strong service record, but the panel convicted him of a serious crime of domestic violence. Additionally, the panel had before it significant aggravating evidence as it deliberated on appellant's sentence for assaulting his wife. The panel knew when it became expedient for appellant, he immediately sought to minimize his misconduct. Just days after the assault, appellant contacted CC in an attempt to get her to recant her allegations—including those allegations that appellant slammed her hand in a door—and specifically requested that she sign an affidavit to that effect. Finally, during sentencing, appellant elected to not apologize to CC during his unsworn statement,[6] instead focusing on his personal embarrassment.

We are confident the panel properly followed the military judge's instructions and considered the totality of the evidence before it when it sentenced appellant to a dismissal. We, too, have given individualized consideration to appellant's entire sentencing case, including his service record, the impact of the loss of appellant's retirement, and the

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[6] *United States v. Garren, 53 M.J. 142, 144 (C.A.A.F. 2000)* (internal quotation marks omitted) (quoting *United States v. Edwards, 35 M.J. 351, 355 (C.M.A. 1992))* ("[T]he court may consider an accused's lack of remorse in determining an accused's rehabilitative potential if the . . . accused has . . . made an unsworn statement and has either expressed no remorse or his expression of remorse can be arguably construed as being shallow, artificial, or contrived.").

witness testimony regarding appellant's character **[*9]** as a soldier, as well appellant's twenty-eight-page post-trial submission under Rules for Courts-Martial 1105 and 1106. We balance those factors against the severity of the offense for which he was convicted. Weighing the entirety of the record, we cannot say the panel's decision to impose a dismissal is inappropriately severe. As such, under the specific facts of this case, providing any sentencing relief under Article 66 would constitute clemency, which we may not do. *See* *United States v. Nerad, 69 M.J. 138, 145-47 (C.A.A.F. 2010)* (despite our significant discretion in reviewing the appropriateness of a sentence, we may not engage in acts of clemency). Accordingly, we find the approved sentence which includes a dismissal is appropriate, even in light of our dismissal of a portion of the offense to which appellant was found guilty.

C. Dilatory Post-Trial Processing

This court has two distinct responsibilities in addressing post-trial delay. *United States v. Simon, 64 M.J. 205, 207 (C.A.A.F. 2006)* (citing *Toohey v. United States, 60 M.J. 100, 103-04 (C.A.A.F. 2004))*. First, as a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process violation. *Id.* (citing *U.S. Const. amend. V*; *Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 38 (C.A.A.F. 2003))*. Second, we may grant an appellant relief for excessive post-trial delay using our broad authority of determining sentence appropriateness under *Article 66, UCMJ*. *Id.* (citing *United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002))*.

We review **[*10]** de novo whether appellant has been denied his due process right to a speedy post-trial review. *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F 2006)*. A presumption of unreasonable post-trial delay exists when the convening authority fails to take action within one hundred twenty days of completion of trial. *Id. at 142*. In *Toohey*, our Superior Court adopted the following four-factor balancing test from *Barker v. Wingo, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, which we employ when a presumption of unreasonable post-trial delay exists, to determine whether the post-trial delay constitutes a due process violation: "(1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant." *60 M.J. at 102*. In assessing the fourth factor of prejudice, we consider three sub-factors: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Moreno, 63 M.J. at 138-39* (quoting *Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980))*.

In the present case, the government concedes that each of the first three *Barker* factors weigh in appellant's favor. Yet in analyzing the fourth **[*11]** factor of prejudice, we conclude appellant has suffered none. Although appellant raises an issue warranting relief, he "is in no worse position due to the delay, even though it may have been excessive." *Id.* (citation omitted). This is so because we are confident, as discussed below, that the panel would have imposed the same sentence even in light of the factually insufficient language contained within Specification 2 that we dismiss below.

We do find, however, that this is an appropriate case to exercise our authority to grant relief under *Article 66, UCMJ*. *See* *Tardif, 57 M.J. at 224*. Having considered the entire record, the lack of any adequate explanation by the government as to its inaction and the extensive and unexplained post-trial delay, we find appellant is entitled to relief. We reduce the adjudged period of forfeiture by one month.

CONCLUSION

As to Specification 2 of The Charge, only the following is AFFIRMED:

> "In that [appellant], U.S. Army, did, at or near Spring Lake, North Carolina, on or about 16 June 2017, strike [CC] on the hand with a door."

We are able to reassess the sentence in this case, but we do so only after a thorough analysis and in accordance with the principles articulated by our **[*12]** superior court in *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*, and *United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986)*. Weighing in favor of reassessment is the fact that there is no change to the penalty landscape; the gravamen of the criminal conduct remains substantially the same; the aggravating circumstances remain substantially the same; and this type of offense is of the type with which we have experience and familiarity. Accordingly, we are confident based on the entire record and appellant's conduct, the panel would have imposed the same sentence as originally adjudged. We reduce the adjudged period of forfeiture by one month to remedy the government's dilatory post-trial processing. We affirm only so much of the sentence as provides for a dismissal, confinement for three months, forfeiture of $4000.00 for five months, and a reprimand. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by this decision are ordered restored. *See* *UCMJ arts. 58b(c)* and *75(a)*.

Judge RODRIGUEZ and Judge FLEMING concur.

United States v. Cowan

United States Army Court of Criminal Appeals

September 28, 2017, Decided

ARMY 20160031

Reporter
2017 CCA LEXIS 633 *

UNITED STATES, Appellee v. Staff Sergeant, JOHN T. COWAN, United States Army, Appellant

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT.
NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Cowan, 2017 CAAF LEXIS 1182 (C.A.A.F., Dec. 28, 2017)*

Prior History: [*1] Headquarters, 1st Cavalry Division (Rear)(Provisional). Wade N. Faulkner, Military Judge. Lieutenant Colonel Oren H. McKnelly, Staff Judge Advocate (pretrial). Colonel Oren H. McKnelly, Staff Judge Advocate (recommendation). Lieutenant Colonel Scott E. Linger, Staff Judge Advocate (addendum).

Counsel: For Appellant: Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Timothy G. Burroughs, JA (on brief).

For Appellee: Colonel Tania M. Martin, JA; Lieutenant Colonel Erik K. Stafford, JA; Major Michael E. Korte, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

Appellant challenges the legal and factual sufficiency of his guilty plea to maltreatment of a subordinate, claiming Private First Class (PFC) KM, the victim, was not subject to his

orders.[1] We believe this is the wrong legal framework with which to address the substance of appellant's claims of error.

Appellant was charged with maltreatment, abusive sexual contact, and assault consummated by a battery of PFC KM, in violation of *Articles 93*, *120*, and *128, Uniform Code of Military Justice*, *10 U.S.C. §§ 893*, *920*, *928 (2012)* [hereinafter UCMJ]. **[*2]**

A military judge sitting as a special court-martial, accepted appellant's guilty pleas and convicted appellant of maltreatment and assault consummated by a battery. The military judge also accepted appellant's guilty plea and convicted appellant of a second assault consummated by a battery specification, as a lesser-included offense of abusive sexual contact. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for eleven months, and reduction to the grade of E-1. This case is before us for review pursuant to *Article 66, UCMJ*.

BACKGROUND[2]

Appellant and PFC KM were in the same platoon. However, appellant did not directly supervise PFC KM. Part of appellant's duties included responding to maintenance issues in the barracks. Private First Class KM had previously contacted appellant asking for help with one or more issues.

In the early morning hours of 30 August 2014, after consuming half a bottle of bourbon, appellant texted PFC KM and asked if she wanted to meet. Appellant drove to PFC KM's barracks building where she met him outside. The two soldiers engaged in "casual conversation" while appellant smoked cigarettes.

Having run out of cigarettes, **[*3]** appellant asked PFC KM if she wanted to join him on a drive to the shopette to get more cigarettes. As she wanted ice-cream, PFC KM agreed. However, instead of driving to the nearest shopette on-post, appellant drove off-post.

Private First Class KM did not have her military identification with her and was immediately concerned about getting back onto base without proper identification. Indeed, appellant told her she would now not be able to regain entry onto post without a Master

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[1] The remaining assignments of error do not require discussion and do not merit relief. Appellant also avers his sentence was excessively harsh, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, which we discuss without granting relief.

[2] Although our summary of the facts combines the stipulation of fact signed by all parties, statements made by the accused during the inquiry pursuant to *United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969)*, and evidence introduced in sentencing, as noted below, our inquiry into the providence of appellant's pleas is confined to the facts admitted and stipulated to by appellant. Additionally, unless specifically noted otherwise, quoted language is from the stipulation of fact.

Sergeant. Appellant further told PFC KM he would not try to drive her back onto base because he did not want the gate-guards to smell the alcohol on his breath.

Appellant then parked at an off-post gas station and went in to get cigarettes. Concerned, PFC KM contacted a fellow female junior enlisted soldier who lived off-post and asked if she could spend the night with her. Her friend agreed. However, after appellant returned to the vehicle he refused to drive PFC KM to her friend's house because, he claimed, it was too far and he did not want to get caught again for driving under the influence.

Private First Class KM then told appellant to leave her at the gas station. Appellant refused, saying that would make **[*4]** him a "shitty" person. Private First Class KM testified in sentencing that appellant told her, "I am your Sergeant. It's my job to take care of you."

Appellant then told PFC KM he had thought of a solution to their situation. His solution was to drive to a nearby hotel. Private First Class KM protested, but appellant told her they were both adults and could each sleep in separate queen beds.

Once in the room, appellant repeatedly asked PFC KM to take a shower with him. At each entreaty, appellant was "pulling on PFC [KM]'s arms to pull her in towards him without her consent." Each time, PFC KM stepped back and wriggled free. Later in the night under circumstances that are not clear, appellant "fell forward toward PFC [KM]" and "landed on top of PFC [KM] on the bed." He then "positioned himself between PFC [KM's] legs." As she pushed appellant away with her hands and legs appellant "intentionally, and without the consent of PFC [KM], pulled at PFC [KM's] shorts, touching her groin while pulling her shorts aside and exposing her genitalia." Private First Class KM told appellant "no means no." After making one last unsuccessful effort to convince PFC KM to take a shower with him, appellant **[*5]** went to sleep.

On the drive back to post the next day, appellant told PFC KM he had wasted seventy dollars on the hotel room because he "didn't get laid." Notwithstanding that PFC KM did not have identification, they were allowed entry onto post. In a pretext phone call appellant apologized, admitted he repeatedly asked her to take a shower with him, and that the situation "was 'bad' because of the disparity in rank."

LAW AND DISCUSSION

A. Review of Appellant's Plea to Maltreatment

We review questions of law arising from a guilty plea de novo and a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*.

1. "This is a guilty plea, folks."[3]

This court does not review guilty pleas for factual and legal sufficiency. Appellant asserts his "conviction for maltreatment was factually and legally insufficient, as PFC [KM] was not actually subject to his orders." The government accepts appellant's framing of the issue.

We disagree. As this is not an uncommon occurrence, we discuss it at some length in order to provide transparency to our reasoning and so that our reasoning may be subject to further review. As we explain below, despite appellant's framing the issue as one **[*6]** of "factual sufficiency," we view the issue as one entirely of law and therefore an issue that is subject to appeal to our superior court.

Where an appellant pleads guilty, "the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." *Faircloth, 45 M.J. at 174*; *see also United States v. Barton, 60 M.J. 62, 64 (C.A.A.F. 2004)*.

> *Article 45(a), UCMJ, 10 USC § 845(a)*, requires that a military judge set aside a guilty plea if an accused "sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect." [Rule for Courts-Martial] 910(e) [hereinafter R.C.M.] . . . requires that the military judge explain the elements of the offense and ensure there is "a factual basis for the plea." Then, "*the accused must be convinced of, and able to describe all the facts necessary to establish guilt*." [R.C.M.] 910(e) Discussion.
>
> There is no requirement "that any witness be called or any independent evidence be produced to establish the factual predicate for the plea." The factual predicate is sufficiently established if "the factual circumstances as revealed by the accused himself objectively support that plea . . . ." *United States v. Davenport*, 9 [M.J.] 364, 367 ([C.M.A.] 1980).

Faircloth, 45 M.J. at 174 (Emphasis added).

At the **[*7]** lower court in *Faircloth*, a dissenting judge had written "[T]his is a guilty plea, folks . . . . By pleading guilty, appellant knowingly waived a trial of the facts . . ." *Id.* The Court of Appeals for the Armed Forces (CAAF) described this dissenting judge's opinion

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[3] Senior Judge Pearson, Navy-Marine Court of Criminal Appeals, as quoted in *United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996)*.

as "on the mark" and held that the lower court erred when, in a guilty plea, they tested the evidence for factual sufficiency. *Id.*

To be clear, our review under *Article 66(c), UCMJ*, includes determining whether the findings and sentence are correct in law, correct in fact, and should be approved. One way to consider this issue is that the correct in fact portion of *Article 66(c), UCMJ*, in a guilty plea is satisfied by the providence of the plea itself. A military judge instructs an accused prior to accepting a guilty plea that a "'plea of guilty is equivalent to conviction,' that 'it's an admission of all the elements involved in the charges and specifications,' and that 'it's the strongest form of proof known to the law.'" *United States v. Dusenberry, 23 U.S.C.M.A. 287, 289, 49 C.M.R. 536, 538 (1975)*; *see also United States v. McCrimmon, 60 M.J. 145. 147 (C.A.A.F. 2004)*; Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Bencbook, para 2-2-1 (10 Sept. 2014).

Thus, while the scope of our review under *Article 66(c), UCMJ*, includes determining whether **[*8]** the findings and sentence are correct "in fact" this is not the focus of appellate inquiry in a guilty plea. Indeed, if reviewing a guilty plea involved "factual sufficiency" appellant would likely be precluded from appealing that part of the decision to the CAAF. While a service court is a court of fact and law, the CAAF is a court solely of law. *Compare UCMJ art. 66(c) with UCMJ art. 67(c)*.

Instead, whether a military judge abused his or her discretion in accepting a guilty plea is reviewable by the CAAF and is therefore a question of law. *See Inabinette, 66 M.J. at 322*. While the military judge may abuse his or her discretion when there is a substantial basis in fact to question the providence of the plea, the abuse of discretion remains a question of law. Put differently, a military judge errs as a matter of law, not fact, when he or she accepts a guilty plea after an accused has asserted facts inconsistent with pleading guilty.

Our focus, therefore, is on the providence of the plea.

> [O]ur appellate review of a guilty plea is focused on *whether the plea is provident*. We do not review the record in a guilty plea for legal or factual sufficiency, nor do we examine the evidence to determine what the government **[*9]** could prove if appellant contested the charges against him.

*United States v. Andersen, ARMY 20080669, 2010 CCA LEXIS 328, at *2 (Army Ct. Crim. App. 10 Sept. 2010)* (mem. op.).

The analysis above is not merely academic or semantic. The distinction we make materially alters what we may consider in determining whether the military judge abused his discretion in accepting appellant's plea. In this case, the framing of the issue may have

led both parties—but mainly the government—to assert facts we believe fall outside of our consideration.

The thrust of appellant's assignment of error is that PFC KM was not subject to appellant's orders and, therefore, we should set aside his conviction for maltreatment. The government responds that "Appellant's role as a noncommissioned officer [hereinafter NCO] in this particular context objectively supports . . . that PFC KM was subject to appellant's orders." In its argument, the government relies heavily on PFC KM's testimony during sentencing.

As noted above, PFC KM testified on sentencing that appellant had told her, more than once, that "I'm your Sergeant, and it's my job to take care of you." As a matter of factual sufficiency, if believed, this testimony would be good evidence that PFC KM was subject to appellant's **[*10]** orders.

However, PFC KM's testimony in sentencing sheds little light on whether *appellant's* plea of guilty was made knowingly and voluntarily. If appellant does not admit making that statement, then the statement does little to inform us as to whether his plea was voluntary and knowing. Here appellant was not asked about the statement at all. Simply put, unless adopted by the accused, government evidence at a guilty plea cannot make an improvident plea provident.

Article 45(a), the statutory source for *Care* and its progeny, also focuses on the accused. "If an accused . . . after a plea of guilty sets up matter inconsistent with the plea . . . a plea of not guilty shall be entered . . ." *UCMJ art. 45(a)*. The focus is on the accused creating an inconsistency with his plea, not the government.

2. There is not a substantial basis in law or fact to question appellant's plea.

Setting aside the framing of the issue, we turn to the substance of appellant's complaint on appeal, essentially that the plea was "ill-informed and ill-accepted." Appellant argues that the military judge abused his discretion in accepting the plea because PFC KM was not subject to appellant's orders. The first element **[*11]** of maltreatment is that the victim be "subject to the orders of the accused." *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶17.b.(1). As we do not think it proper to consider PFC KM's testimony in sentencing, this case presents a closer issue than the government argues.

Appellant points us towards *United States v. Curry, 28 M.J. 419 (C.M.A. 1989)*. Although our superior court specifically did not express "any final opinion" on the issue the court noted there was no evidence that the victim in that case was subject to the orders of the appellant. *Id. at 424*. However, *Curry* was a contested case and thus the framing was appropriately one of sufficiency of the evidence. *Id. at 420*. The evidence in *Curry* supported that the victim, an E-4, "had no duty which required her to obey any orders of

[Yeoman First Class Curry, an E-6]. He lacked authority over her; and he did not try to order her to do something." *Id. at 424*. Setting aside the fact that our superior court specifically avoided deciding the issue in the first instance, we understand the dicta in *Curry* as stating there was no evidence that the victim was subject to the accused's orders, not that the victim was not subject to the accused's orders as a matter of law.

Appellant also **[*12]** points us to *United States v. Sullivan, 2016 CCA LEXIS 404 (C.G. Ct. Crim. App. 13 Jul. 2016)*. Unlike *Curry*, *Sullivan* involved a guilty plea. *Id. at *1*. Our sister court saw the question as "whether there is 'some duty' requiring a seaman to obey lawful orders of a petty officer." *Id. at *7*. The court questioned whether appellant's admission that the victim was subject to his orders showed "a sufficient understanding of the meaning of that phrase, further undermining providence of the guilty plea." *Id. at *8*. Appellant sees the ruling in *Sullivan* applying "jot for jot" to this case.

However, in *Sullivan*, the question of whether the victim was subject to the orders of the accused was made in a different context. The accused and victim in *Sullivan* had met online and then learned that they were both members of the Coast Guard. *Id. at *5*. They were "stationed at a different unit, [and] outside of any official or professional context." *Id. at 7*. Finally, in *Sullivan*, the government had conceded that the victim was not subject to the orders of the accused. *Id. at *8*.

Appellant correctly notes he did not directly supervise PFC KM. However, appellant admitted and stipulated that he and PFC KM were in the same unit. Indeed, he further admitted they were in the same platoon. Appellant admitted **[*13]** that PFC KM had previously contacted him asking for his assistance in his professional capacity to help with her barrack's issues. When specifically asked whether his relationship with PFC KM prior to the offense was personal or professional, appellant responded "It was - - it was more professional than anything else, sir."

Appellant specifically admitted PFC KM was subject to his orders because he was a Staff Sergeant and she was a Private First Class. While this last statement in isolation was conclusory, the statement was made within the context of his entire *Care* inquiry and appellant admitted he and PFC KM were platoon mates. Appellant stipulated that he told PFC KM "that the situation was 'bad' because of the disparity in rank." Appellant further stipulated that he was well aware of their respective ranks prior to the offense.

In broad scope, the conduct admitted to by appellant describes an NCO who used his position and superior knowledge of the military to try to isolate PFC KM for his own sexual interests. In his unsworn statement, appellant correctly described his conduct as selfish.

While there is some basis in law and fact to question the providence of appellant's plea, we **[*14]** do not find a *substantial* basis.

B. Sentence Appropriateness

Appellant personally asserts that his sentence of a bad-conduct discharge, eleven months confinement, and reduction to the grade of E-1, is overly severe. Appellant honorably served four combat tours and was twice wounded by enemy action. Appellant's two separate Purple Heart awards, copies of which were admitted as evidence, sit silently in the record, but speak volumes. Appellant introduced evidence that he was pending a medical separation at the time of his court-martial.

However, as part of the bargained-for-exchange of the offer to plead guilty, appellant received substantial benefits in exchange for his guilty plea. The convening authority agreed to refer the case to a special court-martial; a less serious forum, which substantially lowered appellant's punitive exposure. The convening authority also agreed to order the trial counsel to not prove-up the *Article 120, UCMJ*, offense. While sentence limitations made as part of a pre-trial agreement do not control our sentence appropriateness review, they do inform it. Finally, we note that appellant, after being advised that a punitive discharge would deprive him of benefits **[*15]** administered by the Departments of the Army and Veterans Affairs, specifically requested his sentence include a punitive discharge.

Considering the entire record, we do not find the approved sentence to be inappropriate under *Article 66, UCMJ*. Our review is limited to determining whether the sentence is appropriate under legal norms. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)*. We are not a court of equity, and lack the power to grant mercy or clemency. *Id.* While clemency may be appropriate given appellant's combat service and injuries, especially if the punitive discharge prevents him from receiving treatment for service related injuries, we leave that decision to those charged with the authority to grant such relief.[4]

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge FEBBO concur.

End of Document

[4] For good cause, the Secretary of the Army could substitute an administrative discharge for appellant's bad-conduct discharge. *UCMJ art. 74(b)*.

United States v. Geier

United States Air Force Court of Criminal Appeals

August 2, 2022, Decided

No. ACM S32679 (f rev)

Reporter
2022 CCA LEXIS 468 *; 2022 WL 3079176

UNITED STATES, Appellee v. Craig M. GEIER, Airman Basic (E-1), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Geier, 2022 CAAF LEXIS 681, 2022 WL 5123156 (C.A.A.F., Sept. 21, 2022)*

Review denied by *United States v. Geier, 83 M.J. 86, 2022 CAAF LEXIS 778 (C.A.A.F., Nov. 2, 2022)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Upon Further Review. Military Judge: Colin P. Eichenberger (arraignment and pretrial motions); Rebecca E. Schmidt. Sentence adjudged on 4 September 2020 by SpCM convened at Mountain Home Air Force Base, Idaho. Sentence entered by military judge on 9 November 2020 and reentered on 18 November 2020: Bad-conduct discharge and confinement for 105 days.

United States v. Geier, 2021 CCA LEXIS 46, 2021 WL 351253 (A.F.C.C.A., Jan. 29, 2021)

Counsel: For Appellant: Captain David L. Bosner, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, KEY, and ANNEXSTAD, Appellate Military Judges. Senior Judge KEY delivered the opinion of the court, in which Chief Judge JOHNSON and Judge ANNEXSTAD joined. Chief Judge JOHNSON filed a separate concurring opinion.

Opinion by: KEY

Opinion

KEY, Senior Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of two specifications of wrongful use of controlled substances and two specifications of dereliction of duty in violation of *Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a*, and Article 92, UCMJ, *10 U.S.C. § 892*, respectively.[1] The military judge sentenced Appellant to a bad-conduct discharge **[*2]** and confinement for 105 days. Appellant had been placed in pretrial confinement prior to his court-martial, and the military judge determined Appellant was entitled to 187 days of credit for that confinement.

Appellant's case was originally docketed with this court on 14 January 2021, however, we determined the record of trial was incomplete and returned it on 29 January 2021. *See United States v. Geier, No. ACM S32679, 2021 CCA LEXIS 46 (A.F. Ct. Crim. App. 29 Jan. 2021)*. That error was corrected, and Appellant's case was re-docketed with this court on 16 March 2021.

On appeal, Appellant raises three assignments of error: (1) whether a plea agreement provision requiring the military judge to adjudge a bad-conduct discharge is legally permissible; (2) whether Appellant received adequate sentence relief for his pretrial confinement credit; and (3) whether his sentence is inappropriately severe. Finding no error prejudicial to the substantial rights of Appellant in the case as returned to us, we affirm the findings and sentence.

I. BACKGROUND

Appellant's offenses involved him ingesting another Airman's prescription hydrocodone on one occasion in 2018, using cocaine at least 14 times between November 2019 and February 2020, and providing alcohol **[*3]** to an Airman and that Airman's wife—both of whom were 20 years old at the time. Some of Appellant's cocaine use was in the presence of other Airmen.

On 3 September 2020, Appellant entered into a plea agreement with the convening authority in which the convening authority agreed to refer Appellant's case to a special court-martial. The convening authority further agreed to dismiss a specification alleging Appellant's wrongful distribution of cocaine and a specification alleging his provision of alcohol to a third underage person. The plea agreement required the military judge to adjudge periods of confinement within specified ranges, all of which would be served

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[1] One of the specifications alleging wrongful use of a controlled substance relates to an offense which occurred in 2018. The version of Article 112a, UCMJ, *10 U.S.C. § 912a*, in effect at the time is substantially identical to the version in effect at the time of Appellant's court-martial. Thus, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

consecutively, but in no event would the sentence exceed the number of days Appellant had already served in pretrial confinement.[2] The agreement also required the military judge to adjudge a bad-conduct discharge and noted, "If the provision above regarding a bad[-]conduct discharge is found to be invalid, that determination shall not affect the binding nature and enforceability of the other provisions contained herein."

In discussing the plea agreement with Appellant, the military judge initially questioned the enforceability **[*4]** of the provision requiring her to sentence Appellant to a bad-conduct discharge. After hearing the parties' views, she concluded the provision violated neither the Rules for Courts-Martial nor public policy in Appellant's case, because she still retained substantial latitude with respect to other types of punishment she could adjudge. Because of this latitude, the military judge reasoned the provision did not interfere with Appellant's right to full sentencing proceedings or render his court-martial "an empty ritual."

II. Discussion

A. Agreement to Adjudge a Punitive Discharge

Appellant essentially argues the plea agreement's provision requiring the military judge to sentence him to a bad-conduct discharge deprived him of complete sentencing proceedings. We disagree.

We review questions of interpretation of plea agreements de novo, as such are questions of law. *See* *United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006)* (applying de novo review to pretrial agreements). The standard is the same in our assessment of whether a plea agreement's terms violate the Rules for Courts-Martial. *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).

The Military Justice Act of 2016, enacted through the *National Defense Authorization Act for Fiscal Year 2017,* ushered in **[*5]** a number of changes to the military justice system.[3] Relevant here is the fact the law created *Article 53a, UCMJ, 10 U.S.C. § 853a*, an entirely new article under the Code. This article, titled "Plea agreements," explains that an accused and convening authority may enter into an agreement over various matters, to include "limitations on the sentence that may be adjudged for one or more charges and specifications." *Article 53a(a)(1)(B), UCMJ, 10 U.S.C. § 853a(a)(1)(B)*.[4] The article

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[2] If the military judge sentenced Appellant to the maximum number of days in each range, Appellant's ultimate sentence would have equaled the number of days of pretrial confinement credit he was due.

[3] *Pub. L. No. 114-328, §§ 5001-5542* (23 Dec. 2016).

requires military judges to reject any plea agreement which "is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements." *Article 53a(a)(5), UCMJ, 10 U.S.C. § 853a(a)(5)*.

Pursuant to the version of Rule for Courts-Martial (R.C.M.) 705 which became effective on 1 January 2019, plea agreements may include promises by convening authorities to limit the sentence which may be adjudged in a given case. R.C.M. 705(b)(2)(E). Such limits may include a limitation on the maximum punishment which may be imposed; a limitation on the minimum punishment which may be imposed; or both. R.C.M. 705(d)(1).[5] A plea agreement, however, may not deprive an accused of certain rights, to include "the right to complete presentencing proceedings." R.C.M. 705(c)(1)(B).

Under the prior version of R.C.M. 705—which addressed "pretrial agreements," as **[*6]** opposed to plea agreements—any sentence limitation constrained the convening authority in taking action, not the sentencing authority's discretion in adjudging a sentence. *See* R.C.M. 705 (b)(2)(E), *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*). Like the current version of the rule, the preceding version prohibited agreements which deprived the accused of "complete sentencing proceedings." R.C.M. 705(c)(1)(B), 2016 *MCM*. In deciding whether to accept an accused's guilty plea under the old rules, the military judge would require the disclosure of the entire agreement—with the exception of any sentence limitation in cases in which the military judge was the sentencing authority—and ensure the accused understood the agreement. R.C.M. 910(f)(3)-(4), 2016 *MCM*. Under the current rules, the military judge still ensures the accused understands the agreement, but the entirety of the plea agreement is disclosed, to include any sentence limitations. R.C.M. 910(f)(3)- (4). The sentencing authority must then sentence the accused in accordance with the terms of the agreement. R.C.M. 910(f)(5); R.C.M. 1005(e)(1); R.C.M. 1006(d)(6).

Even before the Rules for Courts-Martial explicitly referred to "complete sentencing proceedings," military appellate courts concluded that pretrial agreements which had the effect of transforming **[*7]** sentencing proceedings into "an empty ritual" were impermissible. *See, e.g.*, *United States v. Davis, 50 M.J. 426, 429 (C.A.A.F. 1999)* (quoting *United States v. Allen, 8 C.M.A. 504, 25 C.M.R. 8, 11 (C.M.A. 1957)*) (describing this premise as a "fundamental principle" in military jurisprudence). In arguing that his plea agreement did just that, Appellant points to *United States v. Soto*, which involved a pretrial

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[4] Prior to the creation of this article, the UCMJ did not contain any provisions related to such agreements. Rather, the *Manual for Courts-Martial*'s guidance on pretrial agreements was found solely in the Rules for Courts-Martial.

[5] R.C.M. 705(d)(2) addresses plea agreement limitations on confinement and fines, while R.C.M. 705(d)(3) explains that a plea agreement "may include a limitation as to other authorized punishments as set forth in R.C.M. 1003." R.C.M. 1003(b)(8), in turn, discusses punitive separations which may be adjudged by a court-martial.

agreement provision requiring trial defense counsel to argue in favor of a bad-conduct discharge—a provision which was not disclosed to the military judge until after the sentence was adjudged. *69 M.J. 304, 305 (C.A.A.F. 2011)*. The United States Court of Appeals for the Armed Forces (CAAF) found error because the parties failed to inform the military judge about the provision—even after he asked about the existence of any other provisions—which meant the military judge did not have the opportunity to determine whether or not the provision was fair prior to sentencing the accused. *Id. at 307*. Additionally, even when the military judge finally learned of the provision after sentencing the accused, the military judge "did not acknowledge the term . . . let alone discuss it" with the accused. *Id.* In a footnote, the CAAF explained it did not determine whether or not the provision violated R.C.M. 705(c), but cautioned military judges to "be ever vigilant in **[*8]** fulfilling their responsibility to scrutinize pretrial agreement provisions to ensure that they are consistent with statutory and decisional rules, and 'basic notions of fundamental fairness.'" *Id. at 307 n.1* (quoting *United States v. Partin, 7 M.J. 409, 412 (C.M.A. 1979)*).[6]

Appellant argues that *Soto* stands for the proposition that a provision requiring defense counsel to argue for a bad-conduct discharge is invalid, but his reading is incorrect—the ruling in *Soto* was based on the lack of judicial scrutiny of the provision by the military judge, not the validity of the provision itself.[7] *Id. at 307*. At the time of the court-martial in *Soto*, the military judge was unaware of the bad-conduct discharge provision when he sentenced the accused. This deprived the military judge of the ability to either analyze the provision's fairness or discuss it with the accused prior to sentencing him. In Appellant's case, however, the military judge was not only aware of the bad-conduct discharge provision prior to adjudging a sentence, but she discussed it with counsel for both parties as well as with Appellant himself. As a result, *Soto* does not advance Appellant's position.

Appellant also points to the United States Coast Guard Court of Criminal Appeals case of *United States **[*9]** v. Libecap* in which that court held a provision similar to the one in *Soto* was "against public policy" and therefore impermissible. *57 M.J. 611, 616 (C.G. Ct. Crim. App. 2002)*. That decision was premised on the notion that requiring an accused to argue for a punitive discharge would "always have the potential to seriously undercut any other efforts at trial to avoid a punitive discharge." *Id. at 615*. The court concluded it would "create the impression, if not the reality, of a proceeding that was little more than an empty ritual, *at least with respect to the question of whether a punitive discharge should be imposed*." *Id.* at 606 (emphasis added). *Libecap* does little to advance Appellant's argument

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[6] *United States v. Partin* dealt not with an impermissible pretrial agreement term, but rather the military judge's erroneous explanation of the agreement's terms. *7 M.J. 409, 412 (C.M.A. 1979)*.

[7] We offer no opinion on the validity of the provision at issue in *Soto*.

because the ruling is based on the fact that the military judge was unaware of the pretrial agreement's sentence limitations and was still deciding whether or not to adjudge a punitive discharge. We read *Libecap* as saying the problem was the accused was required to give up his bargaining position, thereby undermining the sentencing process in place at the time, in which the accused would typically try to obtain a sentence lighter than the limitations in the pretrial agreement. Under the current rules, however, the military judge is aware of—and **[*10]** bound by—the sentence limits in the plea agreement, so the *Libecap* concerns are absent. In fact, one could rationally conclude the rules regarding plea agreements were designed for the purpose of limiting, if not eliminating, defense efforts to "beat the cap" in sentencing proceedings.

Appellant argues *Libecap* stands for the proposition that Appellant was denied constitutional due process by virtue of the plea agreement provision—which he agreed to—requiring the military judge to adjudge a bad-conduct discharge. *Libecap*, however, was not decided on constitutional grounds and makes no reference to due process at all. Instead, the opinion was grounded in notions of public policy.[8] Appellant identifies no notion of due process that would prohibit a military accused from negotiating for a specific sentence under the UCMJ provisions applicable to his court-martial, and we are aware of none. While the prior system bound convening authorities to take certain actions regarding adjudged sentences, the current system explicitly constrains military judges' and court members' sentencing discretion. Under the former system, sentencing discretion was largely unfettered, cabined only by the maximum **[*11]** sentences identified in the *Manual for Courts-Martial*. That is no longer the case, and the Rules for Courts-Martial's references to "complete sentencing proceedings" must not be read in isolation or inseparably tied to now-obsolete practices, but in conjunction with the evolution of those sentencing proceedings.

Another argument advanced by Appellant is that a plea agreement term requiring a bad-conduct discharge violates public policy. He correctly notes that laws passed by Congress are a good measure of public policy, and he points to *Article 56(c)(1), UCMJ*, which states that "[i]n general . . . a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces." *10 U.S.C. § 856(c)(1)*. Therefore, Appellant argues, courts-martial should be afforded maximum latitude in sentencing decisions. Somewhat undermining this theory is that this very same article requires the mandatory imposition of a dishonorable discharge for specific offenses. *See* Article 56(b), UCMJ, *10 U.S.C. § 856(b)*. Moreover, *Article 53a, UCMJ*—also an indicator of public policy—not only permits plea agreements which

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[8] We recognize *Soto* and *Libecap* dealt with provisions requiring defense counsel to argue for punitive discharges while Appellant's case involves a provision binding the military judge's discretion, but both types of provisions are designed to reach the same result: a sentence including a punitive discharge.

impose limitations on the sentence that may be adjudged, but requires sentencing authorities **[*12]** to adhere to those limits. Taking these provisions together, our assessment is that the policy established by Congress is that sentencing authorities should adjudge appropriate and non-excessive sentences, but that certain offenses require certain punishments and—in any event—those facing courts-martial are permitted to enter plea agreements which constrain military judges' or court members' sentencing discretion.

Appellant does not attempt to identify any legal basis for maximal discretion in sentencing other than by pointing to the "complete sentencing proceedings" reference in the Rules for Courts-Martial, 2016 *MCM*. While there may be sound arguments for granting military sentencing authorities broad discretion in those proceedings, we cannot say they are rooted in constitutional due process considerations. As the United States Supreme Court has explained, "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States, 500 U.S. 453, 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)* (citing *Ex parte United States, 242 U.S. 27, 37, 37 S. Ct. 72, 61 L. Ed. 129 (1916)*). Individualized sentencing is not derived from the United States Constitution, but from "public policy enacted into statutes." *Id.* (quoting *Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)* (plurality opinion)). In short, Congress may give and Congress may take **[*13]** away. In terms of sentencing proceedings, Congress has authorized plea agreements which involve "limitations on the sentence that may be adjudged." Given the fact Congress elsewhere in the UCMJ addresses minimum and maximum sentences, the absence of such qualifications with respect to the "limitations" in *Article 53a, UCMJ*, is strong evidence such limitations may apply to both the upper and lower ends of the punishment spectrum. We see no indication Congress intended a contrary outcome. In promulgating the current version of R.C.M. 705, it seems clear the President read *Article 53a, UCMJ*, in the same way we do. We conclude the plea agreement provision requiring a military judge or court members to sentence Appellant to a bad-conduct discharge violates neither the Constitution nor the UCMJ, nor does it run afoul of public policy under the arguments raised on appeal.

B. Credit for Pretrial Confinement

Appellant served 187 days in pretrial confinement, and the military judge sentenced him to 105 days of confinement and a bad-conduct discharge. She announced, "The accused will be credited with 187 days of pretrial confinement against the accused's term of confinement." For the first time on appeal, Appellant argues he is entitled **[*14]** to additional sentence relief based upon the fact he had more pretrial confinement credit than he had adjudged days of confinement. Seemingly conceding that nothing in the UCMJ or the Rules for Courts-Martial calls for applying "excess" pretrial confinement credit to other elements of an adjudged sentence, Appellant attempts to compare his situation to cases

involving illegal pretrial punishment credit, which may be applied against non-confinement punishments. *See, e.g.*, R.C.M. 305(k). Specifically, he argues his 82 days of "excess" credit should be applied against his punitive discharge. We disagree.

We review the application of pretrial confinement credit de novo. *United States v. Spaustat, 57 M.J. 256, 260 (C.A.A.F. 2002)*. Military members who serve pretrial confinement are entitled to day-for-day credit against their adjudged sentence. *United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984)*.

Although Appellant entered into a plea agreement which both required the military judge to adjudge a bad-conduct discharge and virtually guaranteed a "surplus" of pretrial confinement credit (unless the military judge sentenced him to the absolute maximum amount of confinement she was authorized), we will set aside the question of whether he waived this issue. In doing so, we note the same argument Appellant raises now **[*15]** was squarely rejected by the CAAF in *United States v. Smith*. *56 M.J. 290 (C.A.A.F. 2002)*. In that case, the appellant spent 94 days in pretrial confinement, but was sentenced to a bad-conduct discharge, forfeitures, reduction in grade, and three months of hard labor without confinement. *Id. at 291*. The convening authority disapproved the hard labor without confinement after the staff judge advocate encouraged him to do so under the theory such a punishment would have simply amounted to a burden on the appellant's unit.[9] *Id.* As Appellant does now, the appellant in *Smith* argued his pretrial confinement credit should be analogized to illegal pretrial punishment credit. *Id. at 292*. The CAAF rejected this argument and concluded the appellant was only entitled to credit against adjudged confinement insofar as no law, rule, or regulation required the application of credit against non-confinement elements of a sentence. *Id. at 293*. Appellant has similarly not identified any authority directing the result he seeks. We acknowledge Appellant's case is slightly different from *Smith* because Appellant was sentenced to a period of confinement. But we cannot find any logic in the proposition that a person who is sentenced to some confinement should receive **[*16]** a more favorable result than one who is not sentenced to any confinement at all.

We briefly note the fundamental difference between illegal pretrial punishment and pretrial confinement in the UCMJ context. The former involves the illegal treatment of a servicemember—that is, a legal error. Credit is granted in the case of such punishment in order to remedy the error and thereby ensure the sentence "retains its integrity" in spite of the illegality. *United States v. Larner, 24 C.M.A. 197, 1 M.J. 371, 373, 51 C.M.R. 442 (C.M.A. 1976)*. Pretrial confinement, however, involves the entirely legal proposition of confining a servicemember pending court-martial in order to ensure the servicemember's

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[9] Because the Rules for Courts-Martial at the time employed a ratio of one-and-a-half days of hard labor to one day of confinement, the appellant in *Smith* would have still had "excess" pretrial confinement credit had his credit been applied to the hard labor.

presence at trial or to prevent the servicemember from engaging in serious criminal misconduct. Thus, when pretrial confinement is properly imposed, there is no legal error to remedy, nor does its imposition raise any question about the ultimate sentence. Credit in this circumstance operates to ensure the servicemember's sentence is not inappropriately extended. *See, e.g.*, *Allen, 17 M.J. at 129* (Everett, C.J., concurring) (highlighting the risk of exceeding the maximum amount of confinement authorized by the *Manual for Courts-Martial*). This is not to say Congress or the President is prohibited **[*17]** from directing pretrial confinement credit being applied against non-confinement elements of a sentence, but they have not, and we will not institute such a practice on our own accord.

C. Sentence Appropriateness

Appellant contends his sentence is inappropriately severe. He primarily argues this is so based upon his substantial health concerns which came to light during his military service. According to his written unsworn statement he presented at his court-martial, Appellant suffered from significant pain and other symptoms due to his medical condition, and he turned to alcohol and cocaine as a method of self-medication.

We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (citation omitted). Our authority to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)* (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d), UCMJ, *10 U.S.C. § 866(d)*. "We assess sentence appropriateness by considering the particular appellant, the nature **[*18]** and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam) (citations omitted). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

We do not diminish Appellant's significant health concerns, but we also do not find his sentence to be inappropriately severe given his extensive illegal drug use with and in the presence of other Airmen. Appellant stipulated that his hydrocodone use came about when another Airman complained of the unpleasant side effects he suffered from his prescribed medication. Appellant took the opportunity to research—on the spot—whether one could get high from the pills. He then took a pill, crushed it up, and snorted it in front of several others. Later, Appellant began using cocaine once or twice a weekend for about three months, leading up to his placement in pretrial confinement. The military judge sentenced

Appellant to be confined for 25 days for the hydrocodone use and 85 days for the cocaine use. During the period in which he was using cocaine, Appellant provided alcohol to an underage Airman and that **[*19]** Airman's underage wife in anticipation of the wife's 21st birthday; Appellant received no confinement time for this conduct. Considering Appellant, his record of service, his personal circumstances, and everything else in the record of trial, we conclude Appellant's sentence to 105 days of confinement and a bad-conduct discharge is appropriate.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and 66(d), UCMJ, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence are **AFFIRMED**.

Concur by: JOHNSON

Concur

JOHNSON, Chief Judge (concurring):

The opinion of the court, which I join, explains why the plea agreement provision requiring the military judge to adjudge a bad-conduct discharge did not violate Appellant's due process rights and was not contrary to public policy. The opinion of the court does not need to, and does not, decide whether a more restrictive plea agreement term—e.g., one that prescribed the entire precise sentence the military judge was bound to impose—might be unenforceable under R.C.M. 705(c)(1)(B), which prohibits plea agreement terms which deprive the accused of "the right to complete presentencing proceedings." **[*20]** However, the reasoning of the opinion might be read to *imply* that such a restrictive term would be consistent with complete presentencing proceedings. I do not agree with that proposition, and I write separately to clarify my understanding of the relationship between punishment limitations and the requirement for "complete" proceedings under R.C.M. 705.

As the opinion of the court explains, the plea agreement process created by the Military Justice Act of 2016 differs from the prior practice of creating pretrial agreements between the convening authority and the accused. In particular, there is a fundamental difference in how the two practices operate to put limits on the sentence that an accused may receive from a court-martial. In a pretrial agreement that included a limitation or "cap" on one or more forms of punishment, the convening authority agreed to approve a sentence no greater than that authorized by the cap. The sentencing authority was not made aware of the limitations before the sentence was announced. Therefore, the sentencing authority was

free to adjudge any lawful sentence that they believed to be appropriate for the offenses of which the accused was convicted.

Plea agreements are significantly different **[*21]** from pretrial agreements in that they can directly constrain the punishment the sentencing authority may impose. Thus, in a plea agreement, the accused may negotiate away his or her right to have an independent sentencing authority fully exercise independent discretion to decide what, if any, punishment is appropriate for the offenses, unconstrained by any minimum punishment required by the plea agreement. Put another way, plea agreements enable the removal of the safeguard of an independent sentencing authority's judgment as to what punishments the accused's sentence should and should not include. Of course, the requirement remains that the accused enters the plea agreement voluntarily. R.C.M. 705(c)(1)(A). However, in a system where an undeniable imbalance of power exists between the Government and the accused servicemember, the substitution of a prescribed negotiated result for the independent judgment of a neutral and detached sentencing authority is potentially concerning.

Yet R.C.M. 705(c)(1)(B) still prohibits plea agreement terms that deprive the accused of, *inter alia*, "the right to complete presentencing proceedings." Certainly, the primary purpose of presentencing proceedings—including the introduction of evidence, **[*22]** the testimony of witnesses, the receipt of statements from the victim and the accused, all provided or addressed to the sentencing authority—is to enable the sentencing authority to make an informed decision on the appropriate sentence. If a specific sentence were predetermined by a plea agreement before the presentencing hearing even begins, it is difficult to avoid the conclusion that the presentencing proceeding becomes a substantially hollow exercise.

I do not purport to decide or know at what point maximum and minimum sentence limitations so constrain the military judge's discretion that they might deprive an accused of complete presentencing proceedings. But I agree the requirement to adjudge a bad-conduct discharge in Appellant's case did not cross such a line, because the military judge retained significant discretion over the other potential elements of the sentence,[*] and I agree the findings and sentence should be affirmed.

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[*] The plea agreement required the military judge to adjudge a sentence that included a bad-conduct discharge, between 0 and 77 days of confinement for wrongful use of hydrocodone, between 0 and 90 days for divers wrongful use of cocaine, and between 0 and 10 days for each of the two derelictions of duty, with the adjudged terms of confinement to be served consecutively. The plea agreement did not constrain the military judge's discretion with respect to any other form of punishment.

United States v. Goldsmith

United States Air Force Court of Criminal Appeals

January 11, 2023, Decided

No. ACM 40148

Reporter
2023 CCA LEXIS 8 *; 2023 WL 155118

UNITED STATES, Appellee v. Devonte R.C. GOLDSMITH, Master Sergeant (E-7), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Charles G. Warren. Sentence: Sentence adjudged on 8 April 2021 by GCM convened at Joint Base San Antonio-Lackland, Texas. Sentence entered by military judge on 14 May 2021: Dishonorable discharge, confinement for 84 months, reduction to E-1, and a reprimand.

Counsel: For Appellant: Major Ryan S. Crnkovich, USAF; Major Eshawn R. Rawlley, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major John P. Patera, USAF; Major Zachary T. West, USAF; Mary Ellen Payne, Esquire.

Judges: Before KEY, ANNEXSTAD and GRUEN, Appellate Military Judges. Senior Judge KEY delivered the opinion of the court, in which Judge ANNEXSTAD and Judge GRUEN joined.

Opinion by: KEY

Opinion

KEY, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of three specifications of willfully disobeying a superior commissioned officer, one specification of wrongfully discharging a firearm under circumstances to endanger human life, one specification of communicating a threat, two specifications of assault consummated by a battery, and four specifications of domestic violence in violation **[*2]** of *Articles 90*, *114*, *115*, *128*, and *128b*, *Uniform Code*

of Military Justice (UCMJ), 10 U.S.C. §§ 890, *914*, *915*, *928*, *928b*.[1] After the military judge announced Appellant's sentence, the convening authority withdrew and dismissed one specification of attempted murder in violation of *Article 80, UCMJ, 10 U.S.C. § 880*, and one specification of domestic violence in violation of *Article 128b, UCMJ*, as required by the plea agreement. The military judge sentenced Appellant to a dishonorable discharge, confinement for 84 months, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence in its entirety, but deferred Appellant's reduction in grade until judgment was entered and waived Appellant's automatic forfeitures for a period of six months.

Appellant raises six issues, specifically whether: (1) a provision in his plea agreement is invalid; (2) the entry of judgment should be corrected; (3) the military judge erred in considering certain matters in a victim's unsworn statement; (4) the convening authority erred by considering victim matters submitted post-trial after the deadline for submission had passed; (5) Appellant's record of trial was incomplete and defective, and (6) Appellant was denied the right to a speedy trial. **[*3]** [2] We have carefully considered issue (6) and find it does not require discussion or warrant relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and the sentence.

I. BACKGROUND

Appellant and his wife, HG, were married in 2012, and they had two children together. On two occasions during the 2017-2018 timeframe, Appellant assaulted his wife; the two separated after the second assault. Appellant and HG both started seeing other people, but they remained married to each other. Over the course of 2019, Appellant committed various acts of domestic violence against one woman he was dating, leading to Appellant being ordered to cease contact with this woman in early 2020. Appellant's wife, meanwhile, became pregnant with the child of HS, a man she was seeing. Upset by this fact, Appellant told an acquaintance that he intended to shoot HS in the head. This conversation resulted in Appellant being ordered to stay away from HG's house.

Months later—and one week after the child of HG and HS was born—Appellant discovered that HS was at HG's house. At the time, HG's father, HG's three children, and HS were preparing dinner on her rear patio **[*4]** while one of the children was on a video call with Appellant. Once Appellant realized HS was at the house, he made a comment

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[1] Reference to *Article 128, UCMJ, 10 U.S.C. § 928*, is to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise noted, all other references to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant personally raises issue (6) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

indicating he intended to confront HS. Appellant armed himself with a handgun, went to HG's house, blew a kiss at her doorbell camera, walked around the side of the house, and fired four bullets into her backyard fence. Because the group had become concerned by Appellant's comment on the video call, they had moved inside by the time Appellant arrived. While inside the house, they heard the gunshots. HG's doorbell camera along with a neighbor's camera caught footage of Appellant arriving at HG's house and blowing the kiss. Appellant returned to his own house where he was apprehended the next day and ordered into pretrial confinement. While Appellant was in confinement awaiting trial, HG divorced him.

II. DISCUSSION

A. Appellant's Plea Agreement

Pursuant to the terms of Appellant's plea agreement, the convening authority agreed to dismiss the attempted murder specification (the Specification of Charge I) and one domestic violence specification (Specification 2 of Charge VI) upon announcement of Appellant's sentence. This dismissal was without prejudice, but would **[*5]** "ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." In the plea agreement, Appellant asserted that he was not waiving "the right to complete sentencing proceedings, and complete and effective exercise of post-trial and appellate rights."

On appeal, Appellant argues the "ripen into prejudice" provision is "void or otherwise unenforceable." Appellant's theory is that if his findings or sentence—as adjudged at his court-martial—are altered in any way on appeal, then the two dismissed specifications would not be dismissed with prejudice. In the absence of a "with prejudice" dismissal, Appellant would be potentially subject to trial on those offenses. Appellant asserts this outcome impairs his right to complete an effective appellate review, rendering the plea agreement term invalid under Rule for Courts-Martial (R.C.M.) 705(c)(1)(B) (prohibiting agreement terms which deprive an appellant of "the complete and effective exercise of post-trial and appellate rights"). Likening the provision to the sword of Damocles, Appellant claims it "serves as a disincentive from raising meritorious issues that could entitle [him] to relief." As Appellant puts it, he "is left only with the Hobson's **[*6]** choice to forgo an appeal" in order to avoid the risk of further prosecution, as he would be threatened by greater criminal liability in the event he obtains appellate relief.

Appellant does not ask us to void his plea agreement, but to instead recast the provision at issue by deleting the words "where the findings and sentence have been upheld." Such a modification would ostensibly result in the two specifications and Charge I being

dismissed with prejudice upon completion of appellate review, regardless of whether the findings and sentence are completely upheld.

The interpretation of a plea agreement's meaning and effect is a question of law that we review de novo. *See* *United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006)* (applying de novo review to pretrial agreements). We use the same standard in assessing whether a plea agreement term violates the Rules for Courts-Martial. *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).

Appellant supports his argument by pointing to *United States v. Partin, 7 M.J. 409 (C.M.A. 1979)*. In that case, the appellant had been charged with premeditated murder, but the convening authority agreed to "withdraw" that specification in exchange for the appellant's agreement to plead guilty to the lesser-included offense of unpremeditated murder. **[*7]** *Id. at 410*. The "withdrawal" was effected by amending the specification at trial. *Id.* n.1. The pretrial agreement explained that, "should the accused's plea of guilty to unpremeditated murder . . . be changed by anyone to not guilty, the charge of premeditated murder and the referral of the case as capital may be reinstated by the [c]onvening [a]uthority." *Id. at 411*. At the appellant's court-martial, however, the military judge told the appellant that if findings of his guilt were *overturned* on appeal, then the appellant could be tried on the capital murder charge. *Id. at 412*. In a two-judge majority opinion, the United States Court of Military Appeals found the military judge's explanation to be incorrect, insofar as the pretrial agreement addressed the changing of the pleas, but appellate courts do not enter or change pleas. *Id.* Concluding the military judge's explanation was not actually part of the pretrial agreement, the court determined the explanation was "without legal effect" and warranted no relief. *Id.* Despite this conclusion, the court noted that it did "not condone . . . in any way" the provision in the pretrial agreement. *Id. at 411 n.3*. Citing *United States v. McCray, 7 M.J. 191 (C.M.A. 1979)*, the court found it "need not address [the issue] at the present **[*8]** time."[3] *Id.* The court also commented that "if this misinterpretation by the military judge was an actual term of the pretrial agreement, [the appellant's argument that the term imposed an impermissible burden on his appeal rights] may have merit."[4] *Id. at 412*. In a concurring opinion, Judge

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[3] The reason for the court's reliance on *McCray* is somewhat opaque, as that case stood for the proposition that legally incorrect statements about waiver in a pretrial agreement do not necessarily result in prejudice to an accused who is pleading guilty. *7 M.J. 191 (C.M.A. 1979)*.

[4] The court cited several opinions in support of this proposition, but it is unclear how those opinions relate to the facts of *Partin*. For example, one of the cases is *North Carolina v. Pearce*, in which the United States Supreme Court concluded it would be a constitutional due process violation "to follow an announced practice of imposing a heavier sentence . . . for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *395 U.S. 711, 723-24, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)*. *Pearce* dealt with the retrial of a defendant on the same charges which had been set aside. The *Partin* court also cited *Blackledge v. Perry*, but that case—like *Pearce*—addressed prosecutorial vindictiveness, albeit in terms of adding more serious charges after the defendant exercised his statutory right to request a de novo trial. *417 U.S. 21, 28, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)*. The appellant in *Partin* did not allege any act of vindictiveness on the Government's part, nor has Appellant in this case.

Cook wrote, "I disagree with the inference in note 3 of the principal opinion that a convening authority cannot require final judicial acceptance of a plea of guilty as a condition to effectuation of the pretrial agreement with the accused."[5] *Id. at 413 n.** (Cook, J., concurring in the result).

We are not convinced the language in *Partin* carries as much legal force as Appellant claims, as the Court of Military Appeals seemingly distanced itself from the language just two years later in *United States v. Mills, 12 M.J. 1 (C.M.A. 1981)*. In *Mills*, the appellant had entered into a pretrial agreement in which the convening authority agreed to remit a portion of the appellant's sentence, but the agreement would be canceled in the event an appellate court ordered a rehearing. *Id. at 2*. Thus, the effect of this particular provision would have been to subject the appellant to the risk of serving the originally adjudged **[*9]** sentence should the appellant obtain appellate relief requiring a rehearing. By the time of this decision, one of the two judges in the *Partin* majority had been replaced by Judge Everett. Judge Everett authored the *Mills* opinion and was joined by Judge Cook, who had expressed his disagreement in *Partin*, for a new two-judge majority. The court noted that cases cited in *Partin* focused on "prosecutorial vindictiveness," but also concluded that it "cannot approve an agreement between an accused and the convening authority which would tend to inhibit the exercise of appellate rights." *Id. at 4*. The court upheld the pretrial agreement provision, but only after reframing it so that the provision only subjected the appellant to an increased maximum punishment should a rehearing be ordered *and* the appellant refused to enter into a stipulation of expected testimony, as he had done at his original court-martial. *Id. at 5*. Now in the minority, the dissenting judge wrote that he would have found the provision unlawful. *Id. at 8* (Fletcher, J., concurring in part and dissenting in part). Thus, the comment in *Partin* about not condoning the pretrial agreement term seems to provide little in the way of a concrete foundation for **[*10]** Appellant's argument, especially in light of the fact the *Partin* court upheld the agreement. Reading *Partin* and *Mills* together, what is prohibited is prosecutorial vindictiveness after a successful appeal or—arguably—an agreement provision which would subject an accused to a higher sentence based solely on an appellate court's decision to order a rehearing. Neither of these situations is presented in Appellant's case.

We recognize a provision in a plea agreement which deprives an appellant of "the complete and effective exercise of post-trial and appellate rights" is invalid. R.C.M. 705(c)(1)(B). But we also recognize that convening authorities may withdraw and dismiss specifications, and such "does not bar later reinstitution of the charges" so long as jeopardy has not attached. R.C.M. 705(b)(2)(C), Discussion. Because a convening authority may withdraw a specification before jeopardy attaches and then re-refer it at some point in the

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[5] This judge also commented, "I disagree with, and am uncertain about the meaning of, a number of statements in the principal opinion." *United States v. Partin, 7 M.J. 409, 413 (C.M.A. 1979)* (Cook, J., concurring in the result).

future—regardless of the existence of a plea agreement, the accused's pleas, or an appellant's success on appeal—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. **[*11]** If anything, such an agreement operates to an appellant's benefit, as it creates the opportunity for that appellant to see withdrawn specifications dismissed with prejudice. In the absence of such an agreement, a convening authority would be free to simply dismiss specifications without prejudice and allow them to be revived at some later date—the same position Appellant faces should the findings in his case be disturbed on appeal.

Furthermore, an accused is entitled to waive a broad swath of rights, and doing so has the plain potential to negatively impact his or her ability to mount an appeal. For example, military courts recognize "the general principle of criminal law that an unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018)* (citation and internal quotation marks omitted).[6] Indeed, a guilty plea resulting in conviction "waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt." R.C.M. 910(j). This concept of waiver-by-plea has operated to waive appellate review of the denial of discovery requests, *United States v. Jones, 69 M.J. 294, 296 (C.A.A.F. 2011)*; the denial of a motion to disqualify trial counsel, *United States v. Bradley, 68 M.J. 279, 282 (C.A.A.F. 2010)*; most multiplicity issues, **[*12]** *United States v. Campbell, 68 M.J. 217, 220 (C.A.A.F. 2009)*; and virtually all suppression motions, Mil. R. Evid. 311(e). Similarly, an accused may waive a variety of issues mid-court-martial by asserting he or she has no objection or otherwise assents to certain matters, such as alleged errors related to stipulations of expected testimony, *United States v. Campos, 67 M.J. 330, 332-33 (C.A.A.F. 2009)*; findings instructions, *United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020)*; evidence admissibility, *United States v. Eslinger, 70 M.J. 193, 200 (C.A.A.F. 2011)*; and credit for prior punishment, *United States v. Haynes, 79 M.J. 17, 19-20 (C.A.A.F. 2019)*.

In the context of plea negotiations, an accused may agree to waive all waivable motions, at least so long as the accused understands what he or she is doing. *United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009)*. In this case, the military judge explained that the convening authority was withdrawing the specifications, which meant that they were "taken away here at this court-martial for now," but that once the findings and sentence were upheld on appeal, then the specifications would be dismissed with prejudice and could "never be brought against [Appellant] again." The military judge twice asked Appellant if he understood, and Appellant answered both times that he did. Appellant has

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[6] We recognize our obligation to assess the entire record of any case presented to us and "to determine whether to leave an accused's waiver intact, or to correct the error." *United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016)*.

not asserted he did not actually understand the provision at the time of his plea or that he was misled as to its legal effect, and nothing in the record would support such a claim if he had.

The typical pretrial **[*13]** agreement involves the "accused fore[going certain] constitutional rights . . . in exchange for a reduction in sentence or other benefit." *United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006)*. Here, Appellant essentially accepted the risk of being tried by court-martial on the two dismissed specifications should his findings and sentence not remain intact during appellate review. On the other hand, he secured the convening authority's promise to dismiss those specifications with prejudice if the findings and sentence are upheld. While we understand such a scenario might lead Appellant to question whether or not to raise certain issues on appeal, it was Appellant who agreed to this particular provision, and he does not claim he was coerced into doing so.

Although not evaluating the Rules for Courts-Martial, the United States Supreme Court has determined that the possibility of receiving a higher sentence during a retrial following a successful appeal "does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction" so long as the second sentence is not "a product of vindictiveness." *Chaffin v. Stynchcombe, 412 U.S. 17, 35, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973)*. We find this analogous to the situation faced by Appellant. As the Supreme Court has noted, **[*14]** "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." *Id. at 32* (quotation marks and citation omitted).

Considering the foregoing, we cannot conclude the provision operated to deprive Appellant of his ability to completely and effectively exercise his appellate rights. Appellant would surely be in a better position had the convening authority agreed to dismiss the specifications with prejudice during Appellant's court-martial and without waiting to see the outcome of the appellate process, but Appellant is not entitled to the most advantageous plea agreement. Rather, Appellant is owed the benefit of the bargain he negotiated with the convening authority.

Not only was Appellant not deprived of his ability to completely and effectively exercise his appellate rights, we see no evidence the plea agreement provision impacted those rights at all. Appellant has raised six issues on appeal, and—for two of these issues—he asks us to set aside his sentence. For the third, he asks us to set aside both the findings and his sentence. Thus, whatever pressure Appellant may have felt by virtue of the plea **[*15]** agreement provision, it has not stopped him from asking for the very sort of relief which would relieve the convening authority of the obligation to dismiss the two specifications with prejudice. In other words, even if the plea agreement provision was legally

unenforceable, and in light of our conclusions in this case, Appellant has failed to demonstrate any prejudice. We decline Appellant's invitation to modify his plea agreement or grant other relief for this alleged error.

B. Entry of Judgment

Because we grant no relief to Appellant with respect to the plea agreement provision discussed above, we turn to Appellant's claim that the entry of judgment is inaccurate and requires correction. In a column titled "F," the entry of judgment indicates that Charge I and its specification along with Specification 2 of Charge VI were "[w]ithdrawn and dismissed after arraignment (without prejudice)." Appellant argues this description fails to explain that prejudice will ripen upon completion of appellate review, and he asks us to remand his case and order the entry of judgment be modified to so reflect. Although Appellant has not identified any requirement for the document to include this additional **[*16]** language, the Government "acknowledges that corrective action is needed." Rather than remand the case, however, the Government asks this court to modify the entry of judgment. In light of the parties' agreement that modification is called for, we will accept the Government's recommendation and modify the entry of judgment in our decretal paragraph pursuant to our authority under R.C.M. 1111(c)(2).

C. HG's Unsworn Statement

Appellant's ex-wife, HG, was called as a witness by trial counsel during presentencing proceedings in support of the Government's case in aggravation. She testified about the 2017 assault in which Appellant held her down by pushing his forearm into her neck while he tried to take her phone from her. HG testified that she could not breathe and "was panicking" during the assault. She also testified about Appellant assaulting her in 2018 by slapping her face in the presence of their two children. HG said this latter assault "[j]ust added to [her] lack of trust, lack of feeling safe around [Appellant]." HG recounted that Appellant threatened to kill her boyfriend, HS, as well as that Appellant came to her house and shot at her fence. She explained the emotional toll the events had taken **[*17]** on her and her children and described her persistent concerns for her safety.

After the Government rested, HG sought to present an unsworn statement pursuant to her rights under *Article 6b, UCMJ, 10 U.S.C. § 806b*, and R.C.M. 1001(c). The written statement not only elaborated on the two assaults and the shooting incident at HG's house, but also indicated Appellant had physically abused HG throughout most of their marriage, beginning in 2013. The Defense objected to large sections of the proposed unsworn statement, leading to about half of the statement being redacted. Trial counsel agreed to almost all the redactions.

The military judge, however, overruled the Defense's objection to these two lines: "[Appellant] spent all these years trying to convince me that each incident wasn't that bad, and that I wasn't remembering correctly. On one occasion he would admit what he did and apologize, but then on another occasion he would try to tell me that it happened differently." In objecting, trial defense counsel argued the "two sentences constitute accusations of further mistreatment, not victim impact."

Under R.C.M. 1001(c)(5)(A), a crime victim may provide an unsworn statement to the court-martial which is oral, written, or both. The contents of the statement **[*18]** are limited to victim impact and matters in mitigation. R.C.M. 1001(c)(3). "Victim impact" is defined to "include[ ] any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

In overruling the Defense's objection, the military judge focused on the phrase "directly relating to or arising from" in the definition of "victim impact" in R.C.M. 1001(c)(2)(B). He noted that this phrase was essentially the same as that found in R.C.M. 1001(b)(4), which limits the Government's evidence in aggravation to "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." The military judge explained that case law interpreting the latter rule permitted "commentary on a continuing course of conduct so long as the victim had a qualifying . . . financial, social, psychological, or medical impact from that course of conduct." From there, the military judge concluded the concept of a "continuing course of conduct" applies to victim unsworn statements in the same way the concept applies to the Government's aggravation evidence.

We review a military judge's decision to admit an unsworn **[*19]** victim statement for an abuse of discretion. *United States v. Edwards, 82 M.J. 239, 244 (C.A.A.F. 2022)*. Military judges abuse their discretion when their "factual findings are clearly erroneous, view of law is erroneous, or decision is outside the range of reasonable choices." *United States v. Hutchins, 78 M.J. 437, 444 (C.A.A.F. 2019)* (citations omitted).

Military courts have recognized the principle that uncharged misconduct which is part of "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community" may be admitted as evidence in aggravation, because such evidence is directly related to the conduct which resulted in conviction. *United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990)*. In *Mullens*, the accused had been charged with sexually abusing his children on numerous occasions between 1983 and 1986; the stipulation of fact in that case discussed "uncharged identical

acts with the same children" between 1979 and 1983 at a different duty station.[7] *Id. at 399*. Similarly, in *United States v. Nourse, 55 M.J. 229 (C.A.A.F. 2001)*, the United States Court of Appeals for the Armed Forces (CAAF) upheld the admission of other conduct in a case involving the larceny of ponchos from a sheriff's office. Although the accused in *Nourse* was charged with and convicted of a single larceny of property worth $2,256.00, the Government introduced evidence of **[*20]** other larcenies from the same office of property valued at $30,000.00 and that the accused had sold items to a military surplus store around the same time. *Id. at 230*. In concluding the military judge had not abused his discretion in admitting the evidence, the CAAF explained it pertained to "the same crime upon the same victim in the same place" and was "admissible to show the full impact of [the accused's] crimes upon the [s]heriff's [o]ffice." *Id. at 232*.

We agree with the military judge's conclusion that the "continuous course of conduct" theory found in aggravation cases applies to a victim's right to be heard at sentencing under R.C.M. 1001(c). Like the military judge, we note the "directly relating to or arising from" language in R.C.M. 1001(c)(2)(B) is nearly identical to "directly relating to or resulting from," which relates to aggravation evidence in R.C.M. 1001(b)(4). Considering victim-statement rights were added to the *Manual for Courts-Martial* in 2015,[8] decades after military courts linked the concept of "continuous course of conduct" to evidence in aggravation, we can presume the President's incorporation of substantially the same language in the former in another provision of the very same rule was with the intent of incorporating the legal **[*21]** theories applicable to the latter. Similarly, the logical force behind admitting continuous-course evidence in aggravation—that is, to show the full impact of an accused's crimes—seems equally applicable to victim statements. To the extent the Government is permitted to demonstrate how an accused's offenses have impacted a particular victim, we see no valid argument for preventing a victim from explaining the same in his or her own words.

Appellant asserts the two scenarios are not analogous because an accused may test the Government's aggravation evidence with cross-examination, while a victim giving an unsworn statement cannot be questioned upon it. The problem with this argument is that a victim exercising his or her right to be heard may do so through either an unsworn or sworn statement, only the latter of which permits cross-examination by both trial and trial defense counsel. R.C.M. 1001(c)(4-5). Under a plain reading of R.C.M. 1001(c), what may be contained in a victim statement and the definition of "victim impact" apply equally to unsworn and sworn statements. Thus, we see little support for Appellant's theory on this point. We also note that an accused facing uncharged **[*22]** misconduct in an unsworn

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[7] The Court of Military Appeals did not dwell on the fact the offenses occurred in two different states, concluding instead that the "situs" of both the charged and uncharged offenses was "the servicemember's home." *United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990)*.

[8] *See* Analysis of Rules for Courts-Martial, *Manual for Courts-Martial, United States* (2016 ed.), App. 21, at A21-72.

victim statement is not so hamstrung as Appellant suggests, given that such an accused is free to rebut the allegations as well as emphasize to the court-martial that the victim's information was neither provided under oath nor subject to cross-examination.

We conclude the broad victim rights contained in R.C.M. 1001(c) include permitting a victim to discuss a continuous course of conduct of an accused when such course of conduct is directly related to or arises from an offense against that victim of which an accused has been found guilty.

The next question is whether the language in HG's unsworn statement qualifies as permissible subject matter for her presentation to the court-martial. We conclude it does. Although most of the specifics of HG's previous physical abuse were redacted from her statement after Defense objection, unobjected-to portions of her statement make it clear her marriage to Appellant was tarred by abuse almost from its inception. In the statement ultimately accepted by the military judge, HG wrote: "I can't explain why I stayed in a physically, and mentally abusive situation for so long. I can't remember any period of time where our relationship was healthy." **[*23]** The portion the Defense objected to, but was overruled, merely states Appellant "spent all these years trying to convince [HG] that each incident wasn't that bad," and that he alternated between apologizing to HG and accusing her of remembering incidents incorrectly. At the most, this passage hints at other "incidents," but provides no detail. Assuming *arguendo* this passage suggests specific incidents of uncharged assaults, such amounts to allegations of the same sort of offenses committed against the same victim in the context of their marriage. The information places Appellant's charged offenses—and their impact on HG—in context by demonstrating that the charged offenses did not occur in isolation, but were part and parcel of a long-running abusive relationship. We are well aware of the often-complex nature of domestic violence cases,[9] and we are mindful that portraying abusive episodes as isolated incidents runs the risk of misleading a court-martial by eliminating much, if not all, of the context of the abuse.[10] Under the facts presented here, HG apparently suffered repeated abuse at Appellant's hands during their marriage, and that abuse is directly related to the physical abuse **[*24]** of which Appellant was convicted as well as his firing of his gun into HG's fence. In sum, we conclude the military judge did not abuse his discretion in overruling the Defense's objection.

Even if we had concluded the military judge erred, no relief would be warranted due to the absence of any perceptible prejudice. The objected-to language in HG's statement

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[9] *See, e.g.*, *Commonwealth v. Wilson, 2020 PA Super 18, 227 A.3d 928, 940 (Pa. Super. 2020)* ("It is not uncommon for victims of intimate partner violence to remain with or return to their abusers for a myriad of complicated reasons." (citation omitted)).

[10] We have previously explained, however, that victim-impact statements are not vehicles for presenting "a never-ending chain of causes and effects." *United States v. Dunlap, No. ACM 39567, 2020 CCA LEXIS 148, at *20 (A.F. Ct. Crim. App. 4 May 2020) (unpub. op.)* (quoting *United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995)*), *rev. denied*, ***80 M.J. 347 (C.A.A.F. 2020)***.

essentially accuses Appellant of attempting to gaslight HG about unspecified "incidents." Given Appellant's egregious misconduct, which included physically assaulting two women on multiple occasions, threatening to kill HS, then going to HG's house—in violation of orders to stay away—and discharging a firearm in the immediate vicinity of not just HS and HG, but Appellant's two small children and HG's newborn child, the passage in the unsworn statement is almost entirely insignificant in comparison. After carefully considering the factors set out in *United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018)*, we conclude the inclusion of the passage did not substantially influence Appellant's adjudged sentence, and he would be entitled to no relief even if the inclusion was in error.

D. Post-trial Matters Submitted by HS

Once a court-martial sentence is announced, a **[*25]** victim may submit matters to the convening authority for consideration in deciding what action, if any, to take on the court-martial's findings and sentence "within ten days after the sentence is announced." R.C.M. 1106A(a), 1106A(e)(1). "If . . . the crime victim shows that additional time is required . . . to submit matters, the convening authority may, for good cause, extend the period for not more than 20 days." R.C.M. 1106A(e)(3)(A). If a victim fails to submit matters within these time periods, the victim's right to submit such matters is waived. R.C.M. 1106A(f)(1). Once a victim submits matters, the convening authority is required to ensure the matters are "provided to the accused as soon as practicable." R.C.M. 1106A(c)(3). An accused, in turn, has five days after receiving a victim's matters to respond to them (a period which also may be extended). R.C.M. 1106(d)(3). The convening authority is required to consider any matters "timely submitted" by either an accused or a victim under these rules prior to deciding whether to take action in a case. R.C.M. 1109(d)(3)(A). The convening authority may also consider "[s]uch other matters as the convening authority deems appropriate." R.C.M. 1109(d)(3)(B)(iv). However, "the convening authority may not consider matters adverse to the accused that were not admitted at the court-martial **[*26]** . . . unless the accused is first notified and given an opportunity to rebut." R.C.M. 1109(d)(3)(C)(i).

Appellant's court-martial concluded on 8 April 2021, and his victims were notified that same day via written memoranda of their right to submit matters. The memorandum HS received reads, in part, "your matters are due no later than 18 April 2021.[11] If you need additional time, you may request one twenty-day extension from the convening authority. Any matters received after the prescribed time limit may not be considered by the convening authority." HS signed the memorandum, acknowledging receipt. Below that acknowledgement, HS indicated he was "submitting the attached matters," an indication

[11] We take judicial notice that 18 April 2021 was a Sunday.

which is dated 20 April 2021. The staff judge advocate also signed the memorandum, noting that HS had provided matters, and this annotation is also dated 20 April 2021.[12]

HS's statement is about half a page long and expresses HS's view that Appellant did not deserve any relief from his sentence. HS also wrote, "[Appellant] intentionally violated military and civilian protective orders. He has a lack of respect for authority and the laws which we are governed by." On 23 April 2021, Appellant's trial defense counsel signed **[*27]** for receipt of the statement.

Appellant was also notified on 8 April 2021 of his right to submit matters to the convening authority. In that notification, trial counsel advised Appellant: "The victims in your case are also being afforded a chance to submit written matters to the convening authority . . . . Any matters submitted by a victim will be forwarded to you so that you may rebut them, if you so choose." Appellant submitted a request for clemency to the convening authority dated 18 April 2021. In that request, Appellant asked the convening authority to: (1) defer his adjudged forfeitures[13] and reduction in grade until the entry of judgment; (2) waive his automatic forfeitures for six months; and (3) reduce the amount of confinement pertaining to one specification of violating a protective order (or recommend this court do so).[14]

In a memorandum dated 5 May 2021, the convening authority approved Appellant's adjudged sentence in its entirety while also deferring his reduction in grade and waiving his automatic forfeitures for a period of six months, as Appellant had requested. The convening authority noted she had considered matters "timely submitted" both by Appellant and by two of **[*28]** his victims. R.C.M. 1104(b)(2)(B) permits parties to file motions to correct errors in a convening authority's action within five days of receiving the action, but Appellant filed no such motion.

On appeal, Appellant argues HS submitted his matters after the ten-day window passed and without requesting an extension of time, and those matters therefore should not have been considered by the convening authority. He explains there was "no need" to rebut HS's statement at the time it was submitted because the statement was late and therefore "a nullity."[15] Appellant points to the fact the convening authority did not grant him any relief from his sentence to confinement on the one specification and suggests the convening

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[12] The Government does not contest Appellant's assertion that HS submitted his statement on 20 April 2021. We will assume HS did, in fact, submit his statement on that date.

[13] No forfeitures were adjudged by the court-martial.

[14] Appellant was sentenced to four months of confinement for this particular specification, and that period of confinement was to be served consecutively with other periods of confinement pursuant to both the plea agreement and the ultimate judgment entered by the military judge.

[15] Appellant also takes issue with various comments in HS's statement. For example, Appellant argues he was not actually attacked at his court-martial as having a lack of respect for authority, even though he admitted to violating several orders issued by his superiors. We have carefully considered Appellant's claims regarding the substantive contents of HS's statement and conclude they are without merit.

authority might have been swayed by HS's statement. Appellant asks us to remand his case "to resolve a substantial issue with the post-trial processing in his case" as relief.

We review alleged errors with respect to post-trial processing de novo. *United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)*. When an appellant fails to file a post-trial motion regarding a convening authority's action under R.C.M. 1104, then that appellant's right to object to the accuracy of the action is forfeited absent plain error. *United States v. Miller, 82 M.J. 204, 207 (C.A.A.F. 2022)*. "Plain error occurs when (1) there is error, **[*29]** (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id. at 207-08* (citation omitted).

Although the convening authority's memorandum in this case indicates she considered matters which were "timely submitted" by the victims—and HS's statement was not timely, insofar as it was submitted outside of the ten-day window set out in the Rules for Courts-Martial and the memorandum HS received—we will assume the convening authority did, in fact, consider HS's statement before taking action.[16] The Rules for Courts-Martial, however, do not clearly prohibit a convening authority from considering victim matters submitted late. Under R.C.M. 1106A, a crime victim may submit matters within ten days after the sentence is announced, the convening authority may—for good cause—extend the period for "not more than 20 days," and the failure to submit matters within the prescribed timeframe "waives the right to submit such matters." R.C.M. 1106A(e)(1), 1106A(e)(3), 1106A(f)(1). On its face, R.C.M. 1106A describes the rights of victims and a time limit for victims to exercise those rights. Arguably, the rule simply delineates the minimum rights a convening authority must grant victims with respect to their post-trial **[*30]** matters and does not serve to constrain that convening authority from granting more expansive rights. This interpretation is somewhat undercut, however, by the inclusion of the "not more than 20 days" language, which seems to establish an absolute upper limit on the amount of time a victim may be afforded to submit matters—at least under this particular rule. The rule also only makes the additional 20 days available when there is "good cause" to do so, further constraining a convening authority's discretion, at least under R.C.M. 1106A. Notwithstanding this arguable constraint, we also find significant that R.C.M. 1106A does not contain any language prohibiting convening authorities from considering late-submitted victim matters or directing that convening authorities may *only* consider matters submitted within the rule's timeframes; instead, the rule states that victims who miss their deadline waive their rights to submit such matters. R.C.M. 1106A(f)(1).

Appellant would have us conclude R.C.M. 1106A and R.C.M. 1109 operate to absolutely bar consideration of any victim matters not "timely submitted" under the R.C.M. 1106A deadlines. We decline to adopt this interpretation, as a convening authority may consider

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[16] We reach this conclusion, in part, due to the absence of any indication the convening authority or the staff judge advocate rejected HS's submission or considered whether an extension was required.

matters submitted by a victim outside the R.C.M. 1106A timeframes **[*31]** under R.C.M. 1109(d)(3)(B)(iv). This provision permits a convening authority to consider "[s]uch other matters as the convening authority deems appropriate." The protection afforded an accused under this provision is analogous to the protection under R.C.M. 1106A: the convening authority must provide any new matters to the accused and give the accused an opportunity to rebut information contained therein. R.C.M. 1109 places no restrictions on what "such other matters" may entail, so long as those matters are deemed "appropriate" by the convening authority. It would be counterintuitive to provide convening authorities essentially *carte blanche* authority to consider outside-the-record matters while simultaneously prohibiting consideration of any victim matters which happen to fall outside of the R.C.M. 1106A deadlines. Nor can we fathom any sort of principled rationale for drawing such a distinction. We find a more logical reading of R.C.M. 1106A and R.C.M. 1109 as requiring convening authorities to consider timely submitted victim matters; once a victim misses the time prescribed under R.C.M. 1106A, a convening authority has the discretion to either consider the matters or decline to do so. This reading harmonizes victims' rights to submit post-trial matters with convening authorities' **[*32]** rights to consider any matters deemed "appropriate."

Even if we concluded the convening authority errantly considered HS's submission, Appellant can show no prejudice, as he was given the opportunity to respond to that submission and opted not to do so. We give little credence to Appellant's suggestion that he might have believed the convening authority was only considering "timely submitted" matters and therefore did not feel it was necessary to respond, in large part because Appellant does not allege he was actually misled. Nor does he explain what he would have included in any response. In short, if Appellant wanted to ensure the convening authority did not consider HS's statement, he should have either responded to the statement when it was submitted or filed a post-trial motion within five days of receiving the convening authority's action. Appellant's failure to take either action is strong evidence that Appellant simply elected not to respond to HS's submission, further minimizing any potential prejudice.

E. Record of Trial

Appellant argues he deserves relief because he did not receive several discs with his copy of his record of trial. We are unpersuaded.

In addition to the audio **[*33]** recording of the court-martial, Appellant's record of trial includes seven discs. Four of the discs are attachments to Prosecution Exhibit 1, the stipulation of fact, and these discs are labeled as Attachments 3, 4, 5, and 17 to the stipulation. Of those four discs, two are doorbell camera footage of Appellant the night he shot HG's fence; one is a video recording of Appellant threatening to kill HS; and one is a

recording of a voicemail message Appellant left in violation of one of his no-contact orders. The fifth disc is an attachment to Appellate Exhibit X (the Government's response to a defense motion to suppress), labeled "Ring Doorbell Footage." The sixth and seventh discs are attachments to Appellate Exhibit XVIII (a defense motion to preclude certain evidence) and consist of two recordings of law enforcement interviews.

Appellant's court-martial concluded on 8 April 2021, and he signed for receipt of his record of trial about a month and a half later, on 18 May 2021. Appellant avers—and we see no evidence to the contrary—that the copy of the record he received while he was initially being held at a civilian confinement facility only included a single disc. According to Appellant, **[*34]** this disc included recordings of two law-enforcement interviews and video footage from one of HG's neighbor's doorbell cameras, along with other unspecified files which "were not in a compatible format."

In May 2022, Appellant was transferred to the Naval Consolidated Brig at Joint Base Charleston, South Carolina. His record of trial was forwarded in early June, but when it arrived, it contained no discs. After Appellant requested assistance obtaining the discs from his appellate defense counsel, the Government provided him with six of the seven discs on 27 June 2022.[17] According to Appellant—and verified by a brig legal officer—some of the files on the discs could not be opened with the software on the computer Appellant was authorized to use. Nevertheless, Appellant filed his assignments of error brief with this court on 30 June 2022.

In mid-July 2022, the Government provided Appellant with three new discs after ensuring the files on the discs could be opened by the software Appellant was using. Appellate government counsel also submitted another declaration from the legal officer in which she said Appellant received the new discs and that she was "aware of no further complaints from **[*35]** [Appellant] that the files on the discs are inoperable."[18] The Government filed its answer to Appellant's assignment of errors on 29 August 2022, and Appellant filed a reply brief on 13 September 2022. The reply brief does not mention the discs or further discuss Appellant's claim that his record of trial was defective.

Whether a record is complete is a question of law we review de novo. *United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014)*. We also review post-trial processing under the same standard. *United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)* (citing *United States v. Kho, 54 M.J. 63 (C.A.A.F. 2000)*).

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[17] The missing disc was Attachment 17 to the stipulation of fact (the voicemail message related to the no-contact order). The relevant content of the voicemail is included in the text of the stipulation of fact admitted at Appellant's court-martial and included in the record of trial.

[18] The declaration was signed on 12 August 2022.

A complete, certified record of proceedings shall be kept for each general or special court-martial which results in a punitive discharge. *Articles 54(a)* and *54(c)(2), UCMJ*, *10 U.S.C. §§ 854(a)*, *854(c)(2)*. A copy of the record "shall be given to the accused as soon as it is certified." *Article 54(d), UCMJ*, *10 U.S.C. § 854(d)*. Exhibits admitted in evidence as well as appellate exhibits are to be included in the record. R.C.M. 1112(b)(6).

We have reviewed the record of trial filed with this court, and it contains all the discs identified by Appellant. Thus, the actual record of trial is complete. The copy Appellant received, however, was missing certain attachments to one exhibit and to two different motions. Therefore, Appellant's copy of the record was incomplete, and the question is whether Appellant should be granted relief. Appellant **[*36]** asks us to set aside his sentence or, alternatively, to order the Government to serve a complete record on Appellant.

We do not think either form of relief is warranted, because Appellant has not demonstrated he has suffered any prejudice. Appellant argues that not receiving a complete record "hinders his ability to fully assist in his appeal and raise other potential matters pursuant to [*United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)]*," but Appellant has never asked this court to grant him an enlargement of time in order to obtain and review the discs in question. Perhaps more significantly, Appellant's appellate counsel concede the copy of the record in their possession has always included working copies of all seven discs. This tells us that Appellant's counsel, at a minimum, could have discussed the contents of the discs with Appellant, if not provided him a copy outright. Fatal to Appellant's claim of prejudice, however, is the fact that Appellant received new copies of the discs in the middle of July 2022, yet he did not file his reply until the middle of September 2022. This tells us that in those two months, Appellant was unable to find anything pertinent in the discs to support any additional claim of error. As noted above, **[*37]** Appellant did not ask for additional time to review the discs. Based upon the absence of prejudice, we will not set aside Appellant's sentence. In light of the fact Appellant now possesses six of the discs and the functional equivalent of the seventh, we will not order the Government to serve Appellant with a redundant record.

III. CONCLUSION

The entry of judgment is modified as follows: The wording in the "F" column for Charge I and its specification, and for Specification 2 of Charge VI, is modified to add the words "to ripen into dismissal with prejudice upon completion of appellate review where the findings and sentence have been upheld" after the words "(without prejudice)." The findings and sentence as entered by the military judge and modified by this opinion are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.

Articles 59(a) and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

United States v. Green

United States Navy-Marine Corps Court of Criminal Appeals

December 29, 2021, Decided

No. 202100032

Reporter
2021 CCA LEXIS 701 *; 2021 WL 6139736

UNITED STATES, Appellee v. Victor M. GREEN, Master-at-Arms Second Class (E-5), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Petition for review filed by *United States v. Green, 82 M.J. 222, 2022 CAAF LEXIS 103, 2022 WL 768146 (C.A.A.F., Feb. 1, 2022)*

Review denied by *United States v. Green, 82 M.J. 274, 2022 CAAF LEXIS 217 (C.A.A.F., Mar. 18, 2022)*

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Arthur L. Gaston III (arraignment and motions), Derek D. Butler (trial). Sentence adjudged 9 September 2020 by a general court-martial convened at Naval Support Activity Naples, Italy, and Naval Air Station Jacksonville, Florida, consisting of a military judge sitting alone. Sentence approved by the convening authority: reduction to E-3, confinement for 15 months, and a bad-conduct discharge.

Counsel: For Appellant: Captain Jasper W. Casey, USMC.

For Appellee: Lieutenant R. Blake Royall, JAGC, USN, Major Kerry E. Friedewald, USMC.

Judges: Before MONAHAN, STEPHENS, and DEERWESTER, Appellate Military Judges. Judge DEERWESTER delivered the opinion of the Court, in which Chief Judge MONAHAN and Senior Judge STEPHENS joined. Chief Judge MONAHAN and Senior Judge STEPHENS concur.

Opinion by: DEERWESTER

Opinion

DEERWESTER, Judge:

Pursuant to his pleas, Appellant was convicted of three specifications of violating a lawful general order in violation of *Article 92*, Uniform Code of Military Justice [UCMJ]; one specification of conspiracy to violate a lawful general order in violation of *Article 81, UCMJ*; one specification of negligent damage of military property, in violation of *Article 108, UCMJ*; **[*2]** and one specification of drunken operation of a vehicle in violation of *Article 111, UCMJ*. Appellant raises two assignments of error [AOE]: (1) the military judge abused his discretion in admitting and considering evidence of the decedent's injuries and death in an accident involving Appellant; and (2) the sentence to confinement was inappropriately severe.

We find no prejudice and affirm.

I. BACKGROUND

One evening while Appellant was stationed as a military working dog handler at Camp Lemonier, Djibouti, he was the driver of a motor vehicle that collided with a motor scooter ridden by a Djiboutian citizen, Mr. "Golf,"[1] who died as a result of the accident. Earlier in the evening, prior to the accident, Appellant left base in violation of a base instruction which prohibited personnel from leaving base unless authorized for official business. Because Appellant was attached to the security department as a military dog handler, he was aware of a code word, which informed the gate guards he was authorized to leave base for an emergent mission. Appellant and his passengers used this code word to leave base, and then went to a local bar where they continued to drink alcohol. Appellant's blood alcohol level at **[*3]** the time of the accident was 0.14 grams per deciliter.

After the litigation of a number of motions, Appellant entered into a pretrial agreement. He agreed to plead guilty to orders violations, conspiracy to commit an orders violation, damage of military property, and drunken operation of a vehicle. In exchange, the convening authority agreed to withdraw an involuntary manslaughter charge, and agreed to limit confinement to a maximum of three years.

At his guilty plea, the Government moved to admit aggravation evidence concerning Mr. Golf's injuries and death. Specifically, the Government offered autopsy photos of Mr. Golf that graphically depicted his injuries, as well as his death certificate and the testimony of the NCIS agent who reviewed photos of the injuries to Mr. Golf. The Government also offered the testimony from one of Mr. Golf's wives and from his brother. The Government argued that this evidence was admissible under Rule for Courts-Martial [R.C.M.]

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[1] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

1001(b)(4) as evidence in aggravation of the offense for which Appellant was convicted. Appellant countered, arguing that the injuries and resulting death of Mr. Golf were not closely related to the charges to which Appellant pled guilty; that the Government had not established **[*4]** that Appellant's actions were the proximate cause of Mr. Golf's injuries and resulting death; and that the probative value of the evidence was substantially outweighed by its unfairly prejudicial impact.

After hearing argument from counsel, the military judge ruled that although the autopsy photos were not admissible, the testimony of the NCIS agent who reviewed photos of Mr. Golf's injuries was admissible. The military judge also admitted Mr. Golf's death certificate, as well as testimony from one of his wives and brother regarding the financial impact of his loss. In making these determinations, the military judge found the evidence was directly related to and resulting from the offenses to which Appellant pleaded guilty. The military judge rejected the Defense's argument that the evidence was only admissible if the offenses Appellant pleaded guilty to reflect that his actions constituted the proximate cause of Mr. Golf's injuries and death. The military judge also performed the balancing test under Military Rule of Evidence [Mil. R. Evid.] 403, and found the evidence at issue admissible.

After the military judge articulated his ruling, the trial counsel argued for five years' confinement, one year less than the maximum punishment **[*5]** authorized. The trial defense counsel did not give a specific recommendation on sentence, instead asking the judge to award a punishment that is consistent with the charges appellant pled guilty to, but also stated five years' confinement was much too severe. The pretrial agreement limited confinement to three years, with all other punishments as adjudged. The military judge announced a sentence of confinement for 15 months and a bad-conduct discharge.

Appellant argues the military judge abused his discretion in admitting the testimony of Mr. Golf's wife and brother, because they were not "directly related to or resulting from" the offenses to which he pled guilty. He further argues that the military judge awarded an inappropriately severe sentence.

II. DISCUSSION

A. The Evidence in Aggravation was Admissible

1. Standard of Review and the Law

We review the decision of a military judge to admit aggravation evidence at sentencing for an abuse of discretion.[2] "Where the military judge conducts a proper [Mil. R. Evid.] 403 balancing on the record, we will not overturn his ruling unless we find a clear abuse of discretion."[3]

The Government is entitled to offer evidence in aggravation at sentencing under R.C.M. 1001(b)(4) to show **[*6]** "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[4] Aggravation includes evidence of the impact "to any person or entity who was the victim of an offense committed by the accused . . . ."[5] This information assists the sentencing authority to place the offense "in context, including the facts and circumstances surrounding the offense."[6] The link between R.C.M. 1001(b)(4) evidence of uncharged misconduct and the crime "must be direct as the rule states, and closely related in time, type, [and] often outcome, to the convicted crime."[7] Evidence in aggravation must not be so attenuated from the offense for which an accused was convicted as to be unfairly prejudicial, irrelevant, or merely inflammatory.

Evidence offered in aggravation often highlights "same course of conduct" misconduct of an accused. It has included circumstances in which an accused was convicted of sexually abusing his children at one duty station, but stipulated to almost identical, though uncharged, misconduct at another duty station.[8] It has also included circumstances where a military recruiter was convicted of four specifications of helping potential recruits **[*7]** cheat on military entrance examinations, but had evidence admitted during sentencing indicating he did this "twenty or thirty" times;[9] evidence that an accused distributed a far greater amount of drugs than the amount to which he stipulated;[10] and evidence of additional thefts by an accused of property from a local sheriff's office beyond that for

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[2] *United States v. Ashby, 68 M.J. 108, 120 (C.A.A.F. 2009)*.

[3] *Id.* (citing and quoting *United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009)*).

[4] R.C.M. 1001(b)(4) (emphasis added).

[5] *Id.*

[6] *United States v. McCrary, 2013 CCA LEXIS 387 at *12 (A.F. Ct. Crim. App. May 7, 2013)* (unpublished) (citing *United States v. Mullens, 29 M.J. 398, 400-01 (C.M.A. 1990)*; *United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982)*; *United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001)*; *United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)*).

[7] *United States v. Hardison, 64 M.J. 279, 282 (C.A.A.F. 2007)*.

[8] *Mullens, 29 M.J. at 398-401*.

[9] *United States v. Ross, 34 M.J. 183, 184 (C.M.A. 1992)*.

[10] *United States v. Shupe, 36 M.J. 431, 432-36 (C.M.A. 1993)*.

which the accused was convicted.[11] Evidence showing continued drug use after the drug offenses for which an accused was convicted has also been held to be proper evidence in aggravation.[12]

Evidence in aggravation can also show uncharged misconduct, which is qualitatively different from the offense for which an accused was convicted. This most often comes in the form of a victim providing a more complete picture of circumstances surrounding the misconduct to which the accused was convicted. For example, when an accused pleaded guilty to unlawful entry of a home and committed an assault consummated by a battery against a woman, she testified at sentencing about how he sexually assaulted her after entering the home, including his later admission to her that he "raped" her.[13]

For the purposes of R.C.M. 1001(b)(4), "the meaning of 'directly related' . . . is a function of **[*8]** both what evidence can be considered and how strong a connection that evidence must have to the offense of which the accused has been convicted."[14]

In *United States v. Glazier*, the appellant and a fellow Soldier took a joyride in an Army truck while they drank alcohol.[15] As a result, the appellant crashed the vehicle and caused such severe injuries to his passenger that he died. The government charged Glazier with involuntary manslaughter, negligent damage to a government vehicle, willfully disobeying an order of a commissioned officer, wrongful appropriation of a government vehicle, and wrongful use of marijuana. The charges of involuntary manslaughter and wrongful appropriation of a military vehicle were dismissed due to insufficient evidence. The appellant eventually pleaded guilty to the remaining charges and entered into a stipulation of fact. Part of that stipulation stated that the passenger "suffered injuries which resulted in his death later that night."[16] The appellant objected at trial, not to the truth of the stipulated fact, but to its admissibility as proper evidence in aggravation. The military judge admitted it and the Court of Military Appeals held that it was admissible **[*9]** under R.C.M. 1001(b)(4) because it was "directly related to the charged offenses and thus admissible."[17]

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[11] *United States v. Nourse, 55 M.J. 229, 230-32 (C.A.A.F. 2001)*.

[12] ***United States v. Moore, 68 M.J. 491 (C.A.A.F. 2010)***.

[13] *United States v. Terlep, 57 M.J. 344, 347 (C.A.A.F. 2002)*.

[14] *Hardison, 64 M.J. at 281*.

[15] *United States v. Glazier, 26 M.J. 268 (C.M.A. 1988)*.

[16] *Id. at 269*.

[17] *Id. at 271* (citing *Vickers, 13 M.J. at 406*).

Recently in *United States v. Halfacre*, we analyzed *Glazier* while we addressed the claim of an appellant who had pleaded guilty of patronizing three prostitutes, who challenged the admission of sentencing evidence that he had also sexually assaulted each of them.[18] Specifically, we reasoned,

> In *Glazier*, the passenger was a victim of the appellant's actions, but was not a victim of the offense for which the appellant was convicted. If the passenger had merely sustained serious injuries and had lived to testify, he could surely have testified about the incident to provide the sentencing authority a more complete picture of what happened, even if he were not a bona fide victim. The type of misconduct for which Glazier was convicted—disobeying an officer, negligently damaging an Army truck, and smoking marijuana—were relatively minor, especially compared to involuntary manslaughter. And the passenger was certainly not a victim of any of the convicted offenses. But the misconduct was much more aggravated than just a typical joyride and it was proper for the sentencing authority to have the whole picture, including the facts **[*10]** and circumstances that were part-and-parcel of the convicted offenses, in particular the negligent damage to the government vehicle in which the passenger was riding.[19]

2. Analysis

Appellant attempts to distinguish *Glazier* from the facts of his own case, arguing that here, there was no stipulation that Mr. Golf's injuries and death were the result of Appellant's own actions. We disagree that the cases are significantly distinguishable. Although Appellant did not stipulate that the injuries and death resulted from his actions for which he pled guilty, the providence inquiry established that he was negligent, intoxicated, and driving on unfamiliar roads in dark conditions. While Appellant challenged that his actions were the *proximate* cause of the accident, he acknowledged that he was the *but-for* cause of the collision that killed Mr. Golf. Thus, just as was the case in *Glazier*, Mr. Golf's death was directly related to or resulting from the actions of Appellant that night, specifically, his drunken operation of a motor vehicle and damaging that vehicle when he struck Mr. Golf on his motor scooter. The aggravation evidence of the death of the decedent was proper in both cases because that evidence was **[*11]** inextricably interwoven with the facts and circumstances of the offenses for which each appellant was convicted, and that evidence painted a complete picture for the sentencing authority.

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[18] *United States v. Halfacre, 80 M.J. 656, 658 (N-M. Ct. Crim. App. 2020)*.

[19] *Id. at 661*.

Here, the military judge conducted a thorough Mil. R. Evid. 403 balancing test with regard to the evidence at issue. Evidence in aggravation may be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice."[20] A military judge enjoys "wide discretion" in applying this rule.[21] As long as the military judge conducts a proper balancing test and places that analysis on the record, we will not overturn the ruling unless there is a clear abuse of discretion.[22]

First, the military judge found that Mr. Golf's graphic autopsy photos were inadmissible because their prejudicial effect outweighed their probative value. However, with regard to Mr. Golf's death certificate, the NCIS agent's testimony concerning Mr. Golf's his injuries, and the testimony of one of Mr. Golf's wives and brother concerning the loss of the financial support he provided his family, the military judge correctly found that the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice **[*12]** to Appellant.

We recognize the inherent danger of evidence in aggravation that appears to be qualitatively different from the offenses for which an accused was found guilty. An accused is "not 'responsible for a never-ending chain of causes and effects.'"[23] The government should be cautious in attempting to use such evidence in aggravation. Any evidence that is so unfairly prejudicial that the unfairness substantially outweighs the probative value may be excluded.[24] This was not the case here. The military judge analyzed, in great detail, each piece of offered evidence, and did not consider that evidence "so unrelated to the offense charged as to be irrelevant."[25] Thus, he did not abuse his discretion in ruling that the death certificate, the testimony of the NCIS agent, and the testimony from Mr. Golf's family constituted proper aggravation evidence.

B. Appellant's Sentence was Appropriate

1. Standard of Review and the Law

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[20] Mil. R. Evid. 403.

[21] *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)*.

[22] *Id.* (citing *United States v. Ruppel, 49 M.J. 247, 250 (C.A.A.F. 1998)*).

[23] *United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995)* (citing *United States v. Witt, 21 M.J. 637, 640 n. 3 (A.C.M.R. 1985)*.

[24] Mil. R. Evid. 403.

[25] *United States v. Bono, 26 M.J. 240, 242 (C.M.A. 1988)* (finding ineffective assistance of counsel to not object to admission of an appellant's confession to totally unrelated misconduct from that for which he pleaded guilty).

We review sentence appropriateness de novo.[26] Each "court-martial is free to impose any [legal] sentence it considers fair and just."[27] Therefore, "[t]he military system must be prepared to accept some disparity . . . provided each military accused is sentenced as an individual." **[*13]** [28] In execution of this highly discretionary function, we are neither required to, nor precluded from, considering sentences in other cases, except when those cases are "closely related."[29] As a general rule "sentence appropriateness should be determined without reference to or comparison with the sentences received by other offenders."[30] Notably one narrow exception to this general principle of non-comparison exists as we are "required . . . 'to engage in sentence comparison with specific cases . . . in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'"[31] When requesting relief by way of this exception, an appellant's burden is twofold: the appellant must demonstrate "that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'"[32] If the appellant succeeds on both prongs, then the burden shifts to the government to "show that there is a rational basis for the disparity."[33]

For cases to be considered closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." **[*14]** [34] This threshold requirement can be satisfied by evidence of "co[-]actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared . . . ."[35]

When assessing disparity among sentences, we look only to adjudged sentences, rather than those approved or bargained for in a pre or post-trial agreement: "[a]djudged

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[26] *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*.

[27] *United States v. Turner, 14 C.M.A. 435, 34 C.M.R. 215, 217 (C.M.A. 1964)*.

[28] *United States v. Durant, 55 M.J. 258, 261 (C.A.A.F. 2001)* (citations omitted).

[29] *United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985)*; *United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001)*.

[30] *Ballard, 20 M.J. at 283* (citations omitted).

[31] *Wacha, 55 M.J. at 267* (citations omitted).

[32] *United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)*.

[33] *Id.*

[34] *United States v. Kelly, 40 M.J. 558, 570 (N.M.C.M.R. 1994)*.

[35] *Lacy, 50 M.J. at 288-89* (finding cases were closely related "where appellant and two other Marines engaged in the same course of conduct with the same victim in each other's presence").

sentences are used because there are several intervening and independent factors between trial and appeal—including discretionary grants of clemency and limits from pretrial agreements—that might properly create the disparity . . . ."[36] Accordingly, we "generally refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement or a [convening authority's] lawful exercise of his authority to grant clemency to an appellant."[37]

We acknowledge disparity among sentences may arise from "differences in initial disposition rather than sentence uniformity."[38] However, "[m]ilitary commanders stationed at diverse locations throughout the world have broad discretion to decide whether a case should be disposed of through administrative, nonjudicial, **[*15]** or court-martial channels."[39] Therefore, if "cases are closely related, yet result in widely disparate disposition, we must instead decide whether the disparity in disposition results from good and cogent reasons."[40]

Apart from the comparative analysis, we are nevertheless able to evaluate an appellant's sentence on its own facts as part of our required due diligence under *Article 66(d), UCMJ*. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves."[41] This requires our "individualized consideration of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[42] In making this assessment, we analyze the record as a whole.[43] Notwithstanding our significant discretion for determining appropriateness, we must remain mindful that we may not engage in acts of clemency.[44]

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[36] *United States v. Roach, 69 M.J. 17, 21 (C.A.A.F. 2010)*.

[37] *United States v. Widak, No. 201500309, 2016 CCA LEXIS 172, at *7, (N-M. Ct. Crim. App. Mar. 22, 2016)* (unpublished) (per curiam) (citations omitted).

[38] *United States v. Noble, 50 M.J. 293, 295 (C.A.A.F 1999)*.

[39] *Lacy, 50 M.J. at 287* (citation omitted).

[40] *United States v. Moore, No. 201100670, 2012 CCA LEXIS 693, at *4. (N-M. Ct. Crim. App. May 24, 2012)* (unpublished) (citing *Kelly, 40 M.J. at 570*).

[41] *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*.

[42] *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)* (quoting *United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)*).

[43] *Healy, 26 M.J. at 395*.

[44] *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)*.

2. Appellant's Case Is Not Closely Related to the Other Cases He Identifies

Appellant argues that his case is closely related to those of the appellants in *United States v. Melbourne*[45] and *United States v. Chambers*,[46] but only because he was found guilty of drunken operation of a vehicle. However, he points out that **[*16]** the appellants in those other cases also pleaded guilty to negligent homicide, a fact not present in his case. He also argues that despite the fact that he was not convicted of homicide he received a sentence comparable to what the appellants in those cases received, and thus, he contends that his circumstances warrant less punishment.

At the time of his misconduct, Seaman (E-3) [SN] Melbourne was assigned to a ship homeported in Norfolk, Virginia.[47] While intoxicated, he drove his car at a high speed into Willoughby Bay, adjoining Norfolk Naval Base, resulting in the drowning death of his passenger.[48] A military judge sitting as a general court-martial found SN Melbourne, pursuant to his pleas, guilty of violating a lawful general order, reckless operation of a motor vehicle resulting in death, drunken operation of a motor vehicle resulting in death, and negligent homicide.[49] SN Melbourne's adjudged sentence was 20 month's confinement, forfeiture of all pay and allowances, reduction to E-1, and a bad conduct discharge.[50]

Steelworker Second Class (E-5) [SW2] Chambers' misconduct occurred while he was driving his truck from New Orleans, Louisiana towards Bay Saint Louis, Mississippi.[51] He **[*17]** fell asleep at the wheel, causing his truck to hit a guardrail, then a concrete wall, and flip over, resulting in his passenger's death.[52] A military judge sitting as a general court-martial found SW2 Chambers, pursuant to his pleas, guilty of drunken driving resulting in injury and negligent homicide.[53] His adjudged sentence was confinement for

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[45] *58 M.J. 682 (N-M. Ct. Crim. App. 2003)*.

[46] *54 M.J. 834 (N-M. Ct. Crim. App. 2001)*.

[47] *Melbourne, 58 M.J. at 684*.

[48] *Id.*

[49] *Id. at 683*.

[50] *Id.*

[51] *Chambers, 54 M.J. at 834*.

[52] *Id. at 834-35*.

[53] *Id. at 834*.

18 months, forfeiture of all pay and allowances, and reduction to E-1, with all confinement in excess of one year suspended.[54]

However, the misconduct in Appellant's case, unlike that in the cases of SN Melbourne and SW2 Chambers, occurred while Appellant was deployed in a foreign country and the death of a host country national was directly related to or resulted from the misconduct. Moreover, unlike Appellant, neither SN Melbourne nor SW2 Chambers was a member of military law enforcement who abused his position to facilitate his misconduct. Furthermore, unlike Appellant the Sailors in the other cases were not convicted of conspiracy. For these reasons, we find that Appellant's case is not closely related to SN Melbourne's or SW2 Chambers' case. Therefore, we do not look to see whether Appellant's sentence is highly disparate as compared to the **[*18]** sentences in those cases.

3. Appellant's Sentence Was Not Inappropriately Severe

Appellant negotiated with the convening authority to disapprove confinement in excess of three years. He did not negotiate any protection from a punitive discharge. The military judge properly ensured that Appellant voluntarily entered into the pretrial agreement. He also asked whether the Defense wished to withdraw from the agreement, and Appellant declined. Indeed, Appellant received the benefit of his bargain, but now contends the length of the sentence is excessively severe. As we recently articulated in *United States v. Casuso*, we question an appellant's "claim of inappropriate severity when the sentence he received was within the range of punishment he was expressly willing to accept in exchange for his pleas of guilty."[55]

Even if we were to disregard the terms of Appellant's pretrial agreement, we would still find that his approved sentence was not inappropriately severe. We acknowledge that Appellant presented significant evidence in extenuation and mitigation, including: evidence of his cooperation with NCIS in an unrelated investigation; evidence that he was the first responder to a single-vehicle **[*19]** accident that occurred in the United States and that saved the life of a passenger involved in that accident; evidence of his struggles in his childhood, and his impressive military record. However, his crimes occurred while forward-deployed, were facilitated through his abuse of the special trust conferred upon him as a member of military law enforcement, and the death of a host nation national was directly related to or resulted from his offenses. Weighing the properly admitted evidence

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[54] *Id.*

[55] *United States v. Casuso, No. 202000114, 2021 CCA LEXIS 328 at *8 (N-M. Ct. Crim. App. June 30, 2021)* (unpublished).

in aggravation against evidence in extenuation and mitigation, we are convinced that justice was done and Appellant received the punishment he deserves.[56]

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and find no error materially prejudicial to Appellant's substantial rights occurred.[57] Accordingly, the findings and sentence as approved by the convening authority are **AFFIRMED**.

Chief Judge MONAHAN and Senior Judge STEPHENS concur.

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[56] *See* *Healy, 26 M.J. at 395*.

[57] *Articles 59* & *66, UCMJ*

United States v. Griffin

United States Army Court of Criminal Appeals

October 26, 2023, Decided

ARMY 20220211

Reporter
2023 CCA LEXIS 459 *

UNITED STATES, Appellee v. Staff Sergeant DYLAN L. GRIFFIN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Griffin, 2023 CAAF LEXIS 892, 2023 WL 9232925 (C.A.A.F., Dec. 26, 2023)*

Motion granted by *United States v. Griffin, 2023 CAAF LEXIS 898, 2023 WL 9232544 (C.A.A.F., Dec. 27, 2023)*

Motion granted by *United States v. Griffin, 2024 CAAF LEXIS 24, 2024 WL 645323 (C.A.A.F., Jan. 17, 2024)*

Review denied by *United States v. Griffin, 2024 CAAF LEXIS 111 (C.A.A.F., Feb. 26, 2024)*

Prior History: [*1] Headquarters, Fort Carson Steven C. Henricks and Jacqueline L. Emanuel, Military Judges, Colonel Ryan B. Dowdy, Staff Judge Advocate.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Major Bryan A. Osterhage, JA (on, brief); Colonel Philip M. Staten, JA; Major Bryan A. Osterhage, JA (on reply brief).

For Appellee: Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Andrew M. Hopkins, JA; Captain Stewart A. Miller, JA (on brief).

Judges: Before PENLAND, HAYES, and MORRIS, Appellate Military Judges. Judge HAYES and Judge MORRIS concur.

Opinion by: PENLAND

Opinion

SUMMARY DISPOSITION

PENLAND, Senior Judge:

A military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of one specification of child sexual abuse, in violation of *Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b* [UCMJ]. She sentenced appellant to a dishonorable discharge, and 7 years of confinement. We review the case under Article 66, UCMJ.

Appellant and the convening authority reached a pretrial agreement,[1] and the offer portion required the military judge to sentence appellant to a dishonorable discharge. The military judge discussed this provision in detail with appellant at the guilty plea inquiry, and he ultimately indicated it was his "expressed desire" to receive a dishonorable discharge. **[*2]** The military judge sentenced him to that punishment, and confinement. Appellant now complains the pretrial agreement's dishonorable discharge term was invalid, entitling him to a new sentencing proceeding.

Rule for Courts-Martial [R.C.M.] 705(a) (2016 ed.), authorizes the service secretaries to establish limits on pretrial agreements. Under that authority, Army Regulation 27-10 states in cases where "all charged offenses occurred prior to 1 January 2019 .... [t]he convening authority may not enter into an agreement specifying a minimum or specific sentence." Army Reg. 27-10, Legal Services: Military Justice, para. 5-27 (20 November 2020) [AR 27-10].

We agree the now-contended term was violative of Army policy, but appellant has fallen far short of showing prejudice. He writes he "voluntarily acquiesced"[2] to the discharge provision, but he did more than that. Appellant and his counsel specifically included the term with an offer to plead guilty and quantum dated 22 April 2022. The convening authority accepted both. After this arm's length transaction, appellant discussed and affirmed the term with the military judge, indicating he wanted a dishonorable discharge. Not surprisingly, he received the bargained-for sentence. Based on our common sense and experience as practitioners, we are confident the pretrial **[*3]** agreement's discharge provision worked to his favor by helping induce the convening authority to accept the proposed confinement limitation. We are also confident, based on our review of the record and experiences with similar cases, the military judge would have included a dishonorable

[1] The case was tried under the 2016 Manual for Courts-Martial, which provided for separating appellant's "offer" from the convening authority's promise to limit the adjudged sentence. Rule for Courts-Martial [R.C.M.] 705(b)(2)(E) (2016 ed.). The convening authority's promise was colloquially known as the "quantum," and its contents remained unknown to the military judge until after announcing sentence. Coincidentally, the quantum limited appellant's confinement to seven years.

[2] Appellant's brief, page 2.

discharge in the adjudged sentence even without the agreement's mandatory discharge provision.[3]

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge HAYES and Judge MORRIS concur.

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[3] We do not speculate whether the discharge provision caused the military judge to adjudge less confinement, but we are certain it did not hurt appellant in that regard.

United States v. Kroetz

United States Air Force Court of Criminal Appeals

October 27, 2023, Decided

No. ACM 40301

Reporter
2023 CCA LEXIS 450 *; 2023 WL 7105577

UNITED STATES, Appellee v. Kyle M. KROETZ, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER *AFCCA RULE OF PRACTICE AND PROCEDURE 30.4*.

Subsequent History: Petition for review filed by *United States v. Kroetz, 2023 CAAF LEXIS 890 (C.A.A.F., Dec. 22, 2023)*

Motion granted by *United States v. Kroetz, 2023 CAAF LEXIS 894 (C.A.A.F., Dec. 27, 2023)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jason M. Kellhofer. Sentence: Sentence adjudged 4 April 2022 by GCM convened at Joint Base Langley-Eustis, Virginia. Sentence entered by military judge on 18 May 2022: Dishonorable discharge, confinement for 68 months, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For Appellant: Major Matthew L. Blyth, USAF.

For Appellee: Major Brittany M. Speirs, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Judges: Before RICHARDSON, CADOTTE, and KEARLEY, Appellate Military Judges. Judge KEARLEY delivered the opinion of the court, in which Senior Judge RICHARDSON and Senior Judge CADOTTE joined.

Opinion by: KEARLEY

Opinion

KEARLEY, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one charge and one specification of conspiracy to distribute child pornography, one charge and one specification each of wrongful possession and distribution of child pornography, and one specification of indecent language, in violation of *Articles 81* and *134*, *Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881*, *934*.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 68 months, forfeiture of all **[*2]** pay and allowances, and reduction to the grade of E-1. The convening authority suspended the adjudged forfeitures of pay and allowances for six months and waived the automatic forfeitures for a period of six months.

Appellant asserts two assignments of error: (1) whether a plea agreement requiring a dishonorable discharge renders the sentencing procedure an "empty ritual" and thus violates public policy; and (2) whether Appellant's sentence is inappropriately severe.[2] Additionally, we address an issue discovered during our review of this case: (3) whether Appellant is entitled to relief when the plea agreement does not specify agreed-upon limitations for confinement for each enumerated offense as required by service regulations. We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

Appellant's offenses involved possession of 398 video or digital image files[3] of child pornography and participation in private chatrooms where he discussed, received, and distributed child pornography. He actively participated in a group chat on a social media application to send and receive child **[*3]** pornography, and he conspired with other individuals to distribute child pornography. He was involved as an administrator in the management of the chatrooms where he vetted and verified the chatroom users and he provided directions to set up an autonomous program to screen potential members. Additionally, he communicated indecent written language to another chatroom user.

On 1 April 2022, Appellant entered into a plea agreement with the convening authority in which Appellant agreed that upon acceptance of his guilty plea, the sentencing authority must enter a sentence including a "mandatory dishonorable discharge." The plea agreement stated that if the "mandatory punitive separation is found to be invalid, based on relevant

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[1] Unless otherwise noted, all references in this opinion to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The second assignment of error is raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

[3] The parties stipulated that 357 of those "were unique, nonduplicate image and video files."

rules, law, or case law, that provision [relating to the dishonorable discharge] shall be severed from this plea agreement and shall not affect the binding nature and enforceability of the other provisions contained" therein.

The military judge discussed the plea agreement with Appellant. The military judge first referenced the minimum and maximum confinement that may be adjudged pursuant to the plea agreement.[4] Then, the military judge pointed out that the paragraph **[*4]** regarding the dishonorable discharge "binds the court with regard to judicial discharge action." The military judge further highlighted that the agreement created a minimum punishment that was not required by law based on the offenses. Appellant agreed with the military judge's assessment of the agreement and confirmed he was satisfied with his military defense counsel, who also signed the agreement. The military judge did not specifically address the clause in the plea agreement which referenced what would happen if the mandatory punitive separation is found to be invalid. Appellant refers to this clause of the plea agreement as the "severability clause."

II. Discussion

A. Plea Agreement to Adjudge a Dishonorable Discharge

Appellant argues the term of the plea agreement requiring a dishonorable discharge should be severed from the plea agreement in accordance with its "severability clause" because it is contrary to public policy. Appellant argues that the "mandatory dishonorable discharge" term "hollowed out the presentencing proceeding and deprived [ ] Appellant of his opportunity to secure a fair and just sentence." We disagree and find no relief is warranted.

1. Law

We review questions **[*5]** of interpretation of plea agreements de novo, as such are questions of law. *See* *United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006)* (citation omitted); *United States v. Cron, 73 M.J. 718, 729 (A.F. Ct. Crim. App. 2014)* (citing *United States v. Acevedo, 50 M.J. 169, 172 (C.A.A.F. 1999)*). The standard is the same in our assessment of whether a plea agreement's terms violate the Rules for Courts-Martial.

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[4] The plea agreement required a cumulative sentence to confinement for all charges and specifications to which Appellant pleaded guilty be a minimum of three years and a maximum of six years. We discuss this issue in Section C, *infra*.

The Military Justice Act of 2016, enacted through the National Defense Authorization Act for Fiscal Year 2017,[5] brought several changes to the military justice system. One change included an entirely new article, *Article 53a, UCMJ, 10 U.S.C. § 853a*.[6] This article, titled *Plea agreements*, explains that an accused and convening authority may enter into an agreement over various matters, to include "limitations on the sentence that may be adjudged for one or more charges and specifications." *Article 53a(a)(1)(B), UCMJ, 10 U.S.C. § 853a(a)(1)(B)*.

The President implemented *Article 53a, UCMJ*, in Rule for Courts-Martial (R.C.M.) 705, also titled *Plea agreements*. Plea agreements may include promises by convening authorities to limit the sentence which may be adjudged. R.C.M. 705(b)(2)(E). These may include a limitation on the maximum punishment which may be imposed, a limitation on the minimum punishment which may be imposed, or both. R.C.M. 705(d)(1).[7] An accused or the Government may propose, or a convening authority may counteroffer, any term or condition not prohibited by law or public policy. R.C.M. 705(e)(1), 705(e)(3)(A).

"Subject to such limitations as the **[*6]** Secretary concerned may prescribe, an accused and the convening authority may enter into a plea agreement in accordance with this rule." R.C.M. 705(a). The parties can agree to a limit on the maximum and minimum amount of punishment that can be adjudged by the court-martial. *See* R.C.M. 705(d)(1). The Secretary of the Air Force prescribed limitations on plea agreement terms in a duly published Department of the Air Force instruction, prohibiting any plea agreement which "includes an exact agreed[-]upon term of confinement (e.g., no more than one year confinement and no less than one year confinement) . . . ." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 12.9.2.2 (18 Jan. 2019, as amended by AFGM 2021-02, 15 Apr. 2021); *see also* Department of the Air Force Policy Directive 51-2, *Military Justice and Other Criminal Proceedings*, ¶ 2.15 (21 Jun. 2021) (where convening authority and accused will not enter a plea agreement for specific agreed-upon term of confinement).[8]

"If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted." R.C.M. 910(f)(3). "If a plea agreement contains

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[5] *Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2943 (23 Dec. 2016)*.

[6] Prior to the creation of this article, the UCMJ did not contain any provisions related to such agreements. Rather, the *Manual for Courts-Martial*'s guidance on pretrial agreements was found solely in the Rules for Courts-Martial. *See* R.C.M. 705, *Pretrial agreements, Manual for Courts-Martial, United States* (2016 ed.).

[7] R.C.M. 705(d)(2) addresses plea agreement limitations on confinement and fines, while R.C.M. 705(d)(3) explains that a plea agreement "may include a limitation as to other authorized punishments as set forth in R.C.M. 1003." R.C.M. 1003(b)(8), in turn, discusses punitive separations which may be adjudged by a court-martial.

[8] This was the applicable paragraph that was in effect when Appellant signed the plea agreement. It has since been changed and it is likely to be changed in the future. *See* DAFI 51-201, ¶ 17.6.2 (14 Apr. 22).

limitations on the punishment that may be imposed, the court-martial . . . shall sentence the accused in accordance with the agreement." R.C.M. 910(f)(5).

"To ensure that the record reflects the accused understands the pretrial agreement [or plea agreement] and that both the Government and the accused agree to its terms, the military judge **[*7]** must ascertain the understanding of each party during the inquiry into the providence of the plea." *Cron, 73 M.J. at 729* (quoting *United States v. Smith, 56 M.J. 271, 272-73 (C.A.A.F. 2002)*).

A military judge must reject any plea agreement which "is prohibited by law" or "is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements." *Articles 53a(b)(4)* and *53a(b)(5), UCMJ*, *10 U.S.C. §§ 853a(b)(4)*, *(5)*. "To the extent that a term in a pretrial agreement violates public policy, it will be stricken from the pretrial agreement and not enforced." *United States v. Edwards, 58 M.J. 49, 52 (C.A.A.F. 2003)* (citing R.C.M. 705(c)(1)(B)[9]) (additional citation omitted).

"In sentencing an accused under [*Article 53, UCMJ*], a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces . . . ." *Article 56(c)(1), UCMJ*, *10 U.S.C. § 856(c)(1)*. Pretrial agreements or plea agreements which have the effect of transforming sentencing proceedings into "an empty ritual" are impermissible. *See*, *e.g.*, *United States v. Davis, 50 M.J. 426, 429 (C.A.A.F. 1999)* (quoting *United States v. Allen, 8 C.M.A. 504, 25 C.M.R. 8, 11 (C.M.A. 1957)*) (describing this premise as a "fundamental principle" in military jurisprudence). "A term or condition in a plea agreement shall not be enforced if it deprives the accused of . . . the right to complete presentencing proceedings" **[*8]** and "the complete and effective exercise of post-trial and appellate rights." R.C.M. 705(c)(1)(B).

"A [pretrial agreement] creates a constitutional contract between the accused and the convening authority wherein the accused agrees to waive constitutional rights in exchange for a benefit." *Cron, 73 M.J. at 729* (citation omitted). "However, due process concerns outweigh the contract principles as 'the [G]overnment is bound to keep its constitutional promises.'" *Id.* (citation omitted). "To that end, a provision that denies the accused a fair hearing or otherwise 'substitutes the agreement for the trial, [thereby] render[ing it] an empty ritual' violates public policy." *Id.* (alterations in original) (citations omitted). "It is the military judge's responsibility to police the terms of pretrial agreements to insure [sic] compliance with statutory and decisional law as well as adherence to basic notions of

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[9] *Manual for Courts-Martial, United States* (2000 ed.).

fundamental fairness." *Id.* (quoting *United States v. Riley, 72 M.J. 115, 120 (C.A.A.F. 2013)*).

"This court has adopted the principle that terms in a [pretrial agreement] 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.'" *United States v. Hoard, No. ACM S32424, 2018 CCA LEXIS 49, at *8 (A.F. Ct. Crim. App. 31 Jan. 2018)* (unpub. **[*9]** op.) (quoting *United States v. Raynor, 66 M.J. 693, 697 (A.F. Ct. Crim. App. 2008)*).

This court has found that a "plea agreement provision requiring a military judge or court members to sentence [an a]ppellant to a bad-conduct discharge" did not violate the United States Constitution, UCMJ, or public policy. *United States v. Geier, No. ACM S32679 (f rev), 2022 CCA LEXIS 468, at *13 (A.F. Ct. Crim. App. 2 Aug. 2022) (unpub. op.)*, *rev denied, 83 M.J. 86 (C.A.A.F. 2022)*.

2. Analysis

The question for our determination is whether Appellant's plea agreement provision requiring a minimum sentence requirement of a dishonorable discharge was prohibited by law or prohibited by public policy. We determine it was not.

a. Prohibited by Law

We begin by determining whether a plea agreement clause requiring a dishonorable discharge is prohibited by law. As a result of the Military Justice Act of 2016, plea agreements may now include provisions to limit the sentence which may be adjudged to include a maximum and a *minimum* punishment which may be imposed, or both. R.C.M. 705(d)(1). Both the convening authority and Appellant agreed to a minimum punishment that included a dishonorable discharge. This agreement is now permissible pursuant to R.C.M. 705(d)(1).

Therefore, Appellant's plea agreement provision requiring a minimum sentence requirement of a dishonorable discharge is not prohibited by law; instead, it is a permitted term allowed by R.C.M. 705(d)(1).

b. Prohibited by Public Policy

Despite **[*10]** it being permissible under the new R.C.M. 705 to have a limitation on the minimum punishment in a plea agreement, Appellant claims that his plea agreement

mandating a dishonorable discharge "hollowed out" the presentencing proceeding and deprived him of his opportunity to secure a fair and just sentence and was therefore against public policy. Appellant raises his claims by addressing legislative intent and sentence authority discretion and directs the court's attention to our sister service's opinion in *United States v. Libecap, 57 M.J. 611 (C.G. Ct. Crim. App. 2002)*.

i) Sentence minimums in plea agreements

Appellant first argues Congress chose not to make the offenses of which Appellant was convicted carry a "mandatory dishonorable discharge," therefore the plea agreement to a dishonorable discharge violates public policy. *See* *Article 56(b), UCMJ, 10 U.S.C. § 856(b)* (setting forth offenses which carry sentence minimums). Appellant argues "statutes codified by the legislature and rules enacted pursuant to those laws by the executive are *public policy*." Therefore, Appellant claims public policy dictates plea agreements may not mandate a dishonorable discharge for non-listed offenses.

As the military judge pointed out in his discussion with Appellant, the plea agreement clause requiring a dishonorable **[*11]** discharge adds a minimum sentence when one does not exist under the law. The military judge ensured Appellant realized he would be accepting a sentence term not required by law. While additional changes to the Military Justice Act of 2016 included minimum sentences for certain offenses, we reject Appellant's suggestion that because no minimum sentence exists for Appellant's offenses under law, it is impermissible to have a minimum sentence in a plea agreement. We are not convinced Congress intended to limit plea agreements for offenses they did not list as having mandatory minimums.

Appellant and the convening authority had more flexibility in plea agreement terms than they would have if Congress had prescribed a sentence minimum for Appellant's offenses. Appellant and the convening authority agreed to minimum and maximum sentence terms based on the facts, circumstances, and offenses in Appellant's case. The sentencing authority was aware of and bound by those terms, yet still had a range of sentencing elements to choose from before deciding on a final sentence.

R.C.M. 705(a) states, "Subject to the limitations as the Secretary concerned may proscribe, an accused and the convening authority may enter into a plea agreement in **[*12]** accordance with this rule." The Secretary of the Air Force provided a specific prohibition on plea agreements involving an exact term of *confinement*. *See* DAFI 51-201, ¶ 12.9.2.2. Notably, there is no prohibition on agreeing to a particular punitive discharge, and we do not find that public policy prohibited doing so in this case.

ii) Sentencing authority's discretion

To further his public policy argument, Appellant asks this court to find that the dishonorable discharge clause violates public policy because it "prevents the sentencing authority from adjudging—*in its sole discretion*—a punishment that is *sufficient, but not greater than necessary*," and therefore is inconsistent with the mandate of *Article 56(c), UCMJ, 10 U.S.C. § 856(c)(1)*. (Second emphasis added). Appellant's argument implies that no minimum sentence could be agreed to in a plea agreement, because doing so would take away the sentencing authority's *sole discretion* to determine what is both sufficient and necessary.

First, we find no "sole discretion" requirement written into *Article 56(c), UCMJ*. Any plea agreement with a limitation on sentence by its nature removes some of the sentencing authority's discretion. While the sentencing authority's minimum and maximum sentence options **[*13]** were limited by the plea agreement—instead of limited solely by statute and executive order—the military judge still had "sole discretion" to determine what punishment is sufficient and necessary considering the nature and the circumstances of the offense, the impact of the offense, and the need for the sentence to accomplish other requirements in *Article 56, UCMJ*.[10]

Next, our military justice system is evolving, and new sentencing proceedings are different from previous practice. Rule for Courts-Martial 705(d)(1) was re-written to allow, in part, plea agreements to contain minimum punishments, along with maximum punishments. "The fact that military justice evolves is not . . . against public policy." *United States v. Rivero, 82 M.J. 629, 635 (N.M. Ct. Crim. App. 2022)* (finding that appellant's plea agreement **[*14]** punishment limitations did not render sentencing proceedings meaningless, and therefore did not violate public policy), *rev. denied, 83 M.J. 35 (C.A.A.F. 2022)*. Appellant exercised a relatively new option to agree to a minimum sentence in exchange for other terms in the plea agreement. Appellant was free to not sign the plea agreement. Appellant and the convening authority were also free to agree to other factors such as stipulated facts and pleas to various offenses. Even having signed the agreement, Appellant was able to inform the sentencing authority's decision-making. The sentencing proceeding provided Appellant an opportunity to put forward evidence in mitigation and

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[10] *Article 56(c)(1)(C), UCMJ*, indicates:

> a court-martial shall impose punishment . . . taking into consideration the need for the sentence—(i) to reflect on the seriousness of the offense; (ii) to promote respect for the law; (iii) to provide just punishment for the offense; (iv) to promote adequate deterrence of misconduct; (v) to protect others from further crimes by the accused; (vi) to rehabilitate the accused; and (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service.

10 U.S.C. § 856(c)(1)(C).

extenuation, call witnesses, and provide argument, including whether any sentence component was appropriate. Additionally, the military judge still had latitude with other punishment options, to include the term of confinement between three and six years.

Given all the options still available to Appellant and the sentencing authority, the plea agreement in this case did not preclude the sentencing authority's ability to determine a sentence that is sufficient and necessary, but not greater than necessary, to promote justice and to maintain **[*15]** good order and discipline in the armed forces, taking into consideration other aspects of *Article 56, UCMJ*.

Our conclusion is not novel. In *Geier*, this court found a plea agreement provision requiring the military judge to adjudge a bad-conduct discharge did not violate the appellant's constitutional or other rights. *Geier, unpub. op. at *13*; *see also United States v. Walker, No. ACM S32737, 2023 CCA LEXIS 355, at *2 (A.F. Ct. Crim. App. 21 Aug. 2023)* (unpub. op.) (finding no error in a plea agreement term requiring the military judge to adjudge a bad-conduct discharge).

iii) United States v. Libecap

Appellant points to *United States v. Libecap* to show how the United States Coast Guard Court of Criminal Appeals (CGCCA) rejected a provision of a pretrial agreement where an appellant agreed to request the military judge impose a bad-conduct discharge. Appellant asks us to apply the CGCCA's analysis to Appellant's case. *Libecap* is not binding on this court; nonetheless, we will address Appellant's arguments.

The court in *Libecap* expressed concerns that a requirement in the pretrial agreement that the accused must *request* a bad-conduct discharge would "create the impression, if not the reality, of a proceeding that was little more than an empty ritual . . . with respect to whether a punitive discharge *should be* imposed." *57 M.J. at 616* (emphasis added).

Appellant **[*16]** argues that *Libecap* provides helpful insight because the CGCCA found the request for a punitive discharge offended due process by curtailing complete presentencing proceedings. We do not apply the reasoning in *Libecap* to this case for several reasons. First, *Libecap* was decided before the President issued an executive order which, in part, changed R.C.M. 705(d)(1), allowing agreements for minimum sentences and requiring full disclosure of any sentence limitations prior to the sentencing authority's determination of a sentence. *See Executive Order 13,825, Annex 2, § 2, 83 Fed. Reg. 9889, 9966-9967 (1 Mar. 2018)*. Therefore, the complete sentencing proceeding envisioned in *Libecap*, where the military judge was not aware of the sentence limitations until after sentence was announced, would be different than a complete sentencing proceeding today.

Additionally, the court in *Libecap* determined that the appellant's request for a bad-conduct discharge undercut any other efforts at trial to argue a punitive discharge was undeserved. *57 M.J. at 615*. The court further determined that R.C.M. 705(c)(1)—as it read at that time—prohibited the provision of the pretrial agreement requesting the bad-conduct discharge, because in CGCCA's view, it negated the value of putting on a defense sentencing case, which deprived the accused of a complete **[*17]** sentencing proceeding. *Id. at 616*.

In addition to being non-binding on this court, *Libecap* is not particularly helpful given the issue was a "request" for a particular sentence component. We can distinguish a *request* for a punitive discharge, as described in *Libecap*, from Appellant's *agreement* to a punitive discharge. The former meant that defense counsel would not be able to argue forcefully for a sentence that did not include a punitive discharge. *Id. at 617*. Affirmatively requesting a punitive discharge may give the impression that the defense counsel and the accused agreed the accused deserved a punitive discharge and that it was merited by the facts and circumstances of the offense. In contrast, here *agreeing* to a punitive discharge does not require an expression or argument of outward support for that punishment; it merely establishes Appellant is willing to accept the specified punishment in return for a favorable aspect of the plea agreement. [11]

In conclusion, Appellant's plea agreement term regarding a dishonorable discharge was not prohibited by law or public policy. It did not deprive Appellant of his opportunity to secure a fair and just sentence, nor did it render the sentencing proceeding an "empty ritual." **[*18]** Therefore, no relief is warranted.

B. Sentence Appropriateness

Appellant contends his sentence is inappropriately severe. He claims the military judge's experience in federal courts led to his sentence to confinement being more like those in civilian courts and out of line with other sentences in military cases. Appellant points out that under *18 U.S.C. §§ 2252A(a)(2)* and *(b)(1)*, the sentencing range for distribution of child pornography is 5 to 20 years. Appellant also claims that the sentence was inappropriately severe based on the offender and the offenses. We do not find Appellant's sentence to be inappropriately severe.

1. Additional Background

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[11] Although not cited by Appellant, we also considered *United States v. Soto, 69 M.J. 304 (C.A.A.F. 2011)*, on this issue. For the reasons set forth in our analysis of *Libecap*, we similarly conclude that the CAAF's decision in *Soto* does not foreclose the propriety of a mutually agreed upon plea agreement term imposing a punitive discharge as a component of the adjudged sentence.

In accordance with his plea agreement, Appellant was sentenced by a military judge. The military judge was a reserve member of the United States Air Force, who worked as a civilian at the United States Attorney's Office for the Eastern District of North Carolina. During voir dire, trial defense counsel questioned the military judge about his role as an Assistant United States Attorney. The military judge described his role as a criminal deputy chief in the national security section of the U.S. Attorney's Office where he worked. He said that child pornography cases are not **[*19]** the mission of his section, but if other sections are overburdened, their cases, to include child pornography cases, may fall to attorneys he oversees in the national security section. When trial defense counsel asked the military judge if he had any concerns that he would give more deference to the Government's argument than he would to the Defense's argument in this case, the military judge replied "no."

Trial defense counsel went on to question the military judge about the federal sentencing guidelines for federal cases, and asked if his knowledge and indepth use and interaction with such guidelines would play any role in his determination of an appropriate sentence in this case. The military judge replied that the federal sentencing guidelines were "inapplicable." Further voir dire by the trial defense counsel confirmed that the military judge would be able to separate his role as a prosecutor in his civilian job from his role as an unbiased fact finder in the military proceeding. At the end of this questioning, neither party challenged the military judge despite being provided the opportunity.

2. Law

We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (citing *United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)*). Our authority **[*20]** to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)* (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. *Article 66(d), UCMJ, 10 U.S.C. § 866(d)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam) (citations omitted). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)* (citing *United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)*).

3. Analysis

Appellant has not identified any evidence to support his argument that the military judge improperly allowed his experience as a federal prosecutor and familiarity with federal sentencing guidelines to impact his determination of the sentence. To the contrary, while he was questioned by trial defense **[*21]** counsel during voir dire, the military judge specifically stated that the federal sentencing guidelines did not apply to Appellant's case.

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *Mason, 45 M.J. at 484*. We presume that the military judge would not improperly apply federal sentencing guidelines when determining Appellant's sentence in a military court-martial. Appellant claims that his adjudged sentence of 68 months of confinement appears to include application of the federal sentencing guidelines for his offenses, since the federal sentencing guidelines range from 5-20 years of confinement. While Appellant's sentence to confinement may also be within that range, it is within the terms of the plea agreement, which included a minimum term of confinement of three years and a maximum of six years. The military judge ordered a total term of confinement of 68 months, which is four months under six years. We are not convinced the military judge improperly allowed his experience as a federal prosecutor to impact his determination of a sentence.

Furthermore, we do not find Appellant's sentence to be inappropriately severe given Appellant's involvement in **[*22]** actively managing the private chatrooms for members to discuss and share child pornography. He not only possessed and distributed child pornography, he also actively engaged in and at times led implementation of some of the administrative tasks associated with the chatrooms. Considering Appellant, his record of service, his personal circumstances, and the record of trial, we conclude Appellant's sentence to a dishonorable discharge, 68 months' confinement, total forfeiture of pay and allowances, and reduction to the grade of E-1 is appropriate.

C. Confinement Limits for Enumerated Offenses

In our review, this court noticed that Appellant's plea agreement did not specify agreed-upon limitations for confinement "for each enumerated offense," as required by DAFI 51-201, ¶ 12.9.2.3, and incorporated by R.C.M. 705(a). While not raised by Appellant, this court recognizes that the military judge should have rejected this plea agreement for failing

to specify agreed limitations for confinement for each offense to which Appellant intended to plead guilty.

1. Additional Facts

Appellant's plea agreement stated, "I offer to . . . [a]gree to be sentenced by the military judge" alone. It further states,

> In exchange for my plea of guilty **[*23]** to the aforementioned charges and specifications, I agree . . . [to] a cumulative sentence [which] will include a minimum of 3 years of confinement and a maximum of 6 years of confinement . . . .

The minimum and maximum terms of confinement for each offense were not addressed in the plea agreement.

The military judge announced the sentence to confinement as follows:

> As to the Specification of Charge I: 68 months;
> Specification 1 of Charge II: 24 months;
> Specification 2 of Charge II: 64 months;
> Specification 3 of Charge II: 3 months.
> All adjudged terms of confinement shall run concurrently to one another thus resulting in a total term of confinement of 68 months.

2. Law

"Subject to such limitations as the Secretary concerned may proscribe, an accused and the convening authority may enter into a plea agreement in accordance with this rule." R.C.M. 705(a).

"Military judges adjudge confinement, if any, and fines, if any, for each enumerated offense of which the accused is found guilty." DAFI 51-201, ¶ 12.9.2.3 (citing R.C.M. 1002(d)(2)). "A plea agreement that requires sentencing by a military judge and includes sentencing limitations must specify any agreed-upon limitations regarding confinement and/or fines with each enumerated offense, if any." **[*24]** *Id.*

We review questions of interpretation of plea agreements de novo, as such are questions of law. *See Hunter, 65 M.J. at 401*. "When interpreting pretrial agreements, we consider basic principles of contract law, however contract principles are outweighed by the Constitution's *Due Process Clause*[12]] protections for an accused." *United States v. Brown,*

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[12] *U.S. CONST. amend. V.*

*No. ACM 34037, 2002 CCA LEXIS 15, at *4 (A.F. Ct. Crim. App. 10 Jan. 2002) (unpub. op.)* (citing *Acevedo, 50 M.J. at 172*).

3. Analysis

Since Appellant's plea agreement required sentencing by military judge alone, it should have specified agreed-upon limitations for confinement for each offense, pursuant to DAFI 51-201, ¶ 12.9.2.3. It did not. The requirements pertaining to plea agreements listed in DAFI 51-201 are the limitations prescribed by the Secretary of the United States Air Force pursuant to R.C.M. 705(a) and, therefore, must be followed. While Appellant's agreement specified a minimum term of confinement and a maximum term of confinement, it ran afoul of the limitation prescribed by the service Secretary and should have been rejected in its current form at the court-martial.

Appellant and the convening authority both signed the plea agreement without agreed limitations for confinement for each offense. While considering basic principles of contract law, it seemed all parties understood the plea agreement when they signed it, **[*25]** and the trial proceedings were sufficient to make sure there was no misunderstanding about the effect of the agreement. The military judge properly sentenced Appellant in accordance with his responsibility under DAFI 51-201, ¶ 12.9.2.3, by adjudging confinement for each "enumerated" offense of which Appellant was found guilty and staying within the range of minimums and maximums for the sentence to confinement. Given that Appellant did not raise this issue at trial, nor on appeal, and this court does not find any material prejudice to Appellant's substantial rights, we find no relief is warranted.[13]

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of the Appellant occurred. *Articles 59(a)* and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence are **AFFIRMED**.

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[13] *Article 59(a), UCMJ, 10 U.S.C. § 859(a)*.

United States v. Padilla

United States District Court for the District of New Mexico

August 29, 2023, Filed

No. 22-cr-1723-WJ

Reporter
2023 U.S. Dist. LEXIS 152127 *; __ F.Supp.3d __

UNITED STATES OF AMERICA, Plaintiff, vs. EDWIN PADILLA, Defendant.

Counsel: [*1] For Edwin Padilla, also known as, Edwin Efrain Padilla, Defendant: Aric G. Elsenheimer, LEAD ATTORNEY, Federal Public Defender, Albuquerque Office, Albuquerque, NM.

For USA, Plaintiff: Letitia Carroll Simms, LEAD ATTORNEY, U.S. Attorney's Office, Albuquerque, NM; Rachel Eagle, LEAD ATTORNEY, USAO, Albuquerque, NM.

Judges: William P. Johnson, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: William P. Johnson

Opinion

MEMORANDUM OPINION AND ORDER REJECTING PROPOSED *RULE 11(c)(1)(C)* PLEA AGREEMENT

THIS MATTER comes before the Court following a hearing on Defendant's Sentencing Memoranda (**Doc. 33)** and the United States' Sentencing Memorandum (**Doc. 34**). Having reviewed the pleadings of the parties and the reports from the United States Probation Office (**Docs. 30, 35, 40**), heard the oral arguments of counsel, and considered the applicable law, the parties' request that the Court accept the *Rule 11(c)(1)(C)* plea agreement (**Doc. 36**) to a specific sentence of 12 months and 1 day incarceration is not well-taken, and is, therefore, **REJECTED**.

BACKGROUND

Defendant Edwin Padilla is charged with conspiracy pursuant to *8 U.S.C. § 1324(a)(1)(A)(v)(I)* for transporting and harboring illegal aliens (the Count). **Doc. 13**. Padilla reached a plea agreement with the Government pursuant to *Federal Rule of Criminal Procedure 11(c)(1)(C)* for a specific **[*2]** sentence of 12 months and 1 day of

incarceration on the Count. **Doc. 27, ¶ 11(a)**. After reaching the *Rule 11(c)(1)(C)* deal, the United States Probation Office ("Probation") released Padilla's Pre-Sentence Report ("PSR"), in which Probation calculated the United States Sentencing Guidelines ("Sentencing Guidelines") range to be 30-37 months, with a total offense level 17 and criminal history category III. **Doc. 30, PSR, ¶ 78**.

In his plea agreement, Padilla made the following admission:

> On or between September 27, 2021 and September 27, 2022 in Bernalillo County in the District of New Mexico and elsewhere, I agreed with another person to transport and harbor aliens. Specifically, I agreed with my co-conspirator (whose identity is known to me) that my co-conspirator would travel from Dallas to Albuquerque, to my residence located at 237 90th Street SW, 87121, (the two-story structure at that address). Once he arrived, my co-conspirator would pick up two to three undocumented non-citizens and drive them to Dallas. I paid my co-conspirator for related expenses . . . . On September 27, 2022, Homeland Security Agents found approximately 28 undocumented non-citizens in my residence. I knew these people were present **[*3]** in the United States illegally, and I agreed to harbor them at my residence so that they would remain undetected by law enforcement. I harbored them for monetary gain. I entered the conspiracy knowing that the objective was to harbor and transport aliens, and I voluntarily involved myself in the conspiracy.

Doc. 27, ¶ 9.

Without Defendant Padilla's acceptance of responsibility, the Sentencing Guidelines range would be 41-51 months. **Doc. 30, PSR, ¶ 79**. In addition to the baseline offense, the Sentencing Guidelines range calculations were increased for: (1) harboring 25-99 unlawful aliens, and (2) possessing a firearm. **Doc. 30, PSR, ¶¶ 23-24**. Defendant Padilla does not dispute the factual basis for either increase. **Doc. 33**. Instead, he argues "[s]uch a weak connection between the gun and the alien smuggling supports a variance from the guideline range." ***Id.*** Essentially, despite the enhancement being "appropriate," Defendant Padilla takes issue with the resultant 6-7 month increase in time incarcerated. **Doc. 33 at 2-3**; **Doc. 30, PSR, ¶ 24**. The Defendant asserts the Sentencing Guidelines range would be 24-30 months without this gun-related increase. **Doc. 33 at 3**. The Government explicitly **[*4]** disavows any "significant hearsay and confrontation problems" as levied by the Defendant; instead explaining the plea agreement is largely the result of the logistical hurdles stemming from the cooperating witness's pending prosecution in New York. **Doc. 33 at 3-5; Doc. 34 at 2-3**. The Government emphasizes this witness's unavailability by placing it on a pedestal as a "justifiable reason" for accepting the plea, but simultaneously disregards the available would-be testimony from law enforcement on-scene during the execution of the September 27, 2022, search warrant. **Doc. 30, PSR, ¶¶ 13-14; Doc. 34 at 2**. Despite the inconvenience associated with transporting the coconspirator-witness

between New York and New Mexico, the Court is not convinced this reason justifies deviating so significantly from the guidelines—given the presumptive availability of law enforcement and other corroborating witnesses. **Doc. 2 at 7; Doc. Doc. 30, PSR, ¶¶ 13-15**. As it stands, Padilla has justifiably reduced his exposure between 11-14 months by accepting responsibility—yet he and the Government have entered into a *Rule 11(c)(1)(C)* plea that further reduces his term of imprisonment by another 18-25 months (this time without **[*5]** sufficient justifiable reasons). Ultimately, both parties hang their hat on issues with a cooperating Government witness the driving force for this deal. ***Id.*** On its face, this plea agreement fails to take into account the Sentencing Guidelines, the nature and circumstances of the offense, the seriousness of the offense, the PSR, or Defendant Padilla's behavior while incarcerated—wherein he, again, possessed contraband (namely, fentanyl and methamphetamine). **Doc. 40, Second Add. to PSR at 1**.

After evaluating the Defendant's applicable Sentencing Guidelines range and the *§ 3553(a)* factors, the Court rejects the *Rule 11(c)(1)(C)* plea agreement proposed by Padilla and the Government because a specific sentence of 12 months and 1 day is not sufficient to satisfy the goals of sentencing.[1]

DISCUSSION

I. Relevant law on *Rule 11(c)(1)(C)* plea agreements

Federal Rule of Criminal Procedure 11(c)(1)(C) allows the prosecution and the defendant to agree to a specific sentence range—and if accepted by the Court—then it is bound to impose a sentence within the agreed upon range. *Fed. R. Crim. P. 11(c)(1)(C)*. Given that "sentencing is within the exclusive purview of the district court, the court has a wide range of discretion to either accept or reject sentence bargains, as contemplated by *Rule 11(c)(1)(B)* and *(C)*." *United States v. Macias-Gonzalez, 219 F. App'x 814, 817 (10th Cir. 2007)*. Federal sentencing **[*6]** law requires the sentencing judge to impose "a sentence sufficient, but not greater than necessary," to accomplish the goals of sentencing, the Sentencing Guidelines, and other *§ 3553(a)* factors. *18 U.S.C. § 3553(a)*. Although the Sentencing Guidelines are not binding, "[i]n deciding whether to accept an agreement that includes a specific sentence, the district court must consider the Sentencing Guidelines." *Hughes v. United States, 138 S. Ct. 1765, 1773, 201 L. Ed. 2d 72 (2018)*; *see United States v. Lewis, 398 F. Supp. 3d 945, 983-84 (D.N.M. 2019), on reconsideration in part, 432 F. Supp. 3d 1237 (D.N.M. 2020)* ("Even when a defendant enters into a binding, 11(c)(1)(C)

[1] The Court notes, of course, that Padilla has the opportunity to withdraw his guilty plea in light of the Court's rejection of the *Rule 11(c)(1)(C)* plea agreement. *See United States v. Byrum, 567 F.3d 1255, 1261 (10th Cir. 2009)*; *Fed. R. Crim. P. 11(c)(5)*.

agreement, the district court must still consider the Sentencing Guidelines, and "may not accept the agreement unless the sentence is within the applicable Guidelines range, or it is outside that range for justifiable reasons specifically set out.") (citing *Hughes, 138 S. Ct. at 1769*); *United States v. Dodds, 772 F. App'x 733, 735 (10th Cir. 2019)* ("[T]he Sentencing Guidelines prohibit district courts from accepting [*Rule 11(c)(1)(C)*] agreements without first evaluating . . . the defendant's Guidelines range . . . .") (citing *Hughes, 138 S. Ct. at 1776*).

The Tenth Circuit has explained "*Rule 11* vests district courts with the discretion to accept or reject plea agreements" without defining the specific criteria to apply. *United States v. Robertson, 45 F.3d 1423, 1437 (10th Cir. 1995)*; *see also Morgan v. United States Dist. Court (In re Morgan), 506 F.3d 705, 710 (9th Cir. 2007)* ("[N]owhere does *Rule 11* define the criteria by which a district court should exercise the discretion the rule confers, or explain *how* **[*7]** a district court should determine whether to accept a plea agreement."). So long as a district court exercises "sound judicial discretion in rejecting a tendered plea, *Rule 11* is not violated." *Id.* (citing *Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)*). Of note, the Sentencing Guidelines "require the district judge to give due consideration to the relevant sentencing range, even if the defendant and prosecutor recommend a specific sentence as a condition of the guilty plea." *Freeman v. United States, 564 U.S. 522, 530, 131 S. Ct. 2685, 180 L. Ed. 2d 519 (2011)*; *see United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985)* ("There is no absolute right to have a guilty plea accepted, and a court may reject a plea in the exercise of sound judicial discretion." (citing *Santobello, 404 U.S. at 262*)).

The power to sentence criminal defendants lies with the district court, not the parties themselves. *See Gall v. United States, 552 U.S. 38, 51-53, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)*. Sentence bargaining, as done here, severely "implicates judicial discretion by limiting the sentencing power of the district court." *Robertson, 45 F.3d at 1437* (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 at 712*). A district court is "free, in certain respects, to take an 'active role' once the agreement is disclosed." *United States v. Miles, 10 F.3d 1135, 1140 (5th Cir. 1993)*; *see also United States v. Sandoval-Enrique, 870 F.3d 1207, 1217 (10th Cir. 2017)* (citing *United States v. Kraus, 137 F.3d 447, 452 (7th Cir. 1998)*). As a backstop to guarantee courts exercise "sound judicial discretion and adequately respect the principle of prosecutorial independence," the Tenth Circuit has stated a district court "must set forth, on the record, the prosecution's reasons for framing the bargain and the court's justification for rejecting it." *Robertson, 45 F.3d at 1438*.

II. Parties' [*8] arguments

The Government asserts the plea agreement saves considerable resources and avoids both logistical and credibility issues with their main witness who is also in custody for alien smuggling. **Doc. 34 at 2-3**. The Government does not dispute "[a] sentence within the guideline range is the best approach to preventing unwarranted sentencing disparities between similarly situated defendants." ***Id.* at 3**. Again, however, they assert the disparity is warranted because of "the arrest of the cooperating witness." ***Id.***

Defendant Padilla submits that several sentencing factors support the stipulated sentence. First, his history and characteristics are generally favorable—he is a father who has a long history of employment. **Doc. 33 at 1-2**. Additionally, he argues the nature and circumstances of the offense support the plea agreement's terms given the lack of harm imposed on the immigrants coupled with their lack of involvement in smuggling drugs or guns. ***Id.* at 2**. Padilla, like the Government, then claims issues with the prosecution's witness provide significant support for the sentence. ***Id.* at 3**.

III. Analysis

District courts must submit a defendant's sentence to "thorough adversarial testing," **[*9]** and determine if the Sentencing Guidelines "fail[] to properly reflect *§ 3553(a)* considerations." *Rita v. United States, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)*. This Court's job is not to impose a reasonable sentence, but instead "impose a sentence sufficient, but not greater than necessary, to comply with the purposes of *section 3553(a)(2)*." *United States v. Conlan, 500 F.3d 1167, 1169 (10th Cir. 2007)* (citation omitted). In so doing, the Court has "considerable leeway" in rejecting sentence-bargains. *Robertson, 45 F.3d 1439*.

Additionally, a court is permitted to consider uncharged conduct for sentencing purposes. *See United States v. Magallanez, 408 F.3d 672, 684 (10th Cir. 2005)* ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." (quoting *18 U.S.C. § 3661*)). In *United States v. Allen*, the Tenth Circuit explained it was "unreasonable" for a district court to impose a sentence more than two-and-a-half times the top end of the Sentencing Guidelines based on uncharged conduct. *United States v. Allen, 488 F.3d 1244, 1245 (10th Cir. 2007)*. This conclusion was not based upon the district court's consideration of uncharged conduct, but instead upon the excessive weight this conduct was given. *Id. at 1259*. Here, conversely, the parties have agreed to a sentence two-and-a-half to three times

below the Sentencing **[*10]** Guidelines—giving exaggerated weight to a singular reason as justification.

The Court has considered the factors in *§ 3553(a)*, and several of those factors weigh heavily against accepting this *Rule 11(c)(1)(C)* plea agreement. First, the nature and circumstances of the offense as well as the history and characteristics of the defendant. Obviously, Defendant Padilla's family circumstances and work history play a role in sentencing. **Doc. 34 at 1-2**. But the Government's statement that Padilla is "no stranger to law enforcement"—as evidenced by his criminal history category III—neutralizes these positive characteristics. **Doc. 34 at 3; Doc. 30, PSR, ¶ 43**. As for the nature and circumstances of the offense: Padilla conspired to harbor and transport at least 28 illegal aliens while in possession of a firearm, fentanyl, and methamphetamine. These facts weigh heavily against accepting the plea agreement. *18 U.S.C. § 3553(a)(1)*. Second, a sentence of 12 months and 1 day creates an unwarranted sentence disparity with other similarly situated defendants. *18 U.S.C. § 3553(a)(6)*. Third, the kinds of sentence and the sentencing range established for the offense committed by this category of defendant weigh against the proposed sentence. *§ 3553(a)(4)*, *(5)*. Finally, the proposed sentence **[*11]** of 12 months and 1 day does not meet the goals of sentencing provided in *§ 3553(a)(2)* because it does not reflect the seriousness of the offense, promote respect for the law, or provide just punishment for this offense.

After reviewing Padilla's admissions in the plea agreement, the PSR, and the Sentencing Guidelines, this Court finds the proposed sentence of 12 months and 1 day insufficient to satisfy the goals of sentencing. At best, this case falls squarely inside the "heartland" of conspiracy to transport and harbor illegal aliens contemplated in the guidelines. *Rita, 551 U.S. at 351*. In an ordinary case, the sentencing range reflects "a rough approximation of sentences that might achieve *§ 3553(a)*'s objectives." *Kimbrough v. United States, 552 U.S. 85, 109, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007)* (quoting *Rita, 551 U.S. at 350*). At worst, the nature and circumstances of the offense are more aggravating than ordinary. Whatever downward pressure Defendant Padilla's fatherhood and employment play (even when coupled with the Government's potential witness[2] issue), these considerations are outweighed by the upward pressure stemming from his weapon possession, drug possession, cartel connections, and the business-like methodology of interstate shipment of these aliens. *See United States v. Smith*, 2020 U.S. App. LEXIS 15391, at *4 **[*12]** (6th Cir. 2020) (taking into account "the conspiracy's interstate activity, the number of [victims], . . . and the length and continuous nature of the conspiracy"). In fact, the Court highlights the availability of law enforcement to testify regarding their on-scene actions and observations during the execution of the search warrant—specifically, their discovery

[2] The substantial risk that no conviction would result if case went to trial was a "justifiable reason" for a sentence that departs from the Sentencing Guidelines range. *United States v. Stone, 374 F. Supp. 2d 983, 989-90 (D.N.M. 2005)*.

of: (1) fentanyl, (2) methamphetamine, (3) a loaded Springfield Armory Hellcat Pro 9mm firearm, (4) ledgers, and (5) at least 28 undocumented non?citizens. **Doc. 30, PSR, ¶¶ 13-14**. Likewise, Padilla's neighbors are presumably available to testify regarding their observations that Padilla's premises "continuously" had large groups of people coming and going as well as with the fact Padilla solicited help in transporting illegal aliens. **Doc. 30, PSR, ¶ 15**. Unlike in *Stone*, where the trial court "share[d]" in the United States' concern that "no conviction" was likely if the plea wasn't accepted—here, the Court is not concerned with the strength of the Government's case (and apparently neither is the Government). *Stone, 374 F. Supp. 2d at 989-90*; **Doc. 34 at 2**. For the reasons explained below, the Court concludes neither the logistics nor resources required to **[*13]** transport the coconspirator-witness are a justifiable reason for accepting the outside-guideline plea agreement.

A. The nature and circumstances of the offense, history and characteristics of the defendant, and sentencing disparity

The nature and circumstances of the offense weigh against accepting the plea. Defendant Padilla orchestrated a substantially complex commercial enterprise wherein he and a co-conspirator harbored and transported illegal aliens across state lines for profit. **Doc 27 at 4-5**. By his own admission, Padilla was harboring at least 28 illegal aliens. ***Id.*** Moreover, the Court should view his relationship with a cartel as a cause for concern. **Doc. 30, PSR, ¶ 9**. At the time of his arrest, Padilla was also in the possession of a firearm, fentanyl, and methamphetamine. **Doc. 30, PSR, ¶ 14**. The circumstances of the offense are undoubtedly serious.

Padilla's history and characteristics as a supportive father with a long history of employment are mitigating. **Doc. 33 at 1-2**. Conversely, Padilla is not unfamiliar to the criminal justice system—as evidenced by his criminal history category III. **Doc. 30, PSR, ¶ 43**. When taking into account his continued misconduct while incarcerated, **[*14]** this factor weighs against accepting the plea agreement. **Doc. 40, Second Add. to PSR at 1**.

Additionally, a sentence of 12 months and 1 day creates an unwarranted sentence disparity with other defendants who have been found guilty of similar conduct for conspiring to transport and harbor illegal aliens. Similarly situated defendants who conspired to transport and harbor 25-99 illegal aliens while in possession of a firearm would be sentenced to 30-37 months incarceration (so long as they also accept responsibility). **Doc. 30, PSR, ¶¶ 22-32**. Logistical hardship concerning a Government witness is not a justifiable reason for accepting this sweetheart plea agreement imposing a sentence two-thirds below the Guidelines range. *See USSG § 6B1.2(b)*. The proposed sentence is not commensurate with the crime committed vis-à-vis similarly situated offenders. *18 U.S.C. § 3553(a)(6)*.

B. Sentencing range and policy statement

The Supreme Court explained that a "court may not accept the [Type-C] agreement unless the court is satisfied that '(1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with **[*15]** specificity.'" *Hughes, 138 S. Ct. at 1773* (quoting *USSG § 6B1.2(c)*).

Here, the plea offer is based primarily on the logistical and trial issues involving "the arrest of the cooperating witness." **Doc. 34 at 2-3**. The degree of the discrepancy is so great, however, that the plea hardly reflects the conduct as Padilla admitted in his plea agreement or the PSR. **Doc. 27 at 4-5; Doc. 30, PSR, ¶¶ 9, 14** (describing Padilla's cartel affiliation and listing then 10 grams of fentanyl and 10.2 grams of methamphetamine); *see United States v. Rutter, 897 F.2d 1558, 1564 (10th Cir. 1990)* (ruling that the sentencing court may additionally consult the PSR to determine relevant conduct). Whatever effect the Government's potential witness issue plays, it does not serve as a justifiable reason for slashing Padilla's punitive exposure by two-thirds. These sentencing factors weigh against accepting the *Rule 11(c)(1)(C)* plea agreement. *18 U.S.C. § 3553(a)(4)*, *(5)*; *U.S.S.G. § 6B1.2(c)*.

C. Seriousness of the offense, promoting respect for the law, and providing just punishment for the offense

A sentence of 12 months and 1 day is insufficient to satisfy the goals of sentencing provided in *§ 3553(a)(2)*—namely, the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. In the plea agreement, **[*16]** Padilla admits to harboring at least 28 illegal aliens for profit—whereby he would pay his coconspirator to transport the illegal aliens at a time from Albuquerque, New Mexico to Dallas, Texas. **Doc. 27, ¶ 9**. This is a serious offense. Padilla's criminal conduct suggests he does not obey or respect the law. Moreover, the underlying offense shows a disregard for both public safety and community. Accepting this plea agreement would send the precisely wrong message to Padilla and the public: transporting and harboring dozens of unlawful aliens isn't serious. These sentencing factors weigh heavily against accepting the plea agreement.

CONCLUSION

The Court has carefully considered the Sentencing Guidelines, *§ 3553(a)* factors, and sentencing goals. Specifically, the Court considered the Guidelines' range for the

applicable category of offense committed by the applicable category of the defendant. In so doing, the Court concludes that a specific sentence of 12 months and 1 day incarceration is not sufficient to meet the goals of sentencing.

For the reasons set forth in this Memorandum Opinion and Order, the Court **REJECTS** the *Rule 11(c)(1)(C)* plea agreement (**Doc. 27**) for a specific sentence of 12 months and 1 day. **IT [*17] IS SO ORDERED**.

/s/ William P. Johnson

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, EWING,* and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class NOAH M. RANES
United States Army, Appellant

ARMY 20200301

Headquarters, 7th Infantry Division
Douglas K. Watkins, Military Judge
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Captain Thomas J. Travers, JA; Captain Carol K. Rim, JA.

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed.

24 February 2021

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

(b) (6)

JOHN P. TAITT
Acting Clerk of Court

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* Judge Ewing decided this case while on active duty.

United States v. Vega

United States Army Court of Criminal Appeals

June 8, 2020, Decided

ARMY 20190009

Reporter
2020 CCA LEXIS 206 *

UNITED STATES, Appellee v. Private E1 JUSTIN R. VEGA, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Vega, 2020 CAAF LEXIS 731 (C.A.A.F., July 29, 2020)*

Motion denied by, As moot *United States v. Vega, 80 M.J. 332, 2020 CAAF LEXIS 505, 2020 WL 5939879 (C.A.A.F., Sept. 2, 2020)*

Review denied by *United States v. Vega, 80 M.J. 331, 2020 CAAF LEXIS 501 (C.A.A.F., Sept. 2, 2020)*

Related proceeding at *United States v. Brooks, 2020 CCA LEXIS 394, 2020 WL 6375853 (A.C.C.A., Oct. 29, 2020)*

Prior History: [*1] Headquarters, 8th Theater Sustainment Command Kenneth W. Shahan and Lanny J. Acosta, Jr., Military Judges. Lieutenant Colonel Ryan B. Dowdy, Staff Judge Advocate.

Counsel: For Appellant: Captain Rachele A. Adkins, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain R. Tristan C. De Vega, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and LEVIN[1] Appellate Military Judges. Chief Judge KRIMBILL and Senior Judge BROOKHART concur.

Opinion by: LEVIN

Opinion

[1] Judge Levin participated in this case while on active duty.

MEMORANDUM OPINION

LEVIN, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of making a false official statement, one specification of wrongful use of a controlled substance, one specification of rape of a child, two specifications of sexual assault of a child, and one specification of adultery, in violation of *Articles 107*, *112a*, *120b*, and *134*, Uniform Code of Military Justice, *10 U.S.C. §§ 907*, *912a*, *920b*, and *934* [UCMJ].[2] The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for twelve years.

On appeal, appellant raises two assignments of error. First, appellant **[*2]** argues that the evidence is legally and factually insufficient to sustain findings of guilty for rape of a child, sexual assault of a child, and adultery. Second, appellant claims his sentence is inappropriately severe. For the reasons that follow, we disagree.

BACKGROUND

At the time of appellant's crimes, KB was a fifteen-year-old girl. On 20 April 2017, KB, a troubled teenager who had run away from home the previous day, went to a McDonald's restaurant, where she met appellant for the first time. While in the parking lot, appellant introduced KB to his friend, Private (PVT) Donovan Brooks.[3] The three of them discussed a number of matters, including the fact that KB had run away from home and had neither showered nor eaten recently. Appellant, who was married, gave KB $20.00 for food, supplied her with vodka, and asked KB her age and whether she had a boyfriend. Among other things, KB responded that she was sixteen years old. Hungry, tired, and dirty, KB accepted appellant's invitation to go to his barracks to shower and spend the night.

The two service members drove KB to appellant's barracks. In order to enter post, appellant told KB, who had no identification, **[*3]** to hide in the car. The plan worked and once on post, appellant again hid KB's presence by leading her through a side entrance to his barracks and directly to his room, where, after KB showered, the two engaged in sexual intercourse.

Shortly thereafter, appellant contacted PVT Brooks and told him to bring the bottle of vodka that they shared at McDonald's earlier that evening to his room. Private Brooks did

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[2] The military judge acquitted appellant of rape of a child in Specification 3 of Charge I, but convicted him of the lesser included offense of sexual assault of a child.

[3] Private Brooks was prosecuted separately. *See United States v. Brooks*, ARMY 20180567 (appeal pending before this court).

so, and the three of them passed the bottle of vodka around and drank it until the bottle was empty.

According to her testimony, the next thing KB remembered was waking to appellant having vaginal sex with her. Appellant was on top of KB, pinning her hands and legs down, while vaginally penetrating her in a painful and more aggressive manner than in their previous sexual encounter. KB cried as she told appellant to stop at least three times. He did not.

While appellant continued to penetrate KB vaginally, PVT Brooks positioned KB's head so that she could simultaneously fellate him. According to her testimony, KB could not move because appellant placed his weight upon her and had pinned her hands and legs down, nor could she say anything because PVT Brooks had placed his penis in her **[*4]** mouth. Eventually, KB stopped resisting, even as appellant and PVT Brooks switched positions so that PVT Brooks vaginally penetrated KB while appellant forced his penis into her mouth.

By approximately 0400 hours, PVT Brooks had departed the barracks room and KB used appellant's phone to call a friend. When the friend did not answer, appellant arranged for a Lyft to return KB to the McDonald's parking lot where they had met.

On 22 April 2017, KB returned to her parents' home, where she appeared withdrawn and in pain. KB eventually disclosed the attack and was taken to the hospital. While there, KB complained of genital pain, burning during urination, vaginal discharge, leaking urine, and knee and ankle pain. The examination results were consistent with vaginal penetration, and the treating physician observed that KB walked with an altered gait and guarded her knee, indicating additional nongenital injuries. The results from a vaginal swab corroborated the presence of appellant's DNA in KB's vagina.

During the investigation that followed KB's visit to the hospital, appellant told law enforcement officials that he had not engaged in vaginal intercourse with KB. At trial, appellant admitted **[*5]** that he had previously lied to authorities, and that he in fact had engaged in vaginal intercourse with KB.

LAW AND DISCUSSION

Sufficiency of the Evidence

Appellant asserts his convictions for rape of a child, sexual assault of a child, and adultery are legally and factually insufficient. We address each in turn.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)*; *see also United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)*. "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)*. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" we are "convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*.

Article 66(d)(1), UCMJ, provides that this court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." When exercising this authority, this court does not give deference to the decisions of the trial **[*6]** court (such as a finding of guilty). *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (A court of criminal appeals gives "no deference to the decision of the trial court" except for the "admonition . . . to take into account the fact that the trial court saw and heard the witnesses."). "We note the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)*, *aff'd on other grounds*, *76 M.J. 224 (C.A.A.F. 2017)*.

We first address appellant's conviction for forcible child rape. The elements of forcible child rape are:

> [1] That the accused committed a sexual act upon a child causing penetration, however slight, by the penis of the vulva or anus or mouth; and
> [2] That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and
> [3] That the accused did so by using force against that child or any other person.

Manual for Courts-Martial, United States (2016 ed.)[*MCM*], pt. IV, ¶ 45b.b.(1)(b).

Force is "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child." *MCM*, pt. IV, ¶ 45b.a.(h)(2). Appellant argues that the government failed to **[*7]** prove the third element beyond a reasonable doubt. We disagree.

At the outset, and after assessing the credibility of the witness, we credit KB's version of events. *See United States v. Crews, ARMY 20130766, 2016 CCA LEXIS 127, at *11 (Army Ct. Crim. App. 29 Feb. 2016)* (mem. op.) ("The deference given to the trial court's ability to see and hear the witnesses and evidence—or 'recogni[tion]' as phrased in *Article 66, UCMJ*—reflects an appreciation that much is lost when the testimony of live witnesses is

converted into the plain text of a trial transcript."). KB's testimony was supported by the testimony of others, to whom she had made fresh complaints. KB's testimony was further corroborated by the forensic examination that revealed evidence of physical injuries. Appellant's prior false statements to law enforcement also support the government's theory. *See* *United States v. Lloyd, ARMY 9801781, 2000 CCA LEXIS 365, at *16* (Army Ct. Crim. App. 24 Oct. 2000) (mem. op.) (finding that a testifying "appellant's credibility was severely undermined by his lies and omissions to [law enforcement]," which included lying about aspects of what occurred and omitting important details, and then averring to the truth of his in-court testimony); *see also* *United States v. Nicola, 78 M.J. 223, 227 (C.A.A.F. 2019)* ("But one risk of testifying, recognized long ago, is that the trier of **[*8]** fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt in connection with all the other circumstances of the case.") (citation and internal quotation marks omitted). Considering KB's testimony, along with the evidence corroborating her testimony, we find that the evidence at trial is both legally and factually sufficient to support the military judge's finding of guilty as to rape of a child.

Next, we address appellant's argument that the evidence is legally and factually insufficient to support the findings of guilty to two specifications of child sexual assault. Specifically, whether appellant had a reasonable and honest mistake of fact that KB was 16 years old.

The elements of child sexual assault are:

> [1] That the accused committed a sexual act upon a child by causing contact between penis and vulva or anus or mouth; and
> [2] That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.

MCM, pt. IV, ¶ 45b.b.(3)(a).

A mistake of fact regarding a child victim's age is a defense to a charge of child sexual assault. Rule for Courts-Martial [R.C.M.] 916(j)(2). The accused must prove by a preponderance **[*9]** of evidence that he held a reasonable belief that the child victim "had attained the age of 16 years." *UCMJ art. 120b(d)(2)*; R.C.M. 916(j)(2). The mistake of fact must be both reasonable and honest. *United States v. Zachary, 61 M.J. 813, 825 (Army Ct. Crim. App. 2005)*.

A threshold requirement for an accused to avail himself of the defense of mistake of fact as to age is that the accused reasonably believed that the child had attained the age of 16 years. R.C.M. 916(j)(2); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-45b-2, note 3 (10 Sep. 2014) [Benchbook]. The mistake or ignorance must be "reasonable under all circumstances," and "based on information, or lack of it, which would indicate to a reasonable person that [the victim] was at least 16 years old."

Benchbook, para. 3-45b-2, note 3. Further, the ignorance or mistake could "not be based on the negligent failure to discover true facts." Benchbook, para. 3-45b-2, note 3. In other words, one cannot unreasonably decline to find out his sexual prey or partner's age and then avoid liability by simply claiming, "I didn't know."

We find that appellant held neither an honest nor reasonable belief that KB was 16 years old. When questioned by law enforcement, appellant denied knowing KB's age at all. Thus, **[*10]** as the government points out in its brief, to the extent that KB said she was 16 years old, appellant did not appear to retain that information and did not act in reliance on it. Considering all of the evidence, as well as appellant's reasonable mistake of fact as to age argument, we find appellant's convictions for sexual assault of a child both legally and factually sufficient.

Finally, we address appellant's claim that the evidence was legally and factually insufficient to convict him of adultery. Specifically, whether his conduct was service discrediting.

The elements of adultery are:

> (1) That the accused wrongfully had sexual intercourse with a certain person;
> (2) That, at the time, the accused or the other person was married to someone else; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, pt. IV, ¶ 62.b.

The *MCM* provides guidance concerning the third element:

> To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. . . . Discredit means **[*11]** to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances . . . when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces.

MCM, pt. IV, ¶ 62.c.(2).

There is no requirement that the government show actual damage to the reputation of the military. *United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994)* (holding that in context

of *Article 133, UCMJ*, prosecution need not prove actual damage to the reputation of the military). Rather, the test is whether appellant's offense had a "tendency" to bring discredit upon the service. *United States v. Saunders, 59 M.J. 1, 11 (C.A.A.F. 2003)*; *Hartwig, 39 M.J. at 130*.

The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable **[*12]** doubt that appellant's conduct would tend to bring the service into disrepute if it were known. *See Saunders, 59. M.J. at 11*. "In general, the government is not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting. Rather, the government's obligation is to introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction." *United States v. Phillips, 70 M.J. 161, 166 (C.A.A.F. 2011)*.

In conducting the service discrediting analysis, our Superior Court noted:

> Whether conduct is of a 'nature' to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which [a]ppellant's conduct is known to others. The trier of fact must consider all the circumstances, but such facts— including the fact that the conduct may have been wholly private—do not mandate a particular result unless no rational trier of fact could conclude that the conduct was of a 'nature' to bring discredit upon the armed forces.

Id.

As the government correctly described in its brief, appellant, a married soldier, **[*13]** preyed upon an underage runaway, snuck her onto a military installation, avoided the Charge of Quarters desk, and plied her with alcohol before having sex with her in an Army barracks with another soldier. Private Brooks' presence during appellant's adulterous conduct alone establishes the service discrediting nature of appellant's misconduct. *See United States v. Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325, 330 (1956)* (noting that adultery "is 'open and notorious,' flagrant, and discrediting to the military service when the participants know that a third person is present"). The fact that this sexual conduct amounted to rape only further denigrates the service.

Based upon the evidence, we find that a rational trier of fact could reason that appellant's adulterous conduct would have "a tendency ... to bring the service into disrepute or ... lower it in public esteem." *MCM*, pt. IV, ¶ 62.c.(2). Thus, a reasonable factfinder could have found all the essential elements of adultery beyond a reasonable doubt, making the evidence legally sufficient. Furthermore, after our independent review of the record and

making allowances for not personally observing the witnesses, we are ourselves convinced beyond a reasonable doubt of appellant's guilt.

Sentence Appropriateness ***[*14]***

Appellant asserts that his sentence of twelve years confinement and a dishonorable discharge is inappropriately severe and warrants relief under *Article 66(d), UCMJ*. We disagree that the sentence is inappropriately severe.

This court reviews sentence appropriateness de novo. *United States v. Bauerbach, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)* (citing *United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990))*. We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." *UCMJ art. 66(d)(1)*. "When we conduct a sentence appropriateness review, we review many factors to include: the sentence severity; the entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017)*. This court has a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Nerad, 69 M.J. 138, 146-48 (C.A.A.F. 2010)*.

Appellant faced a maximum punishment that included life without the possibility of parole for the child rape conviction. He faced an additional thirty-seven years for the remaining charges. At sentencing, the government asked for twenty years **[*15]** of confinement, while appellant's counsel requested no more than eight and one-half years. The adjudged sentence included confinement for a fraction of the maximum term allowable and was far less than that which was requested by the government.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, appellant's record of service, the record of trial, and other matters presented by appellant in extenuation and mitigation. Finally, we note that *Article 66(d)*, UCMJ, requires us to take into account that the trial court saw and heard the evidence. Given all the circumstances in this case, the adjudged sentence was not outside the range of an appropriate sentence. We hold that the adjudged and approved sentence, to include the characterization of discharge, is not inappropriately severe.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are correct in law and fact. Accordingly, the findings and the sentence are AFFIRMED.

Chief Judge KRIMBILL and Senior Judge BROOKHART concur.

United States v. Yebba

United States Air Force Court of Criminal Appeals

August 23, 2019, Decided

No. ACM S32519

Reporter
2019 CCA LEXIS 338 *; 2019 WL 4011863

UNITED STATES, Appellee v. Joseph M. YEBBA, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Yebba, 2019 CAAF LEXIS 827 (C.A.A.F., Nov. 22, 2019)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Vance H. Spath. Approved sentence: Bad-conduct discharge, confinement for 240 days, reduction to E-1, and a reprimand. Sentence adjudged 9 March 2018 by SpCM convened at Kadena Air Base, Okinawa, Japan.

Counsel: For Appellant: Major Mark C. Bruegger, USAF.

For Appellee: Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Judges: Before MAYBERRY, MINK, and RAMÍREZ, Appellate Military Judges. Judge RAMÍREZ delivered the opinion of the court, in which Chief Judge MAYBERRY and Senior Judge MINK joined.

Opinion by: RAMÍREZ

Opinion

RAMÍREZ, Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas pursuant to a pretrial agreement, of one specification of dereliction of duty, three specifications of signing official documents with false information, and two specifications of stealing military property valued at more than $500.00, in violation of *Articles 92*, *107*,

and *121, Uniform Code of Military Justice (UCMJ)*, *10 U.S.C. §§ 892*, *907*, *921*.[1] In exchange for his guilty plea and making restitution of $17,000, the convening authority agreed to refer Appellant's case to a special court-martial as part of the pretrial agreement. **[*2]** The military judge sentenced Appellant to a bad-conduct discharge, confinement for 240 days, reduction to E-1, and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, Appellant asserts (1) the military judge committed reversible error by not considering mitigating evidence included in the stipulation of fact and (2) that he is entitled to appropriate sentence relief resulting from the Government's post-trial delay. We find no prejudicial error and affirm.

I. BACKGROUND

Appellant entered active duty in the United States Air Force in July 2006. While attending technical school, he married. After his technical training, Appellant's first assignment was to Beale Air Force Base (AFB), California. However, after two years at Beale AFB and for humanitarian reasons, Appellant was reassigned to Westover Air Reserve Base, Massachusetts.

In February 2010, Appellant was officially divorced and admitted that he was aware of the finality of his divorce during this same time. He claimed he attempted to change his status with the finance office from "married with a dependent" to "not married with no dependents." However, it is unclear **[*3]** if Appellant actually attempted to make this change or whether the finance office failed to do so. In either event, the change never occurred.

Appellant continued to receive the basic allowance for housing (BAH) at the "with dependent" rate when he did not have any dependents and knew that he was not entitled to the "with dependent" rate. He continued to receive the "with dependent" BAH rate until June 2014, when he was due for a permanent change of station (PCS). Appellant claimed he first realized during this June 2014 timeframe that the finance office never made the change to his dependent status because he saw that he was still receiving pay and benefits as though he was still married and had a dependent. Appellant decided not to inform anyone of the error and chose to keep the additional funds he was receiving.

In April 2014, Appellant received his PCS orders to Kadena Air Base (AB), Okinawa, Japan. In preparation for his PCS, Appellant supplied information indicating his "wife" would not be traveling with him to Japan. Due to the information provided by Appellant,

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[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.).

the orders included the statement, "dependent will not relocate; will remain at current PDS [Permanent Duty Station] **[*4]** location." When Appellant arrived at Kadena AB in June 2014, he filled out an official military document claiming he was still married and that his "spouse chose not to accompany" him. Specifically, he reviewed and signed an Air Force Form 594, which was an application and authorization to start, stop, or change basic allowance for quarters or dependency redetermination. Appellant reviewed and signed the document naming his ex-wife as his dependent and acknowledging that he would report any changes of his dependent's status or her residence immediately to the accounting and finance office. Appellant perpetuated this lie the entire time he was stationed at Kadena AB.

In addition to other offenses, Appellant pleaded guilty to two specifications of stealing military property valued at more than $500.00. The first specification of Charge III occurred during the time period between 13 February 2013 and 28 June 2014. The second specification of Charge III occurred during the time period between 29 June 2014 and 12 February 2018. While Appellant began receiving BAH at the "with dependent" rate to which he was not entitled long before 13 February 2013, the Government could not charge Appellant **[*5]** for the time period before 13 February 2013 because the five-year statute of limitations had run. During the uncharged timeframe from 15 February 2010 to 13 February 2013, Appellant received $11,590.29 of BAH at the "with dependent" rate. Nonetheless, Appellant conceded that it was an amount he received and which he was not entitled to, and included it as part of the stipulation of fact.

As to the first specification of Charge III (13 February 2013-28 June 2014), Appellant was assigned to Westover Air Reserve Base and admitted to stealing a total of $5,595.11 BAH at the "with dependent" rate. During the second specification of Charge III, Appellant was assigned to Kadena AB and admitted to stealing a total of $66,982.66. Thus, the total amount of BAH at the "with dependent" rate Appellant stole during the two charged timeframes was $72,577.77.[2]

Pursuant to the Air Force's "Tainted Claim Policy," the Defense Finance and Accounting Service (DFAS) generated an official debt against Appellant to recoup overpayment which was attributed to Appellant's actions. This specific amount represents all allowances Appellant received after the date of his divorce, including all allowances Appellant **[*6]** may otherwise have been entitled to receive as a military member without dependents. The total debt owed by Appellant, including interest, as calculated by DFAS as of March 2018 was $203,866.92. By the time of his court-martial, Appellant had paid DFAS $17,187.00.

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[2] Had the Appellant been charged for all the monies he collected to which he was not entitled (15 February 2010-12 February 2018), but for the running of the statute of limitations, the total amount would have been $84,168.06.

Pursuant to a pretrial agreement, Appellant pleaded guilty and entered into a stipulation of fact which was introduced into evidence at his court-martial. The military judge explained the stipulation of fact was for the purpose of both findings and sentencing. The stipulation of fact included the amounts above.

Throughout the sentencing arguments, both sides discussed the various amounts of money owed to and/or belonging to the Government. As it relates to the issue before this court, during the Defense's sentencing argument, trial defense counsel stated,

> [J]ust yesterday [Appellant] was made aware by the government that he would likely be staring down the barrel of a debt in the amount of $203,000 for his actions. Your Honor, we've attached -- it's in the stipulation of fact. We had attached a spreadsheet provided by finance that explains the total debt and Your Honor doesn't need to spend time trying to make sense of it. The **[*7]** bottom line is that the total amount is $203,000, which is our understanding that that is both the amount that he improperly received as well as the amount that he properly received for the past eight years. That amount is something that [he's] going to have to pay off at some point in the future. He needs a good job, a quality job to be able to pay off that debt. [Appellant] needs to be able to seek employment with an employer who can provide him the income that he needs to get back on his feet.

As a response, and during the Government's sentencing argument, trial counsel argued,

> [D]efense spoke a lengthy time there about the collateral consequences here, the $200,000. Frankly, Your Honor, that's not what this court is really about. It's an administrative, a logistical thing outside of this what is -- this is Your Honor is a criminal matter, not a civil matter. We would ask Your Honor that you focus primarily on the charged timeframe. Of course, things that have happened before, things that may potentially happen after can be considered, but that's not really what this court is about. Certainly, because the accused's conduct is taken so seriously by the government that has reached this **[*8]** massive level of $200,000 he shouldn't be punished less lightly for that. It shouldn't be a consideration that he [be] punished less lightly because the government takes these kinds of things so seriously.

Subsequent to trial counsel's "collateral consequences" comment, trial defense counsel was given an opportunity to provide a surrebuttal argument. Defense counsel took the opportunity to discuss a conversation between Appellant and his ex-wife and to argue again that neither confinement nor a bad-conduct discharge were appropriate in this case. Defense counsel never objected to trial counsel's "collateral consequences" comment, nor did he make any argument about it in his surrebuttal argument.

At the conclusion of the sentencing arguments, the military judge deliberated regarding an appropriate sentence. After he returned to the courtroom, but prior to announcing sentence, the military judge stated,

> It's always tempting to comment on kind of your thought process, which I can't do, I just always remind myself collateral matters are just that as I tell the court members so often. They're not for me to consider, they're for a convening authority to consider.

The military judge then announced **[*9]** the sentence in this case, which included a bad-conduct discharge, confinement for 240 days, reduction to E-1, and a reprimand.

The date of Appellant's sentencing was 9 March 2018. The convening authority took action on 16 April 2018, and the case was docketed with this Court on 23 May 2018.

II. Discussion

A. Collateral Consequences

Appellant asserts that the military judge committed error by not considering mitigating evidence, in the form of the $203,866.92 debt, which was included in the stipulation of fact.

"We review a military judge's consideration of sentencing factors under an abuse of discretion standard." *United States v. Green, 64 M.J. 289, 292 (C.A.A.F. 2007)* (citing *United States v. McDonald, 55 M.J. 173, 178 (C.A.A.F. 2001))*. The military judge's comments on the sentence may be reviewed on appeal to determine whether the military judge relied on inadmissible matters in determining the sentence, *id. at 291*, or as alleged here, failed to rely on matters in determining the sentence.

Upon reviewing the record, it is clear to the court that Appellant has not shown the military judge's action amounted to an abuse of discretion.

A court-martial is "to concern [itself] with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of **[*10]** the penalty under consideration." *United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988)*. "A collateral consequence is '[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence.'" *United States v. Talkington, 73 M.J. 212, 215 (C.A.A.F. 2014)* (alteration in original) (citations omitted). Therefore, the question presented before this court is whether the DFAS-generated official debt against Appellant to recoup overpayment pursuant to the Tainted Claim Policy is a collateral consequence of the crime committed in this case. For the reasons articulated below, we answer this question in the affirmative.

Similar to the reasoning in *Talkington*, which explained that "[s]ex offender registration operates independently of the sentence adjudged and remains a collateral consequence," here recoupment of overpayment pursuant to the Tainted Claim Policy operates independently of the sentence adjudged. *Id. at 216-17*. To illustrate this point, Appellant seems to concede that regardless of the sentence or even the conviction in this case, the Tainted Claim Policy would have applied to Appellant even had he been found not guilty at his court-martial. Furthermore, and unlike the potential monetary consequences of a sentence, recoupment of overpayments is an administrative act. *Talkington* ***[*11]*** also recognized that the requirement that an individual register as a sex offender is a consequence of his conviction and is separate and distinct from the court-martial process. *Id. at 217*. Here too, the recoupment of overpayment is separate and distinct from the court-martial process.

If this were a members case in which the question arose about potential civil forfeitures or administrative recoupment of overpayments associated with the criminal allegations, the appropriate reply from the military judge would ordinarily be "to reaffirm the idea that collateral consequences are not germane" to either the findings or the sentencing phase of a court-martial. *United States v. McNutt, 62 M.J. 16, 19 (C.A.A.F. 2005)*. "The general rule concerning collateral consequences is that courts-martial are to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *Talkington, 73 M.J. at 215* (internal citation and brackets omitted).

Although it was in a different context, our superior court has explained that "[a]dministrative recoupment of pay is separate from and not based upon criminal proceedings under the Uniform Code of Military Justice." *United States v. Olson, 25 M.J. 293, 295 n.1 (C.M.A. 1987)*. In *Olson* ***[*12]*** , the Court found civil damages in a related civil action to be a collateral consequence of the appellant's conviction. *Id. at 297*.

Here, the $203,866.92 debt to DFAS is an administrative consequence to Appellant for falsely claiming he had a dependent and receiving additional money to which he was not entitled. As such, it is a collateral consequence and the military judge properly did not consider it for purposes of an appropriate sentence. Accordingly, Appellant has not shown the military judge's action amounted to an abuse of discretion.

B. Post-Trial Delay

Appellant asserts that he is entitled to sentence appropriateness relief resulting from the post-trial delay in this case as a due process violation, or in the alternative, under Article 66(c), UCMJ.

We review *de novo* whether an appellant has been denied his due process right to a speedy post-trial review and appeal. A presumption of unreasonable delay arises when the record of trial (ROT) is not docketed with the service court of criminal appeals within 30 days of action. *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*. Here, the convening authority only took 38 days to take action in this case. However, the ROT was not docketed with this court within 30 days of action.

According to the **[*13]** affidavits submitted in this case, two copies of Appellant's ROT were sent from Kadena AB to Joint Base Andrews, Maryland[3], on 27 April 2018, 11 days after action, via FedEx delivery service. The numbered Air Force legal office, 5 AF/JA, sent Appellant's original ROT via United States Postal Service on 26 April 2018 and it was received at Joint Base Andrews on 11 May 2018, 25 days after action. The next 12 days are unaccounted for after the original ROT and the two copies arrived at Joint Base Andrews. While the Government exceeded the 30-day action-to-docketing deadline by seven days, and while these seven days cannot be directly attributed to the base legal office or the numbered Air Force, the processing of the mail is ultimately a Government responsibility. Although this delay is presumptively unreasonable, we discern no prejudice. *See Moreno, 63 M.J. at 142*. Hence, we find no violation of Appellant's due process right to timely post-trial processing and appeal. *See id. at 136*. The delay was not so egregious as to undermine the appearance of fairness in Appellant's case and the integrity of our military justice system. *See United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*.

Nevertheless, recognizing our authority under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, we considered whether **[*14]** relief for post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002)* ("Appellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review."). After considering the factors enumerated in *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, we find relief is not appropriate.[4]

III. CONCLUSION

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[3] Joint Base Andrews is where the military justice section of the Air Force Legal Operations Agency as well as where this Court is located.

[4] The factors this court considered include: (1) how long the delay exceeded the standards set forth in *Moreno*; (2) what reasons, if any, the Government set forth for the delay and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) whether there is nonetheless evidence of harm (either to the appellant or institutionally) caused by the delay; (4) whether the delay has lessened the disciplinary effect of any particular aspect of the sentence and whether relief is consistent with the dual goals of justice and good order and discipline; (5) whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and (6) whether, given the passage of time, this court can provide meaningful relief in this particular situation.

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and the sentence are **AFFIRMED**.

End of Document

CERTIFICATE OF SERVICE, U.S. v. HUNTER (20230313)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] ***@mail.mil*** on the 28th day of March, 2024.

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