

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230521

Staff Sergeant (E-6)
EDWIN A. GONZALEZ,
United States Army,

Appellant

Tried at Wheeler Army Airfield,
Hawaii on 2 June and 6 September
2023, before a special court-martial
convened by the Commander, HQ
8th Theater Sustainment Command,
Lieutenant Colonel Michael Korte
and Colonel Rebecca Farrell,
military judges, presiding.

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

Assignments of Error¹

I

**WHETHER APPELLANT'S BAD-CONDUCT
DISCHARGE IS INAPPROPRIATELY SEVERE**

¹ The government has reviewed appellant's *Grostefon* matters and respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

II
WHETHER THE MILITARY JUDGE ERRED BY
SENTENCING APPELLANT TO A PUNITIVE
DISCHARGE THAT SHE FOUND “SERVES NO
INTEREST OF PUNISHMENT OR JUSTICE”

Statement of the Case

On 2 June and 6 September 2023, a military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of reckless operation of a vehicle, one specification of drunken operation of a vehicle, and one specification of reckless endangerment in violation of Articles 113 and 114 Uniform Code of Military Justice, 10 U.S.C. § 913, 914 (2019) [UCMJ]. (R. at 56; STR). Pursuant to the plea agreement, the military judge sentenced appellant to confinement for 5 days and a bad conduct discharge. (R. at 117). At the conclusion of the proceedings, the military judge made a clemency recommendation, under Rule for Courts-Martial [R.C.M.] 1109(f)(1), to suspend the bad conduct discharge. (R. at 117–18; App. Ex. IX). The convening authority took no action on the adjudged sentence. (Action). On 1 November 2023, the military judge entered judgment. (Judgment).

Statement of Facts

a. Appellant drives at a high speed through a residential area while severely intoxicated and flees from law enforcement before crashing into a building.

After having “three or four,” drinks² at Waikiki restaurant and becoming intoxicated, appellant got behind the wheel and drove himself and his wife, Mrs. CG home in the early morning hours of 28 August 2022. (R. at 26; Pros. Ex. 1, p. 2). As they reached the gate of Schofield Barracks in their 2004 Honda Civic, appellant and Mrs. CG began to argue. (R. at 26). Mrs. CG needed to stop to urinate, but appellant refused to stop the car, forcing his wife to urinate on herself. (R. at 26).

Appellant sped down Bunker Place on the wrong side of the road, catching the attention of military policemen who were patrolling near the intersection of Bunker Place and Wright Avenue. (Pros. Ex. 1, p. 2–3). At approximately 0150, they activated their lights and sirens and began their pursuit of appellant. (Pros Ex. 1, p. 3). The officers observed appellant as he made a left turn on Wright Avenue, and accelerated, disregarding traffic control signals along the way. (Pros. Ex. 1, p. 3). Appellant continued to travel through a residential area for close to a mile, passing the post chapel and a middle school. (Pros. Ex. 1, p. 3). He reached a

² Appellant provided this number during his providence inquiry. His blood alcohol concentration [BAC] taken over an hour after his collision with the Wings of Lightning Dining Facility revealed a concentration of 0.194%. (Pros Ex. 1, p. 2).

speed of approximately 83 miles per hour³ before crossing over a grass median and driving into the oncoming lane of traffic. (Pros. Ex. 1, p. 3). The officers in pursuit watched as he struck a curb, sending his car airborne over the sidewalk before crashing into the Wings of Lightning Dining Facility. (Pros. Ex. 1, p. 3).

Military police officers pulled both appellant and Mrs. CG from the smoking wreckage of their car. (Pros. Ex. 1, p. 3). Mrs. CG laid on the grass until emergency medical services arrived. (Pros. Ex. 1, p. 3). She reported chest pain and had a visible abrasion across her chest from her seat belt. (Pros. Ex. 1, p. 5).

Appellant, who was found in the driver's seat, refused to participate in a field sobriety test and refused to provide a breath sample. (Pros. Ex. 1, p. 4). At approximately 0253, a blood test determined appellant's BAC to be 0.194%. (Pros. Ex. 1, p. 2).

b. Appellant's guilty plea.

On 22 June 2023, the appellant submitted an offer to plea to the convening authority, offering to plead guilty to all charges and receive a bad conduct discharge in exchange for a guarantee of no confinement. (App. Ex. II). The convening authority responded with a counter-offer, accepting all of the terms but requiring a confinement range of 0–180 days for each specification, all served

³ The posted speed limit on Wright Avenue was 25 miles per hour. (Pros. Ex. 1, p. 4).

concurrently. (App. Ex. III). Appellant signed and accepted this offer the day after the convening authority signed it, 26 July 2023. (App. Ex. III, p. 2).

Appellant began his providence inquiry by explaining that in the years prior to his charged misconduct, he had family members pass away and family members hospitalized, which led to him feeling depressed and being prescribed antidepressants. (R. at 26). When asked about this treatment, appellant revealed that the treatment began in 2014. (R. at 34). Appellant further offered that he only went out that night because his wife convinced him to go out to help with his depression. (R. at 26). He explained that he only had “3 or 4 drinks that night,” and lost control of the vehicle due to becoming distracted by the loud music and his wife arguing with him. (R. at 26). He also added that the conditions of the road were unfavorable, as it was rainy and “really dark.” (R. at 26).

Appellant described drinking the three or four drinks over the course of a couple hours at the restaurant, but not feeling any of the effects of intoxication until he arrived on Wheeler Army Airfield. (R. at 32). Appellant described abruptly feeling “severe intoxication. . . right after I got to the gate and we started arguing.” (R. at 32). He denied knowing why his blood was drawn after the collision, or what the results of that blood draw were. (R. at 33). Upon being directed to the stipulation of fact, appellant acknowledged that his blood alcohol concentration was over the legal limit of .08. (R. at 33). When asked if he had

taken any other medication that night, appellant responded “the antidepressant and a muscle relaxant and ibuprofen.” (R. at 35). This prompted the military judge to inquire if that medication impacted his ability to drive. (R. at 35). Appellant responded “[t]he medication was not an issue. It was a combination of maybe both?” (R. at 35).

When asked if he was speeding before crashing into the Wings of Lightning Dining Facility, appellant downplayed his misconduct, stating, “I don’t know but I was not going 85mph. . . . I was driving a little over [25mph], yes.” (R. at 27). The military judge then asked for further elaboration, explaining that even 27mph would technically be speeding. (R. at 27). Appellant countered, “Maybe 45mph–55mph.” (R. at 27).

Appellant then explained that lost control of his vehicle due to the wet and muddy conditions of the median, “I could not brake it was just sliding.” (R. at 28). “It happened too fast I could not react right away. I ended up in the building.” (R. at 28). When asked how he came to hit the median, appellant explained:

“[s]ometimes you can’t see the lines, there are no lines on the road. So, when you come in on that road there’s a median there. You can barely see it at night. So, I used truck [sic] and lost control and hit the building. So, I was able to see that median.”

(R. at 28). When asked if his speed or alcohol consumption affected his ability to drive that night, appellant responded, “[i]t was a combination. It was the

distraction, the argument, I was speeding. It happened, I hit the median and lost control.” (R. at 28).

The military judge asked appellant if his operation of the vehicle was reckless; appellant responded, “For this for the speed, maybe.” (R. at 29). Again, the military judge sought elaboration, asking if “speeding on a wet road in the dark poses a risk to people,” which prompted appellant to respond, “[y]es, Your Honor.” (R. at 29).

Appellant described waiting in the vehicle for several minutes until the military police arrived. (R. at 26). The arriving officers asked him why he did not stop. (R. at 27). According to appellant, he then climbed out of the car and pulled his wife out of the passenger seat to safety. (R. at 27).

c. Sentencing

After accepting appellant’s guilty plea, the military judge explained the sentence limitations imposed upon appellant in great detail. (R. at 50–52). Particularly, the military judge asked appellant and the parties if they all understood that the agreement required the imposition of a bad conduct discharge. (R. at 51). After asking appellant if he was satisfied with his counsel, she again emphasized the bad conduct discharge: “I understand that the agreement between the parties, accused, and the convening authority states that the military judge is bound to adjudge, a Bad-Conduct Discharge. Defense, do you intend to argue for a

punitive discharge?” (R. at 52). Defense counsel responded, “[y]our Honor, I don’t intend to argue for one.” (R. at 52).

For their sentencing case, appellant called five former colleagues, who all testified that he was a reliable, hard worker, with a strong work ethic, who would be easily employable as a civilian. (R. at 60, 67, 70, 78). Sergeant First Class (SFC) NR said appellant was among the top 3% of soldiers he had worked with. (R. at 74). Sergeant First Class SW testified that appellant a number one or two NCO. (R. at 70). And SFC AH regarded appellant as among the top 25–30% of NCOs. (R. at 67).

MAJ MR, the brigade chaplain, testified that appellant cares about his country and family. (R. at 83). He testified that appellant had shared his hardships with him, that he was concussed early in his Army career, that the DUI and collision opened his eyes that he needs to work on himself. (R. at 84–85).

Mrs. CG testified that due to appellant’s separation from the Army, their family would experience financial hardship. (R. at 88). She explained that appellant had experienced difficulties through his life: his father’s stroke, responsibility for his parents, the death of a dear cousin, his depression, the death of a grandfather. (R. at 89). She also expressed fears of appellant going into confinement, that it might trigger a deep depression. (R. at 90).

In appellant's unsworn statement, he spoke about his life and his 11 years of service. (R. at 98). He mentioned receiving a traumatic brain injury while on rotation at the National Training Center in 2014, and described ongoing issues of "depression, migraines, anxiety." (R. at 98). When asked how the "accident,"⁴ impacted appellant, he responded "[n]ot to mention my sentence, it changed a lot personally. My mood changed; I know my wife tells me I changed. I lost the love sensation and became a cold person. Then with stress too." (R. at 98). When asked how the collision impacted his alcohol consumption, appellant responded, "I stopped drinking. I have been scared. I think it could happen again. . . . They even told me I am an alcoholic. It is easy to happen. It could happen to anybody." (R. at 99).

Appellant concluded by reading an unsworn and unsigned written statement. (R. at 100; App. Ex. VIII). The statement starts with appellant claiming, "full responsibility for the basis for why we are here today." (App. Ex. VIII, p.1).

Paragraph five detailed appellant's ongoing medical issues:

I am currently going through a MEDBOARD that is almost finished, due to my injuries in the ARMY. I had a TBI in late 2014 and I had been suffering from side effects that continued worsening over the years or just did not go away. I have severe headaches, migraines, severe

⁴ Appellant's defense counsel was presumably referring to the aforementioned incident where appellant drove while severely intoxicated, at high speeds, on the wrong side of the road, before crashing into the Wings of Lightning Dining Facility. (R. at 98; Pros. Ex. 1).

depression, anxiety, PTSD, mood changes, trouble remembering things, concentration, and speaking. Even on the day that I crashed, I was suffering from severe depression and anxiety and was medicated, making my mental state even worse. However, I understand there is no excuse for what happened and putting lives at risk like that.

(R. at 100; App. Ex. VIII, p. 2). Appellant's statement concluded with an apology:

"I . . . am so sorry. Thinking back on what occurred, I feel devastated for myself, my family, and my unit that I might have to leave the service this way." (R. at 100; App. Ex. VIII, p. 2).

After sentencing appellant to five days of confinement and the mandatory bad conduct discharge, the military judge issued a clemency recommendation pursuant to RCM 1109(f)(1). (R. at 117; App. Ex. IX). The military judge recommended that the convening authority suspend the bad conduct discharge due to "considerable extenuation." (App. Ex. IX). The grounds being that "[appellant] has long suffered from depression, migraines, memory loss, and anxiety as a result of injuries sustained while serving on active duty." (App. Ex. IX). Further, "[h]is offenses, when viewed alongside the injuries he sustained servicing [sic] as a soldier in the US Army, simply do not warrant the long standing [sic] impact of a bad conduct discharge and a complete denial of VA health benefits he has earned serving his country." (App. Ex. IX). The military judge opined that a bad conduct

discharge served no punitive interest as “[appellant] already bears the stigma and consequences of three criminal convictions. . . .” (App. Ex. IX).

I
**WHETHER APPELLANT’S BAD-CONDUCT
DISCHARGE IS INAPPROPRIATELY SEVERE**

Standard of Review

This court reviews sentence appropriateness de novo. *United States v. Martinez*, 76 M.J. 837, 840 (Army Ct. Crim. App. 2017).

Law

A Court of Criminal Appeals “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.” Article 66(d)(1), UCMJ. “[S]entence appropriateness should be judged by ‘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) (quoting *United States v. Mamahuy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). “When [this court] conduct[s] a sentence appropriateness review, [this court] review[s] 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.” *Martinez*, 76 M.J. at 841-42. “Sentence appropriateness involves the judicial function of

assuring 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).

Notwithstanding the broad discretion afforded under Article 66(d)(1), UCMJ, this court does not have “unfettered discretion” to take action on an imposed sentence “for any reason, for no reason, or on equitable grounds.” *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010) (citation omitted). This grant of discretion to determine whether a sentence “should be approved” is based in law, not equity, and a court may only find a sentence to be inappropriate pursuant to principles of law. *See Nerad*, 69 M.J. at 146–47.

Argument

Appellant argues that the bad conduct discharge was “inappropriately severe.” (Appellant’s Br. 12). He requests the court disapprove the bad conduct discharge and reassess the sentence. (Appellant’s Br. 18). This court should reject appellant’s argument and affirm the sentence as adjudged because the bad conduct discharge is appropriate in light of appellant’s crimes, and appellant negotiated for the bad conduct discharge to minimize his potential confinement. (App. Ex. II; App. Ex. III). Moreover, appellant demonstrated a lack of remorse, minimized the gravity of his offenses, and even deflected blame to his wife. Finally, the “considerable extenuation,” the military judge identified in her clemency recommendation relied upon appellant’s self-serving statements as well as

collateral consequences inherent in every guilty plea. (R. at 117–18; App. Ex. IX). It also ignored appellant’s mendacity during his providence inquiry. (R. at 26, 117–18; App. Ex. IX).

a. Appellant bargained for a bad conduct discharge.

First, this court should find the sentence is not inappropriately severe when the appellant bargained for the specific sentence to which he now requests relief--and did so under advice of counsel,⁵ knowing the long-term consequences. (App. Ex. II). “[W]hen an accused who is represented by competent counsel bargains for a specific sentence, that is strong evidence that the sentence is not inappropriately severe and it will likely not be disturbed on appeal.” *United States v. Avellaneda*, 84 M.J. 656, 663 (N. Ct. Crim. App. 2024).

Appellant’s opening offer to the convening authority did not include a reduction in rank or any forfeitures, and it expressly prohibited any confinement. (App. Ex. II). Though the convening authority’s counter-offer raised the potential confinement to 180 days, it required no minimum period of confinement, clearly in consideration of appellant’s offer of the mandatory bad conduct discharge. (App.

⁵ The absence of any claim of ineffective assistance of counsel reflects that trial defense counsel fully advised appellant on the consequences of a bad conduct discharge, including the loss of medical benefits he now seeks to reclaim.

Ex. III). Through the course of these negotiations, appellant benefited from prosecutorial decisions that greatly limited his punitive exposure.⁶

The record of trial supports a conclusion that appellant was motivated by a strong desire to avoid confinement, so much so that he was willing to incur the consequences of a bad conduct discharge. During the guilty plea, appellant revealed anxiety of confinement. When asked, “[h]ow did the accident impact you?” appellant responded “[n]ot to mention the sentence, it changed a lot personally.” (R. at 98). Mrs. CG stressed that appellant feared confinement, “to say a hundred percent . . . if he goes to prison, I don’t know what’s going to happen. Like, I know he is going to try, but it is going to be very hard.” (R. at 90). Mrs. CG also feared the toll confinement would take on appellant: “it’s going to take so much from him, so much that he can go on too [sic] deep depression. . . . His mental health, that is what worries me.” (R. at 90).

The record of trial, along with appellant’s offer to plea, suggests that appellant preferred a bad conduct discharge to any lengthy period of confinement. Appellant traded the short-term consequences of confinement for the long-term consequences of a bad conduct discharge. Appellant and his counsel bargained for

⁶ Appellant benefited from the government’s decision omit a charge of drunken operation of a vehicle *resulting in personal injury*, an offense punishable by a dishonorable discharge and eighteen months of confinement. (Manual for Courts-Martial [MCM] App’x 12-4). Appellant further benefited from the convening authority’s referral to a special court-martial. (Charge Sheet; *See* Art. 19, UCMJ).

this plea agreement, presumably in good faith. Whether another party, similarly situated to appellant, would request the same agreement is not relevant for consideration. Appellant is now requesting this court use its Article 66 powers to reverse the deal he made with the convening authority. This court should deny relief and find that the negotiated punishment is both lawful and appropriate.

b. Appellant demonstrated a lack of remorse and minimized the gravity of his offenses.

During his providence inquiry, appellant partially blamed his wife for his reckless and criminal actions rather than taking full responsibility. (R. at 26). “I remember that I did not want to go out. . . . My wife convinced me – convinced me to go out.” (R. at 26). Appellant reiterated that his wife convinced him to drive in the facts and argument section of his brief. (Appellant’s Br., p. 3, 10). If Mrs. CG had such power of persuasion over appellant, he would have acquiesced to her pleading to stop on the drive home. (R. at 26). Appellant ignored his wife’s request to stop which resulted in her urinating in the car seat. (R. at 26). Despite appellant’s attempt to more favorably apportion the blame, it was he, not his wife, who decided to drink. He made the decision to drive. (R. at 26). He also made the decision, twice since, to blame his wife for his own poor decisions.

When asked how he achieved a BAC of .194, appellant explained that he had 3–4 drinks over two hours. (R. at 26). This explanation requires suspension of

disbelief. In *United States v. Warren*, the Court of Military Appeals noted that “a defendant’s truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing.” 13 M.J. 278, 282 (C.M.A. 1982).

During his providence inquiry, appellant repeatedly minimized his culpability. When he was asked if he was speeding before crashing into the Wings of Lightning Dining Facility. Appellant responded, “I don’t know but I was not going 85mph. . . . I was driving a little over [25mph], yes.” (R. at 27). Appellant only conceded that he may have been going “45–55mph” after the military judge confronted appellant with the fact that a mere 27mph would technically be speeding. (R. at 27). Appellant’s claim that he was traveling “maybe 45–55mph” during providence ran contrary to the stipulation of fact, which gave an approximate speed of 83mph. (Pros. Ex. 1, p. 4).

Further, appellant equivocated on whether his ability to drive was affected by alcohol or his speed. When confronted by the military judge, appellant again invoked his wife’s influence: “[i]t was a combination. It was the distraction, the argument, I was speeding. It happened, I hit the median and lost control.” (R. at 28). Rather than fully accepting responsibility for his irresponsible, dangerous, and illegal act, appellant again deflected blame to his wife.

Appellant also attempted to minimize his culpability. When asked by the military judge if his operation of the car was reckless, appellant responded, “For this for the speed, maybe.” (R. at 29). He did not bother mentioning the recklessness of driving with a BAC of .194. Appellant only conceded that his driving was reckless after the military judge confronted him with the fact that “speeding on a wet road in the dark poses a risk to people in your car as well as people that might be out in the road or in the parking lot or on the sidewalk[.]” (R. at 29).

Five days of confinement alone is incredibly lenient for appellant after he drove while impaired from a BAC well over twice the legal limit, and potentially the effects of a muscle relaxer. (R. at 35; Pros. Ex. 1, p.2). The military police pursuing appellant saw him drive in the wrong lane, against the flow of traffic, twice. (Pros. Ex. 1, p. 3). He accelerated to approximately 83 miles per hour as he drove through a residential area, before losing control of his car, driving over a sidewalk and going airborne before hitting the Wings of Lightning Dining Facility. (Pros. Ex. 1, p. 3). The collision with the building injured appellant’s wife, and given his speed, appellant could have easily killed another driver on the road, or a pedestrian on the sidewalk. (Pros. Ex. 1, p. 4, 5). Considering these facts, appellant’s lack of remorse, and repeated deflection of blame, the bad conduct discharge is entirely appropriate.

c. The military judge's clemency recommendation does not render the approved sentence inappropriate.

The potential impact of a punitive discharge on appellant's medical benefits may in some circumstances be relevant for consideration under Rules for Courts-Martial [R.C.M.] 1001(c)(1)(B). *United States v. Addesso*, 2019 CCA LEXIS 494, *5 (Army Ct. Crim. App. 9 December 2019)([sum](#)). In his unsworn statement, appellant claimed that he suffered a traumatic brain injury while on rotation at the National Training Center in 2014, and had since suffered depression, migraines, and anxiety. (R. at 98). Appellant's depression became so severe that he was hospitalized "twice or three times," and continued to receive medication at the time of the court-martial. (R. at 98). In appellant's written statement, he additionally stated, "I am currently going through a MEDBOARD that is almost finished, due to my injuries in the ARMY." (App. Ex. VIII, p. 2). The defense did not submit any medical documentation to support appellant's medical claims.

These claims lead to concerns about the long-term benefits appellant was forfeiting with his plea; concerns noted by the military judge:

The accused has long suffered from depression, migraines, memory loss, and anxiety as a result of injuries sustained while serving on active duty. . . . His offenses, when viewed alongside the injuries he sustained servicing [sic] as a soldier in the US Army, simply do not warrant the long standing [sic] impact of a bad conduct discharge and complete denial of VA health benefits he has earned serving his country.

(App. Ex. IX). However, appellant's and his wife's self-serving claims were never corroborated by reliable evidence. The trial defense counsel did not even mention these claims as a basis for mitigation, clemency, or even sympathy.

The collateral consequences the military judge cited in her clemency recommendation—the stigma of his criminal conviction and potential effect on his future employability—do not render the adjudged sentence inappropriate. *United States v. Cueto*, 82 M.J. 323, (C.A.A.F. 2022)(“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.’”)(quoting *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988)). “While an accused may raise a collateral consequence in an unsworn statement, . . . the military judge may instruct the members essentially to disregard the collateral consequence in arriving at an appropriate sentence for an accused.” *United States v. Talkington*, 73 M.J. 212, 213 (C.A.A.F. 2014).

In appellant's case, the military judge recommended the convening authority grant appellant clemency partially based on these collateral consequences. It should have no bearing on this court's sentence appropriateness review, which is not a matter of clemency, but a matter of law. “Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the

punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves.” *Healy*, 26 M.J. at 395.

Appellant invokes *Kerr*, an unpublished Navy-Marine Corps opinion with at best persuasive authority on this court, but appellant’s case is dissimilar.

(Appellant’s Br., p. 19, 21). In *Kerr*, the appellant received a sentence of eight months confinement and a bad conduct discharge for larceny offenses. *United States v. Kerr*, No. 202200140, 2023 CCA Lexis 434, *1–2, 6 (N.M. Ct. Crim. App. 17 October 2023)(op.). This was shortly after returning from a deployment to Kabul, Afghanistan, where he served as security at Abbey Gate. *Id.* at 5. He was on duty on 26 August 2021, during the improvised explosive attack that claimed the lives of thirteen Marines. *Id.* at *5–6. The *Kerr* appellant demonstrated “exceptional valor,” carrying away a dying Marine, and saving the lives of two soldiers wounded in the blast. *Id.*

There is no evidence that appellant demonstrated similar valor or faced similar circumstances. His sentencing case focused instead on his work ethic and reliability.⁷ Further, unlike the crimes discussed in *Kerr*, where the appellant

⁷ Captain WM described appellant as a hard worker who didn’t require much follow through. (R. at 60). Sergeant First Class AH regarded appellant as among the top 25–30% of NCOs. (R. at 67). Sergeant First Class SW said appellant had outstanding work ethic and was a number one or two NCO. (R. at 70). Sergeant First Class NR said appellant was among the top 3% of soldiers he had worked

deprived the government and a fellow soldier of property rights, appellant placed his wife and the general public in great danger by his decision to drive while intoxicated. *Compare id.* at *2–3 and (Pros. Ex. 1, p. 2–5). Moreover, his lack of meaningful remorse, his repeated attempts to deflect blame and minimize his actions contrast with the *Kerr* appellant. *Id.* at *2. Finally, appellant did not receive a lengthy period of confinement. (R. at 117). For all of these reasons, this court should reject appellant’s illusory comparison to *Kerr*.

Appellant’s sentence is not inappropriately severe. This court should affirm appellant’s sentence as adjudged.

II WHETHER THE MILITARY JUDGE ERRED BY SENTENCING APPELLANT TO A PUNITIVE DISCHARGE THAT SHE FOUND “SERVES NO INTEREST OF PUNISHMENT OR JUSTICE”

Standard of Review

Matters of statutory interpretation are reviewed de novo. *United States v. Flores*, 84 M.J. 277, 280 (C.A.A.F. 2024). “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

with. (R. at 74). Sergeant First Class KK said appellant possessed great work ethic and was a dependable NCO. (R. at 78).

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 [MJA 16], 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. 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, by which the military judge is bound. 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).

Article 56(c)(1), UCMJ states: “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” The article instructs military judges to consider many factors in determining what is a sufficient sentence, to include: “the need for the sentence to – (i) reflect the seriousness of the offense; (ii)

promote respect for the law; (iii) provide just punishment for the offense; (iv) promote adequate deterrence of misconduct. . . .” Article 56(c)(1)(C).

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 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).

Argument

The military judge did not err by accepting the guilty plea and plea agreement because the bad conduct discharge was lawful and it was the parties’ agreed upon punishment. When an appellant bargains for a specific sentence, it does not violate public policy, it does not deprive the appellant of complete sentencing procedures, and it is not inappropriately severe. *United States v. Avellaneda*, 84 M.J. 656, 660–63 (N.M. Ct. Crim. App. 2024). Article 53a(a)(1)(b) expressly allows provisions to limit the sentence which may be adjudged, to include a minimum and maximum punishment that may be imposed. R.C.M. 705(d)(1). Here, appellant and the convening authority agreed to a range of confinement, 0–180 days, and that he would receive a BCD. (App. Ex. IV).

The military judge should reject a plea agreement that imposes an unlawful mandatory sentence; however, this is not that case. As in *Avellaneda*, appellant, with the benefit of legal counsel, negotiated terms he deemed favorable for a guilty plea, was satisfied with his counsel, pled guilty voluntarily, and stated that he understood each provision of the plea agreement. (R. at 41, 51–52, 54; App. Ex. II, III). The judge did not abuse her discretion by accepting appellant’s pleas, and the sentence of a bad conduct discharge and five days confinement does not warrant reversal by this court.

Regarding appellant’s complaint that the sentence was inappropriately severe, the Government relies on its previously made arguments in AEI. The charge sheet, the stipulation of fact, and appellant’s providence inquiry all supported the result in this case. There is no basis in law to state the military judge erred in her sentence or imposed an inappropriately severe sentence. Appellant put the general public in grave danger, tried to deflect a portion of the blame upon his wife, and minimized the gravity of his misconduct. If anything, had the military judge failed to impose the bad conduct discharge, there would be error.

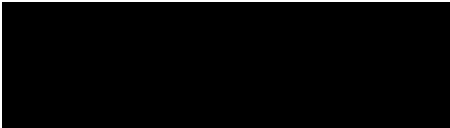
Appellant’s pre-sentencing argument shows that he believed that the discharge with a minimum period of confinement was the appropriate, and minimal, punishment for his crimes. Perhaps most critically, appellant negotiated for the very punishment he now asks this court to deem illegal. (App. Ex. IV).

Appellant included this term in his initial offer to the convening authority and he accepted his counteroffer with the term intact. (App. Ex. IV).

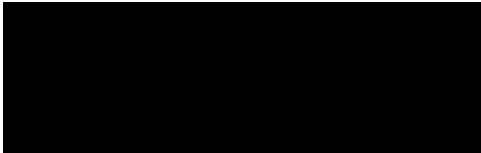
Mere regret does not produce a violation of R.C.M. 705 or Article 53a. This court should reject appellant's attempt to invalidate the deal for which he bargained. *See Harvey*, No. 202100309, 2023 CCA LEXIS 16, at *4 (N. M. Ct. Crim. App. 19 Jan. 2023)(per cur.) (we find this [assignment of error] is without merit and reject Appellant's argument as mere 'post-trial quibbling over bargained-for sentence limitations.'").

Conclusion

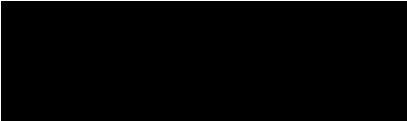
WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.



ALEX J. BERKUN
CPT, JA
Branch Chief, Government
Appellate Division



MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division



RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

APPENDIX

United States v. Kerr

United States Navy-Marine Corps Court of Criminal Appeals

October 17, 2023, Decided

No. 202200140

Reporter

2023 CCA LEXIS 434 *; 2023 WL 6817303

UNITED STATES, Appellee v. Brandon R. KERR, Lance Corporal (E-3), U.S. Marine Corps, Appellant

in which Senior Judge KISOR and Judge DALY joined.

Opinion by: PENNIX

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER [*NMCCA RULE OF APPELLATE PROCEDURE 30.2*](#).

Opinion

PENNIX, Judge:

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: John L. Ferriter. Sentence adjudged 7 April 2022 by a special court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: confinement for eight months and a bad-conduct discharge.¹ [*1] .

Counsel: For Appellant: Lieutenant Commander Leah M. Fontenot, JAGC, USN.

For Appellee: Lieutenant Commander Paul S. LaPlante, JAGC, USN, Lieutenant Gregory A. Rustico, JAGC, USN.

Judges: Before KISOR, PENNIX, and DALY, Appellate Military Judges. Judge PENNIX delivered the opinion of the Court,

A military judge sitting as a special court-martial convicted Appellant, consistent with his pleas, of two specifications of larceny in violation of [*Article 121, UCMJ*](#). The military judge sentenced Appellant to confinement for eight months and a bad-conduct discharge consistent with Appellant's plea agreement. The military judge recommended to the convening authority that the bad-conduct discharge be suspended for six months. Appellant submitted matters in clemency, requesting that the bad-conduct discharge be suspended [*2] for a minimum of six months. The convening authority considered the military judge's recommendation and Appellant's request, denied the request, and approved the sentence as adjudged.

Appellant asserts one assignment of error: that the bad-conduct discharge portion of the sentence is inappropriately severe based on the nature of the offense, Appellant's prior service, his service-connected trauma,

¹ Appellant was credited with having served 140 days of pretrial confinement.

and his sincere remorse. We agree that the bad-conduct discharge is inappropriately severe and take action in our decretal paragraph.

I. BACKGROUND

Appellant pleaded guilty to stealing an explosive flashbang and two gas canisters (military property), and a fellow Marine's car. Appellant's command had issued Appellant explosive flashbangs and gas canisters to use while deployed.² Once the deployment was complete, Appellant was ordered to return all remaining gear and munitions issued during the deployment.³ Appellant withheld one explosive flashbang and two gas canisters, which he intentionally concealed until he could store them in his desk in his barracks room, to keep as "a souvenir, a keepsake."⁴ Sometime later, Appellant found a key fob in the parking lot near his barracks building on board [*3] Camp Pendleton.⁵ The next day he located the car to which the key fob belonged, a grey Lexus sedan, and stole it.⁶ The car belonged to a fellow Marine who had also returned from a deployment and was in the process of preparing to separate from the Marine Corps. Appellant caused substantial property damage to the car and loss of the other Marine's government-issued gear that the Marine was required to

return as part of his separation out-processing. As a result, the other Marine was required to repay the Government for the lost property and to pay for alternate means of transportation to get to his medical appointments, classes, and other errands.⁷

At trial, the military judge discussed the plea agreement with Appellant to ensure that he understood all the terms and that he had signed the plea agreement voluntarily.⁸ The military judge then found Appellant guilty of the Charge and Specifications to which he pleaded guilty, finding that Appellant pleaded guilty to these larceny offenses knowingly, intelligently, consciously, and voluntarily, and that the pleas were supported by a factual basis.⁹

II. DISCUSSION

A. Standards of Review

We review sentence appropriateness de novo.¹⁰ This Court may [*4] only affirm "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."¹¹ In exercising this function, we seek to ensure that "justice is done and that the accused

² R. at 37.

³ *Id.*

⁴ R. at 42.

⁵ R. at 50.

⁶ R. at 50-54.

⁷ R. at 87-89.

⁸ R. at 58-76.

⁹ R. at 77.

¹⁰ [United States v. Lane, 64 M.J. 1, 2 \(C.A.A.F. 2006\)](#).

¹¹ [Article 66\(d\)\(1\), UCMJ](#).

gets the punishment he deserves."¹² The review requires an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender."¹³ In making this assessment, we analyze the record as a whole.¹⁴

B. Appellant's character of service prior to the crimes.

Appellant entered the Marine Corps in August 2017. He excelled in recruit training and was immediately identified to serve in highly competitive Marine Corps billets, the first of which was service at the Marine Barracks, Washington, D.C., where he participated in training for the Presidential Support Program. Appellant was then competitively selected to serve in support of the White House Communications Agency [WHCA].

In 2021, Appellant was deployed to Kabul, Afghanistan, as a member of the Fleet Marine Forces, 2nd Battalion, 1st Marine Regiment (2/1), assigned as security forces working on behalf [*5] of the U.S. Department of State to provide security and crowd control at the Hamid Karzai International Airport as part of the U.S. withdrawal from Afghanistan and the associated civilian humanitarian evacuation. Appellant was specifically assigned to

provide security at the airport's Abbey Gate Tower [Abbey Gate] checkpoint located along the perimeter fence where crowds of Afghans waited to be screened and let into the airport for departure from Afghanistan.

The record reveals that Appellant performed with exceptional valor and calmness throughout the difficult day of the infamous Abbey Gate bombing. On 26 August 2021, at the Abbey Gate checkpoint, Appellant survived the improvised explosive device [IED] suicide bombing that detonated approximately 25 meters away from where he was standing. This IED blast took the lives of 13 U.S. servicemembers, wounded many more, and killed dozens of Afghans. When the blast went off, Appellant observed, "there's smoke and there's blood, and all of the thousands of people that had been standing there are all gone, whether they're dead or laying down or retreating. Everything that was, was now gone."¹⁵ Appellant responded immediately. He and another [*6] Marine carried a third Marine who died before they could get him to safety. Appellant assisted a wounded U.S. Army Soldier to reach safety and also helped save the life of another wounded Marine.¹⁶

C. Appellant's return to Camp Pendleton.

Appellant and his fellow Marines left Afghanistan just five days later, on 31 August 2021, travelling to Kuwait, then to

¹² [United States v. Healy](#), 26 M.J. 394, 395 (C.M.A. 1988).

¹³ [United States v. Snelling](#), 14 M.J. 267, 268 (C.M.A. 1982) (citation and internal quotation marks omitted).

¹⁴ [Healy](#), 26 M.J. at 395-97.

¹⁵ R. at 228.

¹⁶ R. at 227-29.

Saudi Arabia, and back to Camp Pendleton, California. When he returned to Camp Pendleton, Appellant began having nightmares and experiencing vivid flashbacks of the concussive blast from the IED. He unsuccessfully attempted to cope with his symptoms but did not seek professional medical treatment for his symptoms.

D. The crimes and the sentence in this case.

Shortly after his return from Afghanistan, on 17 November 2021, Appellant was arrested for stealing another Marine's car. A subsequent investigation revealed his theft of the explosive flashbang and two gas canisters.

This Court has significant discretion in determining sentence appropriateness but may not engage in acts of clemency.¹⁷ This Court must ensure that justice and the law are upheld, and that this court-martial results in punishment that is sufficient, but not greater than [*7] necessary, to promote and maintain good order and discipline.¹⁸

In giving individualized consideration to the nature and seriousness of these crimes of larceny and the character of Appellant, we note the many facts and circumstances that have been established in the record to support Appellant's claim that the bad-conduct discharge portion of his sentence is inappropriately severe. They include:

Appellant's exceptional performance in training and high-visibility assignment to the WHCA; Appellant's specific acts of heroism in Afghanistan and his life-saving actions taken for his fellow Marines, an Army Soldier, and an Afghan woman and her children; the mental stress and traumas that Appellant incurred in the Marine Corps;¹⁹ Appellant's otherwise stellar record of service; the numerous and highly laudatory character statements from command members and colleagues who served with him; and evidence of Appellant's then-untreated symptoms that were noted as consistent with a clinical psychiatric diagnosis of post-traumatic stress disorder [PTSD].²⁰ In addition, Appellant presented testimony from a 28-year licensed professional counselor who testified that Appellant scored "very high" on the evaluation [*8] tests that were conducted prior to his court-martial and after his return from Afghanistan—for both traumatic brain injury [TBI] and PTSD.²¹

A sentence limited only to the eight months of confinement awarded adequately reflects the seriousness of the offenses committed, promotes respect for the law, provides just

¹⁹ R. at 177; Appellant was witness to and tried to prevent suicide attempts of two fellow Marines and witnessed a negligent homicide of a third Marine—while stationed at a Marine Corps barracks, prior to his deployment to Afghanistan.

²⁰ Defense Ex. F, 706 Board Report by CDR John M. Woo, MC, USN, Lead Forensic Psychiatrist, Naval Hospital Camp Pendleton, stating "At the time of the alleged criminal conduct, the accused did report symptoms consistent with clinical psychiatric diagnosis of Post-Traumatic Stress Disorder (PTSD)." Appellant's experience in Kabul was not the only tragedy he experienced while serving in the Marine Corps. *See* R. at 177.

²¹ R. at 198-200 (citing testimony of licensed professional counselor, Reverend John Kerr).

¹⁷ *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

¹⁸ Rule for Courts-Martial [R.C.M.] 1002(f).

punishment for the offenses, promotes adequate deterrence of misconduct, protects others from further crimes by Appellant, and serves to rehabilitate Appellant.²²

privileges, and property, of which Appellant has been deprived by virtue of the portion of the sentence set aside by this decision, are ordered restored.²⁵

In conducting a de novo review, we find the sentence to be inappropriately severe insofar as it includes a bad-conduct discharge. We agree with the military judge that it is not appropriate because of the matters presented in extenuation and mitigation.²³ The military judge could have, and should have, simply rejected the plea agreement in its entirety.²⁴ Given the current plea agreement process, where minimum and maximum punishments are often the same, the role of trial judges (and appellate judges) as ultimate assessors of sentence appropriateness has become all the more important.

End of Document

III. CONCLUSION

We **AFFIRM** the findings of guilty for the crimes of larceny to which Appellant pleaded guilty.

The portion [*9] of the sentence that provides for eight months of confinement is **AFFIRMED**. The bad-conduct discharge portion of the sentence is **SET ASIDE** as being inappropriately severe. All rights,

²² R.C.M. 1002(f)(3)(A)-(F).

²³ R. at 281-92. *See also* Military Judge's Addendum to Statement of Trial Results. We recognize that Appellant's plea agreement required the military judge to adjudge a bad-conduct discharge. But we agree with the military judge that a bad-conduct discharge was inappropriate in this case.

²⁴ *See United States v. Alkazahg*, 81 M.J. 764, 790 n.129 (N-M. Ct. Crim. App. 2021); *see also United States v. Raines*, 82 M.J. 608 (N-M. Ct. Crim. App. 2022.)

²⁵ *See Articles 58a(b), 58b(c), 75(a), UCMJ.*

[United States v. Harvey](#)

United States Navy-Marine Corps Court of Criminal Appeals

January 19, 2023, Decided

No. 202100309

Reporter

2023 CCA LEXIS 16 *; 2023 WL 312879

UNITED STATES, Appellee v. Daniel P. HARVEY, Private First Class (E-2), U.S. Marine Corps, 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. Harvey, 2023 CAAF LEXIS 160, 2023 WL 2920965 \(C.A.A.F., Mar. 20, 2023\)](#)

Review denied by [United States v. Harvey, 83 M.J. 457, 2023 CAAF LEXIS 553, 2023 WL 5836893 \(C.A.A.F., Aug. 2, 2023\)](#)

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Michael D. Zimmerman. Sentence adjudged 10 August 2021 by a special court-martial convened at Marine Corps Base Quantico, Virginia, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for 91 days, and a bad-conduct discharge.¹ [*1] .

Counsel: For Appellant: Captain Kimberly D. Hinson, JAGC, USN.

For Appellee: Lieutenant John L. Flynn, JAGC, USN Captain Tyler W. Blair, USMC.

Judges: Before HOUTZ, MYERS, and KISOR, Appellate Military Judges.

Opinion

PER CURIAM:

Appellant was convicted, pursuant to his pleas, of two specifications of wrongful use of lysergic acid diethylamide [LSD], in violation of [Article 112a, Uniform Code of Military Justice \[UCMJ\]](#).² Appellant asserts three assignments of error [AOEs]: (1) the sentence limitation portion of the plea agreement contained impermissible limitations under a plain reading of Rule for Courts-Martial [R.C.M.] 705(d) and should not have been accepted; (2) Appellant's plea agreement violated R.C.M. 705(c)(1) and appellate case law in that it deprived Appellant of his right to complete presentencing under R.C.M. 705(c)(1)(B) by stating an exact sentence to be awarded

¹ Appellant was credited with having served 91 days of pretrial confinement.

² [10 U.S.C. § 912a](#).

by the military judge; and (3) the plea agreement violated public policy because it contained prohibited [*2] and unenforceable provisions requiring the military judge to award a specific sentence.³ We find no prejudicial error and affirm.

I. BACKGROUND

The Government charged Appellant with drug offenses arising out of his possession and use of LSD. Appellant and the convening authority entered into a plea agreement in which Appellant agreed to plead guilty to two specifications of wrongful use of LSD. The plea agreement mandated Appellant would receive a bad-conduct discharge, maximum reduction in grade to E-1, and time served for the total confinement that could be adjudged. At sentencing, Appellant was sentenced to 91 days confinement to be served concurrently for each specification (which equated to the total time already served in confinement).⁴

At his guilty plea, Appellant admitted that he asked a friend, who he knew prior to joining the Marine Corps, to send LSD in the mail to his barracks located at Fort Lee, Virginia. The friend obliged and the LSD was sent. When the package arrived, Appellant testified that inside was a package of "Cheezits" and a greeting card.⁵ Inside the greeting card was a tinfoil pouch that

contained tabs of LSD.⁶ Appellant admitted to knowing it was LSD because [*3] he recognized the appearance. He ingested the LSD multiple times by putting it on his tongue. Once he ingested the LSD he experienced effects that included "[e]uphoria and extreme deep thought . . . hallucinat[i]ons."⁷ During sentencing, the military judge "recommend[ed] suspension of the bad-conduct discharge to the convening authority."⁸ The convening authority considered the military judge's recommendation, but declined to take any action.

II. DISCUSSION

A. Standard of Review and Law

Whether a provision of a plea agreement violates appellate decisions or public policy is a question we review *de novo*.⁹ Prohibited terms and conditions for plea agreements are outlined in R.C.M. 705(c)(1).¹⁰ Rule 705(c)(1)(B) specifically restricts the deprivation of certain rights by plea agreements, including "the right to complete presentencing proceedings."¹¹

B. The Plea Agreement did not Deprive

³ We have reviewed Appellant's first and third AOE's and find them to be without merit in light of our recent decision in [United States v. Rivero](#), 82 M.J. 629 (N-M. Ct. Crim. App. 2022). See [United States v. Matias](#), 25 M.J. 356, 363 (C.M.A. 1987).

⁴ Appellate Ex. IV.

⁵ R. at 25.

⁶ R. at 26.

⁷ R. at 26-28.

⁸ R. at 69.

⁹ [United States v. Sunzeri](#), 59 M.J. 758, 760 (N-M. Ct. Crim. App. 2004) (citation omitted).

¹⁰ R.C.M. 705(c)(1).

¹¹ R.C.M. 705(c)(1)(B).

Appellant of His Right to Presentencing Under R.C.M. 705(c)(1)(B) by Stating an Exact Sentence to be Awarded by the Military Judge

Appellant argues that because the plea agreement stated an exact sentence to be awarded by the military judge, it violated R.C.M. 705(c)(1)(B). Appellant asserts that a plea agreement that mandates every portion of the sentence to be awarded effectively renders [*4] all aspects of the presentencing futile, resulting in a de facto prohibition on presenting evidence or witnesses.¹² In making this argument, Appellant draws a principle comparison to [Sunzeri](#), in which we found a pretrial agreement containing a provision prohibiting the appellant from calling witnesses in presentencing violated R.C.M. 705(c)(1)(B).¹³ Appellant further contests that the plea agreement negated every purpose of R.C.M. 1001(d), stating "nothing Appellant could present to the court would affect his adjudged sentence."¹⁴ We disagree.

In [Rivero](#), this Court found "nothing in R.C.M. 705 that conflicts with or precludes a term requiring a specific sentence."¹⁵ Here, while Appellant's plea agreement stipulated the sentence to be awarded by the military judge, it in no way deprived Appellant of his right to full presentencing proceedings afforded by R.C.M.

705(c)(1)(B). In likening the facts of this case to [Sunzeri](#), Appellant fails to acknowledge [Sunzeri](#)'s nearly 20-year-old holding applied to a completely different sentencing regime under pre-Military Justice Act of 2016 sentencing rules—unlike the modern sentencing rules that currently govern Appellant's case. Additionally and unlike [Sunzeri](#), Appellant's ability to present testimony in presentencing was not restricted. The specific [*5] sentence outlined in the plea agreement—a sentence that had the effect of limiting Appellant's exposure to serving additional confinement—in no way violated his right to a full presentencing proceeding. Indeed, he exercised this right by offering testimony from his mother regarding his rehabilitative potential and making an unsworn statement taking "full responsibility" for his actions.¹⁶ After considering this testimony, the military judge recommended suspension of the bad-conduct discharge to the convening authority—a recommendation which was not unduly restricted by the plea agreement. Accordingly, we find this AOE is without merit and reject Appellant's argument as mere "post-trial quibbling over bargained-for sentence limitations."¹⁷

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's

¹² Appellant's Brief at 10.

¹³ [Sunzeri](#), 59 M.J. at 761.

¹⁴ Appellant's Brief at 10.

¹⁵ [Rivero](#), 82 M.J. at 632-33.

¹⁶ R. at 54-60.

¹⁷ [United States v. Cassity](#), 36 M.J. 759, 765 (N.M.C.M.R. 1992).

substantial rights occurred.¹⁸

The findings and sentence are **AFFIRMED**.

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¹⁸ [Articles 59 & 66, UCMJ](#).

CERTIFICATE OF SERVICE, U.S. v. GONZALEZ (20230521)

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]

[REDACTED] on the 8th day of October, 2024.

[REDACTED]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[REDACTED]