

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Private (E1)

ZACKERY M. ARMSBURY,

United States Army,

Appellant

**APPELLEE MOTION FOR
RECONSIDERATION AND
SUGGESTION FOR *EN BANC*
RECONSIDERATION**

Docket No. ARMY 20230534

Tried at Fort Bliss, Texas, on 8 April
and 10 October 2023, before a general
court-martial convened by
Commander, 1st Armored Division,
Lieutenant Colonel Clay West and
Colonel Javier E. Rivera-Rosario,
Military Judges, presiding.

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

COMES NOW, the undersigned appellate government counsel pursuant to Rules 23, 27 and 31.2(b) of this court's Rules of Appellate Procedure to motion the court to reconsider its 4 April 2025 Memorandum Opinion and suggest that the court reconsider *en banc*. Reconsideration *en banc* is necessary because (1) this court failed to discuss the negotiated nature of the punishment in its sentence appropriateness review pursuant to its own precedent in *United States v. Hunter*. 84 M.J. 715 (Army Ct. Crim. App. 2024); Army Court of Criminal Appeals Rules of Appellate Procedure, Rule [A.C.C.A. R.] 27.2(b)(1). Further, (2) the court misapplied *United States v. Lacy* when it did not consider the maximum sentence in conducting sentence comparison analysis and it disregarded its own opinion in

United States v. Pleasant when it found that a bad conduct discharge alone created a highly disparate sentence. 50 M.J. 286 (C.A.A.F. 1999); 71 M.J. 709 (Army Ct. Crim. App. 2012); A.C.C.A. R. 27.2(b)(2). Finally, 3) the court did not address whether the defense counsel was ineffective for agreeing to sentencing terms this court deemed inappropriate. A.C.C.A. R. 31.2(b)(1).

Full *en banc* reconsideration is appropriate under Rule 27(b)(1) in order to maintain uniformity of decisions because the court failed to follow its precedent in *Hunter* and *Pleasant* when it did not consider the negotiated nature of the plea. Further the court disregarded its own finding in *Pleasant* that a bad conduct discharge, alone, does not create a highly disparate sentence. 71 M.J. at 716. *En banc* reconsideration is also necessary under Rule 27(b)(2) because the court misapplied the CAAF's analysis in *United States v. Lacy* by not weighing appellant's sentence against the potential maximum punishment he faced. 50 M.J. at 289.

Statement of the Case

On 10 October 2023, a military judge sitting as a general court-martial convicted appellant, pursuant to his plea, of assault consummated by battery, in violation of Article 128, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 928 (2019). (R. at 26; STR). Consistent with the plea agreement, the

government dismissed the aggravated battery and conspiracy charges¹ and the military judge sentenced appellant to be confined for 60 days and to be discharged from the service with a bad-conduct discharge. (R. at 151). The convening authority approved the findings and sentence as adjudged. (Action).

On 4 April 2025, this court affirmed appellant's finding of guilt but set aside the bad conduct discharge that appellant bargained for and agreed to in his plea agreement. *United States v. Armsbury*, ARMY 20230534, slip op. at 7 (Army Ct. Crim. App. 4 Apr. 2025)(mem. op.). This court, pursuant to Article 66, UCMJ, concluded the sentence was inappropriate as it was highly disparate from another closely related case, that of SGT JH. *Id.* at 3–5. The government now files this suggestion for reconsideration *en banc* within the required thirty-days. A.C.C.A. R. 27(b), 31.2(a). The government has not filed a certificate for review with the CAAF; therefore, this court has jurisdiction over this request for reconsideration. A.C.C.A. R. 27(b).

¹ The military judge granted the government's motion to dismiss, without prejudice to ripen into prejudice upon completion of appellate review, the excepted language of the first specification, a specification of maiming, and a specification of conspiracy to commit an assault consummated by battery, in violation of Articles 128, 128a and 81, UCMJ, 10 U.S.C. § 928, 928a, 881 (2019). (R. at 75-76). The STR incorrectly indicates the court-martial found the appellant not guilty of those offenses. (STR).

A. This court failed to follow its own precedent in *Hunter* by not giving any weight to appellant’s pretrial agreement.

This court set aside appellant’s bad conduct discharge without considering other controlling precedent on sentence appropriateness review. *Armsbury*, ARMY 20230534, 2025 CCA LEXIS 149, slip op. at 7.; *see Hunter*, 84 M.J. 715. As this court illustrated in *Hunter*, when considering sentence appropriateness “[w]e start by highlighting that appellant bargained for a [punitive discharge] in his plea agreement which was agreed to by both parties.” *Hunter*, 84 M.J. at 718.

“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. 2010)(citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)). These agreements are “created through the process of bargaining, similar to that used in creating any commercial contract” and basic principles of contract law apply to their interpretation. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999).

In *Hunter*, this court considered whether a negotiated sentence for a dishonorable discharge was inappropriately severe. *Hunter*, 84 M.J. at 717. The court acknowledged appellant’s remorse and mitigating actions after he struck and killed a pedestrian with his vehicle and set aside the negotiated dishonorable discharge as it “neither fit[] the circumstances in the record nor the offender.” *Id.* at 719. However, it ultimately maintained a bad conduct discharge as a punitive

discharge was a negotiated term of the plea agreement. *Id.* at 718–19. Before providing relief, the court specifically addressed the contractual nature of the plea agreement appellant made with the convening authority. *Id.* at 716. Moreover, the court noted the government included an unusual clause into the agreement which raised the question whether the government attorneys believed the dishonorable discharge would survive sentence appropriateness review.²

Here, the court did not discuss the negotiated nature of appellant’s contract with the convening authority before it granted relief. Appellant’s pretrial agreement “was a bargained for *quid pro quo*” where appellant would plead guilty to one specification of assault consummated by battery and accept a punitive discharge in exchange for the convening authority’s limitation on the maximum confinement and dismissal of one specification of assault with grievous bodily injury and one specification of conspiracy. *United States v. Kibler*, 84 M.J. 603, 610–11 (Army Ct. Crim. App. 2024)(Arguelles, J., dissenting)(citing *United States v. Cook*, 12 M.J. 448, 450 (C.M.A. 1982)); (App. Ex. X para 7(b)). Article 128, assault consummated by a battery carries a maximum penalty of a bad conduct discharge and six months confinement. *Manual for Courts-Martial, United States*

² Agreeing to dismiss a charge “without prejudice, to ripen into prejudice upon completion of appellate review in which the findings *and sentence* have been upheld.” *Id.* (emphasis in original).

(2019 ed.) [MCM] App’x 12, A12-6. By comparison, aggravated assault with grievous bodily harm carries a maximum penalty of a dishonorable discharge and 5 years confinement. MCM App’x 12, A12-7. This bargain effectively reduced appellant’s criminal exposure from a felony conviction to a misdemeanor conviction. Sergeant JH—with whom the court compared appellant’s sentence—bargained for a felony type conviction and the *possibility* of a punitive discharge. (see *United States v. Hagerman*, Dkt No. 20240018, Judgment of the Court; App. Ex. XVI, XIX).

“To set aside a punitive discharge altogether would undermine the process of an accused entering into a plea agreement with a convening authority — an accused should always enter into a plea agreement with the assumption that the terms are binding and enforceable.” *Hunter*, 84 M.J. at 719 (citing *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2010)); see also *United States v. Abdullah*, 85 M.J. 501, 2024 CCA LEXIS 479, *20 (Army Ct. Crim. App. 2024).³ An accused should always enter into a plea agreement with the assumption that the terms are binding and enforceable. See *Smead*, 68 M.J. at 59.

Presumably, the convening authority considered the bad conduct discharge a material term when he signed the agreement. By setting aside the bad conduct

³ Although this case is published, Lexis has not updated the opinion with the appropriate pin cites, therefore the Government refers to the pin cites using the Lexis formatting.

discharge, this court negated the plea agreement and delivered appellant a windfall. *United States v. Martinez*, 76 M.J. 837, 842 (Army Ct. Crim. App. 2017) (“Even if we assume appellant’s sentence was highly disparate, in a closely related case that lacked cogent reasons for such a disparity, appellant is not entitled to a windfall from an otherwise appropriate sentence just because a co-actor, who may even be more culpable, received a more lenient sentence.”).

B. The court misapplied *United States v. Lacy* and did not consider its own precedent in *United States v. Pleasant* when conducting the sentence disparity analysis.

The panel’s decision misapplied *Lacy* by applying sentence appropriateness to mere disparate sentences rather than those that are highly disparate. Moreover, the court failed to consider the maximum sentences allowed for appellant’s and SGT JH’s crimes when it conducted its review. *Lacy*, 50 M.J. at 289 (“The test in such a case is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment.”).

In *Lacy*, the CAAF considered the sentences of three service members who all committed the same crime in each other’s presence. *Lacy*, 50 M.J. at 287. All three pled guilty to indecent acts and carnal knowledge, all three tried at a general court-martial by judge alone. *Id.* Though their sentences were the same in all other respects, the *Lacy* appellant received 18 months confinement while his

codefendants received 15 months and 8 months. While acknowledging the disparity, the CAAF declined to find that the sentences were highly disparate, as all “are relatively short compared to the maximum confinement of 27 years appellant was facing.” *Id.* Similarly, appellants sentence of 60 days confinement and a bad conduct discharge were relatively lenient compared to the maximum of 5 years of confinement and a dishonorable discharge he faced for aggravated assault.

In its memorandum opinion, this court did not compare the sentences of appellant, SGT JH, and SPC JW to the maximum punishments allowed, as proscribed by *Lacy*. This court’s decision in *United States v. Blair*, cited by the *Armsbury* panel, demonstrated this analysis. 72 M.J. 720, 725 (Army Ct. Crim. App. 2013)(“Second, clearly a main reason for the disparity found here is a result of PO Bradley’s case being referred to a summary court-martial. Obviously, the potential maximum punishment varies greatly depending on the forum. This difference in the respective maximum punishments is a proper consideration when comparing disparate sentences.”). The court also made clear that the “relatively lenient” treatment of one codefendant did not entitle appellant to leniency. *Id.* “Ordinarily, leniency towards one accused does not necessarily flow to another, nor should it. Disparity that results from a convening authority’s . . . judgment does not necessarily entitle a service person to some form of appellate relief.” *Id.* at 725 (citing *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994)).

Rather than comparing the sentences appellant, SGT JH, and SPC JW received to their maximum, this court narrowly focused on the punitive discharge appellant received. The court stressed that SGT JH did not receive a punitive discharge even though he plead guilty to a more severe charge.⁴ However, pretrial agreements are the product of *quid pro quo* bargaining. *Cook*, 12 M.J. 448, 450. Disparity between pretrial agreements more often reflect the individual concerns and preferences of each accused. One accused might opt for greater confinement exposure in exchange for no rank reduction or forfeitures, ensuring ongoing support for loved ones. A more shortsighted accused may beg for a punitive discharge to avoid the sting of confinement entirely. The conclusion this court arrived at in appellant's case does not account for these individual preferences and circumstances inherent in every plea bargain. It also prevents convening authorities from offering more lenient sentences to those who agree to cooperate early on in an investigation and those whose assistance reveals deeper criminality than would have otherwise been discovered.

Also, while the court recognized "the significant adverse stigma of a punitive discharge," it did not acknowledge the same for the felony conviction of

⁴ "Sergeant JH pleaded guilty to the more severe charge of aggravated assault and did not receive a punitive discharge, whereas appellant pleaded to the lesser offense of assault consummated by a battery and did receive a bad-conduct discharge." *Armsbury*, 2025 CCA LEXIS 149, at *4.

SGT JH. *Armsbury*, 2025 CCA LEXIS 149, *4–5. As a punitive discharge incurs a “negative impact . . . in the future with regards to legal rights, employment opportunities, and social acceptability,” so too does a felony conviction. *Id.* “Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.” *United States v. Macias*, 53 M.J. 728, 731 (Army Ct. Crim. App. 1999). These “civil disabilities” include limitations on the right to vote, hold public office, serve on juries, possess a firearm, live in public housing, and loss of employment opportunities. *Id.* For a young soldier at the beginning of their military career, receiving the brand of “felon” likely incurs greater consequences in the long-term than a punitive discharge.

Finally, the court’s determination that the sentences are “highly disparate” conflicts with its 2012 opinion of the court in *United States v. Pleasant*, 71 M.J. 709. There, this court considered the sentences of MSG Pleasant and LTC Lethers following their courts-martial for larceny of military equipment while deployed to Iraq. *Id.* at 710-11. While the court-martial only sentenced LTC Lethers to eleven months confinement and no discharge, MSG Pleasant’s approved sentence included eleven months confinement, reduction to E-1, and a bad conduct discharge. *Id.* at 715-716. Nevertheless, this court found that while the cases were

“closely related,” the sentences, while disparate, were not “highly disparate.” *Id.* at 716.

Here, the court concluded that “[c]onsidering the severity and long-term effects of a punitive discharge, we find this alone makes the sentences highly disparate.” *Armsbury*, ARMY 20230534, slip op. at 5. This conclusion directly contradicts this court’s controlling opinion in *Pleasant* and alone warrants *en banc* reconsideration of the panel’s decision.

C. The court did not address whether the defense counsel was ineffective for agreeing to enter into what this court deemed an inappropriate sentence.

If this court determines the sentence is inappropriate, then it should scrutinize and discuss whether defense counsel’s performance was constitutionally ineffective. As explained above, the sentence arose from plea negotiations conducted with the convening authority. It is reasonable to infer that defense counsel believed the negotiated sentence was appropriate given the weight of the evidence, the maximum potential punishment, and the gravity of the offense—namely, kicking an unconscious person in the head after a fight.

If this court determines that counsel’s advice to accept the plea with a mandatory bad conduct discharge was deficient, then under *Strickland v. Washington*, 466 U.S. 668 (1984), it should consider whether trial defense counsel’s representation fell below an acceptable level of competency. The failure

to adequately advise can amount to ineffective assistance. See *United States v. Peterson*, 2023 CCA LEXIS 88, at *18 (A. F. Ct. Crim. App. 2023) (finding no ineffective assistance of counsel on a negotiated dishonorable discharge); (*United States v. Rose*, 71 M.J. 138 (C.A.A.F. 2012) (holding that the defense counsel’s failure to advise on sex offender registration stemming from a guilty plea ineffective assistance of counsel); *United States v. Furth*, 81 M.J. 114 (C.A.A.F. 2021) (finding no ineffective assistance of counsel following counsel’s erroneous advice about a resignation for the good of the service and upholding appellant’s guilty plea).


Ultimately, the government avers that in the context of a negotiated guilty plea, this court should not find sentences “highly disparate” or “inappropriately severe” without at least discussing the performance of the defense team. As this court did not discuss this issue in its memorandum opinion, an *en banc* reconsideration is appropriate.

Conclusion


WHEREFORE, the United States respectfully suggests this honorable court reconsider its ruling and suggests the hear reconsider this case *en banc*.




ALEX J. BERKUN
CPT, JA
Appellate Government
Counsel



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



ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government



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

Panel No. 2

SUGGESTION FOR
RECONSIDERATION
EN BANC

GRANTED:

DENIED:

DATE:

Panel No. 2

MOTION FOR RECONSIDERATION


GRANTED: _____

DENIED: _____

DATE: _____

CERTIFICATE OF SERVICE, U.S. v. ARMSBURY (20230534)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil* on the 5th day of May, 2025.



Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546

