14 October 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	APPELLANT'S BRIEF IN SUPPORT OF ISSUE PRESENTED
v.	)	
	)	USCA Misc. Dkt. No. 10-5004/AF
Senior Airman (E-4), RYAN D. HUMPHRIES, USAF, *Appellee.*	)	Crim. App. Dkt. 37491

APPELLANT'S BRIEF IN SUPPORT OF ISSUE PRESENTED

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TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING APPELLEE'S SENTENCE INAPPROPRIATELY SEVERE UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE AND ERRED IN AN ATTEMPT AT EXERCISING APPELLATE CLEMENCY BY REMANDING THE CASE TO THE CONVENING AUTHORITY WITH INSTRUCTIONS THAT THE CONVENING AUTHORITY MAY APPROVE AN ADJUDGED SENTENCE NO GREATER THAN A SUSPENDED BAD CONDUCT DISCHARGE AND A REDUCTION TO THE GRADE OF E-1.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), Uniform Code of Military Justice (UCMJ).

Statement of the Case

On 1 May 2009, a panel of officer and enlisted members sitting as a general court-martial convicted Appellee of one specification of adultery and one specification of divers sodomy, in violation of Articles 134 and 125, UCMJ. The panel sentenced

Appellee to a bad conduct discharge and reduction to the grade of E-1. The convening authority approved the adjudged findings and sentence.

Appellee raised the following assignments of error:

I.

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING RELEVANT EVIDENCE OF A PRIOR SEXUAL RELATIONSHIP BETWEEN APPELLANT AND THE COMPLAINING GOVERNMENT WITNESS, WHERE APPELLANT WAS CHARGED WITH ADULTERY AND CONSENSUAL SODOMY.

II.

WHETHER THAT PORTION OF THE SENTENCE WHICH PROVIDES FOR A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE.

III.

WHETHER UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE THE FINDINGS OF GUILTY TO ADULTERY AND CONSENSUAL SODOMY SHOULD BE SET ASIDE BY THIS COURT PURSUANT TO ITS POWERS UNDER ARTICLE 66(c), UCMJ.

On 24 May 2010, the Air Force Court of Criminal Appeals issued a decision that "[t]he findings are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred." The Air Force Court expressly declined to "nullify" Appellant's factually and legally sufficient convictions despite having previously decided it had such nullification authority in United States v. Nerad, 67 M.J. 748, 751-52 (A.F. Ct. Crim. App. 2009), *rev'd*, 69 M.J. 138 (C.A.A.F.

2010). However, the Court declined to affirm the findings at that time and found that portion of the sentence which provides for an unsuspended bad conduct discharge inappropriately severe. United States v. Humphries, ACM 37491 (A.F. Ct. Crim. App. 24 May 2010) (unpub. op.) The Court set aside the convening authority's action and returned the record to The Judge Advocate General for remand to the convening authority for reconsideration on the sentence with direction that he may approve a sentence no greater than a suspended bad-conduct discharge and a reduction to E-1. The lower Court's explicit rationale for its decision was that "He deserves punishment **but given the consensual nature of his crimes**, an unsuspended punitive discharge is inappropriately severe." (Emphasis added.)

On 25 June 2010, the Air Force Court denied the government's Motion for Reconsideration *En Banc*.

The Judge Advocate General, United States Air Force, certified the following issue under Article 67(a)(2), UCMJ:

> **WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING APPELLEE'S SENTENCE INAPPROPRIATELY SEVERE UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE AND ERRED IN AN ATTEMPT AT EXERCISING APPELLATE CLEMENCY BY REMANDING THE CASE TO THE CONVENING AUTHORITY WITH INSTRUCTIONS THAT THE CONVENING AUTHORITY MAY APPROVE AN ADJUDGED SENTENCE NO GREATER THAN A SUSPENDED BAD CONDUCT DISCHARGE AND A REDUCTION TO THE GRADE OF E-1.**

On 11 January 2011, this Court heard oral argument upon the

certified issue. On 10 February 2011, this Court remanded the case back to the Air Force Court because the lower Court "acted on the sentence without acting on the findings. This has resulted in having a case before us for review that does not have a complete decision on all findings and the sentence by the Court of Criminal Appeals as required by Article 67(c)."

On 3 August 2011, the Air Force Court issued a new decision in which the lower Court affirmed the findings as correct in law and fact. In a section of their opinion titled "Rationale for the Original decision," the Air Force Court stated in part that "**The panel members found the appellant guilty only of consensual sexual offenses**. After taking into account all the facts and circumstances surrounding the offenses, we concluded that the portion of the sentence that provides for an unsuspended bad-conduct discharge was inappropriately severe." (Emphasis added.) The Air Force Court again set aside the action and remanded it to the convening authority with the direction that he may "approve an adjudged sentence no greater than a suspended bad-conduct discharge and a reduction to E-1."

Following the practice of this Court of requiring a new certification following a remand to the lower Court, The Judge Advocate General of the Air Force again certified the issue noted above.

Statement of Facts

At the time of the offenses on 2 February 2005, Appellee was a married active duty Airman at Dyess AFB. (Jt. App. at 77.) He knew AEH because she and her husband, JH, were his neighbors. (Jt. App. at 16.) JH was a fellow active duty Airman who was deployed to Qatar. (Jt. App. at 33-34.) JH had been deployed for about two and half months at the time of the offenses. (Jt. App. at 34.) On the night in question, AEH was missing her husband and was feeling depressed and anxious about JH being deployed. (Id.)

In the early evening hours, Appellee called AEH and asked if he could come to her house on base. (Jt. App. at 17.) AEH told him that she was going to watch a movie, but he could come over. (Jt. App. at 17-18.) When he arrived that evening, Appellee brought Vodka and some juice for himself and Jack Daniels whiskey for AEH. (Jt. App. at 18-19.) They initially sat in the kitchen talking and drinking. (Id.) AEH stopped to put her baby daughter to bed, and they resumed talking for several hours. (Jt. App. at 19-20.) Her eldest daughter was playing while they talked. (Jt. App. at 34.) Appellee and AEH discussed their families, why they had all stopped hanging out, how depressed AEH was due to her husband being deployed and that AEH was feeling down because of how much she missed her husband. (Jt. App. at

20.) AEH was drinking daily at the time and had been prescribed Valium. (Jt. App. at 21, 39.) AEH trusted Appellee and felt like they were friends. (Jt. App. at 20-21.) However, AEH's husband had told her not to have any men in the house. (Jt. App. at 34.)

While AEH's daughter was still playing, Appellee leaned in and tried to kiss AEH. (Jt. App. at 23.) AEH told him no and pushed him away. (Id.) AEH asked if they were going to watch a movie they had previously discussed and began to walk into the front room. (Id.) She then put her eldest daughter in the bed and came back in the living room and put the movie in the DVD player. (Jt. App. at 24.) Appellee came up next to her and tried to kiss her again. (Id.) She told him to stop. (Id.) She then sat down in her lazy boy chair while Appellee sat on the couch. (Jt. App. at 25.) Appellee said something that made AEH feel uncomfortable, and he stood up and leaned over the chair, put his hand on either side of the armrests and leaned into AEH. (Jt. App. at 25-26.) At that time, AEH's eldest daughter walked in the room. (Jt. App. at 26.) AEH pushed Appellee off of her and told him to stop and took her daughter to the bathroom. (Id.) While she was in the bathroom, AEH's daughter asked her what Appellee was doing to her. (Jt. App. at 26, 45.) AEH told her it was nothing for her to worry about. (Jt. App. at 26.) AEH said that Appellee was just telling her a secret. (Id.) Her

daughter asked if it was a bad secret, and AEH told her it was not a good secret, and that her daughter just needed to go to bed. (Jt. App. at 26, 46.) AEH felt like Appellee was pursuing her and being aggressive. (Jt. App. at 26.)

When AEH walked out of her daughter's bedroom, Appellee was in AEH's bedroom and pulled her inside. (Id.) He told her to take off her clothes and shirt, which she did. (Id.) He got on top of her on the bed. (Jt. App. at 27.) Appellee began performing oral sex on her. (Id.) He then put his penis inside of her. (Jt. App. at 28.) AEH was conscious of her children nearby and was quiet. (Id.) Appellee flipped her over and put his penis in her anus. (Jt. App. at 29.) It was painful. (Jt. App. at 30.) He flipped her back over and put his penis back inside her vagina and ejaculated in her. (Id.) Afterwards, AEH went to her eldest daughter's room and lay down with her for the rest of the night. (Jt. App. at 31.) After Appellee left, AEH took a shower. (Jt. App. at 32.) She hurt "down there" and she felt bruised and cut. (Id.) After AEH reported what happened, her husband came home early from his deployment. (Jt. App. at 71.)

Summary of Argument

As provided in the UCMJ, the authority under Article 60 to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the

convening authority. In his action, the convening authority enjoys sole discretion to approve, disapprove, commute, or suspend the sentence in whole or in part. Appellant's convening authority exercised his sole discretion in the action he approved, and the lower Court has attempted to usurp the convening authority's discretion by ordering the convening authority to reconsider his action and directing a particular clemency decision from the appellate bench.

The AFCCA erred in determining that the unsuspended bad conduct discharge was inappropriately severe despite the egregious facts of Appellee's case. Appellee committed his crimes with the spouse of a deployed service member, in base housing, with the children of the deployed service member in the next room, and at a time when he was a married father of three minor children. The deployed spouse was returned prematurely from his deployment based upon the allegations. By finding the sentence inappropriate, the AFCCA improperly engaged in clemency and set a precedent that a punitive discharge is too severe for adultery and sodomy convictions, even though it is an authorized punishment.

The AFCCA error has already led to one military trial judge citing this case to find that a punitive discharge is not an authorized punishment for members to consider in an adultery case where the facts were less egregious than the facts in Appellee's

case. If this case continues to stand for such a proposition, it could erode the appropriate and authorized punishment for members convicted of adultery, even in cases where the facts cut to the heart of why the military charges adultery--such as when a spouse is deployed.

Finally, with all due respect, the United States asserts that the AFCCA attempted to legislate from the bench when it inappropriately attempted to require the convening authority to approve an adjudged sentence no greater than a suspended bad conduct discharge where the law does not give the AFCCA authority to suspend the punitive discharge on its own. The convening authority should not be directed to exercise clemency and suspend the punitive discharge, when he has already exercised his sole discretion and elected not to grant Appellee clemency, simply because the AFCCA legally cannot.

Moreover, AFCCA's expressly and twice-stated rationale for its decision (because of the consensual nature of Appellee's consensual crimes), demonstrates AFCCA has determined a punitive discharge is not an authorized sentence for such crimes, which reflects an abuse of discretion and reversible error.

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING APPELLEE'S SENTENCE INAPPROPRIATELY SEVERE UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE; IT ERRED IN AN ATTEMPT AT EXERCISING APPELLATE CLEMENCY BY ORDERING THE CONVENING

AUTHORITY TO RECONSIDER HIS CLEMENCY DECISION WITH INSTRUCTIONS THAT THE CONVENING AUTHORITY MAY APPROVE AN ADJUDGED SENTENCE NO GREATER THAN A SUSPENDED BAD CONDUCT DISCHARGE AND A REDUCTION TO THE GRADE OF E-1; AND IT ERRED BY WHEN ACTING IN EQUITY TO DETERMINE THAT THE CONSENSUAL NATURE OF APPELLANT'S ADULTERY AND CONSENSUAL SODOMY JUSTIFIED REMOVAL OF THE LEGALLY PERMISSIBLE PUNISHMENT OF AN UNSUSPENDED BAD CONDUCT DISCHARGE.

Standard of Review

The standard of review for sentence appropriateness is de novo. *See* Article 66(c), UCMJ; United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2002); United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

Law and Analysis

"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); *see also* United States v. Baier, 60 M.J. 382 (C.A.A.F. 2005).

A convening authority's decision to grant or deny clemency is matter of command prerogative, and as such, is a matter solely for the discretion of the convening authority, not a court of criminal appeals. United States v. Nerad, 69 M.J. 138, 148 (C.A.A.F. 2010); Article 60, UCMJ. In reviewing a court of criminal appeal's exercise of sentence appropriateness, this Court asks "if the CCA abused its discretion or acted

inappropriately—i.e., arbitrarily, capriciously, or unreasonably—as a matter of law." Nerad, 69 M.J. at 142.

The legally permissible maximum punishment for Appellee's crimes of adultery and consensual sodomy was reduction to E-1, total forfeiture of pay and allowances, confinement for six years and a dishonorable discharge. (Jt. App. at 74.) The prosecution asked the members to return a sentence of reduction to E-1, six months confinement, and a bad conduct discharge. (Jt. App. at 75.) However, the members only sentenced Appellee to a bad conduct discharge and reduction to E-1. Appellee walked out of the courtroom without one day of confinement or any forfeitures of pay. The only punishment he received was the punitive discharge and reduction in rank. This sentence is not overly severe, especially considering the maximum punishment and the nature of the offenses and the offender.

During trial counsel's sentencing argument for a bad conduct discharge, six months confinement and reduction to E-1, he focused on punishment of Appellee for the crimes, deterrence of Appellee and others who know of him from committing similar crimes, and good order and discipline in the military. (Jt. App. at 75.) Appellee went to JH's home while he was deployed and engaged in vaginal and anal sex with his wife. Appellee took deliberate steps to put himself into position to commit these crimes. He knew that JH was deployed. He initiated contact with

AEH. He came in the evening and brought her alcohol. He drank alcohol with her and engaged in hours of conversation and gained her trust.

AEH talked extensively that evening about her husband being deployed and how much she missed him and was depressed by his absence. Appellee took advantage of the situation and began initiating kisses. Appellee tried to kiss her in the kitchen, in front of the television, and while she was sitting in a chair. Appellee did this all with JH's children nearby and knowing JH's eldest daughter was awake and had previously walked in on them. The eldest daughter was concerned enough that she asked her mother what Appellant was doing. Appellee pulled AEH into the bedroom and engaged in vaginal, oral and anal sex. He left her bruised and torn.

As a result of Appellee's misconduct, the Air Force brought JH back from his deployment to be with his wife. This behavior had a direct impact on AEH, JH, the Air Force's mission readiness, and good order and discipline.

Although the members determined that AEH participated in Appellee's offenses, Appellee was the active duty military member and held to Air Force standards. He acted selfishly, without integrity and his actions were dishonorable. As the trial counsel argued, military members who are deployed should not have to worry about other military members having sex with and

sodomizing their spouse while they are away on foreign soil defending freedom. (Jt. App. at 76.) This behavior is unacceptable for any fighting force and the circumstances of it warranted the punitive discharge. There simply is no excuse for Appellee's actions. His crimes reinforce why a commander should rightfully prosecute military members for adultery and consensual sodomy where the offender's partner is the wife of a deployed military member.

There is no significant evidence of mitigation or extenuation associated with these crimes. Perhaps a suspended punitive discharge would have been appropriate if Appellee had presented an impressive array of evidence in mitigation and extenuation, including a citation for peace-time heroism, like the appellant in United States v. Clark, 16 M.J. 239 (C.M.A. 1983). Instead, Appellee's record included a letter of reprimand for being absent without leave for two days. (Jt. App. at 90.) In addition, his EPRs were checkered at best. He received a rating of five on his first two EPRs, but the next two EPRs reflected a rating of four with several markdowns in the performance assessment, and the final two EPRs had a rating of three with all of the performance assessments marked down. (Jt. App. at 78-89.) In the defense sentencing case, Appellee only presented letters from his father, sister-in-law and friend, along with an unsworn statement. This was not enough to overcome

the insidious way that Appellee took advantage of JH's deployment and AEH's vulnerable state to have sexual intercourse with and sodomize JH's wife.

A punitive discharge denies Appellee of the advantages of someone whose discharge characterization indicated that he or she served honorably. The court members, who spoke as the voice of the Air Force community where Appellee committed his crimes, considered the evidence at trial including Appellee's entire record and adjudged a sentence that was appropriate for the offenses.

Appellee previously requested that the convening authority set aside the findings and sentence in clemency. (Jt. App. at 93-95.) The convening authority, in his sole discretion, declined to do so. The convening authority should not have his discretionary disciplinary decision second-guessed under these circumstances. He alone had the opportunity to grant clemency for any reason or no reason at all and after considering Appellee's case and clemency submission, he chose not to set aside the convictions and affirmed the adjudged sentence. The Air Force Court may have broad powers, but clemency is not one of them. Healy, 26 M.J. at 395. However, based on the Court's holding, clemency is exactly what Appellee received.

The only reason the Air Force Court provided to explain its decision was that "[Appellee] deserves punishment but given the

consensual nature of his crimes, an unsuspended punitive discharge is inappropriately severe." Humphries, unpub. op. at 2. However, this explanation is sorely lacking. All adultery and consensual sodomy convictions would necessarily involve consensual sex or else they would be rape and forcible sodomy convictions. Yet, the maximum authorized punishment solely for the consensual act of adultery is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year. Manual for Courts-Martial, United States part IV, para. 62e (2008 ed.) (MCM). In addition, the maximum authorized punishment for consensual sodomy is a dishonorable discharge, forfeiture of pay and allowances, and confinement for 5 years. MCM, pt. IV, para. 51(e)(4). It is hardly too severe to adjudge a bad conduct discharge for adultery and sodomy when even a dishonorable discharge is authorized.

Despite the lower Court's assertion to the contrary, AFCCA's admitted rationale for its decision (the consensual nature of Appellee's consensual crimes) indicates the Court believed "a punitive discharge is no longer authorized punishment" for these crimes. The military judge in another adultery case cited by AFCCA in its latest decision who followed AFCCA's decision in another adultery case cannot be faulted for following his superior Court's decision, rationale and guidance. Yet, AFCCA found error by the judge for doing what AFCCA attempted to do

here. There are proper means to amend the Manual for Courts-Martial, but AFCCA's action in this case is not among them.

The unique circumstances of this case, where the Air Force Court refused to affirm the punitive discharge despite the fact that Appellee committed his crimes with the spouse of a deployed service member, in base housing, with the children of the deployed service member in the next room, at a time when Appellee was a married father of three minor children and where the deployed spouse was ultimately returned prematurely from his deployment based upon the allegations, emphasizes why this Court has the power to review the Air Force Court's use of its Article 66(c), UCMJ power. As this Court recently noted, a lower court's discretion to modify a sentence or finding under Article 66(c), UCMJ, that "should be approved" has boundaries and is subject to appellate review. In United States v. Nerad, 69 M.J. 138 (C.A.A.F. 2010) this Court stated:

> Our sentencing decisions on this point underscore that the statutory phrase "should be approved" does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review. See, e.g., United States v. Hutchinson, 57 M.J. 231, 234 (C.A.A.F. 2002) (remanding a lower court decision for de novo review in view of the possibility that the lower court, in holding a sentence to be inappropriate, exceeded its powers); see also Lacy, 50 M.J. at 288 (holding Article 66(c), UCMJ, bars the lower courts acting on issues of sentence appropriateness from committing "obvious miscarriages of justice or abuse of

> discretion" and referencing factors that a CCA might look to in determining whether sentence reassessment was warranted); Christopher, 13 C.M.A. at 236, 32 C.M.R. at 236 (noting Article 66(c), UCMJ, does not authorize the lower courts, while reviewing a sentence, to take an action that is "arbitrary, capricious"). 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." United States v. Boone, 49 M.J. 187, 192 (C.A.A.F. 1998) (citation and quotation marks omitted). Granting mercy for any reason or no reason is within the power of the convening authority. Id.

Nerad, 69 M.J. at 146.

Here, the lower Court exceeded its power in holding Appellee's sentence to be inappropriate and "committed an obvious miscarriage of justice or abuse of discretion." The practical result of the Air Force Court's holding is that now some practitioners believe that a punitive discharge can be an *unauthorized punishment* in an adultery case. (Jt. App. 96-138.) In a recent adultery case at Edwards AFB, California, the military judge ruled as follows on a defense motion, citing Humphries, to remove the punitive discharge as part of the authorized maximum punishment:

> I am going to grant the defense's motion as far as maximum punishment. There are three senior judges on the Air Force Court who looked at a case that was originally much, much more serious than this case, where that had allegations of forcible sodomy and forcible rape. The accused was only in that case convicted of consensual sodomy and

> adultery, but they said in those circumstances that a bad conduct discharge would not be appropriate. Based on that guidance, this court concurs that, if that is the opinion of my superior court, that in this case clearly a bad conduct discharge would not be appropriate. So that motion is granted, and I will not instruct it as a possible sentence.

(Jt. App. at 106-07.)

The defense's success with this motion is just the beginning of cases where a punitive discharge will be removed as an authorized punishment based on Humphries. Here, a punitive discharge is authorized for Appellee's crimes. The United States respectfully suggests that neither the Air Force Court nor a trial judge should be permitted to override Congress and the President in this manner.

Finally, this Court should overrule the Air Force Court's action in remanding this case to the convening authority and instructing that he may "upon further consideration approve an adjudged sentence no greater than a suspended bad-conduct discharge and a reduction to the grade of E-1." Humphries, unpub. op. at 3. Quite frankly, the Air Force Court directed the convening authority to carry out an action of *suspending* the bad conduct discharge because the Court has not been given the power by Congress to do so. While the Air Force Court can disapprove or modify the punitive discharge, it cannot suspend the punitive discharge. Article 66(c), UCMJ; Clark, 16 M.J. at 242.

The Court of Military Appeals examined this issue in detail in Clark where the appellant was convicted of absence without leave for over three years and the convening authority approved the adjudged bad conduct discharge despite the military judge's recommendation that it be suspended. Id. at 239. The convening authority declined to suspend the discharge because he determined that "further clemency was not warranted in light of the benefits to the accused of the pretrial agreement." Id. At trial, the appellant had presented an "impressive array of evidence in mitigation and extenuation, including prior enlisted evaluations, a citation for peacetime heroism signed by the Secretary of the Navy and the testimony of one of his superiors." Id. His unsworn statement was also quite sympathetic. Id. at 239-40. Two members of the Court of Military Review rejected the appellant's appeal for retention and one determined that since he could not suspend the discharge he would disapprove it. Id. at 240. However, he invited the Court of Military Review to reconsider its decisions where it held that the Court could not suspend sentences. Id.

The Court of Military Appeals considered the issue and found no statutory authority for the boards of review, courts-martial or the Court of Military Review to suspend sentences. Id. at 240-41. The Court noted that while there had been amendments to the UCMJ, Congress had not chosen to provide the Court this

power. Id. While the Court stated that it would be beneficial to have this power, it acknowledged that absent Congressional action, courts could not suspend sentences. Id. at 242. However, Chief Judge Everett asserted in his concurring opinion that an alternative that was consistent with the majority opinion would be to remand the case to the convening authority with instructions that he review the case further and not affirm any sentence more severe than one in which certain parts have been suspended. Clark, 16 M.J. at 243 (Everett, C.J., concurring). The majority did not embrace Chief Judge Everett's view and neither has this Court. The United States asserts that the Air Force Court's reliance on this concurring opinion from 1983 to exercise appellate clemency is improper and is a matter that this Court should explicitly overrule once and for all.

As the Air Force Court noted, the military justice system is ultimately a commander's program. Humphries, unpub. op. at 3. The convening authority had the opportunity to suspend the bad conduct discharge adjudged by the members and based on the facts of the case, he chose not to do so. The convening authority already exercised his discretion by approving the adjudged sentence. There is no compelling reason to believe that he would now reverse his prior decision and find suspending the bad conduct discharge in a sentence for adultery and sodomy under these egregious circumstances, where the sentence only included a

bad conduct discharge and reduction to the grade of E-1, as supporting good order and discipline within his command.

The Air Force Court should not be permitted to instruct a convening authority that he must approve an adjudged sentence no greater than a suspended bad conduct discharge. Such instruction invades the province of the convening authority to determine in his own mind whether clemency is appropriate. This is not a matter for the Air Force Court to decide; it is strictly a matter left to the convening authority. Given that nobody has apparently seen fit to change the law since Clark was decided in 1983 to give the Air Force Court or this Court authority to suspend a punitive discharge, the concurring opinion in Clark is of questionable validity at best. The convening authority should not have the Air Force Court's act of clemency foisted upon him when he has already considered whether to exercise clemency in the case and chose not to do so.

The United States' view is consistent with the majority opinion in Clark and this Court's recent decision in Nerad. This Court noted that "Congress provided the convening authority with clear unfettered discretion – as 'a matter of command prerogative' – to modify findings and sentence under Article 60(c), UCMJ . . . ." Nerad, 69 M.J. at 145. Just as the Court cannot set aside findings because it believed that the convening authority should have granted the clemency Appellee requested,

the Court cannot set aside the sentence because it believed that the convening authority should have granted the clemency Appellee requested. *See* Id. at 148. The decision is a matter of command prerogative and is for the convening authority, not the Court. Id. "While the CCA clearly has the authority to disapprove part or all of the sentence and findings, nothing suggests that Congress intended to provide CCAs with unfettered discretion to do so for any reason, for no reason, or on equitable ground, which is a function of command prerogative." Id. AFCCA's attempt to exercise appellate clemency cannot stand.

Conclusion

For the foregoing reasons, the United States respectfully requests this Court find that the Air Force Court erred by finding the sentence inappropriately severe and remanding the record to the convening authority with instructions to approve an adjudged sentence no greater than a suspended bad conduct discharge and reduction to the grade of E-1. This Court should reverse the Air Force Court, thereby affirming the approved findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 14 October 2011.

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