14 November 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

Ryan D. Humphries,
Senior Airman (E-4)
United States Air Force,
Appellee.

Crim. App. No. ACM 37491(rem)

USCA Dkt. No. 10-5004/AF

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellant,	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim.App. Dkt. No. ACM 37491(rem)
Ryan D. Humphries, Senior Airman (E-4) United States Air Force, Appellee.	)	USCA Dkt. No. 10-5004/AF

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Decisional Issues

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ACTED WITHIN ITS DISCRETION WHEN IT DETERMINED THAT AN UNSUSPENDED BAD-CONDUCT DISCHARGE WAS INAPPROPRIATELY SEVERE FOR THE APPELLEE'S OFFENSES "GIVEN THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE."

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ACTED WITHIN ITS AUTHORITY BY REMANDING THE CASE TO THE CONVENING AUTHORITY TO CONSIDER WHETHER HE WISHES TO SUSPEND THE BAD-CONDUCT DISCHARGE, AS THIS COURT AUTHORIZED IN *UNITED STATES v. HEALY*, 26 M.J. 394, 396 n.4 (C.M.A. 1988).

Statement of Statutory Jurisdiction

Appellee's approved sentence included a bad-conduct discharge, which brought his case within the Air Force Court of Criminal Appeals' Article 66 jurisdiction. *See* Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §

866(b)(1) (2006). On August 3, 2011, the Air Force Court affirmed the findings in the case but set aside the convening authority's action. *United States v. Humphries*, No. ACM 37491(rem) (A.F. Ct. Crim. App. Aug. 3, 2011) [Appendix].

On September 15, 2011, the Judge Advocate General of the Air Force certified the following issue to this Court:

> 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.

Under the plain language of Article 67(c), this Court has no authority to act with respect to the sentence, since the Air Force Court of Criminal Appeals neither affirmed it nor set it aside as incorrect in law. *See* Article 67(c), Uniform Code of Military Justice, 10 U.S.C. § 867(c) (2006) ("In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the . . . sentence as . . . affirmed or set aside as incorrect in law by the Court of Criminal Appeals."). To the extent that this Court's opinions in *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010), or *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005), suggest otherwise, those cases should be limited to the findings context in which they arose. With regard to this Court's authority to review

decisions of the Courts of Criminal Appeals finding any portion of a court-martial sentence to be inappropriately severe, this Court should follow the plain language of Article 66(c) and hold that this Court has no authority to act with respect to that portion of the sentence.

Reaching that conclusion would be consistent with this Court's traditional view that "[t]he exercise by a board of review of its discretionary and fact-finding function of determining the appropriateness of an adjudged sentence may not be utilized as a basis for creating a certified question reviewable by this Court." *United States v. Turner*, 15 C.M.A. 438, 439, 35 C.M.R. 410, 411 (1965). In 1978, citing Article 67(c)'s predecessor (Article 67(d)) and *Turner*, this Court drew a distinction between its authority to review portions of a sentence that a Court of Military Review set aside as inappropriately severe and portions of a sentence that a Court of Military Review affirmed. *United States v. Dukes*, 5 M.J. 71, 72-73 (C.M.A. 1978). This Court noted that it would "avoid evaluating appropriateness determinations for particular court-martial sentences." *Id*. This Court would, on the other hand, "continue to review, as a matter of law, sentence affirmations based on legal determinations by the Courts of Military Review of a lack of prejudice resulting from acknowledged errors in the sentencing process." *Id*. at 73.

Nevertheless, in 2002, this Court considered a certificate of review challenging a Court of Criminal Appeals' sentence inappropriateness determination, though without noting or discussing *Turner*, *Dukes*, or Article 67(c)'s limitation on this Court's authority. *United States v. Hutchison*, 57 M.J. 231 (C.A.A.F. 2002) (per curiam). Contrary to *Dukes*' approach, *Hutchison* found its standard of review in a case where the Court of Criminal Appeals had upheld the approved sentence's appropriateness. *See id*. at 234 (quoting *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001)). *Wacha*'s statement of the standard of review was based on *United States v. Fee*, 50 M.J. 290, 291 (C.A.A.F. 1999), another case in which the Court of Criminal Appeals had upheld the approved sentence's appropriateness and the accused challenged that ruling before this Court. *See Wacha*, 55 M.J. at 268. *Fee*'s statement of the standard of review was based on *United States v. Lacy*, 50 M.J. 286 (1999), yet another case in which the Court of Criminal Appeals upheld the approved sentence's appropriateness and the accused challenged that ruling before this Court. *See Fee*, 50-M.J. at 291. And *Lacy*'s statement of the standard of review was based on *Dukes*. *See Lacy*, 40 M.J. at 288. Thus, *Hutchison*'s assertion that this Court may review a Court of Criminal Appeals' sentence appropriateness review "to determine, as a matter of law, whether a Court of Criminal Appeals abused its

discretion or caused a miscarriage of justice in carrying out its highly discretionary sentence appropriateness role" is ultimately based on a decision – *Dukes* – that states that this Court has no role in reviewing a case, like this, in which the Court of Criminal Appeals found the portion of the sentence at issue to be inappropriately severe. *See Hutchison*, 57 M.J. at 234 (quoting Wacha, 55 M.J. at 268).

This Court should use this case as an opportunity to confine the exercise of its jurisdiction to Article 67(c)'s limits as established by that statute's plain meaning and as previously construed by *Turner* and *Dukes*. Accordingly, this Court should hold that it has no authority to take action with respect to the sentence in this case.

Statement of the Case

On March 24-26 and April 28-May 1, 2009, Appellee was tried before a general court-martial composed of officer and enlisted members. He was charged with two specifications of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2000), one specification of forcible sodomy in violation of Article 125, UCMJ, 10 U.S.C. § 925 (2000), two specifications of adultery in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2000), and two specifications of wrongfully communicating a threat in violation of Article 134, UCMJ. 10 U.S.C. § 934 (2000). The members found Appellee not guilty of both rape specifications. The

members found Appellee not guilty of forcible sodomy, but guilty of the lesser included offense of consensual sodomy. The members found Appellee not guilty of both specifications of communicating a threat. Finally, the members found Appellee guilty of one specification of adultery and not guilty of the other.

The members sentenced Appellee to a bad-conduct discharge and reduction to the grade of E-1.

On July 10, 2009, the convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

In its initial review of the case, the Air Force Court of Criminal Appeals declined to affirm the findings. *United States v. Humphries*, No. ACM 37491 (A.F. Ct. Crim. App. May 24, 2010); J.A. at 1-4.[1] The court set aside the convening authority's action and returned the record to the Judge Advocate General of the Air Force "for remand to the convening authority for reconsideration of the sentence." *Id.*, J.A. at 4. The opinion stated that "the convening authority may approve an adjudged sentence no greater than one including a suspended bad-conduct discharge. Should the convening authority elect not to do so,

[1] The Government's brief appears to use the joint appendix previously filed with this Court in 2010 as the source for joint appendix citations. Appellee's answer will do the same while providing the Air Force Court's second opinion in this case as an appendix to this answer.

this Court would be obliged to disapprove or modify the bad-conduct discharge upon further review in accordance with Article 66(c), UCMJ." *Id*. The Air Force Court denied the Government's motion for reconsideration en banc.

The Judge Advocate General of the Air Force filed a certificate for review on July 14, 2010. *United States v. Humphries*, 69 M.J. 199 (C.A.A.F. 2010). On August 17, 2010, this Court denied Appellee's motion to dismiss the certificate for review or summarily affirm. *United States v. Humphries*, 69 M.J. 249 (C.A.A.F. 2010). On February 10, 2011, this Court remanded the case to the Air Force Court of Criminal Appeals. *United States v. Humphries*, 69 M.J. 491 (C.A.A.F. 2011) (summary disposition). This Court noted that the Air Force Court's original decision "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) . . . ." *Id*. at 491. This Court therefore remanded the case "for further action consistent with this order." *Id*.

On August 3, 2011, the Air Force Court issued its second decision, which affirmed the findings but set aside the convening authority's action. *United States v. Humphries*, No.

ACM 37491(rem) (A.F. Ct. Crim. App. Aug. 3, 2011) [Appendix].[2] On September 15, 2011, the Judge Advocate General of the Air Force filed a second certificate for review. *United States v. Humphries*, __ M.J. __, No. 10-5004/AF (C.A.A.F. Sept. 15, 2011). On September 30, 2011, Appellee filed a petition for grant of review and an accompanying supplement raising a challenge to Appellee's adultery conviction based on this Court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Humphries*, __ M.J. __, No. 10-5004/AF (C.A.A.F. Sept. 30, 2011). That petition remains pending before this Court.

[2] In its Statement of the Case, the Government's brief misstates the second Air Force Court's opinion's disposition of the case. The Government's brief states that "[t]he 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.'" Government's Brief at 4. The quoted phrase, however, was not a direction from the Air Force Court to the convening authority. Rather, that phrase is a slight misquotation of a portion of the following sentence: "Additionally, we could have set aside the convening authority's action and returned the record of trial to The Judge Advocate General for remand to the convening authority, who 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*, No. ACM 37491(rem), slip op. at 3 [Appendix]. Nothing in the second opinion purports to direct the convening authority that he may approve no greater than a specified sentence. Rather, the second opinion orders the record be "returned to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence 'with full knowledge as to the upper limit on appropriateness.'" *Id.*, slip op. at 4 (quoting *United States v. Clark*, 16 M.J. 239, 243 (C.M.A. 1983) (Everett, C.J., concurring)). Nothing in the second opinion purports to preclude the convening authority from approving the sentence as adjudged, should he wish to do so.

Statement of Facts[3]

Appellee was tried by a general court-martial for alleged sexual offenses and related threats with regard to an adult female and a minor female. Charge Sheet; J.A. at 5, 7. He was found not guilty of all offenses related to the minor female. R. at 853. With regard to the adult female, Appellee was acquitted of rape, forcible sodomy, and communicating a threat. *Id*. He was convicted of adultery and consensual sodomy. *Id*. The members sentenced Appellee to a bad-conduct discharge and reduction to the grade of E-1. R. at 908.

On appeal, the Air Force Court held that an unsuspended bad-conduct discharge was inappropriately severe and ordered the case remanded to the convening authority for a new action. J.A. 1-4. The Judge Advocate General filed a certificate for review with this Court. *United States v. Humphries*, 69 M.J. 199

[3] Most of the Government's statement of facts consists of purported factual statements supported by Ms. AEH's testimony. As the Air Force Court noted, however, the members apparently did not believe portions of Ms. AEH's testimony. *See* J.A. at 2 n.2. The Government also makes unsupported factual allegations in the argument section of its brief. For example, the Government states that "[a]s a result of Appellee's misconduct, the Air Force brought [Ms. AEH's husband] back from deployment to be with his wife." Government's Brief at 12. The Government provides no support for the proposition that JH was returned from deployment due to the sexual activity between Appellee and Ms. AEH rather than due to Ms. AEH's rape allegation – an allegation of which Appellee was acquitted. Nor does the record appear to provide any support for the Government's suggestion that JH was returned from deployment "[a]s a result of Appellee's misconduct."

(C.A.A.F. 2010). This Court subsequently remanded the case to the Air Force Court due to that court's failure to act on the findings in its original decision. *United States v. Humphries*, 69 M.J. 491 (C.A.A.F. 2011) (summary disposition).

Upon remand, the Government argued that the Air Force Court should reconsider its original decision and affirm the sentence as adjudged. *See Humphries*, No. ACM 37491(rem), slip op. at 3-4 [Appendix]. The Air Force Court declined to reconsider its initial decision, concluding that doing so would exceed the scope of this Court's mandate. *Id.*, slip op. at 4. But the Air Force Court did explain its previous decision to remand the case to the convening authority for a new action with the knowledge that the Air Force Court would not affirm an unsuspended bad-conduct discharge. *Id.*, slip op. at 2-3. The court emphasized: "[W]e find the appellant's crimes unacceptable and this decision should not be misconstrued as an act of clemency. Additionally, this decision should not be misinterpreted as a belief that a punitive discharge is no longer an authorized punishment for adultery." *Id.*, slip op. at 3. In a footnote, the court explained:

> In one case, a military judge ruled that a bad-conduct discharge was not an authorized punishment for adultery, citing *United States v. Humphries*, ACM 37491 (A.F. Ct. Crim. App. May 24, 2010) (unpub. op), as authority. We find this is error. The maximum punishment is a dishonorable discharge, forfeiture of

> all pay and allowances, confinement for one year, and reduction to E-1.

Id., slip op. at 3 n.1. The Air Force Court continued, "A military judge's failure to instruct panel members that a punitive discharge is authorized for adultery is error. But, given the unique facts and circumstances of this case and the panel's determination that this appellant's crimes were consensual in nature, an unsuspended bad-conduct discharge is inappropriately severe." *Id.*, slip op. at 3.

Summary of Argument

Congress vested the Courts of Criminal Appeals, but not this Court, with the highly discretionary power to review the appropriateness of court-martial sentences. It is not this Court's role to second guess the Courts of Criminal Appeals' exercise of their sentence appropriateness power. To the extent that this Court has any role in sentence appropriateness review, it is limited to ensuring that the Courts of Criminal Appeals did not rely on incorrect legal principles while making sentence appropriateness determinations. Nothing of the sort occurred in this case. The Air Force Court appropriately noted the limits of its sentence appropriateness power and then, based on the "unique facts and circumstances of this case," found an unsuspended bad-conduct discharge to be inappropriately severe.

That decision was a proper exercise of the Air Force Court's sentence appropriateness authority, which may not be disturbed.

Having found an unsuspended bad-conduct discharge to be inappropriately severe, the Air Force Court remanded the case to the convening authority for a new action with the knowledge that an unsuspended bad-conduct discharge would not be affirmed. This Court has endorsed that approach. *See United States v. Healy*, 26 M.J. 394, 396 n.4 (C.M.A. 1988). As long as a Court of Criminal Appeals does not purport to restrict the convening authority's options, but rather simply provides the convening authority with the opportunity to suspend an inappropriately severe portion of the sentence if he or she wishes to do so, that practice is consistent with both the Uniform Code of Military Justice and the commander's role in the military justice system.

Argument

Decisional Issue I

> The Air Force Court did not abuse its discretion when it found an unsuspended bad-conduct discharge to be inappropriately severe "given the unique facts and circumstances of this case."

A. Standard of Review

The Government's brief states that "[t]he standard of review for sentence appropriateness is de novo." Government's Brief at 10. That is not the standard of review that this Court

applies when reviewing a Court of Criminal Appeals' sentence appropriateness determination. Congress provided the Courts of Criminal Appeals with the de novo power and responsibility to determine sentence appropriateness. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). On the other hand, as this Court has observed, "Quite clearly, and not inadvisedly, Congress denied this Court [sentence appropriateness] authority under the Uniform Code of Military Justice." *United States v. Christopher*, 13 C.M.A. 231, 236, 32 C.M.R. 231, 236 (1962). Accordingly, the Government's brief sets out an incorrect standard of review for this Court to apply in a sentence appropriateness case.

This Court's case law has traditionally held that an intermediate military appellate court's decision finding a portion of a sentence inappropriately severe is not subject to this Court's review. *See, e.g.*, *Turner*, 15 C.M.A. at 439, 35 C.M.R. at 411; *Dukes*, 5 M.J. at 72-73. As discussed in the Statement of Statutory Jurisdiction portion of this brief above, this Court should apply that case law and decline to address the certified issue.

If this Court were to review the Air Force Court's sentence inappropriateness determination, however, then this Court may do no more than review the sentence inappropriateness determination "for application of correct legal principles." *United States v.*

Leak, 61 M.J. 234, 241 (C.A.A.F. 2005). That is the limited role that this Court plays when evaluating the Courts of Criminal Appeals' exercise of their unique Article 66(c) factual sufficiency authority. *Id*. No less deferential a standard is warranted when reviewing the Courts of Criminal Appeals' exercise of their unique Article 66(c) sentence appropriateness authority.

B. Law and Analysis

There is no indication that the Air Force Court failed to adhere to "correct legal principles." *Id*. Accordingly, this Court should affirm the lower court's decision.

The Government offers several challenges to the Air Force Court's opinion, but none withstands scrutiny. First, the Government argues that the Air Force Court engaged in an impermissible act of clemency. Government's Brief at 14. But the Air Force Court's initial opinion acknowledged that "we are not authorized to engage in exercises of clemency." J.A. at 3. The court added that its action on the sentence should not "be misconstrued as a grant of clemency – an act which we recognize is solely within the bailiwick of the convening authority, The Judge Advocate General, and the Secretary of the Air Force." *Id.* In its second opinion, the Air Force Court reiterated that "this decision should not be misconstrued as an act of clemency." *Humphries*, No. ACM 37491(rem), slip op. at 3

[Appendix]. The Government offers no basis on which to doubt the opinions' veracity on this point.[4]

The Government then argues that the Air Force Court's explanation of its decision "is sorely lacking." Government's Brief at 15. But, as this Court's case law establishes, "Courts of Criminal Appeals are not required to explain their decisions." *United States v. Curtis*, 52 M.J. 166, 169 (C.A.A.F. 1999) (citing *United States v. Clifton*, 35 M.J. 79, 81 (C.M.A. 1992)). That rule is especially appropriate in a sentence appropriateness context. This Court has observed:

> [T]he experienced and professional military lawyers who find themselves appointed as . . . judges on the [Courts of Criminal Appeals] have a solid feel for the range of punishments typically meted out in courts-martial. Indeed, by the time they receive such assignments, they can scarcely help it; and we have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a [Court of Criminal Appeals] assesses for sentence appropriateness.

United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985). The Air Force Court's judges in this case likely applied their longtime military justice experience and determined that the sentence was out of line with their "accumulated knowledge" concerning the "range of punishments typically meted out" for adultery and consensual sodomy. But the lower court's judges

[4] The certified issue's characterization of the Air Force Court's opinion as "AN ATTEMPT AT EXERCISING APPELLATE CLEMENCY" should be rejected on the same basis.

were under no obligation to include a description of their "accumulated knowledge" in their opinion, and doing so is far from the norm, despite the reality that such an application of accumulated knowledge is a "factor in virtually every" sentence appropriateness determination. *Id*. So any governmental dissatisfaction with the depth of the Air Force Court's explanation of its decision cannot be the basis for reversal.

The Government then suggests that "[d]espite the lower Court's assertion to the contrary, AFCCA's admitted rationale for its decision . . . indicates the Court believed 'a punitive discharge is no longer authorized punishment' for these crimes." Government's Brief at 15. The Government offers no support for its insinuation that the Air Force Court's judges were being disingenuous when they wrote that "this decision should not be misinterpreted as a belief that a punitive discharge is no longer an authorized punishment for adultery." *Humphries*, No. ACM 37491(rem), slip op. at 3. This Court should reject the Government's unsubstantiated attacks on the opinion's veracity.

The Government's brief also argues that the Air Force Court abused its discretion because, according to the Government, its initial decision has led "some practitioners [to] believe that a punitive discharge can be an *unauthorized punishment* in an adultery case." Government's Brief at 17. In support of this argument, the Government discusses *United States v. Mollard*,

where a military judge misinterpreted and misapplied the Air Force Court's first unpublished opinion in this case as somehow repealing a punitive discharge as an authorized sentence for adultery. *See* Government's Brief at 17-18. The Government offers no authority for the proposition that one court's decision is subject to reversal as a consequence of another judge's or court's misinterpretation of the decision. In any event, the Air Force Court's second opinion in this case eliminates any danger that another military judge will make the same mistake that the *Mollard* judge made. The Air Force Court's second opinion addressed *Mollard*, stated that the military judge in *Mollard* erred, repudiated the notion that "a punitive discharge is no longer an authorized punishment for adultery," and reiterated that "[t]he maximum punishment for adultery is a dishonorable discharge, forfeiture of all pay and allowances, confinement for one year, and reduction to E-1." *Humphries*, No. ACM 37491(rem), slip op. at 3 & 3 n.1 [Appendix].

Finally, the Government argues that "neither the Air Force Court nor a trial judge should be permitted to override Congress and the President" regarding adultery's maximum punishment. Government's Brief at 18. But the Air Force Court did no such thing. Congress has charged the Air Force Court with reviewing the appropriateness of sentences that have been adjudged by courts-martial and approved by convening authorities. Article

66(c), UCMJ, 10 U.S.C. § 866(c) (2006). Congress necessarily contemplated that Courts of Criminal Appeals would sometimes reduce a legally permissible punishment that has been approved by a convening authority. Thus, in finding an unsuspended bad-conduct discharge to be inappropriately severe "given the unique facts and circumstances of this case," *Humphries*, No. ACM 37491(rem), slip op. at 3, the Air Force Court did not "override Congress." Government's Brief at 18. Rather, it carried out Congress's Article 66(c) mandate.

The Air Force Court applied "correct legal principles" in reaching its conclusion that an unsuspended bad-conduct discharge is inappropriate in this case. *See Leak*, 61 M.J. at 241. That sentence appropriateness determination, therefore, may not be reversed.

Decisional Issue II

> This Court's precedent authorizes a Court of Criminal Appeals to remand a case to a convening authority for a new action with knowledge that the Court of Criminal Appeals will not affirm an unsuspended punitive discharge.

Having found an unsuspended bad-conduct discharge to be inappropriately severe, the Air Force Court chose to remand the case to the convening authority for a new action with the knowledge that the Air Force Court would not affirm an unsuspended discharge. *Humphries*, No. ACM 37491(rem), slip op.

at 3-4. In doing so, the Air Force Court cited Chief Judge Everett's concurring opinion in *United States v. Clark*, 16 M.J. 239 (C.M.A. 1983), which observed that while a Court of Military Review could not suspend a portion of a sentence, it could determine that an unsuspended sentence is inappropriately severe and remand the case to the convening authority for "an opportunity to review the sentence further with full knowledge as to the upper limit on appropriateness." *Id*. at 243 (Everett, C.J., concurring).

The Government argues that the Air Force Court exceeded its power by following that course of action in this case. Government's Brief at 18-22. But this Court's case law authorizes the Air Force Court to do just what it did.

The Government's argument is predicated on its assertion that the majority in *Clark* "did not embrace Chief Judge Everett's view and neither has this Court." Government's Brief at 20. But this Court unanimously endorsed Chief Judge Everett's approach in *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). There, this Court stated:

> Consistent with our interpretation of the allocation of responsibilities intended by Congress, we have held that a Court of Military Review may not itself suspend a sentence to a punitive discharge, even if it determines that an unsuspended discharge is inappropriate. *United States v. Clark,* 16 M.J. 239 (C.M.A.1983). However, under such circumstances it may remand to the convening authority to consider

> whether he wishes to suspend the discharge. *Id.* at 243 (Everett, C.J., concurring).

Id. at 396 n.4.

Two years after issuing its *Healy* decision, this Court cited Chief Judge Everett's *Clark* concurrence while remanding a case to the Navy-Marine Corps Court to consider whether "the record of trial should be remanded to the convening authority for further consideration in light of the fact that 'the ... sentence he has approved is inappropriate' and with directions that no sentence be approved if it includes punishment greater than a discharge suspended under proper conditions." *United States v. Bell*, 30 M.J. 168 (C.M.A. 1990) (summary disposition). So, contrary to the Government's position, this Court has "embraced Chief Judge Everett's view." Government's Brief at 20. Moreover, the intermediate military appellate courts have, from time to time, followed the approach that this Court authorized in *Healy* without any apparent adverse consequences. *See, e.g.*, *United States v. Millsap,* 17 M.J. 980 (A.C.M.R. 1984).

A Court of Criminal Appeals may not order a convening authority to suspend a portion of a sentence; to do so would be inconsistent with Article 60(c)(1), which provides the convening authority with "the sole discretion" as "a matter of command prerogative" to "modify the findings and sentence of a court-

martial." 10 U.S.C. § 860(c)(1) (2006). The Air Force Court's second opinion in this case is Article 60(c)(1) compliant; it does not order the convening authority to take any particular action but rather provides him with the option of suspending execution of the bad-conduct discharge if he wishes to do so, disapproving the bad-conduct discharge, or again approving the bad-conduct discharge if that is his preference. This Court should affirm that decision and return the case to the Judge Advocate General of the Air Force to remand to the convening authority to take a new action with the knowledge that the Air Force Court will disapprove an unsuspended bad-conduct discharge.

Remanding this case for the convening authority to decide whether he wishes to suspend execution of a punitive discharge that would otherwise be disapproved would not interfere with the convening authority's command prerogative. On the contrary, it would reinforce it by providing the convening authority with an option that he would lose if the Court of Criminal Appeals were to set aside the bad-conduct discharge without providing such an opportunity. Thus, as the Air Force Court determined below, providing the convening authority with the option to suspend execution of the bad-conduct discharge is consistent with the military justice system's character as "ultimately a commander's program." *Humphries*, No. ACM 37491(rem), slip op. at 3.

The Air Force Court did not err by following a course of action that has been endorsed by this Court. *See, e.g., Healy*, 26 M.J. at 396 n.4; *Bell*, 30 M.J. 168. Accordingly, this Court should affirm the Air Force Court's decision. But if this Court were to determine that the Air Force Court was not empowered to remand the case to the convening authority for a new action with the knowledge that an unsuspended punitive discharge would not be affirmed, then this Court should set aside the bad-conduct discharge. The Air Force Court has already held that an unsuspended bad-conduct discharge is inappropriately severe. If the inappropriately severe unsuspended bad-conduct discharge cannot be suspended, then it must be set aside. In the interest of judicial economy, rather than prolonging appellate review by remanding the case to the Air Force Court, this Court should execute the sentence appropriateness determination that the lower court has already made by setting aside the bad-conduct discharge.

Conclusion

For the foregoing reasons, this Court should: (1) dismiss the certificate of review; (2) affirm the lower court's decision; or (3) set aside the bad-conduct discharge.

Respectfully submitted,

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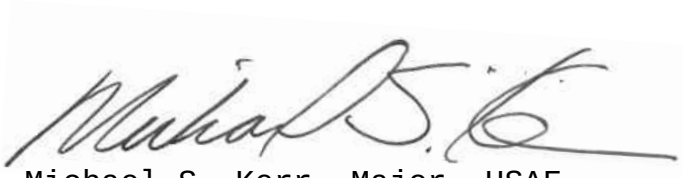

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November 14, 2011

Appendix

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN D. HUMPHRIES
United States Air Force

ACM 37491 (rem)

03 August 2011

Sentence adjudged 1 May 2009 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael S. Kerr; and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; Major Coretta E. Gray; and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

UPON FURTHER REVIEW

ORR, Senior Judge:

Contrary to the appellant's pleas, a panel of officer and enlisted members sitting as a general court-martial found the appellant guilty of one specification of adultery and one specification of sodomy on divers occasions, in violation of Articles 134 and 125, UCMJ, 10 U.S.C. §§ 934, 925. The adjudged and approved sentence consists of a bad-conduct discharge and reduction to the grade of E-1.

This case is before this Court for further review. In an unpublished decision, issued 24 May 2010, this Court considered three errors asserted by the appellant. Under the unique circumstances of the case, this Court declined to affirm the findings, found no prejudicial error but found that portion of the sentence that provides for an unsuspended bad-conduct discharge inappropriately severe. *United States v. Humphries*, ACM 37491 (A.F. Ct. Crim. App. May 24, 2010) (unpub. op.). The Judge Advocate General of the Air Force certified the case to our superior court asserting that this Court erred by finding that the appellant's sentence was inappropriately severe. By decision issued 10 February 2011, the Court of Appeals for the Armed Forces (CAAF) found that we acted on the sentence without acting on the findings. *United States v. Humphries*, 69 M.J. 491 (C.A.A.F. 2011). As a result, our superior court returned the case to The Judge Advocate General of the Air Force for remand to this Court "for further action consistent with [their] order." Finding that the appellant's conviction was correct in law and fact, we affirm the findings and return the record of trial to the Judge Advocate General for further action by the convening authority.

Background

In his original assignment of errors, the appellant asserted that (1) the military judge erred by excluding relevant evidence of the appellant's prior sexual relationship with AEH, one of the alleged victims; (2) the portion of his sentence which provides for a bad-conduct discharge is inappropriately severe; and (3) this Court should use its Article 66(c), UCMJ, 10 U.S.C. § 866(c), powers to set aside his findings of guilty because of the unique circumstances of this case. We disagreed. Specifically, we determined that the appellant's convictions are legally and factually sufficient and his convictions do not unreasonably exaggerate his criminality. However, after reviewing the record of trial, the submission of briefs from both sides, we set aside the convening authority's action because we believed that an unsuspended bad-conduct discharge was inappropriately severe. We provided the following as our rationale for our decision to set aside the convening authority's action.

Rationale for the Original decision

The charged offenses arose out of a phone call from the appellant, a married man, on 2 February 2005, to AEH, a family friend and the wife of a deployed Airman. The appellant asked her whether he could visit her at her on-base home. AEH welcomed the appellant into her home believing that the appellant came over to watch a movie. After AEH's children had gone to bed, the appellant and AEH engaged in oral and anal sodomy and sexual intercourse. Two days later, AEH met with agents from the Air Force Office of Special Investigations (AFOSI) and reported that the appellant had sexually assaulted her. The appellant was subsequently charged with, inter alia, raping and forcibly sodomizing AEH. 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.

Sentence Reconsideration

In finding the appellant's unsuspended punitive discharge inappropriately severe, we were left with several options. We could have disapproved or modified the punitive discharge. Article 66(c), UCMJ; Rule for Courts-Martial 1203, Discussion; *see also United States v. Simmons*, 6 C.M.R. 105, 106 (C.M.A. 1952). We also could have returned the appellant's case to The Judge Advocate General with a request that he use his Article 74, UCMJ, 10 U.S.C. § 874, authority to remit or suspend the appellant's punitive discharge. *See United States v. Silvernail*, 1 M.J. 945, 946 (N.C.M.R. 1976). Additionally, we could have set aside the convening authority's action and returned the record of trial to The Judge Advocate General for remand to the convening authority, who 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. *See United States v. Clark*, 16 M.J. 239, 243 (C.M.A.1983) (Everett, C.J., concurring). Because the military justice system is ultimately a commander's program, we believe it is most appropriate to set aside the convening authority's action and return the record of trial to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence "with full knowledge as to the upper limit on appropriateness." *Id.* (Everett, C.J., concurring).

In doing so, we once again emphasize that we find the appellant's crimes unacceptable and this decision should not be misconstrued as an act of clemency. Additionally, this decision should not be misinterpreted as a belief that a punitive discharge is no longer an authorized punishment for adultery.[1] A military judge's failure to instruct panel members that a punitive discharge is authorized for adultery is error. But, given the unique facts and circumstances of this case and the panel's determination that this appellant's crimes were consensual in nature, an unsuspended bad-conduct discharge is inappropriately severe.

Other Issues

Following the remand of this case, we granted the parties' request to file supplemental briefs. On 17 June 2011, the Government asked this Court to "correct the prior panel's erroneous decision" by affirming the approved findings and sentence. The Government provided three reasons for their request. First, they contend that the record

[1] In one case, a military judge ruled that a bad-conduct discharge was not an authorized punishment for adultery, citing *United States v. Humphries*, ACM 37491 (A.F. Ct. Crim. App. May 24, 2010) (unpub. op), as authority. We find this is error. The maximum punishment for adultery is a dishonorable discharge, forfeiture of all pay and allowances, confinement for one year, and reduction to E-1. *See* Article 134, UCMJ, 10 U.S.C. § 934.

demonstrates that an unsuspended discharge is not inappropriately severe. Second, they assert that the original decision in this case gives the impression a punitive discharge is no longer an authorized punishment for adultery. Third, the Government believes that this Court has inappropriately exercised appellate clemency. In response, on 24 June 2011, the appellant asked this Court to deny the Government's invitation to reconsider our 24 May 2010 decision.

The remand from CAAF stated that we "acted on the sentence without acting on the findings" and directed this Court to take "further action consistent with [their] order." *Humphries*, 69 M.J. at 492. On remand from CAAF, this Court "can only take action that conforms to the limitations and conditions prescribed by the remand." *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001). Because, the Government's request for reconsideration concerns the appellant's sentence rather than the findings, granting their request would exceed the scope of the remand. *See Riley*, 55 M.J. at 185. Accordingly, we deny the Government's request that we affirm the sentence as adjudged.

Conclusion

The approved findings are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). We affirm the findings and set aside the convening authority's action. The record of trial is returned to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence "with full knowledge as to the upper limit on appropriateness." *Clark*, 16 M.J. at 243 (Everett, C.J., concurring). Thereafter, Article 66(c), UCMJ, shall apply.

OFFICIAL

STEVEN LUCAS
Clerk of the Court