IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Dominic P. Altier Gas Turbine System Technician Mechanical First Class (E-6), U.S. Navy Appellant	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201000361 USCA Dkt. No. 12-0496

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

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Statement of Statutory Jurisdiction

Petty Officer Altier's original approved court-martial sentence included a punitive discharge. Accordingly, his case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals (NMCCA). 10 U.S.C. § 866(b)(1)(2006). The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ. 10 U.S.C. §867(a)(3).

Statement of the Case

On April 8, 2010, a panel of officer and enlisted members convicted Petty Officer Altier, contrary to his pleas, of violating two specifications of Article 92, UCMJ. 10 U.S.C. § 892. The first specification alleged a violation of the Secretary of the Navy's fraternization policy. Secretary of the Navy Instruction 5300.26D (Dec. 8, 2005). The second specification alleged a violation of the Chief of Naval Operations' sexual harassment policy. Chief of Naval Operations Instruction 5370.2C (Apr. 26, 2007). The members acquitted Petty Officer Altier of attempted wrongful sexual contact. The members sentenced him to a bad-conduct discharge and the convening authority approved the adjudged sentence. (JA at 46, 49.)

On May 26, 2011——based upon a specified issue——the NMCCA set aside Petty Officer Altier's sentence and authorized a sentence rehearing. *United States v. Altier*, No. 201000361, slip op. (N-M. Ct. Crim. App. May 26, 2011) (Altier I); (JA at 34-44.) On July 22nd, a military judge conducted the rehearing and sentenced Petty Officer Altier to 30 days of confinement, 45 days of restriction with hard labor, reduction to E-5, and $1500 in forfeitures per month for three months. (JA at 181.)

That same day, the convening authority ordered Petty Officer Altier to report for confinement five days later, designating the Fort McHenry County Jail outside of Chicago as his place of confinement. (JA at 9); Confinement Order of Jul. 22, 2011. On July 27th, Appellant filed a petition for extraordinary writ with NMCCA, which the court granted, barring the Government from executing Petty Officer Altier's confinement until it had a chance to rule on the legality of executing his sentence. (JA at 14-15.)

On October 31, 2011, the convening authority approved the sentence as adjudged but, in accordance with NMCCA's order, deferred execution of the sentence. (JA at 8-9.) In his action, the convening authority stated his intention to execute Petty Officer Altier's sentence: "the remaining adjudged sentence will be executed if deemed legal after NMCCA review." (JA at 9.)

On April 30, 2012, NMCCA affirmed Petty Officer Altier's sentence. *United States v. Altier*, No. 201000361, slip op. (N-M. Ct. Crim. App. Apr. 30, 2012) (Altier II); (JA at 1-7.) Senior Judge Perlak dissented, arguing that the approved sentence was illegal because it violated Article 63, UCMJ: "there is no rational equivalency assignable to the fundamentally dissimilar punishments of a punitive discharge and confinement and they defy any severity comparison." (JA at 7) (Perlak, S.J., dissenting).

NMCCA continued its stay of the execution of Petty Officer Altier's sentence, stating that "this is a case of first impression and [] the appellant is likely to petition the CAAF for review of our decision." (JA at 5.)

Petty Officer Altier petitioned this Court for review on May 17, 2012, which was granted on July 10th.

Statement of Facts

While Petty Officer Altier was an instructor at Training Support Center Great Lakes, a Seaman accused him of attempting to touch her sexually without her consent. The Seaman characterized Petty Officer Altier's interactions with her as nonconsensual. As a result of this allegation, the Government charged him with attempted wrongful sexual contact. At trial, the members discounted the Seaman's allegations of nonconsensual conduct, acquitted Petty Officer Altier of attempted wrongful

sexual contact, and convicted him instead of fraternization and sexual harassment.

Argument

PETTY OFFICER ALTIER'S SENTENCE VIOLATES ARTICLE 63, UCMJ, AND R.C.M. 810(d) BECAUSE IT IS IN EXCESS OF AND MORE SEVERE THAN HIS ORIGINAL APPROVED COURT-MARTIAL SENTENCE.

According to Article 63, UCMJ, and Rule for Courts-Martial (R.C.M.) 810(d), after a sentence rehearing a convening authority may not approve any "sentence in excess of or more severe than the sentence ultimately approved by the convening authority . . . following the previous trial or hearing." 10 U.S.C. § 863; RULE FOR COURTS-MARTIAL 810(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). In *United States v. Hoff*, Chief Judge Everett described the policy rationale underlying Article 63:

> Obviously, Congress feared that an accused would be reluctant to seek review if, by doing so, he subjected himself to conviction of a more serious crime or to harsher punishment. This policy, in turn, is akin to –- and even more protective than –- that which undergirds the former jeopardy guarantee of the Fifth Amendment.
>
> . . .
>
> Congress probably also thought that, in light of the automatic review given to court-martial findings and sentence, it would be unfair –- or would be perceived as unfair –- for a process designed for protecting the accused to yield results less favorable to him than those he had originally received at trial.

27 M.J. 70, 75 (C.M.A. 1988) (Everett, C.J., concurring in part and dissenting in part).

The sentence rehearing in this case replaced Petty Officer Altier's first approved sentence——a bad-conduct discharge——with 30 days of confinement, 45 days of restriction with hard labor, $1500 forfeitures per month for three months, and reduction to E-5.

This Court, in interpreting Article 63's prohibition on approving a sentence at rehearing "in excess of or more severe" than the original sentence, has stated that "because punitive separations and confinement are so different, there is no readily measurable equivalence available to make meaningful conversions of one to the other possible." *United States v. Mitchell*, 58 M.J. 446, 448 (C.A.A.F. 2003) (internal quotation marks and citations omitted). As such, the convening authority was prohibited from approving any confinement or restriction after Petty Officer Altier's rehearing because his first approved court-martial sentence included zero days of confinement and zero days of restriction. The new sentence, as approved, was illegal.

A. It is impossible to meaningfully compare a punitive discharge to deprivations of physical liberty such as confinement and restriction.

After Petty Officer Altier's sentence rehearing, the convening authority's duty under Article 63 was to determine

whether his sentence was in excess of or more severe than a bad-conduct discharge. A convening authority has a "responsibility for protecting [an appellant] against greater sentences at a rehearing." *United States v. Davis*, 63 M.J. 171, 174 (C.A.A.F. 2006).

But as this Court stated in *United States v. Mitchell*, it is "not possible" to meaningfully compare a punitive discharge to a sentence to confinement to determine which of the two sentences is worse. 58 M.J. at 448. In *Mitchell*, this Court grappled with the question of how much confinement equates to a punitive discharge and concluded that it was impossible to equate the two:

> In *United States v. Rosendahl* and *United States v. Josey*, this Court determined that punitive separations are "qualitatively different" from confinement and "other punishments" such as forfeitures. We also concluded that because punitive separations and confinement are "so different," *there is "no readily measurable equivalence" available to make meaningful conversions of one to the other possible.*

Id. (citing *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000); *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003)(emphasis added)).

"In our view," this Court continued, "it cannot be known what effects a particular punitive discharge will have on a particular accused. These effects will no doubt differ between individuals based on their personal circumstances." *Id*. at 449. Although *Mitchell* is factually different from this case

(Mitchell was first adjudged a BCD and 10 years' confinement, later a DD and 6 years) the essential question is the same: in the context of a sentence rehearing, can a convening authority or court value a punitive discharge to determine its equivalent "worth" in confinement? This Court's answer was no. *See also United States v. Zarbatany*, 70 M.J. 169, 175 (C.A.A.F. 2011) (reaffirming that punitive discharges are qualitatively different than confinement).

Just as in *Mitchell*, where this Court stated that "a dishonorable discharge is *more severe* than a bad-conduct discharge," 58 M.J. at 449 (emphasis added), here the sentence of 30 days of confinement and 45 days of restriction is surely *"in excess of"* zero days of confinement and zero days of restriction. As such, the convening authority erred in approving this sentence.

Further, this is not the case of a convening authority commuting a sentence under Article 60, UCMJ. The bounds of sentence rehearings are formed by Article 63, UCMJ, which requires a determination of whether the new sentence is "in excess of or more severe" than the original sentence. As described by Chief Judge Everett, *supra*, the policy considerations underlying Article 63 are unique and very protective of servicemembers facing rehearing after a flaw in their original trial.

Undoubtedly, the government will attempt to hammer the commutation cases into the rehearing hole by citing to *United States v. Carter*, 45 M.J. 168 (C.A.A.F. 1996), but *Carter* simply will not make the commutation cases fit. In *Carter*, this Court compared a punitive discharge with a term of confinement in the commuted sentence context, and held that twenty-four months of additional confinement and forfeitures was not more severe than a BCD. 45 M.J. at 170. But as explicitly noted by the Court, the appellant in *Carter* requested the commutation of the bad-conduct discharge to confinement. *Id*. Thus, *Carter's* rational and outcome centered on the proverb: "Watch what you ask for, you may get it." *Id.* at 168.

Because meaningful comparisons are impossible, Petty Officer Altier should have been subjected at rehearing only to a BCD. The Government failed to secure a BCD in his case, despite specifically requesting only a BCD during argument. (JA at 22.) Accordingly, Petty Officer Altier's conviction—— and the numerous consequences stemming from that conviction—— should stand alone as his punishment.

B. The circumstances surrounding Petty Officer Altier's resentencing demonstrate the impossibility of comparing a punitive discharge to confinement and restriction.

R.C.M. 305(k) provides a limited punishment conversion calculus (in the Article 13, UCMJ, context); however, it "does not authorize application of credit against two types of

punishment: reduction and punishment." *Rosendahl*, 53 M.J. at 347. "Conversion of confinement credit to forms of punishment other than those found in R.C.M. 305(k) is generally inapt. This is especially true in the case of punitive discharges, where the qualitative differences between punitive discharge and confinement are pronounced." *Zarbatany*, 70 M.J. at 170. Such is the case here. Conversion requires the application of a standard not found in R.C.M. 305 or elsewhere in the Manual for Courts-Martial, and which necessarily must qualitatively compare physical liberty to punitive discharge status. This Court demonstrated this point in *Mitchell*, when it established the impossibility of meaningfully comparing punitive discharges and confinement because, in part, the impact of each punishment will "no doubt differ between individuals based on their personal circumstances." 58 M.J. at 449. This is particularly true here.

Two years ago, Petty Officer Altier's court-martial conviction for fraternization and sexual harassment ended his 15-year Navy career. After his court-martial, he had a prolonged period of unemployment and failed job applications, which ended when he finally secured employment as a mechanic at Akron Energy Systems. (R. at 155-56, 164.) But his sentence

rehearing ended this new career.[1] He then entered another period of unemployment, which ended when he secured another job at a Frito Lay distribution center. According to his sworn declaration, he fully expects to lose this second job if his confinement or restriction is executed.[2]

To further highlight the principle this Court laid out in *Mitchell*, Petty Officer Altier's convening authority has designated the Fort McHenry County Jail outside of Chicago as his place of confinement. (JA at 8-11.) Civilian jails notoriously possess certain negative qualities that are absent from military confinement facilities. His confinement in civilian jail——for military specific offenses——will no doubt be harsher than that faced by similarly-situated military appellants.

Convening authorities should not be burdened with the impossible task of weighing these considerations when determining whether one sentence is "in excess of or more severe" than another. Senior Judge Perlak's interpretation of Article 63 lays out a common sense, legally-sound roadmap for analyzing sentences handed down at sentence rehearings:

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[1] JA at 17; R. at 164; LT Myers affidavit of Jul. 26, 2011 in support of Petition for Extraordinary Writ at 3 (LT Myers affidavit); LT Sham affidavit of Jul. 26, 2011 in support of Petition for Extraordinary Writ at 3 (LT Sham affidavit); Clemency Request of Aug. 2, 2011.

[2] Appellant's Motion to Attach of Feb. 15, 2012, granted Feb. 23, 2012.

> What we can and therefore must do, however, is compare head-to-head, authorized punishment for authorized punishment, the approved sentence from the initial court-martial and that from the rehearing. . . a sentence to no confinement is now a sentence to 30 days confinement, which, per Article 63, is necessarily more severe.

(JA at 7.)

This interpretation also insures that the concerns raised by Chief Judge Everett are never realized: that a military defendant's rehearing does not, in any case, "yield results less favorable to him than those he had originally received at trial." *Hoff*, 27 M.J. at 75.

Conclusion

Petty Officer Altier respectfully requests that this Court overturn the Court of Criminal Appeals decision and set aside his punishment because the sentence of 30 days of confinement and 45 days of restriction is "*in excess of and[/or] more severe*" than zero days of confinement and zero days of restriction. As such, the Court of Criminal Appeals erred in approving this sentence.

/s/

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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was delivered electronically to the Court, and that copies were delivered electronically to the Appellate Government Division and to Code 40 on August 8, 2012. I also certify that I caused the Joint Appendix in this case to be delivered, in paper form, to the Court and the government on the same day.

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