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	REPLY BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201000361 USCA Dkt. No. 12-0496/NA

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

This Court should set aside the sentence approved by the convening authority because (A) it is impossible to meaningfully compare a punitive discharge to deprivations of physical liberty and other punishments, or (B) in the alternative, the punishment of thirty days confinement, forty-five days restriction with hard labor, reduction in rank to pay-grade E-5, and $1,500.00 forfeitures per month for three months is "*in excess of and[/or] more severe*" than a bad-conduct discharge.

A. It is impossible to meaningfully compare a punitive discharge to deprivations of physical liberty and other punishments.

This case presents an ideal vehicle to establish a clear rule defining the Article 63 language of: "no sentence in excess of or more severe". Because it is impossible to articulate any legal or reliable standard for which to compare a punitive

discharge against loss of liberty and other punishments, this Court should adopt the lineal test for sentence comparison proposed by Appellant and recommended by now-Chief Judge Perlak. (Appellant Br. at 11-12; JA at 7).

The objective test—advocated by the government—requires military appellate courts to compare strikingly dissimilar aspects of lawful sentences, and then determine their relative severity or excessiveness. The lineal test, on the other hand, limits litigation and ensures predictability by providing lower courts with clear guidance to compare authorized punishments to other similar authorized punishments. Such a rule is consistent with Congress' servicemember-centric concerns, addressed by Chief Judge Everett, in its passage of Article 63. (Appellant's Br. at 5-6.)

B. If this Court decides that it is possible to compare a punitive discharge with other lawful punishments, then Petty Officer Altier's second sentence is still more severe than a bad-conduct discharge alone.

The government's argument that Petty Officer Altier's second sentence is less severe fails because: (1) the government attempts to curtail the actual punishment received at the second hearing, and (2) the government's reliance on the commutation line of cases is misplaced.

1. Curtailing the Actual Punishment: The Government conflates the comparison to only confinement and a bad-conduct discharge.

On more than one occasion the government attempts to focus the analysis solely on a *quid pro quo* comparison of thirty days confinement to a bad-conduct discharge. (Appellee's Br. at 5, 10.) In actuality, Petty Officer Altier was sentenced at the second hearing to thirty days confinement, forty-five days restriction with hard labor, reduction in rank to pay-grade E-5, *and* $1,500.00 forfeitures per month for three months. (JA at 181.) Thus, the question before this Court is not isolated to a comparison between "a discharge on the one hand versus restraint of liberty on the other", (Appellee's Br. at 10), but a comparison between a discharge on the one hand versus all the punishments received at the second hearing on the other.

2. Reliance on the commutation line of cases is misplaced.

The government's reliance on the commutation line of cases is misplaced. For the most part, the government relies on cases stemming from the 1950's and 60's for the proposition that a bad-conduct discharge carries "lifelong effects". But the government has (a) misconstrued the holding in *United States v. Hodges*, and (b) failed to take into account that times have changed.

a. *United States v. Hodges*

The government incorrectly states that this Court "held" in *Hodges*:

> "an executed punitive discharge terminates military status as completely as an executed death penalty ends mortal life. . . . A death sentence changed to confinement reduces the legal degree of punishment. Analogously, changing the military equivalent, the punitive discharge, to confinement lessens the severity of the punishment. *Hodges*, 22 M.J. at 262 (citing [sic] *United States v. Russo*, . . . 29 C.M.R. 168 (1960))."

(Appellee's Br. at 8-9.) *Hodges* actually held that the court below was not authorized to commute the appellant's punitive discharge into additional confinement to more than 21 months contemplated by the pretrial agreement. *Hodges*, 22 M.J. at 264. Thus, the *Hodges* Court was merely quoting *dicta* from *Russo* and *United States v. Prow*, 32 C.M.R. 63 (C.M.A. 1962). Furthermore, it appears that the *Hodges* Court backed away from the "death penalty" analogy and considered the appellant's argument that the rationale for this *dicta* is dated. Though this Court eventually found that in 1986 "the recipient of a punitive discharge is *still* subject to considerable stigma", *Hodges*, 22 M.J. at 263 (emphasis added), its analysis of the current state of affairs is instructive.

b. Today a BCD has limited impact on earnings and employment opportunities.

The rationale of cases like *Russo* is dated and rests on untenable ground.

First, after World War II, the percentage of veterans in the United States was 12.8 percent, 90 percent of which served on active duty during a time of declared war in which the entire nation was drafted for mobilization. Maj Jeffery D. Lippert, *Automatic Appeal under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 19 (2004)(*citing* U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION 1145 (1975)). Today, with the all-volunteer force, less than 1 percent of the population of the United States is on military active duty. Sabrina Tavernise, *As Fewer Americans Serve, Growing Gap is Found Between Civilians and Military*, N.Y. TIMES, Nov. 24, 2011, http://www.nytimes.com/2011/11/25/us/civilian-military-gap-grows-as-fewer-americans-serve.html?_r=0. The change in the force has led to a change in the public's perception of a punitive discharge.

The Bureau of Justice Statistics demonstrated this change in perception in January 2000 with its study of veterans incarcerated in the United States. The study showed that both honorably-discharged veterans and punitively-discharged veterans have the same employment rates and income levels. Lippert, 182

MIL. L. REV. at 22 (*citing* CHRISTOPHER MUMOLA, BUREAU OF STATISTICS, U.S. DEP'T OF JUSTICE, VETERANS IN PRISON OR JAIL 12 (2000)). The study determined that the type of discharge did not affect the rate at which veterans were able to get a job, or the amount of income they were receiving before civilian incarceration. *Id.* (*citing* MUMOLA, *supra*).

Moreover, the 2000 study's findings are supported by a 1978 Military Law Review study which evaluated the impact of punitive discharges on the economic opportunities of service members. Captain Charles E. Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 MIL. L. REV. 1 (1978). The study's author sent thousands of questionnaires to businesses and other entities throughout the United States, including Fortune 500 companies, small businesses, colleges and universities, unions, physicians, attorneys, state trading licensing boards, and personnel agencies. *See id.* at 25-26. The study concluded that: (1) forty-seven percent of employers surveyed believed that a court-martial conviction did not equate to even a federal or state conviction; (2) only five percent of employers would automatically reject an applicant with a punitive discharge; (3) eighty-four percent of employers stated their opinion concerning an applicant who had been convicted at court-martial would be unaffected by the applicant's receipt of a punitive discharge; (4) only eleven percent stated that a court-martial conviction

could result in an adverse hiring decision, but the decision would be based on other factors as well; and (5) most employers indicated the major factor affecting the hiring decision was not whether a punitive discharge had been adjudged, but what type of crime the service member had committed. *Id.* This study established that, as early as 1978, the stigma of a punitive discharge was clearly waning.

Today, employers are on notice not to ask about a servicemember's type of discharge during a job interview, lest they subject themselves to allegations of unfair hiring practices. JEFFREY A. BERMAN, COMPETENCE-BASED EMPLOYMENT INTERVIEWING 124 (1997) ("Inquiries may not be made about the type of discharge received."); *Thomas H. Nail, SPHR & Dale Scharinger, PhD, Guidelines on Interview and Employment Application Questions* 3 (Jan. 1998) ("You may not ask what type of discharge the applicant received from military service.") *available at* http://www.nextaff.com/resource_centers/employers/white-papers/. At least two state agencies adopt this approach, forbidding employers from probing the topic of discharge during interviews. *See, e.g.*, MARYLAND DEPARTMENT OF LABOR, LICENSING AND REGULATION, OFFICE OF FAIR PRACTICES: *Guidelines for Pre-Employment Inquiries Technical Assistance Guide - Interviews and Applications for Employment* (June 9, 2009), http://www.dllr.state.md.us/oeope/preemp.shtml (inquiring whether a servicemember was honorably discharged is

an "unlawful inquir[y]"); *and* IDAHO COMMERCE AND LABOR & IDAHO HUMAN RIGHTS COMMISSION: *Conducting a Lawful Employment Interview* at 5 (I-81-12 (R.9/98)) *available at http://labor.idaho.gov/lawintvw3.pdf* ("Questions about military experience or training are generally permissible. However, the interviewer should not ask an individual about the type of discharge he or she received from the military.").

Lastly, and significantly, in 2010 the revised Military Judges' Benchbook removed the term "ineradicable" when discussing the stigma associated with punitive discharges. Department of the Army Pamphlet 27-9, Ch2, §V, para 2-5-22 (Jan. 1, 2010). Even the military then, realizes that the "lifelong effects" of the punitive discharge has waned.

The modern trend is clear: the stigma of the punitive discharge is not what it once was. As a result, when this case is viewed through a 2012 lens, the government's substantive argument resting on the "lifelong effects" of a punitive discharge cannot carry the day. This Court should find Appellant's second sentence violated Article 63.

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 *per se* "*in excess of and[/or] more severe*" than zero days of confinement and zero days of restriction. In the alternative, the punishment of thirty days confinement, forty-five days restriction with hard labor, reduction in rank to pay-grade E-5, and $1,500.00 forfeitures per month for three months is "*in excess of and[/or] more severe*" than a bad-conduct discharge. As such, the Court of Criminal Appeals erred in approving this sentence.

/s/

TOREN G. E. MUSHOVIC
Lieutenant, U.S. Navy
Bar No. 35426
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7390
toren.mushovic@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on September 27, 2012. I also certify that this reply was electronically served on appellate government counsel, Col Stephen Newman, USMC, also on September 27, 2012.

/s/
TOREN G. E. MUSHOVIC
Lieutenant, U.S. Navy
Bar No. 35426
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7390