IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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ISSUE PRESENTED

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

Statement of Statutory Jurisdiction

Appellant'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), 10 U.S.C. § 866(b)(1)(2006), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals (NMCCA). 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 members with enlisted representation sitting as a special court-martial convicted Appellant, contrary to his pleas, of fraternization and sexual harassment in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2006). The Members sentenced Appellant to a bad-conduct discharge. The Convening Authority approved the sentence as adjudged.

On May 26, 2011, the lower court set aside Appellant's sentence based on a specified issue and ordered a rehearing. *United States v. Altier*, No. 201000361, 2011 CCA LEXIS 201 (N-M. Ct. Crim. App. May 26, 2011). On July 22, 2011, a rehearing on

sentence was held before a Military Judge who subsequently sentenced Appellant to thirty days of confinement, forty-five days of restriction with hard labor, reduction to the pay-grade of E-5, and $1,500.00 forfeitures per month for three months.

Thereafter, Appellant filed a Petition for Extraordinary Relief with the lower court, arguing that this adjudged sentence was improper because it was more severe than his originally approved sentence. On July 27, 2011, the lower court granted the Petition and ordered all adjudged confinement deferred pending their ultimate decision on sentence legality. Meanwhile the Convening Authority approved but did not execute the adjudged sentence in compliance with the lower court's Order.

On April 30, 2012, the lower court issued its second opinion, holding that under the facts of this case, the new sentence approved by the Convening Authority, which included confinement, restriction, hard labor without confinement, forfeitures and a reduction, was not in excess of, nor more severe than, the original approved Court-Martial sentence, which included only a bad conduct discharge and reduction to E-5. *United States v. Altier*, No. 201000361, 2012 CCA LEXIS 156 (N-M. Ct. Crim. App. Apr. 30, 2012). On July 10, 2012, this Court granted Appellant's petition for a grant of review.

Statement of Facts

Appellant, a First Class Petty Officer in a senior leadership position, sexually harassed a very junior sailor in a school-house environment. (J.A. at 50.) The victim approached Appellant seeking counsel because he was in a leadership position and she believed that her fellow sailor was in danger. (R. 102-04, 106-18.) He responded with fraternization and suggestive behavior:

> So, he got up and sat on my lap, and straddled me, and asked me [if] I thought that was inappropriate. And I looked towards the wall and said I thought it was very inappropriate. And he tried to kiss my ear, and my neck, and my lips. And I just sat there and looked at the wall. And he ... asked me if I thought it was inappropriate. And I told him it was.

(R. 108-09.)

This incident caused the victim to rely on medication to try to sleep. (R. 126.) Her inability to sleep also caused the victim to fall behind in her qualifications and training. (R. 127-28.) Appellant's misconduct resulted in the victim being ostracized at work. (R. 131-32.) Fellow sailors nicknamed her the "boat ho." (R. 130.)

Summary of Argument

Any sentence may be approved on rehearing as long as it is not more severe than the originally approved sentence. A punitive discharge is more severe than a short term of confinement and other lesser punishments. Appellant's sentence

to a short term of confinement, restriction, and forfeitures was necessarily less severe than the previously approved punitive discharge and is therefore legal.

Argument

ANY SENTENCE MAY BE APPROVED ON REHEARING AS LONG AS IT IS NOT MORE SEVERE THAN THE PREVIOUSLY APPROVED SENTENCE. APPELLANT'S SENTENCE ON REHEARING WAS NOT MORE SEVERE THAN THE ORIGINALLY APPROVED SENTENCE.

A. Any sentence may be approved on rehearing as long as it is not more severe than the originally approved sentence.

"Upon a rehearing ... no sentence in excess of or more severe than the original sentence may be approved." Art. 63, UCMJ, 10 U.S.C. § 863 (2006). R.C.M. 810(d)(1) implements this prescription: "[O]ffenses on which a rehearing ... has been ordered shall not be the basis of an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or hearing ...."

As such, a sentence is appropriate on rehearing unless it is more severe than a previously approved sentence. Clearly the statutory framework itself necessarily contemplates sentence comparison. Any other solution would foreclose our military appellate courts from examining a sentence on rehearing in order to determine what a "more severe sentence" is. While it is true that military appellate courts have declined to establish a

"fixed table of substitutions" to weigh sentences, *United States v. Darusin*, 20 C.M.A. 354, 356 (C.M.A. 1971) (citations omitted)), even in the absence of such a fixed table sentence comparison is not only lawful, but on some occasions required. The question therefore does not pertain to this Court's ability to conduct such an analysis but is instead more appropriately focused on the analytical framework applied to the comparison.

B. In the sentence comparison context, this Court has historically recognized that the substitution of a period of confinement for a punitive discharge *does not* ordinarily produce an increase in the severity of the punishment.

"The variety of factors bearing upon the relative severity of a punitive discharge and other punishments has tended to discourage the establishment of a fixed table of substitutions." *Darusin*, 20 C.M.A. at 356 (citations omitted). But the mere fact that there is no "fixed table" does not preclude this Court from making such an objective comparison. It merely implies that each case of sentence comparison is unique and must be taken on its own facts. As such in *Darusin* this Court held that "...substitution of a period of confinement for a punitive discharge does not ordinarily produce an increase in the severity of the punishment." *Id.; see also United States v. Smith*, 12 C.M.A. 595, 597 (C.M.A. 1961) (upholding instructions that allowed for other permissible lesser punishments relative to a punitive discharge). Another example includes the

substitution of six months of confinement and forfeitures in place of a punitive discharge. *See United States v. Brown*, 13 C.M.A. 333 (C.M.A. 1962). Like *Darusin*, this Court in *Brown* found that such an exchange *did not* increase the severity of the sentence. *Id. at* 336. The short-term effect of the combined forfeitures and confinement, when objectively viewed in light of the life-long effect of a punitive discharge, is *substantially* less severe.

Appellant submits that changes to his present life circumstances necessarily increase the severity of confinement vis-à-vis a punitive discharge. Specifically he argues that he stands to lose employment opportunities as a result. (Appellant's Brief at 10, 11.) What he fails to acknowledge, however, is that the absence of a discharge necessarily means that he has employment——with the United States Navy. Furthermore, the benefits associated with a General or Honorable Discharge, the logical and probable consequences of a successfully completed term of enlistment, vastly outweigh any passing inconveniences associated with a brief period of confinement; the educational benefits, eligibility for disability compensation, and civil service employment preferences alone more than make up for any transitory and fleeting difficulties resulting from his sentence to confinement. In sum, in light of the benefits Appellant

receives in the absence of a discharge, including immediate employment and ultimately leading to a variety of Veterans' benefits, Appellant's argument that his present life circumstances make confinement overly onerous simply falls short of the mark. See *United States v. Hodges,* 22 M.J. 260 (C.M.A. 1986) (finding that "...the recipient of a punitive discharge is still subject to considerable stigma -- often more than he appreciates when the discharge is issued. Moreover, a punitive discharge may preclude eligibility for veterans' benefits -- some of which have substantial value"); *see also* BARTON F. STICHMAN AND RONALD B. ABRAMS, ED., VETERANS BENEFITS MANUAL (2010) at 1686 (laying out the various benefits a servicemember surrenders upon being subjected to a punitive discharge). People are daily confined under much more challenging circumstances.

C. In such a situation a helpful framework for analysis is in the context of sentence commutation. When analyzing Appellant's situation through that lens it is clear the new sentence is NOT more severe than the original.

Sentence commutation provides this Court with a helpful analytical framework for examining Appellant's predicament. Such cases commonly examine sentences in terms of severity. As such they present this Court with a situation not unlike that presented here. Furthermore, our military courts have a long history of making such comparisons in that context. As a result, there is a robust body of law upon which this Court can

rely in making its decision. As a general rule, that body of law dictates an examination of "all the circumstances in a particular case...." *United States v. Carter*, 45 M.J. 168, 170 (C.A.A.F. 1996) (discussing the relative severity of a sentence in the analogous commutation context).

And *Carter* is an excellent place to begin our analysis. As with the case at bar, the underlying issue in *Carter* was whether the new sentence was more severe than the original, and thus illegal. *Id.* at 169. Also like the case at bar, in *Carter* this Court compared a punitive discharge with a term of confinement. In doing so, this Court found that even when combined with forfeitures, two years of additional confinement *was not* more severe than a bad-conduct discharge. *Id.* at 170. Here this Court should similarly hold that Appellant's new sentence to a mere thirty days' confinement and forty-five days' hard labor without confinement, even when combined with forfeitures of $1,500.00 for three months and a reduction to E-5, is not more severe than the lifelong effects concomitant to a bad-conduct discharge.

Similarly this Court has previously held that "...[i]n a general way, and fully recognizing the possibility of a later collateral revision, 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 *United States v. Russo,* 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960)).

In sum, while sentence commutation is different from sentence comparison, lessons can be drawn from that context which are informative to the case at Bar. Given the finality of the punitive discharge, particularly in view of the transitory nature of 30 days confinement and 45 days hard labor and in light of the commutation case law, it is clear that Appellant's new sentence is not more severe than that previously imposed.

D. Appellant's reliance on *United States v. Mitchell* as an analytical framework for sentence comparison is misplaced.

In *Mitchell*, the appellant was sentenced by members to a bad-conduct discharge, confinement for ten years, total forfeitures, and reduction to the lowest enlisted paygrade. *United States v. Mitchell*, 58 M.J. 446, 447 (C.A.A.F. 2003). On resentencing, however, a second panel of members sentenced the appellant to a dishonorable discharge, confinement for six years, and reduction to the lowest enlisted paygrade. *Id.* at 446-47. Appellant cites *Mitchell* for the proposition that "...because punitive separations and confinement are so different, there is no readily measurable equivalence available

to make meaningful conversion of one to the other." *Id.* at 448. But in the context of that case, the Court was comparing a bad-conduct discharge to a dishonorable discharge. *Id.* at 447 (stating, "for the purposes of this case, we need only decide whether *Article 63* requires a comparison between discharges regardless of the overall sentence awarded at each sentencing hearing."). As a result the "meaningful conversion" challenge upon which Appellant relies pertained not to this Court's ability to make meaningful comparisons between two distinctly different types of punishment, but instead to the "...increased severity of Appellant's discharge and the decreased severity of his confinement and forfeitures." *Id.*

The question posed in the case at bar is dissimilar in that it asks for a comparison between two different *forms* of punishment, a discharge on the one hand versus restraint of liberty on the other. And while a discharge may be "apples" and restraint on liberty may be "oranges," it is untrue to suggest that the two cannot be compared——setting aside the statutory requirement to do so, the mere fact that one notes differences between the two in and of itself implies that a comparison has, in fact, occurred. In sum, Appellant relied on the wrong analytical framework for making the comparison.

E. Not only was the new sentence less severe than the original, to limit the sentence to a bad-conduct discharge would have been error.

This Court addressed a similar scenario in *United States v. Kelley*, 5 C.M.A. 259, 262 (C.M.A. 1954), and held that the other maximum punishments available at a special court-martial, which were limited to six months at the time, were less severe than a punitive discharge. Not unlike the case at bar, in *Kelley* the appellant was originally convicted and sentenced to only a bad-conduct discharge. *Id.* at 260. Unlike the case at bar, in the rehearing the trial counsel informed the court that a bad-conduct discharge was the only possible legal sentence due to the previously awarded sentence. *Id.* at 261. On appeal, the Court held that Trial Counsel's action in that regard was in error. Other possible punishments, including a sentence to confinement and forfeiture for up to six months, *were less severe* than a punitive discharge. As a result they were permissible, lawful punishments even in light of his previous sentence:

> [I]t can hardly be argued that any of these sentences is in excess of or more severe than a punitive discharge. In fact, there is such an obvious difference in severity between a bad-conduct discharge and each of the other punishments as to make discussion unnecessary.

Id. at 262.

Not only is Appellant's sentence permissible, therefore, but it would have been error to limit the potential sentence to only a punitive discharge.

In sum, Appellant's reliance on *Mitchell* is misplaced in that *Mitchell* was narrowly tailored to examine the differences between two types of discharge. More importantly, however, *Mitchell had no effect* on the nearly sixty years of case law that holds that Appellant's sentence is not more severe than the original sentence.

This Court should instead follow *United States v. Darusin* in making an objective comparison between the two sentences herein under review. Whereas Appellant's brief, when read in the context of his Affidavit, appears to ask this Court to adopt a subjective analysis test, asking the court to weigh heavily in the balance the facts of Appellant's personal circumstances, this is the wrong test. Appellant appears to rely on language in *Mitchell* purportedly rejecting the *Darusin* objective analysis. *Mitchell*, 58 M.J. at 448. But while the Court in *Mitchell* did reject the "...objective test..." applied by the lower court, they were not implementing a subjective analysis test.

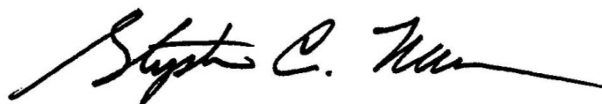
Instead what this Court did was reject a *per se* analysis that a Bad-Conduct Discharge is less severe than a Dishonorable Discharge. But nothing in Mitchell requires appellate courts to

consider an appellant's subjective desires or speculative assertions as to his or her individual circumstances. Rather, appellate courts should apply an objective, *Darusin*-like test, that does not consider the speculative, subjective, post-trial, and opportunistic submissions of appellants made with the benefit of hindsight. Allowing consideration of such matters would only encourage endless submissions and imprecise guessing by appellate courts as to the effect of various sentences based on assertions by appellants post-trial.

Although there is no clear formula to measure equivalence, the preferences of Appellant are therefore not a part of the individual circumstances of this particular case, nor were they part of the Record of Trial. As such, and considering the Record of Trial and the sentences actually approved, the short-term sentence to confinement and hard labor, when viewed in light of the life-long effects of a discharge, is clearly less severe. It therefore does not violate Article 63 and should be upheld.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as approved below.



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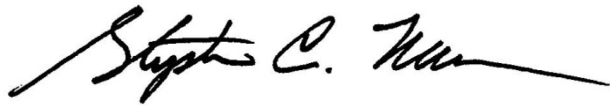
Certificate of Filing and Service

I certify that the foregoing was filed with the Court on September 17, 2012. I also certify that this brief was served on appellate defense counsel, Lieutenant Toren G.E. Mushovic, U.S. Navy, on September 17, 2012.



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