IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Francis L. Captain Sergeant (E-5) U.S. Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201300137 USCA Dkt. No. 15-0172/MC

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

DAVID A. PETERS
Captain, U.S. Marine Corps
Appellate Defense Counsel
Appellate Defense Division
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7088
david.a.peters1@navy.mil
Bar No. 35812

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Issues Presented

I.

WHETHER TRIAL DEFENSE COUNSEL PROVIDED INEFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OFFER EVIDENCE, OTHER THAN AN UNSWORN STATEMENT, IN EXTENUATION OR MITIGATION, AND BY CONCEDING THE APPROPRIATENESS OF A DISHONORABLE DISCHARGE.

II.

WHETHER THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN AFFIRMING A SENTENCE THAT INCLUDED A DISHONORABLE DISCHARGE WHEN THE CONVENING AUTHORITY'S ACTION DID NOT APPROVE ONE.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a punitive discharge. Accordingly, his case fell within the Article 66(b), Uniform Code of Military Justice (UCMJ), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals.[1] This Court now has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

Sergeant (Sgt) Francis Captain pleaded guilty before a military judge sitting as a general court-martial to abusive sexual contact in violation of Article 120, UCMJ.[3] After finding him guilty, the military judge sentenced Sgt Captain to forfeit all pay and allowances, confinement for sixty-six months,

[1] 10 U.S.C. § 866(b) (2008).
[2] 10 U.S.C. § 867 (2008).
[3] 10 U.S.C. § 920 (2008).

reduction to pay-grade E-1, a $50,000 fine, and a dishonorable discharge.

The Convening Authority (CA) only approved so much of the adjudged sentence as it pertained to forfeiture of all pay and allowances, sixty-six months of confinement, and reduction to pay-grade E-1. The CA then, excepting the punitive discharge, ordered the approved sentence executed.

On July 29, 2014, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and that portion of the sentence approved by the CA.[4]

On April 7, 2015, this Court specified and ordered briefing on the two issues now presented.

Statement of Facts

1. Sentencing.

On January 11, 2013, Sgt Captain pleaded guilty before a military judge as part of a pre-trial agreement with the CA. Sgt Captain deployed to combat in Iraq and Afghanistan four times, yet his trial defense counsel did not present *any* extrinsic evidence of Sgt Captain's good military character. Then during his sentencing argument, trial defense counsel asked the military judge to sentence Sgt Captain to a dishonorable discharge. The military judge sentenced Sgt Captain to forfeit

[4] *United States v. Captain*, No. 201300137, 2014 CCA LEXIS 518 (Jul. 29, 2014) (*per curiam*).

all pay and allowances, reduction to the lowest enlisted pay-grade, a $50,000.00 fine, five years and six months of confinement, and a dishonorable discharge.[5]

2. The CA's Action.

The CA acted on March 29, 2013. He specifically disapproved the adjudged $50,000 fine.[6] He approved only so much of the remaining sentence as extended to "forfeiture of all pay and allowances, confinement for 5 years and 6 months, 0 days, and reduction to the lowest enlisted pay-grade."[7]

3. The *Dubay* hearing.

On his initial appeal before the lower court, Sgt Captain argued he was ineffectively represented during sentencing for two reasons: 1) his defense counsel did not present evidence of his good military character, and 2) his defense counsel asked the military judge to award a dishonorable discharge.

On September 23, 2013, the lower court remanded the record of trial to the CA for a post-trial hearing pursuant to *United States v. Dubay*[8] to investigate Sgt Captain's claims of ineffective assistance of counsel. At the *Dubay* hearing, Sgt Captain's trial defense counsel testified that both matters that

[5] JA at 000022. The maximum punishment differed from the adjudged sentence only in that it allowed for seven years of confinement, which was merely eighteen months more than that adjudged.
[6] JA at 000001-3.
[7] *Id.*
[8] *See* 37 C.M.R. 411 (C.M.A. 1967).

were under review were part of a strategy he and Sgt Captain discussed.[9]

a. Trial defense counsel did not introduce evidence of Sgt Captain's good military character.

Counsel claimed he was afraid presenting good military character witnesses would "expose [Sgt Captain] to the Government's scathing rebuttal should they choose to do so."[10] However, when pressed, counsel admitted he believed this rebuttal would have likely been limited to impeachment by "did you know, have you heard" questions.[11]

The military judge specifically asked whether counsel considered using documentary evidence as an alternative to live testimony. The military judge commented, "it would have cost you nothing to garner statements from individuals who Sergeant Captain went to war with. They could not have been rejoined by the Government."[12] The trial defense counsel also said, "I don't recall becoming in receipt of any documentary evidence that would've illustrated any of the minutiae behind his combat endeavors in both Iraq and Afghanistan."[13] Counsel maintained that he was fearful of a possible Government rebuttal, even if the good military character evidence was simply on paper. But

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[9] JA at 000163.
[10] JA at 000209.
[11] JA at 000211.
[12] JA at 000285.
[13] *Id.*

he admitted that, to his knowledge, the Government did not have rebuttal statements at the sentencing hearing.

> Q: Did you know if the Government had those kind of statements on the day of trial?
>
> A: No, sir.[14]

<u>b. Trial defense counsel argued for a dishonorable discharge.</u>

Counsel also testified about his decision to argue for a sentence that included a dishonorable discharge. He explained that this particular military judge had a reputation within the Circuit for harsh sentencing. Once this judge was assigned, counsel explained to Sgt Captain that it was all but a certainty his sentence would include a dishonorable discharge.[15] Though he believed a dishonorable discharge was unavoidable, he nevertheless recommended that Sgt Captain allow him to argue for a sentence that included a dishonorable discharge in order to potentially garner limitation on confinement.

Trial defense counsel made no record of having Sgt Captain's permission to argue for a dishonorable discharge. At the *Dubay* hearing, Sgt Captain testified that counsel never sought his permission or explained his strategy to concede the appropriateness of a dishonorable discharge. Trial defense counsel testified that he explained his strategy and proceeded

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[14] JA at 000289.
[15] JA at 000202, 000244.

with Sgt Captain's permission. Ultimately the *Dubay* judge--who was also the military judge at trial--adopted trial defense counsel's version of events.

Trial defense counsel admitted he did not review any case law before developing his pre-sentencing strategy in Sgt Captain's case.[16]

4. The lower court's opinion.

In a *per curiam* opinion, the lower court listed the adjudged punishments and Sgt Captain's assignments of error.[17] It was not persuaded that his trial defense counsel was ineffective for failing to offer evidence of his good military character, and for arguing for a dishonorable discharge, so it affirmed the findings and sentence "as approved by the convening authority."[18]

Summary of Argument

Sgt Captain was not effectively represented. His trial defense counsel did not have a sound tactical reason to withhold documentary evidence of Sgt Captain's good military character. This error was exacerbated when the trial defense counsel recommended the military judge sentence Sgt Captain to a dishonorable discharge. He did this without showing he was requesting this sentence in accordance with Sgt Captain's

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[16] JA at 000214-15.
[17] *Captain*, 2014 CCA LEXIS 518 at *1-2.
[18] *Id*. at *7.

wishes. This strategy was not based on a correct understanding of the law, nor was it reasonable in light of the military judge's track record. This ineffectiveness undermines confidence in Sgt Captain's sentence such that it should be set aside and sent back for a re-hearing.

Additionally, a Court of Criminal Appeals may only act with respect to approved findings and sentence. The CA did not approve the adjudged dishonorable discharge. And the lower court did not find ambiguity in the CA's action. In its decretal paragraph, the lower court approved "the findings and sentence as approved by the convening authority." Therefore, this Court should find the lower court did not affirm the adjudged dishonorable discharge.

Argument

I.

SERGEANT CAPTAIN WAS ENTITLED TO EFFECTIVE REPRESENTATION DURING SENTENCING. BUT HIS DEFENSE COUNSEL WITHHELD EVIDENCE OF HIS MERITORIOUS SERVICE IN COMBAT, AND REQUESTED A DISHONORABLE DISCHARGE. THESE TACTICAL DECISIONS WERE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE LAW. THEREFORE, THIS COURT SHOULD SET ASIDE THE ADJUDGED SENTENCE BECAUSE IT STEMMED FROM INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review

"In reviewing for ineffectiveness, the Court 'looks at the questions of deficient performance and prejudice *de novo*.'"[19]

Discussion

The Sixth Amendment right to "assistance of counsel"[20] requires "effectiveness" as defined by reasonableness under "prevailing professional norms."[21] This Court presumes an attorney is competent,[22] but this presumption is subject to a two-part test. First, did the counsel's performance fall measurably below that ordinarily expected of fallible lawyers, and second, is there a reasonable probability that, absent the

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[19] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).
[20] U.S. Const. amend VI.
[21] *Strickland v. Washington*, 466 U.S. 668 (1984) (citing *Michel v. Louisiana*, 350 U.S. 91, 100-01 (1955)).
[22] *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001) (citing *United States v. Cronic*, 466 U.S. 648, 658 (2000)).

errors, there would have been a different result?[23] A "reasonability probability" is one "sufficient to undermine confidence in the outcome."[24]

A. Counsel's decision to withhold documentary evidence of Sergeant Captain's good military character was unreasonably deficient because it was based on his erroneous view of the law.

Sgt Captain gave his defense counsel the names of several Marines who could provide evidence of his good military character. While trial defense counsel was arguably deficient in contacting these witnesses, he did personally contact at least one--Gunnery Sergeant (GySgt) Weatherly[25]--who would have provided evidence that Sgt Captain was among the best sergeants with whom he had ever served.[26] GySgt Weatherly was present on the day Sgt Captain was sentenced, but he was neither called to testify, nor asked to provide a written character statement.

The trial defense counsel was deficient by not presenting this evidence. Good military character evidence cannot be impeached by extrinsic evidence of specific incidents of misconduct and can only be impeached by 'opinion evidence' of bad military character.[27] As far as the trial defense counsel

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[23] *Datavs*, 71 M.J. at 424-25 (citing *Strickland*, 466 U.S. at 697).
[24] *Id*. at 424.
[25] JA at 000242.
[26] JA at 000259-64.
[27] *United States v. Henson*, 58 M.J. 529, 531 (A. Ct. Crim. App. Feb. 6, 2003) (citing *United States v. Pruitt*, 43 M.J. 864, 868 (A.F. Ct. Crim. App. Feb. 29, 1996), *aff'd*, 46 M.J. 148

was concerned, the Government had no such evidence on the day of sentencing. While GySgt Weatherly's live testimony may have been subject to "did you know, have you heard" cross-examination questions,[28] a written character statement could not have been similarly impeached.[29]

Trial defense counsel also testified that he did not review the law when formulating his sentencing plan. This is presumably why he did not know the Government would be unable to impeach character statements about Sgt Captain's good military character with extrinsic evidence of other specific incidents of misconduct.[30]

When his strategy is viewed in light of this admission, it is clear that his advice was based on an erroneous view of the law. As this Court held in *United States v. Davis*, familiarity with "the facts and applicable law are fundamental responsibilities of defense counsel."[31] Here, counsel's performance was measurably below an objective standard of

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(C.A.A.F. 1997) ("[T]he prosecutor may not prove specific acts of conduct through extrinsic evidence solely to rebut the accused's character evidence.")); *United States v. Kerr*, 1997 CCA LEXIS 603 (A.F. Ct. Crim. App. Dec. 12, 1997), *aff'd*, 51 M.J. 401 (C.A.A.F. 1999).

[28] Rule for Courts-Martial 1001(b)(5)(e).

[29] Military Rule of Evidence 405(c).

[30] *United States v. Pruitt*, 46 M.J. 148, 151 (C.A.A.F. 1997) (affirming lower court's decision that military judge erred by allowing impeachment of good military character evidence through extrinsic evidence of specific acts of misconduct).

[31] 60 M.J. 469, 475 (C.A.A.F. 2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

reasonableness because there is no excuse for advising a client on a particular sentencing strategy without first understanding the law governing that strategy.[32] Therefore, the deficiency prong of *Strickland* is satisfied.

B. Counsel was unreasonably deficient because he failed to develop the record regarding Sergeant Captain's alleged concurrence with his decision to argue in favor of a dishonorable discharge.

After presenting just Sgt Captain's unsworn statement, the trial defense counsel asked for his client to receive a dishonorable discharge. But he did nothing to show Sgt Captain authorized this recommendation.

This Court has consistently held that defense counsel may not ask for, or concede the appropriateness of, a punitive discharge in the face of a silent record.[33] In *United States v. Pineda*, this Court held, "*when defense counsel does seek a punitive discharge or does concede the appropriateness of such a discharge even as a tactical step to accomplish mitigation of other elements of a possible sentence counsel must make a record that such advocacy is pursuant to the accused's wishes.*"[34]

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[32] *See Davis*, 60 M.J. at 475 ("The failure to investigate [the] critical component of the defense sentencing strategy precluded counsel from exercising informed judgment and fully informing [appellant] of the possible consequences of the strategy.").
[33] *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004) (citing *United States v. Pineda*, 54 M.J. 298, 300 (C.A.A.F. 2001) (citations omitted)).
[34] 54 M.J. at 301 (citing *United States v. Dresen*, 40 M.J. 462, 465 (C.M.A. 1994) (citing *United States v. Lyons*, 36 M.J. 425

The original record of trial clearly shows the trial defense counsel failed to meet this standard. Counsel did not present a letter from Sgt Captain showing agreement with this strategy.[35] He did not have Sgt Captain discuss his desire to be punitively discharged in his unsworn statement so the military judge could test his understanding of that request. He did not even comment during his argument that Sgt Captain understood and accepted that a punitive discharge was part of a likely sentence. This failure is contrary to this Court's established precedent in *United States v. Pineda*, *United States v. Dresen*, and *United States v. Quick*. Therefore, the deficiency prong of *Strickland* is, once again, met.[36]

C. The combined effect of trial defense counsel's deficiencies prejudiced Sergeant Captain's sentence because it increased the likelihood he would be dishonorably discharged.

Trial defense counsel's combined deficiencies made a dishonorable discharge inevitable when a less severe sentence was reasonably attainable.

Trial defense counsel should have known he could introduce written good military character statements without realistic fear of impeachment. Armed with extrinsic evidence of his client's good military character, he could have also credibly

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(C.M.A. 1993); *United States v. McNally*, 16 M.J. 32 (C.M.A. 1983))) (emphasis in the original).

[35] *See United States v. Blunk*, 37 C.M.R. 422 (C.M.A. 1967).

[36] *Quick*, 59 M.J. at 386; *Pineda*, 54 M.J. at 300.

asked the military judge to consider a bad-conduct discharge instead of the more aggravated dishonorable discharge.[37] This carried a realistic probability of success in light of Sgt Captain's prior service, his lack of prior misconduct, and his plea to a single specification of abusive sexual contact.[38] Furthermore, if counsel believed a dishonorable discharge was inevitable based on the military judge's sentencing history, how could conceding its appropriateness mitigate other portions of the sentence?

These errors should undermine this Court's confidence in Sgt Captain's sentence insofar as it extends to the dishonorable discharge. Trial defense counsel's combined deficiencies made the most aggravated punitive discharge inescapable, when a less aggravated sentence was reasonably attainable. Therefore, this Court should be satisfied that the prejudice prong of *Strickland* is also met.

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[37] Though he never asked to be discharged, portions of Sgt Captain's unsworn statement could show he understood a discharge was a likely part of his sentence. JA at 000057.

[38] The maximum punishment was seven years' confinement, reduction to pay-grade E-1, total forfeiture of all pay and allowances, and a dishonorable discharge. Manual for Courts-Martial (MCM), United States, pt IV, ¶ 45(f)(7) (2008).

D. The lower court abused its discretion by ordering the *Dubay* hearing on the trial defense counsel's failure to make a record of Sgt Captain's wishes regarding his recommended sentence because the original record of trial was adequate to evaluate that deficiency.

In *United States v. Ginn*, this Court held that post-trial fact-finding hearings are not always necessary, even in light of competing affidavits.[39] "In most instances in which an appellant files an affidavit in the Court of Criminal Appeals making a claim such as ineffective assistance of counsel at trial, the authority of the Court to decide that legal issue without further proceedings should be clear."[40]

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[39] 47 M.J. 236, 248 (C.A.A.F. 1997).

[40] *Id.* at 243. This Court laid out the following principles to guide lower courts' analysis in weighing whether to order a *Dubay* hearing: "First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis; Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis; Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts; Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the court may discount those factual assertions and decide the legal issue; Fifth, when an appellate claim . . . contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record . . . unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal; Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met." *Id.* at 248.

Here, the pre-*Dubay* record of trial clearly showed the trial defense counsel requested a dishonorable discharge without making a record that this was done pursuant to Sgt Captain's wishes.

This Court has firmly established that such neglect meets the deficiency prong of *Strickland*.[41] Thus, the lower court was only required to resolve prejudice, which was equally possible from the record. Therefore, even in light of the post-trial affidavits, the lower court abused its discretion by ordering the *Dubay* hearing.[42]

This is supported by the fact that the majority of the *Dubay* testimony restated the information contained in the affidavits. The trial defense counsel could not produce any evidence--other than his own self-serving testimony--that Sgt Captain authorized him to recommend that the military judge award a dishonorable discharge. This was simply a restatement of his affidavit. This testimony directly conflicted with Sgt Captain's affidavit and the *Dubay* hearing testimony.

In fact, by ordering the *Dubay* hearing, the lower court out-sourced its discretion to the *Dubay* judge by simply adopting his findings of fact. This, in turn, allowed the *Dubay* judge to

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[41] *Dresen*, 40 M.J. at 465; *Pineda*, 54 M.J. at 300; *Quick*, 59 M.J. at 386.

[42] *Ginn*, 47 M.J. at 248. Sgt Captain did not request a post-trial fact-finding hearing and the Government argued that no such hearing was necessary.

preemptively overcome Sgt Captain's claim he was prejudiced by ineffective assistance of counsel by finding his sentence would have remained unchanged.

This is fundamentally unfair. This Court should not allow a legal nullity--an erroneously ordered procedure--to defeat a servicemember's rights on appeal.[43]

E. Even if this Court believes the lower court did not abuse its discretion by ordering a *Dubay* hearing, its findings of fact, conclusions of law, and decision are not entitled to deference because they lack support in the record, and are contrary to case law.

Sgt Captain invites this Court's attention to the *DuBay* judge's fourth conclusion of law.[44] After hearing the testimony of potential sentencing witnesses during the *DuBay* hearing, the *Dubay* judge found that all the "prospective sentencing witnesses had anemic prospective value." But what about GySgt Weatherly? At the *Dubay* hearing, he testified that Sergeant Captain was "one of the best NCO's that I had work for me[,]" and "He was a fire and forget weapon. I mean, I tasked the devil dog with something, I could count on it being done." [45]

And what about Staff Sergeant (SSgt) Harms? He described Sgt Captain as "A good sergeant, sir. What I would think a good

[43] *See, e.g.*, *United States v. Engler*, _ M.J. _ (Daily Journal Dec. 3, 2014) (summary disposition)(also cited as JA at 000319-20) (holding a military appellate court cannot use a legal nullity to defeat prejudice on a claim of ineffective assistance of counsel).
[44] JA at 000087.
[45] JA at 000262.

sergeant needs to be."[46] Then when the *Dubay* judge directly asked him if he thought Sgt Captain possessed good military character he answered, "Definitely, sir."[47]

Finally, the *Dubay* judge mischaracterized one witness's testimony--First Lieutenant (1stLt) Hernandez-Brito--as calling Sgt Captain merely average amongst the several outstanding sergeants who also worked for him at the time. But in fact, 1stLt Hernandez-Brito said all of his sergeants, including Sgt Captain, were of "extremely high caliber." Thus when 1stLt Hernandez-Brito described Sgt Captain as "average to them," what he really meant was that he was equally "high caliber."[48] That more accurate description is muddied by the *Dubay* judge's finding.

The weight of this combined testimony is not "anemic." In fact, it shows that aside from his crime, Sgt Captain excelled among his NCO peers. Therefore, that portion of the *Dubay* findings is not entitled to deference.

Sgt Captain also invites this Court's attention to the eighth conclusion of law.[49] The *Dubay* judge described the trial defense counsel's memorialization of a client communication as deficient because no attorney-client correspondence was

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[46] JA at 000274.
[47] *Id.*
[48] JA at 000280.
[49] JA at 000080.

prepared. But he also found this deficiency stemmed from inexperience rather than incompetence--as if there was a *Strickland* exception for inexperience. Leaving aside its limited relevance, this conclusion failed to grasp the importance of memorialization on the record as it relates to requesting, or conceding the appropriateness of, a punitive discharge.

On that matter, this Court's precedent is clear; a defense counsel may not request, or concede the appropriateness of, a punitive discharge without a recorded demonstration that he is doing so pursuant to his client's wishes.[50]

Both the *Dubay* judge and the lower court acknowledged that the trial defense counsel failed to meet this representational standard.[51] But neither drew the appropriate conclusion that this deficiency implicated the first *Strickland* prong under *Dresen*, *Pineda*, and *Quick*, and required a subsequent prejudice analysis. Therefore, this conclusion is similarly undeserving of deference.

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[50] *Dresen*, 40 M.J. at 465; *Pineda*, 54 M.J. at 300; *Quick*, 59 M.J. at 386; *see also United States v. Bolkan*, 55 M.J. 425, 429 (C.A.A.F. 2001) (Baker, C.J., dissenting) ("Defense counsel may be perceived by some members of the public as wearing the same uniform as the prosecution--no matter how zealously and effectively they pursue their distinct and independent mission.").
[51] JA at 000088; *Captain*, 2014 CCA LEXIS 518 at *7.

These two conclusions went to the heart of resolving whether the questionable practices now under review--failing to present evidence of good military character and conceding the appropriateness of the dishonorable discharge--constitute ineffective assistance of counsel. Since they are unsupported by the record, and contrary to this Court's precedent, this Court should disregard the *Dubay* hearing and the lower court's opinion while conducting its own *de novo* review.[52]

Conclusion

Sgt Captain was ineffectively represented during sentencing. His counsel failed to present evidence of his good military character because he did not understand R.C.M. 1001(b) or the Military Rules of Evidence. Then he recommended the military judge award a dishonorable discharge without showing this aligned with Sgt Captain's wishes. Not only was this a bad strategy, both mistakes fell below an objective standard of reasonableness. The combined effect of these errors made a dishonorable discharge inevitable when a less aggravated sentence was reasonably attainable.

The *Dubay* findings should not impact this Court's decisions regarding the deficiency and prejudice of trial defense counsel's decision to recommend a sentence that included a

[52] *Loving v. United States*, 68 M.J. 1, 7 (C.A.A.F. 2009) (explaining this Court reviews *Dubay* conclusions *de novo*.) (citing *Davis*, 60 M.J. at 473)).

dishonorable discharge. The lower court had every fact it needed to conclude there was ineffective assistance of counsel on that matter. Instead, it out-sourced its discretion by ordering an unnecessary *Dubay* hearing. This did nothing but allow the military judge to negate Sgt Captain's prejudice argument on appeal. This Court recently held that erroneous procedures cannot be used to defeat servicemembers' appellate rights. It should do the same here.

WHEREFORE, Sgt Captain respectfully requests this Court set aside his sentence and order a re-hearing.[53]

II.

THE LOWER COURT CAN ONLY ACT WITH RESPECT TO THE FINDINGS AND SENTENCE AS APPROVED BY THE CONVENING AUTHORITY. HERE, THE CONVENING AUTHORITY DID NOT APPROVE THE PUNITIVE DISCHARGE. THUS THE LOWER COURT COULD NOT, AND DID NOT, AFFIRM IT.

Discussion

"A convening authority is vested with substantial discretion when he or she takes action on the sentence of a court-martial."[54] Given the CA's vast discretion and power in post-trial processing, it is important that he "exercise care in

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[53] 10 U.S.C. § 867(d) (2012).

[54] *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) (citing 10 U.S.C. § 860(c)(2)-(3); Rule for Courts-Martial 1107).

drafting the action."[55] "Because of the importance of the convening authority's action in the court-martial process, we have required a clear and unambiguous convening authority action."[56] When the plain meaning of the CA's action is clear, "its meaning must be given effect."[57] However, "[w]hen the action of a convening authority is . . . ambiguous [or] silent . . . a Court of Criminal Appeals may instruct the convening authority who took the action 'to withdraw the original action and substitute a corrected action[.]'"[58]

A. The lower court could not, and therefore did not, affirm the dishonorable discharge because it was unapproved and the lower court found no ambiguity in the convening authority's action.

Here, the CA specifically listed those portions of the adjudged sentence that he approved:

1) total forfeitures of all pay and allowances,

2) confinement for five years and six months, and

3) reduction to the lowest enlisted pay-grade.

By the plain language of the approval paragraph, the dishonorable discharge was not approved.

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[55] *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007) (citing *United States v. Politte*, 63 M.J. 24, 26 n.11 (C.A.A.F 2006)).
[56] *Wilson*, 65 M.J. at 141 (citing *Politte*, 63 M.J. at 26).
[57] *Id.*
[58] *United States v. Mendoza*, 67 M.J. 53, 54 (C.A.A.F. 2008) (citing R.C.M. 1107(g)).

It is not clear why the CA did not approve the punitive discharge. However, that is irrelevant because the CA "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The approval or disapproval shall be explicitly stated."[59]

The CA's approval substantially complied with R.C.M. 1107(d)(1). When read in the light most favorable to Sgt Captain, this suggests the CA did not wish to dishonorably discharge him.

There is further evidence the lower court did not affirm the dishonorable discharge in that it did not analyze the CA's action for ambiguity. If the lower court believed the CA's action was ambiguous, it was entitled to remand Sgt Captain's case for a corrected action.[60] It did not. That is evidence the lower court believed the punitive discharge was not approved, because this Court can assume the lower court knows it can only act "with respect to findings and sentence as approved by the convening authority."[61] Consequently, when it affirmed the

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[59] R.C.M. 1107(d)(1).
[60] *Politte*, 63 M.J. at 27; *Mendoza*, 67 M.J. at 54; *United States v. Scott*, 49 M.J. 160 (C.A.A.F. 1998) (summary disposition).
[61] 10 U.S.C. § 866(c) (2012); *see also Politte*, 63 M.J. at 28 (Erdmann, J., Baker, CJ., dissenting) (arguing that review of

approved sentence, that affirmation did not extend to the adjudged punitive discharge.

B. If, in the alternative, this Court believes the lower court did affirm the dishonorable discharge, then it erred because it lacked the authority to act with respect to that portion of the adjudged sentence.

In *United States v. Winckelmann*, this Court reviewed the Army Court of Criminal Appeals' affirmation of adjudged, but unapproved, forfeitures and found that court "committed error in affirming a forfeiture that the final convening order did not approve."[62] This Court ultimately concluded the appellant was not prejudiced because "[u]nder Article 58b, UCMJ, Appellant had already forfeited any claim to the pay and allowances due to him during his confinement."[63]

Unlike the appellant in *Winckelmann*, Sgt Captain was prejudiced by this erroneous affirmation because no similar operation of law could have caused an unapproved punitive discharge to take effect. Thus by affirming the unapproved dishonorable discharge, the lower court enforced a punishment that the CA, for whatever reason, did not.

Therefore, this Court should leave undisturbed only so much of the lower court's affirmation as extends to the approved portion of the adjudged sentence.

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convening authority's action does not extend beyond the four corners of the action itself).

[62] 70 M.J. 403, 409 (C.A.A.F. 2011).

[63] *Id.*

Conclusion

Sgt Captain should not be dishonorably discharged. The lower court only affirmed the findings and sentence as approved by the CA. This did not include the adjudged punitive discharge. But even if this Court believes the lower court erroneously affirmed the adjudged dishonorable discharge, it should test for prejudice and find Sgt Captain was exposed to a punishment the CA did not approve.

DAVID A. PETERS
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7088
Fax (202) 685-7426
Bar No. 35812

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on May 7, 2015.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 21(b). This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2010 with 12-point-Courier-New font. It contains 4,972 words.

DAVID A. PETERS
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7088
Fax (202) 685-7426
Bar No. 35812