IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

STATUTES, RULES, BRIEFS, OTHER SOURCES

Issues Presented

I.

WHETHER TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE 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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2007). The Military Judge sentenced Appellant to sixty-six months confinement, reduction to pay grade E-1, total

forfeitures of pay and allowances, a fine of $50,000.00, and a dishonorable discharge. The Convening Authority disapproved the fine and then approved the "remaining part of the adjudged sentence as adjudged, consisting of forfeiture of all pay and allowances, confinement for 5 years, 6 months, 0 days, and reduction to the lowest enlisted grade[.]" (J.A. 2.)

In accordance with a Pretrial Agreement, the Convening Authority suspended confinement in excess of four years for the remainder of Appellant's confinement plus six months and, except for the punitive discharge, ordered the remainder of the sentence executed. He further stated that "[p]ursuant to Article 71(c), the punitive discharge will be executed, after final judgment."

The Record of Trial was docketed with the lower court on April 3, 2014. On appeal, Appellant alleged that Trial Defense Counsel was ineffective for failing to contact potential character witnesses to testify during sentencing and conceding the dishonorable discharge. After receiving affidavits from both Appellant and Trial Defense Counsel, the Navy-Marine Corps Court of Criminal Appeals ordered a hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967).

The *DuBay* hearing took place on December 5-6, 2013. The *DuBay* Military Judge made Findings of Fact and Conclusions of Law in accordance with the court's order. On July 29, 2014, the

Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence as approved.

On April 7, 2015, this Court granted Appellant's Petition and specified an additional issue.

Statement of Facts

A. Appellant entered Mrs. M's room where she was asleep and penetrated her anus with his finger.

On January 16, 2012, in Iwakuni, Japan, Sgt M and his wife, Mrs. M, went out with a group of friends, including Appellant. (J.A. 65.) Over the course of the evening, Mrs. M "became intoxicated to the point that her motor skills were impaired and she vomited several times." (J.A. 65.)

Sgt M and Mrs. M then returned to their on-base residence, alone. (J.A. 65.) Mrs. M went into the marital bedroom to lie down. (J.A. 65.) She had nothing on except her t-shirt. (J.A. 65.)

Shortly after midnight, Appellant arrived at the residence with a six-pack of beer. (J.A. 27, 65.) Sgt M and Appellant consumed beers and played video games in the living room while Mrs. M was asleep in the bedroom. (J.A. 65.) The bedroom was located "down the hallway from the living room." (J.A. 65.) The bathroom was also located in the same hallway. (J.A. 28, 65.)

Later, Appellant went to the hallway bathroom. (J.A. 65.) While in the hallway, Appellant saw Mrs. M in her bedroom, lying on her stomach, wearing only a t-shirt. (J.A. 30.) Appellant entered Mrs. M's bedroom, began rubbing her leg, and inserted a finger of his right hand into her anus. (J.A. 30-32.) He penetrated the outer edge of her anus to his mid-knuckle, and continued to put his finger in her anus for a few minutes. (J.A. 30-32, 65.)

Mrs. M did not consent to Appellant penetrating her anus. (J.A. 32-34, 65.) She was sleeping throughout the assault. (J.A. 32-34, 65.) "Mrs. [M] woke up while, or shortly after, [Appellant] ceased touching her buttocks and anus." (J.A. 65.) She initially "believed the person touching her was her husband," but then she discovered that it was Appellant. (J.A. 65-66.)

B. Appellant pled guilty to abusive sexual contact of Mrs. M.

Appellant pled guilty pursuant to a Pretrial Agreement. (J.A. 22, 37.) During the providence inquiry, Appellant told the Military Judge that he penetrated Mrs. M's anus for self-pleasure, for his own sexual arousal, and without Mrs. M's consent. (J.A. 33.)

C. Trial Defense Counsel interviewed potential character witnesses, but did not call them to testify or offer other character evidence during sentencing because of potential rebuttal evidence including an additional allegation of sexual assault.

1. Trial Defense Counsel met with Appellant on several occasions, asked Appellant for witnesses, interviewed several witnesses, and kept Appellant informed of the separate, unrelated sexual assault investigation.

Prior to meeting Appellant, Trial Defense Counsel interviewed five percipient witnesses. (J.A. 167-68.) He also attempted to interview Mrs. M and Sgt M, but Mrs. M refused to speak with him and Sgt M was unavailable. (J.A. 167.)

Then in August 2012, Trial Defense Counsel met with Appellant for the first time. (J.A. 140, 165.) To prepare for trial, they met with each other between six to eight times for a total of twelve to twenty hours. (J.A. 117, 254.) In addition to their in-person meetings, they had multiple telephone conversations wherein they discussed Appellant's court-martial. (J.A. 254.)

During the meetings, Trial Defense Counsel advised Appellant of the military justice process, Appellant's rights to counsel and forum selection, the role of defense counsel, and Appellant's potential punishments for the charged misconduct. (J.A. 140-41, 145, 165-66.) He also advised Appellant of the effects of sex offender registration. (J.A. 188, 208, 217-18.) In addition, Trial Defense Counsel asked Appellant to provide

names of witnesses, including potential character witnesses to use at trial. (J.A. 165, 168.)

Throughout the preparation phase of trial, Trial Defense Counsel kept Appellant informed of the evidence against him and the ongoing investigation that continued to uncover evidence of additional misconduct, including an allegation of sexual assault. (J.A. 11-16, 120, 123, 145, 166, 186, 235.)

2. Appellant was convinced that he would be convicted and agreed to plead guilty to limit his sentence exposure, specifically confinement.

After interviewing the percipient witnesses and reviewing all the evidence, including the newly discovered sexual assault allegation, Trial Defense Counsel recommended that Appellant submit an offer for a Pretrial Agreement to limit Appellant's sentence exposure. (J.A. 118, 131-32, 145-47, 171, 184, 193.) Trial Defense Counsel, on several occasions, explained the process and implications of entering into a Pretrial Agreement with Appellant. (J.A. 116, 128, 132, 172-73, 187, 197.)

Because Appellant was convinced that he would be found guilty at a contested trial, he agreed to enter into a Pretrial Agreement with a confinement cap of four years. (J.A. 72, 118, 132, 146, 148.) The Agreement allowed Appellant to plead guilty to only one of the five specifications against him——abusive sexual contact——substantially limiting his sentence exposure. (J.A. 71, 187, 190-91, 217-18.) Appellant's main concern was to

avoid confinement, (J.A. 88, 117, 208), but the Convening Authority rejected Appellant's initial offers with lower confinement caps because of the separate, unrelated sexual assault allegation. (J.A. 11-16, 116, 159-60, 161.)

3. Appellant identified three potential character witnesses with whom he worked, but all of the witnesses met Appellant after he was pending charges and none could testify about his combat experience.

After agreeing to enter into a Pretrial Agreement, Trial Defense Counsel again asked Appellant for sentencing witnesses. (J.A. 113, 290.) Trial Defense Counsel and Appellant devoted two or three meetings to sentencing witnesses. (J.A. 149-50.) Appellant provided Trial Defense Counsel with a list of three potential witnesses——Gunnery Sergeant Weatherly, Staff Sergeant Harms, and Staff Sergeant Jerdon. (J.A. 113, 119, 177-78, 251-52, 291.)

Appellant alleged that the character witnesses would testify about his deployments. (J.A. 137-38.) But the witnesses only knew Appellant for a short time immediately preceding his trial, and none could testify about Appellant's combat experience. (J.A. 262-63, 265, 267, 273, 277.) All three were willing to testify on Appellant's behalf and believed Appellant had good military character during the short time they knew him. (J.A. 114, 179-80, 262, 274.)

After receiving the potential witness list, Trial Defense Counsel contacted Gunnery Sergeant Weatherly via telephone and had his Legal Clerk attempt to contact the other two. (J.A. 178-79.) All three potential witnesses testified at the *DuBay* hearing. (J.A. 259, 264, 273.)

Gunnery Sergeant Weatherly testified that he became Appellant's "Staff [Non-Commissioned Officer-in-Charge] for a short period of time" after Appellant was pending court-martial. (J.A. 259, 261-62.) At Trial Defense Counsel's request, Gunnery Sergeant Weatherly sent him a statement outlining Appellant's good military character. (J.A. 260-61.)

Staff Sergeant Harms worked with Appellant for approximately three months after Appellant was pending court-martial. (J.A. 273.) He testified that he met with Trial Defense Counsel, or another officer, at the defense office about potentially being a character witness for Appellant. (J.A. 275, 278.)

Staff Sergeant Jerdon also began working with Appellant after Appellant was pending court-martial. (J.A. 265.) He worked with Appellant for "about four to six months." (J.A. 265.) He was not contacted directly by the defense to be a witness. (J.A. 266.) But somebody told his command that he "needed to be at the [Legal Services Support Section]." (J.A. 269.) He was present in the Defense's waiting room during the

trial and was told by an officer that he was not needed as a witness. (J.A. 268, 270.)

At the *DuBay* hearing, for the first time, Appellant identified a fourth potential witness——First Lieutenant Hernandez Brito. (J.A. 280-81.) Appellant was one of First Lieutenant Hernandez Brito's sergeants the year leading up to Appellant's trial. (J.A. 280-81.) First Lieutenant Hernandez Brito believed that Appellant was an average sergeant among all the high caliber sergeants he had. (J.A. 280.) But like the other witnesses, First Lieutenant Hernandez Brito never deployed with Appellant, began working with Appellant only after he was pending court-martial, and could not testify about Appellant's combat experience. (J.A. 259, 261-62, 265, 273, 280-81.)

Although Trial Defense Counsel specifically asked Appellant for character witnesses that had "known him over a long period of time, those that had served with him," Appellant did not provide any names of potential witnesses who served with him in combat or served with him prior to his pending court-martial. (J.A. 291-92.)

4. Trial Defense Counsel's sentencing strategy was to "talk about only one night . . . a drunken mistake and the mercy that should follow that singular error."

Leading up to trial, Trial Counsel informed Trial Defense Counsel that additional evidence was forthcoming and additional

charges would be preferred. (J.A. 11-16, 180.) Trial Defense Counsel received the new evidence——allegations of groping, assault, and rape. (J.A. 11-16, 180, 216.) At the *DuBay* hearing, Trial Defense Counsel stated:

> It became apparent to me that the government had options at their disposal for character witnesses——for bad character witnesses——evidence to rebut good military character. That was apparent as soon as the anonymous tip came in to [Naval Criminal Investigative Service]. I still don't know who sent the anonymous tip, but I know that [Naval Criminal Investigative Service] began to continue to find individuals who either held a very poor opinion of [Appellant] or had additional allegations to bring.
>
> And as I got these additional reports as the case progressed, the government was now not willing to take my pretrial agreements. They wanted to press forward. They were more confident in their case, and I told [Appellant] that this mounting evidence made it highly problematic for me to present good military character evidence or good conduct evidence on sentencing because it would expose him to the government's scathing rebuttal should they choose to do so.

(J.A. 208-09.)

As a result, Trial Defense Counsel did not call character witnesses during sentencing because it "would open the door to the did you know, have you heard types of questions" and "then obviously open the door to any of [Appellant's] acquaintances that [Naval Criminal Investigative Service] would find who might hold a contrary opinion." (J.A. 211.) His strategy was to "limit [Appellant's] exposure" by not exposing the other alleged misconduct to the court. (J.A. 211.) He wanted to "talk about

only one night, one mistake——a drunken mistake and the mercy that should follow that singular error." (J.A. 211.) He stated:

> [I]t was my understanding at the time that even submitting a statement regarding his combat experience might have been rejoined by statements in like kind that his service had not been meritorious not just in combat but that it might be relevant now since I have made it an issue that he had meritorious combat service. That the rebuttal to that was the remainder of his service had been somewhat unmeritorious.

(J.A. 289.)

Trial Defense Counsel informed Appellant of this strategy and Appellant agreed. (J.A. 183, 211-13.) However, Appellant does not recall being informed of this strategy. (J.A. 120.)

5. Appellant expressed satisfaction with Trial Defense Counsel's representation.

At trial, Appellant stated that he was satisfied with his Counsel's performance. (J.A. 23.) At the *DuBay* hearing, Appellant conceded that from the preparation phase through the initial stages of the trial, he was satisfied with Trial Defense Counsel's representation. (J.A. 143-44.) He felt his Counsel was watching out for him. (J.A. 132.)

D. The Military Judge considered Appellant's three combat deployments and resulting Post-Traumatic Stress Disorder in adjudging an appropriate sentence.

At trial, Trial Defense Counsel detailed Appellant's awards and decorations, including two Good Conduct Medals, the Afghanistan Campaign Medal, the Iraq Campaign Medal, four Sea

Service Deployment Ribbons, and the North Atlantic Treaty Organization International Security Assistance Force Afghanistan Medal. (J.A. 21.) Trial Defense Counsel then informed the Military Judge that Appellant completed three combat zone deployments. (J.A. 21.)

After receiving the factual information to support Appellant's guilty plea, the Military Judge delayed entering findings in order to call Appellant's treating physician as a witness to discuss Appellant's diagnosis of Post-Traumatic Stress Disorder. (J.A. 41.) The doctor testified that he diagnosed Appellant with Post-Traumatic Stress Disorder stemming from his combat experiences as well as other pre-service experiences. (J.A. 43.) The doctor recommended continued psychotherapy. (J.A. 43.) The doctor further testified that Appellant's Post-Traumatic Stress Disorder had no nexus to Appellant's acts of sexual assault. (J.A. 43-44.)

Prior to sentencing, the Military Judge informed Appellant that he "specifically considered with——and given great credit to the accused's combat experience." (J.A. 62, 74.)

E. Trial Defense Counsel conceded the appropriateness of a dishonorable discharge with Appellant's informed consent.

Prior to trial, Trial Defense Counsel believed a dishonorable discharge was almost a forgone conclusion due to the nature of the offense and the identity of the Military Judge.

(J.A. 201.) But Trial Defense Counsel believed that if he made a reasonable appeal to the Military Judge with a reasonable sentence, he could potentially limit the confinement. (J.A. 117, 208, 245-46.)

On three separate occasions prior to trial, Trial Defense Counsel discussed the proposed strategy with Appellant. (J.A. 221-22.) Specifically, Trial Defense Counsel discussed:

> that conceding the likely dishonorable discharge and offering two years of confinement as an adequate sentence would not only gain credibility with the military judge for being a reasonable sentence, but that the military judge is more likely to give [Appellant] less confinement by conceding the other punishments, reduction to E-1 and the dishonorable discharge, and that coincided with [Appellant's] desire at the time, which was to minimize his exposure to confinement.

(J.A. 220.)

Appellant agreed with the strategy——asking for a dishonorable discharge to minimize confinement. (J.A. 218-21.) Appellant felt that the dishonorable discharge was unlikely to make a difference in his life as he would already have to register as a sex offender. (J.A. 218-21.)

To ensure Appellant was fully informed, Trial Defense Counsel discussed similar questions with Appellant that are found in the BCD Striker Appendix of the Trial Guide to ensure that he understood what he was doing. (J.A. 252-53.) Trial Defense Counsel informed Appellant of the differences between a

bad-conduct discharge and a dishonorable discharge. (J.A. 220.) He further discussed with Appellant the consequences of a dishonorable discharge, including the loss of veteran benefits. (J.A. 128, 158.)

At Appellant's presentencing, Appellant acknowledged in his unsworn statement that his Marine Corps career was ending:

> I'll always be grateful to the Marine Corps for allowing me to serve. But now all of that is lost because of my actions and bad judgment. I have watched it all come to an end. My life as a Marine is ending, and I am solely to blame.

(J.A. 57.)

During presentencing argument, Trial Counsel recommended a punishment that included a dishonorable discharge, confinement for five years, reduction to pay grade E-1, and total forfeitures. (J.A. 59.)

Trial Defense Counsel offered argument and suggested a sentence that would include "two years [confinement], a dishonorable discharge, [and] reduction to E-1." (J.A. 62.) He further stated, "Two years is sufficient time to give him reflection and to rehabilitate him for the protection of society." (J.A. 62.)

At the *DuBay* hearing, Appellant alleged that he never spoke with Trial Defense Counsel about conceding the dishonorable discharge. (J.A. 156.)

F. Trial Defense Counsel submitted clemency requesting disapproval of the fine.

After the sentence was announced, Trial Defense Counsel spoke with Appellant about clemency, to include the possibility of asking for a reduction or disapproval of the dishonorable discharge. (J.A. 256.) In response, Appellant stated, "I'm not concerned about that" and the focus then turned to the $50,000.00 fine. (J.A. 227, 256.) Trial Defense Counsel spoke with the Staff Judge Advocate to inquire if the Convening Authority would be open to disapproval of the fine. (J.A. 223.) And then, with Appellant's approval, submitted the clemency asking for disapproval of the fine, which was successful. (J.A. 2, 224-27.)

G. The Navy-Marine Corps Court of Criminal Appeals ordered a *DuBay* Hearing requiring the *DuBay* Military Judge to make findings of fact and conclusions of law.

On Appeal, Appellant submitted an unsworn declaration with his initial brief. (J.A. 108, 110, 151-52.) As a result, the Navy-Marine Corps Court of Criminal Appeals ordered an affidavit from Trial Defense Counsel. (J.A. 313.) Neither affidavit included statements by the prospective character witnesses. Because the affidavits conflicted, the Navy-Marine Corps Court of Criminal Appeals ordered a *DuBay* hearing to resolve the conflicts. (J.A. 313.)

H. The *DuBay* Military Judge made Findings of Fact and Conclusions of Law based on the evidence presented at the *DuBay* hearing.

After hearing the evidence and observing the witnesses, the *DuBay* Military Judge made Findings of Fact and Conclusions of Law. (J.A. 75.)

Addressing the credibility of the witnesses, the *DuBay* Military Judge stated that "[i]n resolving differences between versions of events offered by both [Trial Defense Counsel] and [Appellant], the Court is compelled to believe the version advanced by [Trial Defense Counsel]." (J.A. 88.) He stated:

> Along with his unsworn statement to the Court above, this Court found [Appellant] to be vague, lacking in details and somewhat inconsistent. In rather sharp contrast, [Trial Defense Counsel] was very convincing, willingly conceded areas where his performance could have been improved upon or was lacking. He advanced detailed explanations of his conduct and corrected testimony that, upon reflection, he was even somewhat unsure of.

(J.A. 88.)

The *DuBay* Military Judge found that Trial Defense Counsel "undertook rather exhaustive attempts to interview any and all witnesses that might contribute to the Government's prospective case in chief." (J.A. 87.) Through these efforts, Trial Defense Counsel became "convinced that his client needed to seek the protection of a pre-trial agreement and plead guilty." (J.A. 87.)

He further found that all Appellant's "prospective sentencing witnesses had anemic prospective value" because "[n]one of the witnesses observed the appellant for anything close to a significant period of time and while most would refer to him as a strong leader, none had served with him in a combat zone." (J.A. 87.) "One proposed sentencing witness referred to him as an average sergeant among several outstanding sergeants." (J.A. 87.) The Military Judge concluded that "[h]ad the trial court heard this testimony it is markedly doubtful that it would have made any difference whatsoever in the sentencing dynamic of this case." (J.A. 87.)

Further, the *DuBay* Military Judge concluded that Trial Defense Counsel had a "tactical basis" for not offering documentary evidence of Appellant's combat tours. (J.A. 87-88.) He also concluded that Trial Defense Counsel believed that "in advancing any matter of character, the Government would be empowered to introduce rebuttal character evidence of uncharged misconduct which [he] felt would ensure a very harsh sentence." (J.A. 87-88.)

The *DuBay* Military Judge further found that Trial Defense Counsel "requested a dishonorable discharge . . . as part and parcel of a strategy seeking to convince the trial judge that the defense was approaching sentencing with the utmost reason"

and thereby "minimiz[ing] the amount of confinement to be awarded." (J.A. 88.) He stated:

> The Court is convinced that [Trial Defense Counsel] fully vetted this strategy with his client before trial and that then [Appellant], whose primary goal in sentencing was to minimize confinement, adopted this approach. Moreover, [Trial Defense Counsel] conferred with senior Navy and Marine Corps defense counsel prior to executing his sentencing plan.

(J.A. 88.)

The *DuBay* Military Judge found that Trial Defense Counsel was "anemic" in preparing correspondence regarding matters discussed with Appellant and formalizing Appellant's consent. (J.A. 88.) The "deficiency, stemming from an absence of experience rather than incompetence, has left the Court with the requirement to judge the credibility of both [Trial Defense Counsel] and [Appellant] as referenced above." (J.A. 88.)

As to Appellant's clemency request, the *DuBay* Military Judge found that Trial Defense Counsel "chose not to include a prayer for relief from the dishonorable discharge within his clemency request to the convening authority because he made a tactical decision to seek elimination of the fine." (J.A. 88.)

Based on the evidence at the *DuBay* hearing, the *DuBay* Military Judge found "beyond any doubt, let alone a reasonable one, that there has been no deprivation of effective counsel within the meaning of *Strickland*." (J.A. 86.)

I. The Convening Authority disapproved the fine and approved the remainder of the adjudged sentence as adjudged.

On March 29, 2013, the Convening Authority took action in Appellant's case. (J.A. 1.) The Convening Authority's Action states, in relevant part:

SENTENCE

> Sentence adjudged on 11 January 2013: dishonorable discharge, forfeiture of all pay and allowances, confinement for 5 years, 6 months, 0 days, reduction to the lowest enlisted grade and $50,000 fine.

APPROVAL

> In the general court-martial case of Sergeant Francis L. Captain the following action is taken on the adjudged sentence; the fine of $50,000 is disapproved. The remaining part of the adjudged sentence as adjudged consisting of forfeiture of all pay and allowances, confinement for 5 years, 6 months, 0 days, and reduction to the lowest enlisted grade is approved.

ACTION

> Pursuant to the pretrial agreement execution of confinement in excess of 4 years, 0 months, and 0 days is suspended. The suspension period shall begin from the date of this action and continue for the period the accused's confinement, plus 6 months thereafter. At that time, unless vacated, the suspended part of the confinement will be automatically remitted.

EXECUTION

> In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations and this action, the sentence is ordered executed. Pursuant to Article 7l(c), the punitive discharge will be executed, after final judgment.

MATTERS CONSIDERED

> Prior to taking action in this case, I considered the results of trial, the recommendation of the staff judge advocate, the accused's service record and all matters submitted by the defense and the accused in accordance with R.C.M. 1105 and 1106.

(J.A. 2.)

J. The Pretrial Agreement allowed for the approval of the dishonorable discharge and Appellant's Clemency Request did not ask for its disapproval.

The Pretrial Agreement allowed the Convening Authority to approve the dishonorable discharge. (J.A. 72.) Appellant did not request disapproval of the dishonorable discharge in his clemency submission, electing instead to ask for disapproval of the $50,000.00 fine. (J.A. 9.) The Staff Judge Advocate recommended disapproval of the $50,000.00 fine and provided guidance to the Convening Authority that the punitive discharge could not be executed until the appeal is final. (J.A. 6-7.)

Summary of Argument

I.

As the identified prospective character witnesses provided little value, and with the ample rebuttal evidence available to Trial Counsel, including another allegation of sexual assault, Trial Defense Counsel was not ineffective in not offering that evidence. Moreover, after fully informing Appellant of the consequences of a dishonorable discharge, and only after receiving Appellant's consent, Trial Defense Counsel conceded

the likely dishonorable discharge because his strategy was to gain credibility with the Military Judge to limit Appellant's adjudged confinement.

Based on the evidence at trial and the *DuBay* hearing, Trial Defense Counsel was not deficient under the first prong of *Strickland*, and Appellant was not prejudiced under the second prong of *Strickland*.

II.

The Convening Authority's Action approved the "remaining part of the adjudged sentence as adjudged" which included the dishonorable discharge. When the action is read in its entirety, the Convening Authority's approval of the dishonorable discharge is not ambiguous. Even assuming some ambiguity, the supporting documentation provides clarity. Therefore, the lower court did not err in affirming the dishonorable discharge.

Even if ambiguous, the appropriate remedy is to remand for corrective action under R.C.M. 1107(g).

Argument

I.

TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE IN OFFERING LIMITED EVIDENCE IN EXTENUATION OR MITIGATION AND CONCEDING THE APPROPRIATENESS OF A DISHONORABLE DISCHARGE BECAUSE THE CHARACTER EVIDENCE WAS "ANEMIC" AND WOULD HAVE OPENED APPELLANT UP TO THE SCATHING REBUTTAL BY THE GOVERNMENT, AND CONCEDING THE LIKELY DISHONORABLE DISCHARGE WAS DONE WITH APPELLANT'S EXPLICIT CONSENT AND WITH THE TACTICAL PURPOSE OF LIMITING APPELLANT'S ADJUDGED CONFINEMENT.

Claims of ineffective assistance of counsel are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Factual findings are reviewed under a clearly erroneous standard. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2004).

All service members are guaranteed the right to effective assistance of counsel at their court-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). In order to prevail on a claim of ineffective assistance of counsel, Appellant "must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance." *Strickland*, 466 U.S. at 698.

Under the *Strickland* two-prong test, the burden is on Appellant to prove: (1) that a deficiency in representation existed; and, (2) that this deficiency by counsel resulted in prejudice to Appellant. *Id.* Appellant also has the burden of

establishing the truth of factual matters associated with the claim of ineffective assistance. *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991).

A. Appellant failed to establish that deficiencies exist in Trial Defense Counsel's representation.

Trial defense counsel is presumed to have provided effective assistance throughout the trial. *Strickland*, 466 U.S. at 687; *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). This presumption may only be rebutted when there exists a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms. *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). The evidence in the record must establish that counsel made errors that were so serious that they were no longer functioning as "counsel" guaranteed to the accused by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

1. No deficiency exists with the limited evidence in extenuation and mitigation.

a. The identified witnesses had "anemic prospective value" because they only knew Appellant for a short period of time, and only after he was pending court-martial; Appellant failed to identify a witness or evidence to emphasize his combat experience.

"Trial defense counsel may be ineffective at the sentencing phase when counsel either fails to investigate adequately the possibility of evidence that would be of value to the accused in

presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (internal quotations omitted).

Trial Defense Counsel here was active in seeking potential witnesses, both for the merits and sentencing.[1] (J.A. 167-68.) As the focus shifted to sentencing, Trial Defense Counsel requested that Appellant provide him with names of potential sentencing witnesses that had "known him over a long period of time." (J.A. 149-50, 291-92.) But Appellant failed to do that.

Trial Defense Counsel, nevertheless, himself or through his Legal Clerk, attempted to contact all three potential character witnesses provided by Appellant——Gunnery Sergeant Weatherly, Staff Sergeant Harms, and Staff Sergeant Jerdon. (J.A. 113, 119, 177-79, 251-52, 291.) He spoke directly with two and the third was told by his command that he "needed to be at the [Legal Services Support Section]" and was available to testify, but was told by an officer that he was not needed. (J.A. 178-79, 259, 268-70, 275, 278.)

Contrary to Appellant's assertions, all three prospective witnesses had not served with him in combat, began working with Appellant only after he was pending court-martial, and had known

[1] Trial Defense Counsel traveled to Iwakuni to interview several percipient witnesses. (J.A. 167.)

him for a short period of time immediately preceding his court-martial. (J.A. 137-38, 178-79, 259, 26-63, 265, 267, 273, 275, 277-78.) Although the witnesses had positive things to say about Appellant during the short time working with him, they met and worked with Appellant only after he was pending legal action for sexually assaulting Mrs. M. (J.A. 259, 261-62, 265, 273.)

Appellant failed to provide Trial Defense Counsel with a single witness who could testify about Appellant's combat experience or who knew him prior to his pending court-martial. (J.A. 259, 261-62, 265, 273, 291-92.) Even on appeal, Appellant has failed to provide the name of a single witness who knew him before he sexually assaulted Mrs. M.[2] And Appellant further failed to provide or identify any evidence of his combat experience outside of what was admitted at his trial. (J.A. 291-92.)

Appellant's sole argument is based on hypotheticals—— hypothetical witnesses and hypothetical evidence——that allegedly show that he was a good Marine for the first six years of his time as a Marine, prior to his misconduct. (J.A. 64.)

[2] At the *DuBay* hearing, Appellant identified a fourth witness—— First Lieutenant Hernandez Brito. (J.A. 280-81.) But, like the other three witnesses, First Lieutenant Hernandez Brito began working with Appellant after he was pending court-martial. (J.A. 280-81.) Moreover, he would have testified that Appellant was an average sergeant among several high caliber sergeants. (J.A. 280.)

The *DuBay* Military Judge's characterization of the identified witnesses was correct——they had "anemic prospective value"——because they would have testified that Appellant, knowing he was facing a court-martial, did a great job in garrison for a short period of time. (J.A. 87.)

b. Based on the "anemic" value of the character witnesses, and in light of the additional sexual assault allegations, Trial Defense Counsel decided, with Appellant's consent, not to call the witnesses.

Throughout the preparation phase of trial, Trial Defense counsel kept Appellant informed as to the ongoing Naval Criminal Investigative Service investigation, including newly discovered evidence of an additional sexual assault. (J.A. 11-16, 120, 123, 145, 166, 180, 186, 235.) He diligently spent many hours investigating the allegations, meeting with Appellant, and preparing for the Article 32 hearing and trial. (J.A. 117, 158, 167, 254.)

As Naval Criminal Investigative Service continued to discover additional evidence of unrelated misconduct, Trial Defense Counsel properly shifted his strategy to limiting exposure through a Pretrial Agreement, to which Appellant agreed. (J.A. 208-11.)

He further decided to avoid opening the door to damaging rebuttal evidence through: (1) bad character witnesses; and, (2) "did you know, have you heard types of questions" that would

inform the Military Judge of the additional allegations of sexual assault. (J.A. 208-11, 289); see R.C.M. 1001(d) ("prosecution may rebut matters presented by the defense"); R.C.M. 1001(b)(5)(E) ("on cross-examination, inquiry is permitted into relevant and specific instances of conduct"). His strategy became "one night, one mistake——a drunken mistake and the mercy that should follow that singular error." (J.A. 211.)

As the prospective character witnesses provided little value, and with the increased risk of other misconduct and bad military character evidence available to Trial Counsel, Trial Defense Counsel made the tactical decision not to call the witnesses, and informed the Appellant of this tactical decision. (J.A. 183, 209, 211.)

Contrary to Appellant's assertions, Trial Defense Counsel knew of at least one bad character witness——the name of another of Appellant's sexual assault victims found through Naval Criminal Investigative Service's investigation——and understood that any bad character witness could rebut any positives coming from the other military character witnesses. (J.A. 11, 208-09, 289.) Trial Counsel's ability to combat any positive character witnesses became "apparent" to Trial Defense Counsel "as soon as the anonymous tip came in to [Naval Criminal Investigative Service] . . . [and Naval Criminal Investigative Service] began

to continue to find individuals who either held a very poor opinion of [Appellant] or had additional allegations to bring." (J.A. 209.) In fact, the anonymous tip stated that it "was common knowledge at [their] shop" that Appellant "forc[ed] sex on girls that [were] too drunk to do anything about it." (J.A. 13.)

Trial Defense Counsel also properly understood that it would destroy his sentencing theory——that this was one mistake, a drunken mistake——if the Military Judge heard, on cross-examination, of allegations that Appellant had previously sexually assaulted another woman or many women. (J.A. 211.)

Trial Defense Counsel's decision to avoid good character evidence was sound, reasonable, and not deficient under these circumstances. As the *DuBay* Military Judge correctly concluded, "beyond any doubt, let alone a reasonable one" there has been "no deprivation of effective counsel within the meaning of *Strickland*." (J.A. 86.) As such, Appellant fails to establish the first prong of the *Strickland* test.

2. Trial Defense Counsel was not deficient in his representation because he made a tactical decision to concede the likely dishonorable discharge, with Appellant's explicit consent and understanding, in an attempt to minimize Appellant's confinement, per Appellant's stated wishes.

"[W]hen 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." *United States v. Dresen*, 40 M.J. 462, 465 (C.M.A. 1994) (citations omitted).

This requirement allows the appellate courts to know that the appellant desired that outcome. If "defense counsel asks for a punitive discharge contrary to the client's desires . . . there is ineffective assistance of counsel." *United States v. Lyons*, 36 M.J. 425, 427 (C.M.A. 1993) (citing *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983)). Also, if "an accused asks the sentencing authority to be allowed to remain on active duty, defense counsel errs by conceding the propriety of a punitive discharge." *United States v. Bolkan*, 55 M.J. 425 (C.A.A.F. 2001); *Volmar*, 15 M.J. at 341.

Here, the Record——the original Record and the expanded Record from the *DuBay* hearing——properly informs this Court that Appellant agreed to concede to the appropriateness of the dishonorable discharge. First, in Appellant's unsworn statement, he concedes the likely discharge, stating:

> I'll always be grateful to the Marine Corps for allowing me to serve. But now all of that is lost because of my actions and bad judgment. I have watched it all come to an end. My life as a Marine is ending, and I am solely to blame.

(J.A. 57.) Not only did he not ask to be retained or to continue as a Marine, he affirmatively stated that his "life as a Marine is ending." (J.A. 57.)

Second, as Appellant's primary focus was to limit confinement, Trial Defense Counsel proposed that Appellant request a dishonorable discharge as a strategy to "minimize the amount of confinement to be awarded." (J.A. 88, 117, 221-22.) Appellant stated that he was not worried about the dishonorable discharge because he would have to register as a sex offender anyways. (J.A. 218.) The Record establishes, and the *DuBay* Military Judge found, that Appellant was fully informed of the consequences of requesting the dishonorable discharge, and explicitly asked that Trial Defense Counsel do so on his behalf. (J.A. 88, 128, 158, 220-22.) The *DuBay* Military Judge based this conclusion on the reliability of Trial Defense Counsel's testimony as opposed to the vague and inconsistent statements made by Appellant. (J.A. 88.)

As to strategy, Trial Defense Counsel knew that a dishonorable discharge "was almost a forgone conclusion" given the serious nature of the misconduct and the sentencing habits of the Military Judge. (J.A. 201.) The *DuBay* Military Judge properly concluded that Trial Defense Counsel "requested a dishonorable discharge . . . as part and parcel of a strategy seeking to convince the trial judge that the defense was

approaching sentencing with the utmost reason" and thereby "minimiz[ing] the amount of confinement to be awarded." (J.A. 88); *see Bolkan*, 55 M.J. at 428 (in cases where no alternative of retention exists, tactical concession by trial defense counsel to avoid confinement is good courtroom advocacy).

Although Trial Defense Counsel did not memorialize Appellant's agreement, as Appellant was fully informed and agreed with the strategy, Trial Defense Counsel's performance was not "so serious" that he was no longer acting as "counsel." *See Strickland*, 466 U.S. at 687. Nor does the lack of memorialization run afoul of *Pineda*, *Lyons*, and *Dresen* because: (1) the *DuBay* hearing did provide an adequate record of Appellant's consent; and, (2) Appellant himself conceded the discharge in his unsworn statement and never asked to be retained.[3]

If any error exists here, it is with the Military Judge for not inquiring further. *See Bolkan*, 55 M.J. at 428 (court assumed the military judge erred by not inquiring into whether

[3] Appellant asks this Court to create a per se rule that conceding a discharge without a memorialization of Appellant's consent violates *Strickland* regardless of evidence in the Record to the contrary. (Appellant's Brief at 11.) But that is a distortion of this Court's reasoning in *Pineda*, *Dresen*, and *Lyons*. *See Bolkan*, 55 M.J. at 428 (finding that *Pineda*, *Dresen*, and *Lyons* stand for the proposition that "when an accused *asks* the sentencing authority to be allowed *to remain on active duty*, defense counsel errs by conceding the propriety of a punitive discharge") (emphasis added).

defense counsel's concession of a discharge reflected appellant's desire). However, even if error, the *DuBay* hearing established that Appellant did agree to avoid confinement and therefore it was harmless——"beyond any doubt, let alone a reasonable one" there has been "no deprivation of effective counsel within the meaning of *Strickland*." (J.A. 86.) Therefore, Appellant fails to establish the first prong of the *Strickland* test.

B. No prejudice exists here because Appellant would have received a dishonorable discharge regardless, and Appellant fails to demonstrate a reasonable probability that, but for the alleged errors, there would have been a different result.

This Court "is not required to apply [the *Strickland*] tests in any particular order." *United States v. Gutierrez*, 66 M.J. 329 (C.A.A.F. 2008). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

Under the second prong of *Strickland*, the errors in counsel's performance must be so prejudicial as to indicate a denial of a fair trial or a trial whose result is unreliable. *Davis*, 60 M.J. at 473 (citing *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001)). Appellant must demonstrate "a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick*, 59

M.J. 383, 386-87 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 694); *see Gutierrez*, 66 M.J. at 331-32 (no reasonable probability because it was "just as likely that the members would have convicted as it is that they would have acquitted").

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009) (citing *Strickland*, 466 U.S. at 694). Moreover, second-guessing and hindsight are not sufficient to overcome this presumption. *Davis*, 60 M.J. at 473.

1. No prejudice exists from Trial Defense Counsel's decision not to call the three identified character witnesses; Appellant has failed to identify any evidence that, if presented, had a reasonable probability of changing the result.

Even assuming an unreasonable deficiency, Appellant here pled guilty to an extremely serious crime of digitally penetrating the anus of a friend's spouse while she lay unconscious, vulnerable, and dressed only in a t-shirt. (R. 31-33; Pros. Ex. 1 at 2.) He penetrated the outer edge of her anus to his mid-knuckle, which lasted for a few minutes. (J.A. 30-32, 65.) The seriousness of the crime warranted a serious sentence.

Moreover, the proffered testimony would have had little effect because the witnesses would have testified that Appellant, knowing he was facing a court-martial, did a great job for a short period of time. *See supra* at 23-25.

If the witnesses had testified, the Military Judge would have been informed of other allegations of sexual assault against Appellant through cross-examination. And the Record does not reflect that the Military Judge was aware of Appellant's other misconduct. The Defense's theme——that this was an isolated incident of an otherwise good Marine——would have been destroyed. (J.A. 211.)

Further, Trial Counsel could have presented bad character witnesses in rebuttal. (J.A. 11-16.) The Naval Criminal Investigative Service report and anonymous tip identified many possible rebuttal witnesses available to Trial Counsel. (J.A. 11-16.)

Moreover, the Military Judge did have evidence of Appellant's deployments and combat experience. (J.A. 21, 57, 74.) The Military Judge stated that he "specifically considered . . . and g[ave] great credit to [Appellant]'s combat experience" during his deliberations on sentencing. (J.A. 78.)

As stated *supra* at 24, Appellant's sole argument is based on hypotheticals——hypothetical witnesses and hypothetical evidence——that allegedly show that he was a good Marine prior to his misconduct. But Appellant has had several opportunities to identify the alleged evidence——at trial, the *DuBay* hearing, his initial appeal, and now——and has failed. Significantly, Appellant's initial enlistment began in 2005, yet he is unable

to identify a single witness from the first six years of service or who knew him while he was deployed. (J.A. 64.) It is more likely that Appellant had bad military character prior to and including the time he sexually assaulted Mrs. M. based on the anonymous tip[4] and the statement from his other alleged sexual assault victim. (J.A. 11-16.) Therefore, Appellant is stuck with arguing hypotheticals which is insufficient to meet his burden under *Strickland*.

Based on the seriousness of Appellant's actions and the "anemic" value of the prospective witnesses, the *DuBay* Military Judge properly concluded that "it is markedly doubtful that it would have made any difference whatsoever in the sentencing dynamic of this case." (J.A. 87.) As Appellant fails to demonstrate a reasonable probability that, but for counsel's error, there would have been a different result, he fails the second prong of the *Strickland* test.

[4] The unidentified witness stated that Appellant told him "about forcing sex on girls that where [sic] too drunk to do anything about it" and this "was common knowledge at [their] shop." (J.A. 13.) The witness identified several names of alleged victims. (J.A. 13.)

2. There was no prejudice in conceding the appropriateness of the dishonorable discharge in light of the seriousness of Appellant's misconduct and adjudged sentence because Appellant has failed to establish that, but for the concession, his sentence would have been different.

In *United States v. Pineda*, 54 M.J. 298 (C.A.A.F. 2001), the trial defense counsel conceded the appropriateness of a punitive discharge for the appellant's misconduct——several specifications of forgery, fraud, false official statements, and unauthorized absence. *Id*. at 299-300. In finding no prejudice under *Strickland*, the court looked to: (1) the seriousness of the appellant's crimes; (2) the appellant's "implicit[] acknowledge[ment] of the reasonable certainty of a punitive discharge"; and, (3) the factfinder, as the military judge, who is presumed to have disregarded the improper argument before him. *Id*. at 301; *see Quick*, 59 M.J. at 387 (in finding no prejudice under *Strickland*, court emphasized that "this was a trial by military judge alone" and judge was not "perceptibly swayed by defense counsel's concessions").

Similarly here, Appellant's misconduct——digitally penetrating the anus of an unconscious and vulnerable woman—— warranted a dishonorable discharge even if Trial Defense Counsel had not conceded its appropriateness. *See supra* at 33.

Appellant also implicitly acknowledged the reasonable certainty of the punitive discharge in his unsworn statement.

(J.A. 57.) After detailing his career, he stated: "all of that is lost because of my actions"; "I have watched it all come to an end"; and "[m]y life as a Marine is ending." (J.A. 57.)

Moreover, the Military Judge, who is presumed to have disregarded any improper argument before him, sentenced Appellant to five and a half years confinement, reduction to E-1, total forfeitures, a $50,000.00 fine, and a dishonorable discharge. (R. 63.) The adjudged confinement and fine were more than the United States asked for in its sentencing argument. (J.A. 59.) The heavy adjudged confinement and the massive fine establish that the Military Judge viewed Appellant's crime for the seriousness and horrendous nature it deserved. It is highly unlikely that the Military Judge would have adjudged anything other than a dishonorable discharge.

Under these circumstances, Appellant fails to show a reasonable probability that, but for counsel's concession, there would have been a different result.

C. The lower court's *DuBay* Order was proper——nothing in *Ginn* prohibits a court of criminal appeals from ordering a *DuBay* hearing to resolve conflicts in cases involving ineffective assistance of counsel.

"A Court of Criminal Appeals has discretion . . . to determine how additional evidence, when required, will be obtained, *e.g.*, by affidavits, interrogatories, or a *factfinding*

hearing." *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995) (emphasis added).

Appellant mistakenly asserts that *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), provides guidelines as to when a lower court is not allowed to order a *DuBay* hearing. (Appellant's Brief at 14-15.) But in *Ginn*, the issue was whether the lower court erred by *not* ordering a *DuBay* hearing and instead found "facts on the basis of the record of trial and post-trial affidavits." *Id*. at 238. Nothing, however, prevents the lower court from ordering a *DuBay* hearing to resolve conflicts in cases involving claims of ineffective assistance of counsel, like the case here.[5] Therefore, the lower court did not abuse its discretion.

II.

WHEN READ IN ITS ENTIRETY, THE CONVENING AUTHORITY'S ACTION APPROVED THE DISHONORABLE DISCHARGE. IF AMBIGUOUS, THE PROPER REMEDY IS TO REMAND FOR CORRECTIVE ACTION UNDER R.C.M. 1107(G).

"The Convening Authority 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 . . . ." R.C.M. 1107(d)(1). "The approval or disapproval shall

[5] The *DuBay* hearing provided the lower court with, *inter alia*, testimony from the prospective witnesses, more details regarding Trial Defense Counsel's reasoning behind the decisions he made, and Appellant's understanding and agreement to concede the dishonorable discharge.

be explicitly stated." *Id.* Further, "the action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved." R.C.M. 1107(f)(4)(A).

"[W]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect." *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007). "An ambiguous action is one that is capable of being understood in two or more possible senses." *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981) (internal quotations omitted).

A. <u>After disapproving the fine, the Convening Authority's Action approved the remaining part of the adjudged sentence; the Navy-Marine Corps Court of Criminal Appeals did not err in affirming</u>.

Based on a plain reading of the entire Convening Authority's Action, the Convening Authority here intended to and did approve the dishonorable discharge.

After stating that he is aware of Appellant's entire adjudged sentence, which included the dishonorable discharge, the Convening Authority states:

> [T]he following action is taken on the adjudged sentence; the fine of $50,000 is disapproved. The remaining part of the adjudged sentence as adjudged consisting of forfeiture of all pay and allowances, confinement for 5 years, 6 months, 0 days, and reduction to the lowest enlisted grade is approved.

(J.A. 2.) After referencing the adjudged sentence in the first sentence, the Convening Authority then explicitly disapproves the fine. (J.A. 2.) No other portion of the adjudged sentence was disapproved. Therefore, based on the first sentence, all that is plainly known is that the fine is disapproved.

The next sentence then states that the "remaining part of the adjudged sentence as adjudged consisting of forfeiture of all pay and allowances, confinement for 5 years, 6 months, 0 days, and reduction to the lowest enlisted grade is approved." (J.A. 2.) If you marry up the verb with the subject of that sentence, the meaning becomes clearer: "[T]he remaining part of the adjudged sentence as adjudged . . . is approved." (J.A. 2.) The only potential ambiguity comes from the words, "consisting of." (J.A. 2.) But when those words are read within the entire context of the Convening Authority's Action, including the "execution" section, no ambiguity exists. (J.A. 2.)

The Convening Authority's Action states: "Pursuant to Article 7l(c), the punitive discharge will be executed, after final judgment." (J.A. 2.) This sentence establishes the Convening Authority's belief that the dishonorable discharge was approved with the ability to execute after appellate review.

Reading the "Approval," "Action," and "Execution" paragraphs together and within the proper context as provided above, this Court should be convinced that the Convening

Authority approved "the remaining part of the adjudged sentence as adjudged," which included the dishonorable discharge. (J.A. 2.)

B. Even assuming some ambiguity, this Court should consider the surrounding documentation——Pretrial Agreement, Clemency Request, and the Staff Judge Advocate Recommendation (SJAR)——to find that the Convening Authority approved the discharge.

In *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006), the convening authority's action approved the sentence, "except for that part of the sentence extending to a bad conduct discharge." *Id*. at 26. In finding that the convening authority's action was not clear, Judges Gierke and Effron looked to "the surrounding documentation"——the Pretrial Agreement, the Staff Judge Advocate Recommendation, and the clemency request that did not ask for disapproval of the punitive discharge.[6] *Id*.

Although this case differs from *Politte* in that the language on its face here is ambiguous, this Court nonetheless should look to the Pretrial Agreement, Appellant's Clemency Request, and the Staff Judge Advocate Recommendation (SJAR) for clarification, all of which provide ample support for the Convening Authority's intent to approve the dishonorable

[6] The dissent in *Politte* took issue with the majority opinion because "the majority f[ound] ambiguity by going beyond the four corners of th[e] otherwise unambiguous action." *Politte*, 63 at 28 (Erdmann, J., dissenting). But the surrounding documentation here is being used to clarify an ambiguity, not create one.

discharge. Unlike *Politte*, these documents are being used to clarify the ambiguity, not create one.

The Pretrial Agreement allowed the Convening Authority to approve the dishonorable discharge. (J.A. 72.) The Staff Judge Advocate only recommended disapproval of the fine. (J.A. 2, 7.) And Appellant did not request disapproval of the dishonorable discharge, electing instead to ask for disapproval of the fine. (J.A. 9.) The supporting documentation, therefore, clarifies the Convening Authority's approval of the dishonorable discharge.

C. Assuming the approval of the dishonorable discharge is incomplete or ambiguous, the appropriate remedy is to remand for corrective action under R.C.M. 1107(g).

When the convening authority's action is ambiguous "the proper course of action is to remand for corrective action under R.C.M. 1107(g)." *United States v. Grosser*, 64 M.J. 93, 96 (C.A.A.F. 2006).

In *United States v. Scott,* the Court held that a convening authority's action was ambiguous when it read:

> Only so much of the sentence as provides for forfeiture of all pay and allowances until 25 October 1996, and then forfeiture of $538.00 pay per month until the discharge is executed, confinement for nine (9) months, and reduction to Private (E-1), is approved, and except for the part of the sentence extending to a bad conduct discharge, will be executed.

49 M.J. 160, 160-61 (C.A.A.F. 1998).

In *United States v. Shumate,* the Court concluded that a convening authority's action was ambiguous when it read:

> [O]nly so much of the sentence as provides for reduction to pay grade E-1 and confinement for a period of eight years is approved, and ordered executed; however, the execution of that part of the sentence extending to forfeiture of all pay and allowances and confinement in excess of time served is suspended for a period of 12 months, at which time, unless suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.

No. 08-0737/MC, 2008 CAAF LEXIS 1288, *1-2 (C.A.A.F. Oct. 16, 2008). This Court found that the action "was ambiguous as to whether or not adjudged forfeitures were approved." *Id*. at *2.

In *Wilson*, the appellant was sentenced to a dishonorable discharge. The *Wilson* Court held that the convening authority's action was not ambiguous because it used clear language——"[t]he remainder of the sentence, with the exception of the dishonorable discharge, is approved and will be executed." *Wilson*, 65 M.J. at 140-41. The *Wilson* Court found that the "dishonorable discharge was excepted from approval in clear and unambiguous language." *Id*. at 141.

Similar to *Scott* and *Shumate*, and contrary to *Wilson*, the Convening Authority here did not use language that disapproved or could potentially be read to disapprove the dishonorable discharge. In fact, the Convening Authority's Action could be read to approve the dishonorable discharge. *See supra* at 38-40.

But assuming the language is ambiguous, like in *Scott* and *Shumate*, the proper remedy "is to remand for corrective action under R.C.M. 1107(g)." *Grosser*, 64 M.J. at 96.

D. The Navy-Marine Corps Court of Criminal Appeals found that the Convening Authority, after disapproving the fine, "approved the remaining sentence."

Contrary to Appellant's assertions, in its opinion, the Navy-Marine Corps Court of Criminal Appeals stated:

> The military judge sentenced the appellant to confinement for 5 years and 6 months, reduction to pay grade E-1, forfeiture of all pay and allowances, a $50,000.00 fine, and a dishonorable discharge. The convening authority disapproved the fine and *approved the remaining sentence*.

(J.A. 312-13) (emphasis added).

Having properly found that the Convening Authority approved the remaining sentence, which included the dishonorable discharge, the lower court stated, "We affirm the findings and sentence as approved by the convening authority." (J.A. 318.)

Appellant's argument ignores the majority of the lower court's opinion and misconstrues the opinion's final sentence. But the lower court's opinion is clear——it found that the Convening Authority approved the dishonorable discharge and then affirmed the sentence "as approved by the convening authority." Moreover, without the approval of the dishonorable discharge, Appellant's third assignment of error would have been moot.

Therefore, when the lower court affirmed the sentence as approved, it included the dishonorable discharge.

Conclusion

Wherefore, the United States respectfully requests that this Court affirm the decision of the lower court.

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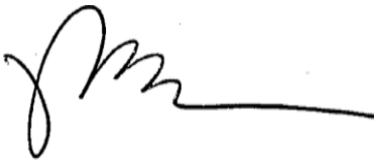

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