IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20140372
Private First Class (E-3) [1] **CHRISTOPHER CHRISTENSEN** Appellant	)	USCA Dkt. No. 17-0604/AR

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

CODY CHEEK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
703-693-0724
USCAAF Bar Number 36711

CHRISTOPHER COLEMAN
Major, Judge Advocate
Appellate Defense Counsel
USCAAF Bar Number 36567

BRENDAN CRONIN
Major, Judge Advocate
Defense Appellate Division
USCAAF Bar Number 36885

MARY J. BRADLEY
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF Bar Number 30649

[1] While this was appellant's rank when he left the Army, he does not concede jurisdiction existed at trial. Instead, for the reasons outlined below, Christopher Christensen was not subject to court-martial jurisdiction.

Issue Presented

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

Supreme Court

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Uniform Code of Military Justice

Other Authorities

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WHETHER APPELLANT WAS SUBJECT TO COURT-MARTIAL JURISDICTION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [UCMJ]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

[1] While this was appellant's rank when he left the Army, he does not concede jurisdiction existed at trial. Instead, for the reasons outlined below, Christopher Christensen was not subject to court-martial jurisdiction.

Statement of the Case

On January 30, March 10 and 19, April 1, 11, and 29, and May 7–9, 2014, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ. (JA 162). The military judge sentenced appellant to reduction to E-1, total forfeitures, eight years confinement, and a dishonorable discharge. (JA 165).

The convening authority approved the sentence as adjudged, crediting appellant with 90 days confinement credit in accordance with the military judge's rulings related to Article 13, UCMJ. (JA 13). The military judge granted this credit, in part, because he found appellant's unit acted dilatorily in bringing him back to military control. (JA 163–65).

On September 15, 2016, the Army Court ordered a *DuBay* hearing to help resolve the issue of personal jurisdiction. (JA 502–04). On November 30, 2016, both parties presented evidence and argument at the *DuBay* hearing, and the military judge issued his ruling on December 15, 2016. (JA 734–41). Following this ruling, both parties filed additional pleadings to the Army Court.

On June 15, 2017, the Army Court affirmed the findings of guilty and the sentence. (JA 1–9). Appellant filed a timely request for reconsideration and suggestion for en banc reconsideration. On July 28, 2017, the Army Court granted appellant's request for reconsideration but did not adopt the suggestion for en banc

reconsideration. (JA 10). On July 31, 2017, the Army Court issued its decision on reconsideration, and again affirmed the findings of guilty and the sentence. (JA 11–12).

Appellant was notified of the Army Court's decision, and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on September 25, 2017. This Court granted appellant's petition for review on January 16, 2018.

Issue Presented

WHETHER APPELLANT WAS SUBJECT TO COURT-MARTIAL JURISDICTION.

Statement of Facts

During his time in the Army, appellant had a history of being drunk on duty. (JA 568). On March 6, 2013, appellant's unit initiated a separation action for his ASAP failure,[2] and he signed his election of rights after meeting with the installation's Senior Defense Counsel. (JA 527–31). On March 8, 2013, appellant reported to the Fort Stewart CID office, where a detective from Liberty County took him into civilian custody and confinement for suspicion of sexual assault. (JA 425, 441, 532).

[2] This separation action was pursuant to Chapter 9, Alcohol or Other Drug Abuse Rehabilitation Failure, Army Regulation (AR) 635-200, Personnel Separations, Active Duty Enlisted Administrative Separations, (June 6, 2005) (Rapid Action Revision (RAR), September 6, 2011) (hereinafter AR 635-200) (JA 794–96).

To help facilitate appellant's separation action while he was in confinement, 1LT Ramos, appellant's company commander, detailed SGT Davenport to clear appellant from the unit and installation. (JA 70–71, 161, 536). On March 27, 2013, LTC Townsend, the separation authority, approved appellant's separation for ASAP failure. (JA 537–38). The unit sent appellant's separation action to the Fort Stewart Transition Center on April 3, 2013. (JA 561).

During appellant's confinement, the unit sent noncommissioned officers to visit him each week. (JA 426–28). During these visits, appellant would sign his out-processing paperwork. (JA 426–28). In early April 2013, SFC Stone visited appellant with the "last bit of paperwork." (JA 428). He told appellant, "[H]ey, you are out of the Army now. Good Luck." (JA 428). In order to complete his out-processing, appellant also signed over his military identification card to SGT Davenport "because it's got to get turned in."[3] (JA 427).

Appellant's discharge orders issued on April 10, 2013. (JA 539). These orders stated, "Date of discharge unless changed or rescinded: 17 April 2013." (JA 539). On April 17, 2013, the Fort Stewart Defense Military Pay Office (DMPO)

[3] The "Final pay" paragraph of the Army's separation regulation at the time of appellant's separation states, "Immediately following final payment, the individual will surrender Identification Card (DD Form 2A) or sworn statement of loss to the finance and accounting officer or class B agent officer." Army Regulation 635-10, Personnel Separations, Processing Personnel for Separation, para. 3-13 (June 10, 1987) (RAR, September 15, 2011) (JA 791–93).

stamped appellant's installation clearing papers. (JA 112, 545). That same day, appellant received his 3d Infantry Division "Rocky Bulldog" stamp, indicating completion of the clearing process. (JA 112, 544, 548). The Fort Stewart Transition Center finalized appellant's DD Form 214 (DD 214) on April 18, 2013. (JA 557). The Transition Center mailed appellant's DD 214 and separation paperwork to his father, David Christensen, on April 23, 2013. (JA 562).

No member of appellant's former unit contacted or visited him after his DD 214 was finalized. (JA 428, 438–39). Instead, appellant received multiple letters from the Department of Veterans Affairs (VA). One letter from October 2013 discussed VA services and referenced a previous letter sent "[a]bout six months ago" describing "VA benefits and services for which you may be eligible." (JA 596). In November 2013, appellant received another letter discussing his eligibility for VGLI, the equivalent of SGLI for veterans. (JA 597). The VA also sent appellant "pamphlets for like anxiety classes and things like that." (JA 437).

After appellant completed the clearing process, David Christensen traveled to Fort Stewart to "pick up all of his [son's] belongings." (JA 592). David Christensen met with SGT Davenport, who told him about "all kinds of shops" that would buy his son's uniforms and "probably give you a good price." (JA 592–93). Appellant gave his father permission to dispose of his uniforms because he "wasn't a Soldier" and "had no need for them." (JA 595). During his visit, David

Christensen also spoke to 1LT Ramos, who "was pretty emphatic" the Army would not take jurisdiction in appellant's case, as "[the] Army was done with him." (JA 593–94).

In May 2013, Liberty County released appellant from confinement. (JA 428–29). As part of his bond agreement, appellant went to Bridges of Hope, a residential alcohol rehabilitation program. (JA 429). As appellant "didn't think [he] was in the Army," his family started paying for his rehabilitation and dental care. (JA 429–30). At one point, appellant's family paid for his dental work for a "really bad cavity" that required him "to go get a cap." (JA 430).

During his time at Bridges of Hope, no member of appellant's former unit ever contacted or visited him, but an Army Reserve commander visited another facility resident. (JA 428–30, 438–39). Ultimately, no member of appellant's former unit contacted or visited him from early April 2013 to December 11, 2013. (JA 428, 438–39).

Then, on December 12, 2013, two armed military police officers arrived at Bridges of Hope. (JA 430–31). Appellant asked if he had to go with them, and one officer told him he did not. (JA 431). After making a phone call, the second officer told appellant, "You have to come with us." (JA 431). The officers shackled appellant and drove him back to Fort Stewart. (JA 431–32). The officers did not provide appellant with any orders, charge sheet, or a uniform. (JA 431-32).

Instead, appellant arrived at Fort Stewart wearing "[a] shirt, shorts, and a t-shirt." (JA 432).

After the police drove appellant to Fort Stewart, the unit did not provide him with an identification card, uniform, or assigned quarters. (JA 433). Appellant slept in "the CQ room" and borrowed another soldier's field uniform and boots. (JA 433). This field uniform was dirty, "full of cigarette butts," and did not have a nametape; the boots were "the wrong size" and "didn't have soles." (JA 433–34).

When appellant tried to eat at the dining facility, the noncommissioned officer in charge of providing a meal card said appellant "wasn't in the system." (JA 434–35). The unit then provided appellant with a memorandum to take to the dining facility, but a dining facility employee told him, "I can't let you in with that." (JA 434–35). After being rebuffed again, appellant "went back to the company," and a sergeant major had to call the dining facility before appellant could eat. (JA 434–35).

Similar obstacles arose when appellant tried to get a new identification card. When he tried to explain the situation, the clerk correctly told appellant, "'[Y]ou are not in the system. I can't just make you an ID card. That's just not how it works." (JA 436). This situation again required the intervention of a senior noncommissioned officer. (JA 436). When appellant tried to re-enroll in ASAP, they were similarly confused. (JA 443). In addition to being "confused about

whether or not [appellant] could be in ASAP because [he] had a Chapter 9," they also asked him, "What are you even doing on post?" (JA 443).

Appellant suffered additional difficulties with finance. After being forcibly returned to Fort Stewart by military police, appellant was not paid in December 2013. (JA 436). When he finally was paid in January 2014, the Army deducted the debt he owed due to his time in civilian confinement, forcing him to use a credit card for expenses. (JA 436–37). This debt had actually existed at the time of discharge: appellant's April 2013 LES reflected a "BASE PAY" of "-1370.34," "ADVANCE DEBT" of "1148.51," "TOTAL INDEBTEDNESS $1148.51(113)," and "INDEBTEDNESS DUE US $1148.51 (091)." (JA 230–31).

During the eight-month timeframe between appellant's discharge and forcible return to Fort Stewart, numerous personnel made decisions about his status without ever telling him. As outlined below, many of these decisions originated from the Chief of Justice's belief that a soldier remains indefinitely under UCMJ jurisdiction if his final pay and accounting is never completed. (JA 41).

Actions and Inactions by Appellant's Unit

On December 20, 2012, appellant's unit requested legal action to initiate separation for his ASAP failure. (JA 525–26). Pursuant to this request, the brigade legal office prepared the documents in appellant's separation action. (JA 73). On March 6, 2013, 1LT Ramos initiated this separation action, and appellant

signed his election of rights. (JA 527–31). On March 8, 2013, appellant went into civilian custody and confinement. (JA 425, 441, 532).

On March 12, 2013, LTC Denius (the rear detachment brigade commander) briefed COL Crider (the forward brigade commander) on appellant's sexual assault allegations *and* pending separation for ASAP failure. (JA 147–51, 312–14). Pursuant to this briefing, COL Crider did not express any desire to pursue a court-martial, nor did he object to appellant's pending separation. (JA 147–51, 312–14). Even though the command knew about appellant's situation "in Hinesville concerning sexual assault," 1LT Ramos received the "go ahead" to "push through" the Chapter 9 separation from LTC Garkey, the forward battalion commander, who communicated through video teleconference. (JA 73).

On March 26, 2013, MSG Jones, Chief Paralegal NCO, Military Justice, OSJA, 3d Infantry Division and Fort Stewart, requested updates on soldiers in confinement. (JA 533). Master Sergeant Jones copied the Chief of Justice (LTC Thalacker) and trial counsel (CPT Carter) on this e-mail. (JA 533). The attachment to the email listed appellant as being in civilian pre-trial confinement and pending charges for sexual assault. (JA 534–35).

On March 27, 2013, LTC Townsend, the 3BSB Commander, approved appellant's ASAP failure separation. (JA 94, 537–38). During the deployment, LTC Denius "acted as the brigade commander, rear" and LTC Townsend

"adjudicated the separation actions, the chapters, and the field grade articles 15's in order that we might keep them in the brigade level." (JA 94). When he signed appellant's separation action, LTC Townsend knew the action was prepared by the legal office. (JA 98). The unit sent appellant's separation action to the Fort Stewart Transition Center on April 3, 2013. (JA 561).

As part of out-processing from the installation, appellant cleared finance. (JA 112). Appellant's "Installation Clearance Record" was stamped "FINANCE OFFICE CLEARED" and listed a departure date of April 17, 2013. (JA 179). The "Unit Clearance Record" listed appellant as being in confinement, but reflected no flags impeding his separation. (JA 183–84). A third document calculated appellant would not receive separation pay. (JA 197).

On April 17, 2013, the Fort Stewart DMPO stamped appellant's clearing papers, and he received his 3d Infantry Division "Rocky Bulldog" stamp for completing the clearing process. (JA 544, 548). The same day, a DMPO employee opened a case in the DFAS Case Management system for appellant's separation action. (JA 554). Due to his confinement status, DFAS referred appellant's case to its reconciliation section. (JA 555).

On April 18, 2013, the Fort Stewart Transition Center finalized appellant's DD 214. (JA 557). The Transition Center mailed appellant's DD 214 and separation paperwork to his father, David Christensen. (JA 562). During the

entire time period from initiation of separation to the dispatch of appellant's DD 214, his chain of command supported an administrative separation and did not seek to halt or reverse his separation action. (JA 143–51, 154–59, 313). In fact, upon receipt of appellant's discharge orders, LTC Garkey sent an email to CPT Trevino stating, "*Good news WRT Christensen. He needed to be removed from the books*." (JA 310) (emphasis added).[4]

On April 19, 2013, MSG Jones sent another email to division military justice members with a "USR Report" and a "Confinement Visitation" attachment. (JA 558–59). The email attachments showed appellant being in civilian pre-trial confinement for sexual assault and specifically noted the unit sent his "Chapter" to "Transition" on April 3, 2013. (JA 560–61). Master Sergeant Jones again copied LTC Thalacker and CPT Carter on this email, included a suspense for updating the slides, and asked all recipients to "double check with your units to ensure these Soldiers are accurately accounted for."[5] (JA 558–61).

On April 23, 2013, CPT Carter emailed two members of the Liberty County District Attorney's office about appellant's case: "Could either of you assist in

[4] This email was in response to an email from CPT Trevino stating, "PFC Christensen received his separation orders last night. *He will be out on 17APR13* (orders attached)." (JA 311) (emphasis added).

[5] The slides were postdated to May 13, 2013, but the email was sent on April 19, 2013, and asked for all updates to be provided by May 6, 2013. (JA 558–61).

providing me the contact info for the ADA handling this case? If the District Attorney's Office intends to prosecute, I can coordinate communication between your office and the victim who is currently deployed." (JA 563).

In his capacity as Chief of Justice, LTC Thalacker was unhappy with the decision to separate appellant for ASAP failure. (JA 32–33). On April 25, 2013, LTC Thalacker emailed Mr. Melvin Dougherty, Chief, Fort Stewart Transition Center, asking if appellant had received his DD 214 and final pay. (JA 566). He also wrote, "PFC Christensen will likely be chaptered, but we are not quite ready for him to be out of the Army yet. Before finalizing, we want to make sure the civilians are going to prosecute the case." (JA 566).

On April 26, 2013, Ms. Wanda Wright, head of the Human Resources Department for the Fort Stewart Transition Center, responded to LTC Thalacker and said, "[E]verything has been completed and he is out of the Army. Sorry." (JA 566). More specifically, Ms. Wright explained, "The unit cleared him on 18 APR and his DD 214 was completed and mailed out. Finance stated he was in confinement in their system but they cleared him and DFAS will administratively pay him as of his separation date which was 17 APR." (JA 566).

About two hours later, LTC Thalacker responded to Ms. Wright's email, stating he spoke to a Ms. Monk and "[appellant's] DFAS account is on hold and final accounting has not been completed." (JA 565). In this response, LTC

Thalacker added, "In cases such as this, we have typically held off with a final separation until the civilian prosecutors have made a decision whether to proceed . . . . They are not ready to make a final decision at this point. That decision will likely take until at least July." (JA 565).

Ms. Wright replied, "Apparently there is some wrong information being put out and according to the Finance Deputy the final pay has nothing to do with whether the Soldier is off active duty or not, it is the DD 214 and orders." (JA 564). She added, "The Soldier has already been separated in TAPDB-E which is the top of the system (Total Army Personnel Distribution Branch) and the DD 214 is the driving factor for this system it has nothing to do with Finance. Sometimes it takes a while to audit the Soldier's account for the final pay so they are going to check into this." (JA 564).

On April 30, 2013, LTC Thalacker e-mailed Ms. Katherine Montero-Olmeda, Assistant Deputy Director for the Fort Stewart DMPO, asking for an update on appellant's final pay and accounting: "You were going to check the status of his final pay and accounting. If that has not occurred, we will look to bring him back onto AD." (JA 564).

The next day, Ms. Montero-Olmeda told LTC Thalacker the unit needed to revoke appellant's separation order and DD 214: "As it stands the Soldier has been separated IAW the DD 214 that was issued, in order to undo the separation,

personnel will have to cut a revocation of the separation order and the DD 214 that was issued. (JA 567). Then, "[o]nce we receive those documents, we can put him back in active duty in confinement until final disposition." (JA 567).

In seeking to delay appellant's financial processing, LTC Thalacker acted solely in his capacity as Chief of Justice and not at the direction of a commander. (JA 32–33). Furthermore, LTC Thalacker simply intended to preserve the status quo, not necessarily court-martial appellant. (JA 590). Lieutenant Colonel Thalacker also believed a soldier remains indefinitely under UCMJ jurisdiction if his final pay and accounting is never completed. (JA 41).

On May 1, 2013, DFAS referred appellant's case to Mr. Michael Jeffers for processing. According to Mr. Jeffers, "After it was put in my folder, the field office calls me up and says, '*Please do not process it. Close the CMS case. Do not take any action*.'" (JA 387) (emphasis added). The CMS note says "close case until situation is completed." (JA 556). Without the request to close the case, Mr. Jeffers would have "looked at the documents" and "seen what input they made and then process it accordingly." (JA 389). Absent this call, Mr. Jeffers would have processed appellant's case "within a day or two." (JA 417).[6]

[6] In contrast to the specific timeline provided by Mr. Jeffers for appellant's case, Ms. Daley – who worked in the finance office at Fort Stewart – said it "normally" took DFAS about 45 days to return a case. (JA 378).

Based on the guidance from the field office, Mr. Jeffers closed appellant's case and returned it to Fort Stewart. (JA 387–88). If DFAS had processed the case, Ms. Daley testified the Fort Stewart finance section could have processed the computation in 48 hours, "give or take a day." (JA 360). After receiving a case back from DFAS, the entire process would average five business days. (JA 379).

At the time of his separation, appellant owed the Army a debt due to being in a confinement status before his discharge. Appellant's April 2013 LES reflected a "BASE PAY" of "-1370.34," "ADVANCE DEBT" of "1148.51," "TOTAL INDEBTEDNESS $1148.51(113)," and "INDEBTEDNESS DUE US $1148.51 (091)." (JA 230–31). In such circumstances, Ms. Daley and Mr. Jeffers knew a soldier would not receive any payment. (JA 363–64, 413).

The idea that appellant could be subject to court-martial jurisdiction caused ripples in personnel channels. On May 2, 2013, Richard Brewer, a transition policy analyst at HRC, contacted a lawyer at HRC to ask if Fort Stewart could rescind the action "after completion in this case." (JA 671–72). Mr. Brewer contacted the lawyer after receiving an email about appellant's case. (JA 668).

In this email, Mr. Brewer stated, "I'm not sure if I agree" with LTC Thalacker's position, as "[t]he command was aware [appellant] was in confinement and continued to process the [separation] action" and "[t]he final approval by LTC Townsend did not suspend execution." (JA 672). In a later email, Mr. Brewer said

such a position "moves the goalpost from a very specific point in time" to one that is "very nebulous." (JA 708).

Several members of appellant's former unit also thought his status was nebulous. On May 7, 2013, CPT Schwab, the deployed trial counsel, sent an email to CPT Trevino seeking "a clearer idea" of the command's "status and intent." (JA 569). For her part, CPT Schwab "heard [appellant] was actually chaptered out a while ago for ASAP failure . . . . I thought that he was in civilian confinement, and they were handling the case, which was why we were originally hearing out here about whether to chapter him." (JA 569).

Captain Trevino, referring to "Mr. Christensen,"[7] responded, "Once we got the green light from LTC Denius, we dropped the CH 9 packet" and "I do not know what the intent is other than someone wants to get an OTH out of the ordeal. However, I am from the school of thought that bringing him back is as crazy as a football bat." (JA 568). Captain Trevino added that CPT Carter (the non-deployed trial counsel) "informed me that DIV *was considering* returning him to AD in order to have him face CM." (JA 568) (emphasis added).

Additional personnel also sought clarification about appellant's status. On May 14, 2013, LTC Denius emailed CPT Carter: "On one hand, I'm tracking

[7] Captain Trevino referred to appellant as "Mr. Christensen" "because we had out processed him and we were under the impression he was a civilian." (JA 84).

[appellant] as still incarcerated downtown, awaiting his grand jury, and separated from the army through a chapter 9. I've also heard that the chapter 9 has been 'held up' by legal. What's the truth on this case? And what is the legal take on our way forward?" (JA 318).

After receiving LTC Denius' email, CPT Carter emailed the assistant district attorney: "[I]t's my understanding that your office has received a victim impact statement . . . and intends to pursue prosecution. This case will go to the grand jury sometime in September." (JA 572). Even though the installation had finalized appellant's DD 214 a month earlier, CPT Carter added, "The Army is in the process of relinquishing prosecutorial jurisdiction over Christensen by administratively separating him from the Army." (JA 572). Finally, CPT Carter asked the district attorney if she could "provide a reasonable degree of certainty, understanding that nothing is 100%, that this case will go to trial and not plea for a lesser offense with no jail time." (JA 572).

Captain Carter responded to LTC Denius on May 14, 2013. He wrote, "The chapter 9 was processed. Christensen received his DD 214 and has cleared post. However, once I found out that Christensen was separated without my legal review or your approval, our office haulted [sic] completion of his final pay and accounting with DFAS which means he is not officially out of the Army for CM Jurisdiction." (JA 317).

Based on his conversation with the assistant district attorney, CPT Carter told LTC Denius the case "will go to a grand jury for a decision on formal charges in September," but the civilian prosecutors would likely "settle for a plea to a lesser offense with little to no jail time and/or probation." (JA 318). Captain Carter specifically recommended "[continuing] to hault [sic] Christensen's final pay and accounting until we get some feedback from [the alleged victim]." (JA 318). However, if the command wanted to "proceed with the chapter" – the same chapter completed an entire month earlier – then CPT Carter would "give DFAS the high sign to process final pay." (JA 318).

On May 15, 2013, LTC Thalacker emailed LTC Harner at HRC: "Thank you for taking the time to discuss PFC Christensen from 1ABCT on Monday. *The unit is still trying to determine proper way forward for him and whether to bring him back for UCMJ*. We will try and get you a final answer as soon as possible." (JA 575) (emphasis added).

On June 10, 2013, LTC Thalacker emailed LTC Harner to follow-up. He wrote, "[Christensen] has not received final pay and accounting which should allow 3ID to bring [him] back onto AD IOT pursue the CM." (JA 696). He added, "The last time we had this issue, we worked through you all at HRC to have the Soldier put back into the system so that new Orders can be cut. Is that something you can assist with in this case as well?" (JA 696).

On June 12, 2013, LTC Harner emailed his supervisor about appellant's case. He explained, "This actually came in last month, but at the time I spoke with LTC Thalacker, and *he said to hold off until his Command decided what they wanted to do*." (JA 695) (emphasis added). Lieutenant Colonel Harner expressed his own doubts, pointing to an OTJAG opinion he found "troubling" and the "false alarm" footnote in *United States v. Hart*, 66 M.J. 273, 277 n.5 (C.A.A.F. 2008). (JA 695). Despite his concerns, LTC Harner stated, "Be that as it may, seems like based on OTJAG opinion, we are good to go as long as this Soldier's final pay is not 'ready for delivery.'" (JA 695). His supervisor replied, "Agree, would rely on OTJAG opinion, even if you and I might opine differently." (JA 695). Neither officer addressed how appellant's debt might impact the OTJAG opinion or *Hart*.

On June 13, 2013, LTC Thalacker emailed Mr. Scott Kuhar at HRC, asking for support "in generating the necessary paperwork to cut Orders for a Soldier who had received a DD 214 but who was still subject to UCMJ court-martial jurisdiction." (JA 576). After receiving this email, Mr. Kuhar emailed MAJ Lynn Kincaid for assistance: "PFC Christensen was chaptered, so it throws a curve ball into the situation. Does the chapter need to be rescinded?" (JA 698).

Lieutenant Colonel Harner, copied in this same thread, replied to the group, "The unit should revoke the discharge order and prep a memo voiding the DD 214 (Mr. Brewer - am I tracking here?) The reason for discharge shouldn't matter;

statute covering this situation (10 USC 1168(a)) doesn't relate to what type of discharge, only that a service member may not be discharged without final pay being ready for delivery." (JA 697–98). On June 18, 2013, Mr. Kuhar provided similar guidance to LTC Thalacker: "PFC Christensen's separation orders and DD214 need to be revoked by the installation transition center." (JA 702).

Ultimately, multiple parties informed LTC Thalacker of the requirements to revoke appellant's DD 214 and separation orders. In fact, Ms. Montero-Olmeda first told LTC Thalacker of these requirements on May 1, 2013. (JA 567). However, despite this repeated and clear guidance, the revocations did not occur until September 30, 2013, which was more than *five months* after appellant received his "Rocky Bulldog" stamp and the installation finalized and mailed his DD 214. (JA 587–88).

The vacillation on whether to court-martial appellant extended throughout the summer. On August 21, 2013, CPT Carter emailed a civilian police detective stating, "The Army is *contemplating* prosecution of this case at court-martial." (JA 581) (emphasis added).

On September 5, 2013, CPT Smith, the Brigade Judge Advocate, told LTC Garkey, "[W]ith the grand jury coming up, we were going to let that finish and see where the civilians stand" and "Our ability to bring him back in and court-martial him is not as strong as we were led to believe, so we are recommending that the

Grand Jury go and we wait to take jurisdiction from the civilians." (JA 583). Captain Smith also informed LTC Garkey there was a "good chance" the government would lose a challenge on jurisdiction, and "we don't want to take the case from [civilian prosecutors] yet knowing that we have an issue." (JA 583).

At the time CPT Smith sent this email to LTC Garkey, no one from appellant's former unit had contacted or visited him in more than four months. (JA 428, 438–39). In a later email to company leadership, CPT Smith noted the effect of appellant's rehabilitation: "The continuing rehab is not going to work, the Army would have to pay for it and currently he is paying." (JA 704).

On September 26, 2013 – more than five months after the finalization of appellant's DD 214 – CPT Smith preferred charges against appellant as accuser. (JA 585–86). Captain Smith later testified this was the first time he had ever preferred charges, and "we wanted to prefer charges . . . as a secondary assertion of jurisdiction." (JA 142).

While CPT Smith preferred charges on September 26, 2013, the Summary Court-Martial Convening Authority did not receive the charges until December 11, 2013. (JA 586). The very next day, the military police shackled appellant and drove him to Fort Stewart for his first direct contact with his unit in nearly eight months. (JA 428–32).

After appellant was forcibly returned to Fort Stewart on December 12, 2013, CPT Trevino preferred an additional charge with two specifications. (JA 20–21). Except for differences in phrasing, Specification 1 of the additional charge was the same as the specification of the original charge. (JA 20, 585). After CPT Trevino preferred the additional charge, the Special Court-Martial Convening Authority (SPCMCA) dismissed the original charge on January 22, 2014. (JA 585). Over *115 days* passed between the preferral of the original charge by CPT Smith and its dismissal by the SPCMCA.

Court-Martial Motions and Rulings

At trial, the defense filed motions to dismiss for lack of jurisdiction and for unlawful command influence. (JA 166; App. Ex. XIII). At the motions hearing for the jurisdiction motion, the defense counsel asked LTC Thalacker about his actions in this case. (JA 28–45, 47–56). This included the following exchanges:

> Q. . . . Did the General Court-Martial Convening Authority step in, in this case? Did you receive direction from the GCMCA, General Hort, or the Brigade Commander, Colonel Crider? Did you receive direction that said, 'I don't want this Soldier separated?' Or did you, Lieutenant Colonel Thalacker, as the acting Chief of Justice, do that on your own accord?
>
> A. *I did that on my own accord. I did not consult with the general. I didn't consult with Colonel Crider*. I took immediate action because I was concerned the government was going to lose court-martial jurisdiction . . . .

(JA 35) (emphasis added)

> Q. . . . Why didn't you start that process to revoke the DD 214 and rescind the discharge orders?
>
> A. Because, my initial concern was that I wanted to make sure that the government had all of its options . . . *I had not made a decision that he was going to be brought back into the military at that point* . . . .

(JA 36–37) (emphasis added)

> Q. . . . It's your position that if a Soldier receives a DD 214, discharge orders, clears the installation, including the local finance office, and then a week later the Chief of Justice emails finance and says, "Do not do the Soldier's final pay and accounting," that that Soldier indefinitely remains under UCMJ jurisdiction. Is that your position?
>
> A. Yes. My position would be that the final pay and allowances had not been issued at that point.

(JA 41)

> Q. Sir, just to kind of follow-up on the process here where you emailed finance and told them to put a hold on the final pay and accounting. Did anybody [contact] PFC Christensen at that point to let him know that his chapter was essentially suspended or in limbo, if you will?
>
> A. I did not contact him. I don't know if anybody within the unit did.

(JA 45)

> Q: So the TC should be checking the status of the Soldier, correct?
>
> A: [No response.]

(JA 49)

During his testimony at the motions hearing, LTC Denius said *he* made the decision to halt the pay process. (JA 61). This occurred after "[i]t was brought to my attention that, and this was by Captain Carter, that the [civilian case] was moving slow." (JA 68). After learning this information, LTC Denius "asked Captain Carter if it was an option to hold [the DFAS processing] and he informed me that the answer was yes and I directed him to hold the DFAS out processing." (JA 68). When asked why he did not seek to revoke appellant's DD 214, LTC Denius said, "I was unaware of the procedure at that time." (JA 68).

Lieutenant Colonel Denius testified that COL Crider redeployed "shortly thereafter" and later signed the revocation memorandum for appellant's DD 214. (JA 69). During the unlawful command influence motions hearing, LTC Denius testified that COL Crider returned in "mid July or last week of July." (JA 145). He also testified, "it wasn't until after Colonel Crider returned that he signed [the memorandum] because there was research that needed to be done." (JA 146).

Several attorneys testified at the unlawful command influence motions hearing. During his testimony, the defense asked CPT Carter why the unit did not take steps to "bring [appellant] back on active duty" or "go pick him up." (JA 141). He responded, "Well, I think at the time we weren't really sure if he was on active duty, per say [sic], or not." (JA 141). At the same hearing, the defense counsel had the following exchange with now-Major Smith:

> Q. So from your standpoint as the brigade judge advocate, all the parties that were participating in the Chapter 9 process, namely,--up through sort of battalion which is the approving authority, they were all pleased with the result?
>
> A. At that point, yeah. *At that point, they were fine with it.* This was--you know, we were deployed from November 2012 until 5 July 2013, so this would have been prior to July 2013.
>
> Q. Did Colonel Garkey or the Brigade Commander, Colonel Crider, at the time, did anyone come to you and say,--obviously, you were Captain Smith at the time. "You know, I don't agree with the Chapter 9. We need to undo that." This was back in the spring of 2013.
>
> A. Right. *No, none of the chain of command at that point had expressed an interest of bringing him back or thinking that the Chapter 9 was somehow insufficient and should be undone and done as another chapter underneath the separation reg*.
>
> Q. So that was all the command up to the brigade level?
>
> A. Right.

(JA 156–57) (emphasis added)

Major Smith testified it was not until "late August" that the commanders started to change their minds about the decision to separate appellant. (JA 159). In an email, then-CPT Smith stated, "In late September, we revoked the separation through COL Crider." (JA 316).

On April 8, 2014, the military judge denied the defense motion to dismiss for lack of personal jurisdiction. (JA 307–09). In his ruling, the military judge found LTC Denius "decided to halt the DFAS out-processing" in "April 2013." (JA 307). As such, the military judge analogized appellant's case to *Hart*. (JA 309). While the military judge found "the Government was *somewhat slow* in revoking the Accused's DD 214 and rescinding his orders," he "[did] not find that the Accused was prejudiced by this." (JA 309) (emphasis added).

Following this ruling, the military judge located an email thread between CPT Carter and LTC Denius during a separate in-camera review. (JA 152–54, 317–18). This email thread started on May 14, 2013, when LTC Denius asked CPT Carter to help him "understand exactly what PFC Christensen's status is. On one hand, I'm tracking him as still incarcerated down-town, awaiting his grand jury, and separated from the Army through a chapter 9. I've also heard that the chapter 9 has been 'held up' by legal. What's the truth on this case?" (JA 317–18). At the defense's request, the military judge said he would "reconsider" his personal jurisdiction ruling based on the email thread. (JA 153–54).

Despite this email blatantly contradicting his written ruling – particularly that LTC Denius "decided to halt the DFAS out-processing" in "April 2013" – the military judge did not issue another written ruling regarding the defense motion to dismiss for lack of personal jurisdiction. The military judge did, however, seem to

apply the information from this email thread in a portion of his separate ruling on the defense motion to dismiss for unlawful command influence:

> From the evidence presented it appears that LTC Thalacker took the first steps without any direction from the separation authority or higher. LTC Thalacker's action to request DFAS to halt the final pay processing seems to have occurred before LTC Denius told his trial counsel CPT Carter, to halt the DFAS final pay processing.
>
> Regardless, this subsequent e-mail from LTC Denius ratifies and supports the action taken by LTC Thalacker . . . . Once they became aware that LTC Thalacker had halted the chapter process,[8] COL Crider or someone could have directed DFAS to continue with the DFAS pay processing and allow the accused to be separated from the Army.

(JA 321–22) (paragraphing added).[9]

DuBay Hearing

The Army Court ordered a *DuBay* hearing to help resolve the issue of personal jurisdiction. (JA 502–04). Both parties presented evidence and argument at the hearing, and the *DuBay* military judge subsequently issued a written ruling concluding "the trial court possessed in personam jurisdiction at the time of appellant's trial." (JA 741).

[8] The military judge did not explain how a "chapter process" would be "halted" in a case where the "chapter process" was actually *completed*.

[9] The military judge also read this ruling on the record. (R. at 377–86).

In his ruling, the *DuBay* military judge adopted the trial judge's factual findings, with one exception: "Finding number 4 indicates that LTC Denius . . . decided to halt the DFAS out-processing sometime in April 2013, and directed CPT Carter to take this action at that time. That action by LTC Denius actually occurred on or about 15 May 2013 (Appellate Exhibit XXII)." (JA 734). The *DuBay* military judge found this action "ratified LTC Thalacker's earlier action of stopping Appellant's final accounting of pay." (JA 735).

The *DuBay* military judge also made his own findings of fact and conclusions of law related to the processing of appellant's pay.[10] Even though Mr. Jeffers received appellant's case on "1 May 2013" and "testified that he would have acted on Appellant's account later that week," the *DuBay* military judge applied "the standard processing time for a confined Soldier" in determining the expected timeline of appellant's pay processing. (JA 735–36). The *DuBay* military judge found this "process takes on average forty-five days, but it can take as long as ninety days to complete." (JA 736). As such, the "stoppage" of pay was "ratified" "within the standard processing time for a confined Soldier." (JA 739).

The *DuBay* military judge noted "appellant also argues that since he owed a debt to the Army in April 2013 at the time of his early separation, the final

[10] Appellant has attached an Appendix addressing several of the clearly erroneous findings and flawed conclusions of the trial judge, *DuBay* judge, and Army Court.

accounting of pay element was met because there was no pay to issue." (JA 740). Despite his own finding of fact that "[i]n April 2013, Appellant owed a debt to the U.S. Army" (JA 736), the *DuBay* military judge rejected appellant's argument by concluding, "Until that final computation is complete, it is impossible to determine whether the possible debt will continue to remain or whether a Soldier will in fact be due some payment." (JA 740). The *DuBay* military judge stated the "concern" in how long it took to revoke appellant's separation orders, but "[t]his is not a case where the unit attempted to extend appellant's final pay indefinitely." (JA 739).

Army Court Opinion

In its opinion, the Army Court wholly adopted the *DuBay* military judge's findings. (JA 5). Based on these findings, the Army Court concluded, "This case is analogous to the facts set forth in our superior court's decision in *Hart*" and "we find the reasoning of the *Hart* court persuasive and controlling." (JA 8–9).

While admitting appellant "had no final pay coming" and "owed a debt," the Army Court rejected appellant's arguments regarding his debt in a footnote: "Like the *DuBay* military judge, we reject appellant's argument [the statute] was met because appellant owed a debt and was not to receive pay." (JA 3, 8).[11]

[11] As outlined below, such a conclusion is paradoxical. The Army Court admitted appellant "had no final pay coming," but then concluded the portion of 10 U.S.C. § 1168(a) regarding "final pay" being "ready for delivery" was not satisfied. This does not make sense. If appellant had "no final pay coming," then how was this non-existent final pay not "ready for delivery" at the time of his separation?

In the last paragraph of its ruling, the Army Court stated, "Although we find the Army retained jurisdiction over appellant, we agree with the *DuBay* military judge that the delay in the official action in revoking appellant's separation orders was not a 'standard to emulate' . . . We, however, do not see this as an effort by the government to indefinitely postpone appellant's final pay while trying to decide whether to court-martial him." (JA 9).

As necessary, additional facts related to the issue presented are included in the relevant subsections below.

Summary of Argument

In this case, the decision of whether to separate appellant or keep him on active duty was a command decision, and the command *made* a decision: it chose to separate him. The subsequent secret actions and flawed advice of government lawyers operating under an erroneous view of the law did not preserve jurisdiction.

First, appellant's case is not *Hart*. Instead, appellant's case was foreseen by the *footnote* in *Hart* that explained it did not involve an intentional delay in the processing of a soldier's pay. 66 M.J. at 277 n.5. While such concerns were a "false alarm" under *Hart*, that alarm rang loud and true for appellant. *Id*.

Second, due to appellant's known and calculated debt at the time of his separation, the plain language of 10 U.S.C. § 1168(a) was satisfied. As appellant was actually not due any money, a "substantial part" of his non-existent pay was "ready for delivery" at the time of his separation. However, even if this Court finds § 1168(a) was not satisfied in this case, its "guidance" is not binding "when we find that they go against reason or policy." *United States v. Nettles*, 74 M.J. 289, 291 (C.A.A.F. 2015). Such logic applies to cases involving debts.

Finally, it remains contrary to "reason or policy" for § 1168(a) to authorize the result in this case. Appellant did not receive any pay or benefits from the Army for nearly eight months, yet supposedly remained under its jurisdiction. Such an inexplicable and unconscionable result should not withstand appellate review.

Law and Standard of Review

"The overarching interest implicated by the law of personal jurisdiction, and especially discharge jurisprudence, is the need – of both servicemember and service – to know with certainty and finality what the person's military status is and when that status changes." *Nettles*, 74 M.J. at 291.

More specifically, "[t]his is important for the armed forces both abstractly and concretely: abstractly, because certainty of status indicates who actually is in the service and subject to the [UCMJ], and concretely, because such certainty provides clear guideposts for prosecutors and commanders when taking actions with a view towards litigation." *Id*. "Certainty and finality are also important to the servicemember, of course, so that he can guide his conduct with awareness of the potential (or not) for criminal liability under the UCMJ." *Id*. at 291–92.

The Supreme Court has noted "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution" and "the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed.*'" *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22–23 (1955) (italics in original) (quoting *Anderson v. Dunn*, 19 U.S. 204, 231 (1821)).

"It is black letter law that in personam jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization." *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985). "The UCMJ itself does not define the exact point in time when discharge occurs, but for nearly twenty years, this court has turned to 10 U.S.C. §§ 1168(a) and 1169 (2000), a personnel statute, for guidance as to what is required to effectuate discharge." *Hart*, 66 M.J. at 275.

However, in *Nettles*, this Court stated, "[S]ince we do not apply § 1168 when determining jurisdiction – but instead look to it only for 'guidance,' *Hart*, 66 M.J. at 275 – its demands are not binding when we find that they go against reason or policy." 74 M.J. at 291 (underlining in original).[12]

A servicemember "may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative." 10 U.S.C. § 1168(a). A discharge terminates

[12] Despite repeated references to this language in appellant's pleadings and arguments at the *DuBay* hearing, the trial counsel asserted, "10 USC 1168 is not a guide . . . . *Considering it as a guide would be a drastic departure from established case law*." (JA 500) (emphasis added). The trial counsel later doubled down on this claim in arguing, "[T]he government's position is that that is well established case law that supports 10 USC 1168. *That is, [1168] is not a guide*." (JA 500) (emphasis added). More troubling, despite appellant's repeated citations, neither the *DuBay* military judge nor the Army Court cited this language from *Nettles*.

in personam court-martial jurisdiction after there is: 1) a delivery of a valid discharge certificate; 2) the member's "final pay" or "a substantial part of that pay" is "ready for delivery" to the member; and 3) the undergoing of a "clearing" process as required under appropriate service regulations to separate the member from military service. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

Army Regulation 635-200 states a discharge is effective at 2400 on the date of notice of discharge to the soldier. *See* AR 635-200, para. 1-29 (June 6, 2005) (RAR, September 6, 2011) (JA 794–96).[13] Furthermore, AR 600-8-105 states, "When there is no evidence of fraud or obvious error and the soldier received actual or constructive delivery, orders discharging a soldier from the service will not be revoked after the effective date of discharge unless the revocation is a written confirmation of verbal orders actually issued before the effective date of discharge." AR 600-8-105, Personnel—General, Military Orders, para. 2-21e (October 28, 1994) (JA 788–90).

Army regulations also explain that payments are routinely made "after" separation. *See* AR 37-104-4, Financial Administration, Military Pay and Allowances Policy, para. 21-3 (June 8, 2005) ("During out-processing, it is highly recommended that soldiers be asked to provide the servicing finance office a valid

[13] This regulation was updated after appellant's court-martial, but the updated regulation still provides that a discharge is effective on the date of notice of discharge. *See* AR 635-200, para. 1-29 (December 19, 2016).

mailing and/or e-mail address that will be valid for at least 120 days after departure, *to facilitate timely payments after separation*.") (emphasis added) (JA 786–87). The relevant section of AR 37-104-4 is even titled "Entitlements or deductions *after* separation." *Id.* (emphasis added) (JA 787).

Furthermore, the "Final pay" paragraph of the Army's separation regulation in effect at the time of appellant's separation stated, "Soldiers will report to the finance and accounting officer or class B agent officer for final pay. *Immediately following final payment, the individual will surrender Identification Card (DD Form 2A)* or sworn statement of loss to the finance and accounting officer or class B agent officer." AR 635-10, Personnel Separations, Processing Personnel for Separation, para. 3-13 (RAR, September 15, 2011) (emphasis added) (JA 791–93).

When an accused contests personal jurisdiction on appeal, appellate courts review that question of law de novo, accepting the military judge's findings of facts unless they are clearly erroneous or unsupported in the record. *Hart*, 66 M.J. at 276.

As necessary, additional legal principles, cases, and authorities are included in the relevant subsections below.

Argument

1. Appellant's case represents the alarm that was "false" in *Hart*.

After stating appellant's case is "analogous" to the facts of *Hart*, the Army Court found "the reasoning of the *Hart* court [to be] persuasive and controlling." (JA 8–9). Appellant's case is not *Hart*. Instead, appellant's case was foreseen by the *footnote* in *Hart* that: 1) clarified the factual limits of its holding,[14] and 2) explained why the dissent was sounding a "false alarm" that was not present under its facts. 66 M.J. at 277 n.5.

To that extent, the overall timeline in *Hart* remains instructive. Despite a prior request from the base legal office to place Hart on "administrative hold for 120 days," the separations section issued Hart his DD 214 on March 3, 2004. *Id*. at 274. The DD 214 "reflect[ed] that date as the effective date of separation." *Id*. Two days later, Hart's commander, AFOSI, and the legal office learned that Hart received his DD 214. That same day, the legal office directed the finance office to stop calculating Hart's final pay, and his commander prepared a memorandum to the support squadron seeking to revoke the DD 214. *Id*. Hart was reported AWOL on March 9, arrested on March 18, and returned to military control on March 23, 2004. *Id*. His unit preferred charges that same day. *Id*.

[14] The *Hart* Court was explicit in that its decision was limited to "the facts of this case." 66 M.J. at 277.

In sum, the time between the issuance of Hart's DD 214 to his commander's revocation request was only two days, and the entire process took less than three weeks (including nine days when Hart was AWOL). *Id*. Therefore, contrary to the Army Court's analysis, appellant's case factually diverges from *Hart* in several key areas.

First, in *Hart*, the *command*, i.e., the separation authority, took swift and decisive action to revoke his separation and maintain jurisdiction. In appellant's case, an *attorney*, acting without command coordination, initially sought to stop the processing of appellant's pay in an attempt to preserve jurisdiction. Lieutenant Colonel Thalacker explicitly testified his actions were "on my own accord. I did not consult with the general. I didn't consult with Colonel Crider." (JA 35).

Second, in *Hart*, the command revoked the DD 214 in only two days. *Id*. at 273–74. By contrast, and despite repeated guidance from finance personnel, appellant's DD 214 and separation orders were not revoked until *more than five months* after the installation finalized his DD 214. (JA 587–88). Notably, when belatedly seeking to revoke appellant's DD 214 and separation orders, the unit said it wanted appellant "recalled to active duty." (JA 584). This is deeply concerning. If appellant needed to be "recalled to active duty," then how can the government assert it never lost jurisdiction? If anything, such a request is a concession that jurisdiction no longer existed.

Third, in *Hart*, the base legal office specifically requested an administrative hold before his discharge. *Id*. at 274. In appellant's case, the legal office did not request any form of hold, and brigade legal personnel even prepared appellant's chapter packet. (JA 73). Furthermore, division legal personnel accurately tracked appellant's status throughout this entire timeframe. (JA 533–35, 558–61).

More importantly, LTC Denius specifically briefed COL Crider on appellant's sexual assault allegations *and* his pending separation for ASAP failure. (JA 147–51, 312–14). Pursuant to this briefing, COL Crider did not express any desire to pursue a court-martial, nor did he object to appellant's pending separation. (JA 147–51, 312–14). Mr. Brewer, the policy analyst from HRC, summarized this point when outlining his concerns with LTC Thalacker's position: "The command was aware [appellant] was in confinement and continued to process the [separation] action." (JA 672).

Fourth, in *Hart*, the unit reported him AWOL six days after separation, civilian authorities arrested him fifteen days after separation, and his unit preferred charges upon his return to military control twenty days after separation. Here, the unit did not notify appellant of any purported change in status after issuing his DD 214, did not return his identification card, did not prefer charges for more than five months (and did so as a "secondary assertion of jurisdiction"), and did not return appellant to military control for nearly eight months after separation. As a result,

at the same time military personnel were secretly debating his status, appellant was asking his family to help pay for his dental care because he "didn't think he was in the Army."[15] (JA 429–30).

Fifth, *Hart* explicitly states, "This case does not involve *any* delay in the processing of Hart's separation pay" and "The military judge also found there was no evidence that the finance personnel were 'deliberately trying to slow down the processing of [Hart's] pay.'" 66 M.J. at 277, 277 n.5 (emphasis added). Here, CPT Carter explicitly recommended the unit "continue to hault [sic] Christensen's final pay." (JA 318).

Furthermore, numerous finance personnel followed the unit's request to "halt" – not just "slow down" – the processing of appellant's final pay. Again, after appellant completed the clearing process and received his DD 214, it took more than *five months* for his DD 214 and separation orders to be revoked, but finance personnel did not take any further action on his case after LTC Thalacker's interference.

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[15] The majority opinion in *Hart* stated, "[T]o the extent the dissent's argument is founded in legal policy, it ignores the sound public policy reasons why the public's interest as well as the interests of military members and their dependents may be better served during the transition from military to civilian life by a system that allows flexibility in accounting for moneys due as well as in providing for health and other coverage during transitional travel." *Hart*, 66 M.J. at 277 n.5. This logic would not apply to appellant's case, as he surrendered his identification card at his unit's request, did not believe he was entitled to benefits after receiving his DD 214, and was never informed by his unit of any asserted change in status.

Sixth, *Hart* involved a "projection separation settlement." 66 M.J. at 274. In appellant's case, he owed a debt due to his time in civilian confinement, and his April 2013 LES reflected his "ADVANCE DEBT," "TOTAL INDEBTEDNESS," and "INDEBTEDNESS DUE US." (JA 230–31). In these types of circumstances, Ms. Daley and Mr. Jeffers knew a soldier would not receive any payment from the Army. (JA 363–64, 413).

Seventh, in *Hart*, this Court stated "neither party claims that the factual findings of the military judge are clearly erroneous. Accordingly, we accept the military judge's factual findings." 66 M.J. at 276. In this case, appellant has included an appendix that identifies clear errors in several findings by the trial military judge and *DuBay* military judge.

In sum, appellant's case is not *Hart*. Instead, appellant's case was foreseen by the *footnote* in *Hart* explaining its holding did not address an intentional delay in the processing of a soldier's separation pay. While such concerns were a "false alarm" under the facts of *Hart*, that alarm rang loud and true for Christopher Christensen.

2. Due to appellant's debt, the plain language of 10 U.S.C. § 1168(a) was met in this case.

"A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty,

respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative." 10 U.S.C. § 1168(a).

In this case, whatever calculations needed to occur for a "substantial part" of appellant's pay to be made "ready for delivery" took place in time for a calculated debt to appear on his April 2013 LES, which was prior to any command decision to revoke his separation orders and DD 214. Simply put, because appellant was not due any money, the plain language of 1168(a) was satisfied.

Notably, the *DuBay* military judge made a finding of fact that appellant "owed a debt to the Army" in April 2013. (JA 3). The Army Court adopted the *DuBay* judge's findings and also stated appellant "had no final pay coming to him," but then somehow found the language of 10 U.S.C. § 1168(a) was not satisfied. (JA 3, 5–6). This is nonsensical. If appellant "owed a debt" and "had no final pay coming to him," then how could his non-existent final pay not be "ready for delivery" at the time of separation? As a matter of common sense, appellant's known and calculated debt satisfies the plain language of 10 U.S.C. § 1168(a).

3. Even if the plain language of 10 U.S.C. § 1168(a) is satisfied, reason and policy dictate it is not binding in cases involving debts.

The trial military judge, *DuBay* military judge, and Army Court all failed to cite, much less address, the language from *United States v. Keels* explaining, "Section 1168 ensures that a member will not be separated from the service, thereby depriving the member and the member's family of pay and benefits such as

medical care, until both the formal discharge certificate and a substantial part of any pay due are ready for delivery." 48 M.J. 431, 432 (C.A.A.F. 1998).[16]

Such a rationale clearly does not apply to this case. If the statute is meant to protect transitioning soldiers from losing pay and benefits, it does not serve this purpose when a soldier: 1) owes money, 2) was required to surrender the identification card necessary to demonstrate his eligibility for benefits, and 3) believes he is completely out of the military (and thus not entitled to benefits).

Based on the circumstances of this case, Ms. Daley and Mr. Jeffers knew appellant would not receive any payment from the Army. (JA 363–64, 413). They were right, and the *DuBay* judge and Army Court specifically found appellant "owed a debt" to the Army. (JA 3, 5, 736). When appellant was finally re-added into the pay system, the Army deducted his debt, forcing him to use a credit card for expenses. (JA 436–37). If the plain language of 10 U.S.C. § 1168(a) is not satisfied in such a situation, then its demands "go against reason or policy" and are therefore "not binding." *Nettles*, 74 M.J. at 291.

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[16] The legislative history supports that "final pay" should mean the money a soldier is due. "The pertinent legislation originated in World War II as part of the Servicemen's Readjustment Act of 1944, Pub. L. No. 346, § 104, 58 Stat. 284, 285 (1944))." *See Hart*, 66 M.J. at 278 (Effron, C.J., with whom Stucky, J., joined, dissenting). The purpose of the law was to "provide Federal Government aid for the readjustment in civilian life of returning World War II veterans." *Id*. "Nearly twenty years later, the provision was recodified at 10 U.S.C. § 1168." *Id*.

There are several other reasons why finding jurisdiction in appellant's case would "go against reason or policy." For example, as highlighted above, Army regulations explain that payments can be made "after" separation. (JA 786–87). The "Frequently Asked Questions" section of the DFAS website corroborates this very point.[17] In answering "When will I get my final pay," the DFAS website states, "Different branches have different timeframes to issue a member's final pay." For members of the Army, "*Post separation* pay audits are conducted regularly and may identify residual payments that are due to the member. If this occurs, DFAS (or in limited instances, the member's servicing finance officer) will pay the residual payments via paper check to the address that the service member provided during separation processing." (emphasis added).

As another example, AR 635-10, para. 3–13, "Final Pay," states that a soldier will surrender their identification card "immediately following final payment." (JA 792). Here, appellant surrendered his military identification card in April 2013. (JA 427). As such, according to the existing regulation by order of the Secretary of the Army, his final payment was satisfied.

Therefore, based on existing regulations by order of the Secretary of the Army *and* guidance from DFAS, appellant was completely separated. In fact, in

[17] Defense Finance and Accounting Service (DFAS), "*Frequently Asked Questions*: *When will I get my final pay?*" (November 7, 2013) https://www.dfas.mil/militarymembers/faqs.html (last visited March 2, 2018)

late April 2013, Ms. Wright said appellant was "separated in TAPDB-E which is the top of the system (Total Army Personnel Distribution Branch)." (JA 564). This did not change until June 18, 2013, when Mr. Kuhar accommodated LTC Thalacker's request to adjust appellant's status, then explicitly reminded LTC Thalacker the "separation orders and DD 214 need to be revoked." (JA 702).[18]

The effects of Mr. Kuhar's actions on June 18, 2013, are apparent from the record. In describing appellant's changing status, CPT Trevino wrote, "He was removed from our AAA-162s in April and was not listed on our May/June personnel rosters. But the interesting thing we recently found out was that *he mysteriously re-populated on our personnel rosters in July*. *I do not know how that happened because we did not do it*." (JA 703) (emphasis added). If appellant was officially "separated" at the "top of the system" in April, then it would "go against reason or policy" to find the unit could secretly and even "mysteriously" reinstate him to regenerate jurisdiction.

4. Based on the unit's actions, reason and policy dictate 10 U.S.C. § 1168(a) is not binding in this case.

"The Army cannot extend court-martial jurisdiction indefinitely simply by not calculating or not paying the soldier's final pay." *United States v. Brevard*, 57 M.J. 789, 794 n.14 (A. Ct. Crim. App. 2002).

[18] In his supplement, appellant inadvertently cited an earlier portion of this email thread as applying to appellant's case, when it actually applied to another soldier.

This court should find that reason and policy dictate that Section 1168(a) is not binding in this case, as the command and attorneys erroneously believed the law allowed them to secretly "halt" DFAS processing while waiting for the grand jury findings. Based on the overall record, the unit's efforts and intentions were clear: they wanted to "wait" to see what "the civilians" would do, without telling appellant or his family.

To that extent, both the *DuBay* military judge and Army Court did not properly address – or even completely failed to address – several communications regarding appellant's case. For example, LTC Thalacker sent an email on May 15, 2013, stating, "*The unit is still trying to determine proper way forward for him and whether to bring him back for UCMJ*. We will try and get you a final answer as soon as possible." (JA 575) (emphasis added).

On June 12, 2013, LTC Harner wrote "[an email regarding appellant's status] actually came in last month, but at the time I spoke with LTC Thalacker, *and he said to hold off until his Command decided what they wanted to do*." (JA 695) (emphasis added). On August 21, 2013, CPT Carter sent an email explaining, "The Army is *contemplating* prosecution of this case at court-martial." (JA 581) (emphasis added).

Captain Smith sent several similar emails. For example, on September 5, 2013, CPT Smith told LTC Garkey, "[W]ith the Grand Jury coming up, *we were*

going to let that finish and see where the civilians stand . . . we are recommending that the Grand Jury go and we wait to take jurisdiction from the civilians." (JA 583) (emphasis added). Captain Smith also said there was a "good chance" the government would lose a challenge on jurisdiction and "*we don't want to take the case from them yet knowing that we have an issue*." (JA 583) (emphasis added). All of these emails were sent while the unaware appellant had his "Rocky Bulldog" stamp, a finalized DD 214, and was using his family to pay for dental care.

In this case, something else is readily apparent: no one at the unit told Christopher Christensen what was happening with his pay and processing until after military police handcuffed him, shackled him, and drove him back to Fort Stewart nearly eight months after the installation finalized his DD 214. (JA 428, 431, 438–39). Notably, the day before military police forcibly drove appellant to Fort Stewart, CPT Smith acknowledged the Army would have been responsible for his treatment, "[T]he continuing rehab is not going to work, the Army would have to pay for it and currently he is paying." (JA 704).

The overall chain of events shows appellant's unit wanted to "wait" to see what "the civilians" would do, without taking any immediate actions to undo his discharge. This would allow them to purportedly maintain jurisdiction, while also keeping appellant away from a unit that did not want him. This ultimately placed appellant into a state of purgatory, in which the unit could allegedly maintain

jurisdiction indefinitely without incurring any actual costs. Appellant did not receive any pay or benefits from the Army for nearly eight months, yet supposedly remained under its jurisdiction.

Plain and simple, appellant's unit was trying to have it both ways. If the command and attorneys remained satisfied with the civilian prosecutorial decision, the unit would have given DFAS the "high sign" without appellant ever learning of his supposed continued service. In fact, the unit could have pretended all of its actions after April 2013 never occurred. Such actions run directly contrary to the actual holding in *Hart* and violate the overarching interests implicated by the law of personal jurisdiction as outlined in *Nettles*. In sum, the unit took the "false alarm" discussed in *Hart* and sought to use it as a basis for jurisdiction. Such manipulative machinations should not withstand appellate review.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court vacate the judgment of the Army Court, set aside the findings and sentence, and dismiss this case.

CODY CHEEK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
703-693-0724
USCAAF Bar Number 36711

For CHRISTOPHER COLEMAN
Major, Judge Advocate
Appellate Defense Counsel
USCAAF Bar Number 36567

BRENDAN CRONIN
Major, Judge Advocate
Branch Chief,
Defense Appellate Division
USCAAF Bar Number 36885

MARY J. BRADLEY
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF Bar Number 30649

APPENDIX

"[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (citation omitted). In this case, the military judges' rulings and Army Court decision contain a series of such mistakes by: 1) making findings that are clearly erroneous in light of the entire record, 2) adopting errors from earlier decisions, and 3) conflating findings of fact with conclusions of law.

1) <u>The various characterizations of the command and unit's decision making process contain clear mistakes in light of the entire record.</u>

Multiple findings related to the command's decision-making process are clearly erroneous. Rather than acknowledging the unit's wait-and-see approach, the military judges and Army Court erroneously found the command and unit made a series of early decisions indicating they wanted to halt Appellant's separation, revoke his DD 214 and separation orders, and make a disposition decision regarding the sexual assault allegations. (JA 2–5, 307–08, 734–38).

The trial court found that "in April 2013" LTC Denius "decided to halt the DFAS out-processing" and "directed his trial counsel" to take action.[19] (JA 307).

[19] The trial judge said he would "reconsider" his ruling after finding the May email thread. (JA 326–28). However, the trial judge did not actually issue a new ruling or fix his clear error. The *DuBay* judge cited the trial judge's verbal ruling for the separate unlawful command influence (UCI) motion to find the "email did not change his ruling" for jurisdiction. (JA 735). The portion of the verbal UCI ruling cited by the *DuBay* judge is the same as the written ruling. (JA 321–22).

The trial court also found that LTC Thalacker explicitly requested that appellant's DD 214 be "revoked" on June 13, 2013. (JA 308).

The *DuBay* judge found, "Captain Carter presented LTC Denius the option of allowing the Appellant to be fully separated, but LTC Denius made the command decision to halt Appellant's separation." (JA 734–35). This "ratified LTC Thalacker's earlier action." (JA 735). The *DuBay* judge also found, "As of 17 April 2013, the brigade commander or higher had not made a disposition decision as it related to the sexual assault allegations." (JA 737).

The Army Court stated, "LTC [Denius] directed CPT [Carter] to hold the DFAS processing so the command could make a disposition decision concerning the sexual assault allegations." (JA 4). The Army Court added, "From 25 April 2013 to 28 June 2013, LTC [Thalacker] took several steps and communicated with a number of people at the Fort Stewart personnel and finance offices and Army Human Resources Command (HRC) to revoke appellant's separation orders and DD Form 214." (JA 4–5). Additionally, "[o]n 13 June 2013, LTC [Thalacker] sent an email to Mr. [Kuhar], the Chief, Transitions Branch, at the HRC, requesting the revocation of appellant's DD Form 214." (JA 4–5).

Each of these findings ignores the multitude of evidence to the contrary. First, the command up to the "brigade level" was pleased with the decision to separate appellant and did not begin to change their mind until "late August." (JA

155–59). During the entire time period from initiation of separation to the dispatch of appellant's DD 214, his chain of command supported an administrative separation and did not seek to halt or reverse his separation action. (JA 143–51, 154–59, 312–14).

To this extent, COL Crider was specifically briefed on appellant's sexual assault allegations *and* pending chapter. (JA 147–51, 312–14). However, pursuant to this briefing, COL Crider did not express any desire to pursue a court-martial, nor did he object to appellant's pending separation. (JA 147–51, 312–14). Simply put, the decision of whether to separate appellant or keep him on active duty was a command decision, and the command *made* a decision: separation.

Second, several communications demonstrate the unit took a wait-and-see approach before revoking appellant's separation: (1) the emails from LTC Thalacker and LTC Harner, which make clear that any command decision to undo the separation was not made by May 15, 2013 (JA 575, 695); (2) the email from CPT Carter describing the unit "contemplating prosecution" in August 2013 (JA 581); (3) CPT Smith's email in September 2013 recommending the command wait for the grand jury before deciding whether to court-martial appellant. (JA 583).

Third, LTC Thalacker did not ask for appellant's DD 214 to be "revoked" on June 13, 2013. Instead, he asked Mr. Kuhar for "similar support" to a previous case. (JA 304). The full email thread shows that Mr. Kuhar could repopulate

appellant in the personnel systems, but he could not revoke appellant's DD 214. (JA 302–06). To the extent this was not clear enough, Mr. Kuhar explicitly told LTC Thalacker, "PFC Christensen's separation orders and DD 214 need to be revoked by the installation transition center." (JA 303). Ultimately, multiple parties informed LTC Thalacker of the requirements to revoke appellant's DD 214 and separation orders, but the revocations did not occur until September 30, 2013.

In this case, the judge advocates erroneously believed they could retain jurisdiction by intentionally stopping finance personnel from processing pay, and they advised the command accordingly. This advice did not seek a command decision to revoke appellant's separation. It instead proposed a flawed plan to delay appellant's pay processing to purportedly retain jurisdiction, while the unit did not incur costs and the unaware appellant did not receive any benefits.

2) <u>The findings over the pay processing timeline are clearly erroneous.</u>

The previous findings ignore clear testimony that appellant's pay documents would have been processed before CPT Carter's email exchange with LTC Denius on May 14–15, 2013. Both the *DuBay* judge and Army Court relied on general testimony that a confined soldier's pay processing can take 45-90 days, instead of the specific testimony for appellant's case. (JA 7, 735–36, 739–40).

The record establishes that appellant's DFAS case was placed in Mr. Jeffers' folder on May 1, 2013. (JA 387, 416, 555–56). The normal processing is "three to

five days." (JA 399, 405). Without the request to close the case, Mr. Jeffers would have "looked at the documents" and "seen what input they made and then process it accordingly." (JA 389). More specifically, absent the call from the field office, Mr. Jeffers would have processed appellant's case "within a day or two." (JA 417). If Mr. Jeffers processed the pay documents, Ms. Daley could have processed the computation in 48 hours, "give or take a day." (JA 360). Once Ms. Daley received the case back from DFAS, the entire process would average five business days. (JA 379).

The *DuBay* judge's unexplained finding that this timeline is "somewhat speculative" is an abuse of discretion. (JA 736). This is not a case of choosing between two competing narratives. The *DuBay* judge simply ignored the specific in favor of the general. Again, the record clearly established what would have happened in appellant's case, and it cannot be ignored or explained as a credibility determination when the testimony is not actually inconsistent.

3) <u>The finding that finance never stopped charging Appellant for his monthly SGLI fee until after his court-martial is clearly erroneous</u>**.**

In his findings of fact, the *DuBay* judge stated, "Finance never stopped charging Appellant for his monthly SGLI (life insurance fee) until after his court-martial. Upon final separation, a person is no longer eligible for SGLI." (JA 736). This finding is clearly erroneous, as appellant was not intentionally charged SGLI by finance or finance personnel.

While it is accurate that computer systems were attempting to bill appellant for SGLI, the system would make a record of a rejection; a DFAS person would look into it and state there was no action required because appellant was being separated. (JA 410, 413–414). It was not until October that a technician looked to refer the issue to the unit. (JA 410, 637–48).

Far from supporting a finding that appellant was still in the military, the technicians acknowledge "no action was required." (JA 410). Mr. Jeffers even testified, "*The computer does that*. I don't—as far as why, *it shouldn't*, but I don't know whether it is a systems problem or that—I can't explain that." (JA 414) (emphasis added). Therefore, a finding of SGLI debiting in support of personal jurisdiction is clearly erroneous.

4) <u>The findings regarding SPCMCA withholding and a disposition decision are clearly erroneous.</u>

The *DuBay* military judge and Army Court both referenced a sexual assault withholding policy. (JA 4, 735, 737). The *DuBay* military judge found LTC Denius "ratified LTC Thalacker's earlier action of stopping Appellant's final pay . . . in accordance with the Secretary of Defense's 20 April 2012 withholding policy." (JA 735). This misses a key point: appellant was not administratively separated for sexual assault, but was instead separated for alcohol rehabilitation failure. Critically, then-MAJ Smith specifically testified the command up through the "brigade level" supported the chapter, and it was not until "late August" that

the commanders started to change their minds about the decision to separate appellant. (JA 157, 159; *See also* JA 143–51, 154–56, 158, 312–14).

5) The rulings conflate findings of fact and conclusions of law.

When discussing status codes, NT-lines, DFAS processing, the impact of appellant's debt, and actions finance personnel take, the lower courts conflate findings of fact with conclusions of law. The answer to the question, "Has the guidance of § 1168(a) been satisfied?" is a conclusion of law. The answers to the questions "What occurred in appellant's case?" and "What do finance personnel do in every case?" are findings of fact.

Here, the lower courts, misunderstanding the actual holding of *Hart*,[20] conflate the actions finance personnel take after separation with the requirements to terminate jurisdiction. The lower courts also failed to consider these actions in light of the *guidance* of § 1168(a), but instead treated them as being talismanic for purposes of jurisdiction.

The *DuBay* judge, without support in the record, states in his findings of fact that the completion of these actions is when "final pay is ready for delivery." (JA 736). The Army Court adopted this finding in concluding appellant was not fully

[20] The majority in *Hart* accepted the military judge's factual findings regarding final pay because neither party contested the findings. 66 M.J. at 276. This Court did not hold as a matter of law that the steps described in *Hart* must be completed to satisfy § 1168, and instead limited *Hart* to the facts of that case. *Id*.

separated (JA 7), even though this contradicted by Army regulation. *See* AR 37–104–4, para. 21–3 ("During out-processing, it is highly recommended that soldiers be asked to provide the servicing finance office a valid mailing and/or e-mail address that will be valid for at least 120 days after departure, to facilitate timely payments *after separation*.") (emphasis added) (JA 787).

Similarly, the lower courts mix up factual findings and conclusions of law when discussing appellant's debt. The *DuBay* military judge found the overall process "must occur" regardless of "whether there is money to be paid out or ultimately a debt owed" in order "[f]or a Soldier in civilian confinement to receive final accounting of pay." (JA 736). This mislabeled "finding" was then used as the sole grounds for concluding "the element requiring final accounting of pay" in § 1168(a) was not met. (JA 738–39).

In this case, there was never going to be a "substantial part" of pay ready for delivery because no pay was actually being delivered. The *DuBay* judge even found "[a]ppellant owed a debt to the U.S. Army" in April 2013. (JA 736). Therefore, the only thing being processed is paperwork, not final pay of any money. Furthermore, even under the steps the *DuBay* judge outlined "must occur" as a "finding of fact," the record fails to establish how making "final pay or a substantial part of that pay" ready for delivery could ever be accomplished with a known and calculated debt.

6) The allegation of a defense concession is not supported by the record.

While not a finding of fact, the *DuBay* military judge mischaracterizes an exchange to erroneously assert, "Appellant in effect conceded during the *DuBay* hearing that the required computation was never completed nor was his 'final pay or substantial part of that pay' made ready for delivery."[21] (JA 738). Appellant did no such thing. While the *DuBay* defense counsel agreed that Mr. Jeffers stopped his actions due to the field office calling him, the defense counsel argued that everyone knew appellant owed a debt and the statute only requires any pay be "ready for delivery." (JA 349, 475). As such, the statute was satisfied, and the government attorneys who believed they could stall DFAS to retain court-martial jurisdiction were mistaken. Therefore, the military judge's statement regarding a defense concession is simply incorrect.

[21] Within the record, various witnesses and attorneys make statements about "final pay" that imply "final pay" is an evidentiary fact. It is not. Conclusory statements of whether final pay occurred should be given no weight. Instead, the "guidance" of § 1168(a) should help drive this Honorable Court's decision, as the statute's "demands are not binding when we find that they go against reason or policy." *Nettles*, 74 M.J. at 291.

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief and associated appendix complies with the type-volume limitation of Rules 24(c) because it contains a combined 13,637 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

CODY CHEEK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0724

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Christensen*, Crim. App. Dkt. No. 20140372, USCA Dkt. No. 17-0604/AR, was delivered to the Court and Government Appellate Division on March 2, 2018.

CODY CHEEK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0724