IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Derrick L. DINGER Gunnery Sergeant (E-7) United States Marine Corps (Ret.), Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201600108 USCA Dkt. No. 17-0510/MC

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

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Index of Brief

Table of Authorities

Regulations

Other Sources

Issue Presented

10 U.S.C. § 6332 STATES THAT WHEN A PERSON IS PLACED IN A RETIRED STATUS, THIS "TRANSFER IS CONCLUSIVE FOR ALL PURPOSES." CAN A COURT-MARTIAL LAWFULLY SENTENCE A RETIREE TO A PUNITIVE DISCHARGE?

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that includes a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] This Court therefore has jurisdiction under Article 67, UCMJ.[2]

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant pursuant to his pleas, of two specifications of committing indecent acts in violation of Article 120, UCMJ, 10 U.S.C. § 920, one specification of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934, one specification of attempting to produce child pornography in violation of Article 80, UCMJ, 10 U.S.C. § 880, and two specifications of wrongfully making a video recording of his spouse in violation of Article 120c, UCMJ, 10 U.S.C. § 920c.[3]

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867 (2012).
[3] JA at 62-63.

The military judge sentenced Appellant to nine years' confinement and a dishonorable discharge.[4] The Convening Authority (CA) approved the sentence as adjudged, but suspended all confinement over ninety-six months pursuant to a pretrial agreement.[5] Except for the punitive discharge, the CA ordered the approved sentence executed.[6]

On February 15, 2017, the NMCCA held oral argument in this case and, on March 28, it affirmed the findings and the sentence.[7] The lower court denied Appellee's Motion for Reconsideration on May 17, 2017. Appellant petitioned this Court for review on July 14, 2017, and this Court granted review on October 16, 2017.

Statement of Facts

A. Background

An enlisted member of the Marine Corps may, after twenty years of active duty, elect transfer to Fleet Marine Reserve.[8] In this status the member receives "retainer pay" based primarily on years of active duty service.[9] After thirty total years, the member is transferred "to the retired list of the . . . regular Marine

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[4] JA 64.
[5] JA at 38.
[6] *Id.* at 39.
[7] *United States v Dinger*, 76 M.J. 552 (N-M. Ct. Crim. App. 2017).
[8] 10 U.S.C. § 6330 (b).
[9] 10 U.S.C. § 6330 (c)(1).

Corps" and receives "retired pay" at "the same rate as the retainer pay[.]"[10]

B. GySgt Dinger

From November 1, 2003 to August 1, 2013, following twenty years of active duty service in the Marine Corps, Appellant was a member of the Fleet Marine Corps Reserve List ("Fleet Marine Reserve").[11] He transferred to the active duty retired list ("retired list") on August 1, 2013. He received retirement benefits after transferring to the Fleet Marine Reserve.[12] The Secretary of the Navy authorized Appellant's court-martial by a Memorandum dated June 18, 2015.[13] As a civilian, Appellant appeared at his court-martial in civilian clothes.[14]

Summary of Argument

Section 6332 of Title 10 plainly states that a retiree's status on the retired list is "conclusive for all purposes." This statute's precursor declared transfer to the Fleet Naval Reserve to be final "except by sentence of a court-martial." Congress' amendment removing this language confirms that the statute means what it says it means.

The lower court rejected section 6332's plain meaning and held that Article 18, UCMJ—which states that general courts-martial may "adjudge any punishment

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[10] 10 U.S.C. § 6331 (a), (c).
[11] JA at 65.
[12] JA 65-66.
[13] JA at 90.
[14] JA at 48.

not forbidden by this chapter"—controls over section 6332. The lower court's analysis fails for at least three reasons: 1) it fails to give effect to this Court's interpretation of Section 6332 in *United States v. Allen*[15] and *United States v. Sloan*;[16] 2) it requires an executive order to trump a statute; and 3) it rejects a specific statute for a general statute.

Argument

10 U.S.C. § 6332 STATES THAT WHEN A PERSON IS PLACED IN A RETIRED STATUS, THIS "TRANSFER IS CONCLUSIVE FOR ALL PURPOSES." A DISCHARGE WOULD CONTRAVENE THE CLEAR STATUTORY LANGUAGE. ACCORDINGLY, A COURT-MARTIAL CANNOT DISCHARGE A RETIREE.

Standard of Review

Interpretation of statutes is a question of law this Court reviews *de novo*. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).

Discussion

When assessing the meaning of statutes, this Court begins "by simply reading the plain language of the rule giving effect to every clause and word."[17] "'[W]hen the statute's language is plain, the sole function of the courts—at least

[15] 33 M.J. 209 (C.M.A. 1991).
[16] 35 M.J. 4 (C.M.A. 1992).
[17] *United States v. Fetrow*, 76 M.J. 181, 186 (C.A.A.F. 2017).

where the disposition required by text is not absurd—is to enforce it according to its terms.'"[18]

Appellant's punitive discharge is precluded by the plain language of 10 U.S.C.§ 6332, which states that when a member of the naval service is placed in a retired status, this "transfer is conclusive for all purposes." Read literally, "all" includes the individual's status as a retiree on the retired list with an honorable discharge and precludes the award of a punitive discharge to a retiree.[19] In fact, there is no explicit legal authority, or exception, that sanctions the discharge of an individual on the retired list. To the contrary, this Court's precedent suggests that a discharge is an unauthorized punishment for a retiree.[20]

The Court of Military Appeals in both *United States v. Allen*[21] and *United States v. Sloan*,[22] examined whether the adjudged reductions in rank for these two

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[18] *EV v. United States*, 75 M.J. 331, 333 (C.A.A. 2016) (alteration in original) (citations omitted); *see Perry v. MSPB*, 137 S. Ct. 1975, 1994 (2017) (Gorsuch, J. dissenting) ("Congress already wrote a perfectly good law. I would follow it.").
[19] *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [] a definition in a statute, the court construes a statutory term in accordance with its ordinary or natural meaning.").
[20] In *United States v Reynolds*, the NMCCA relied on *Dinger*, without analysis, in holding that 10 U.S.C. § 6332 does not preclude a punitive discharge for a member on the Temporary Disability Retired List. *United States v. Reynolds*, No. 201600415, 2017 CCA LEXIS 282 (N-M. Ct. Crim. App. Apr. 27, 2017).
[21] *Allen*, 33 M.J. 209, 216-17 (C.M.A. 1991).
[22] *Sloane*, 35 M.J. 4, 11-12 (C.M.A. 1992).

retired servicemembers convicted at court-martial were lawful. Neither involved punitive discharges, but this Court's construction of the statute at issue applies here.

In *Allen*, a retired Senior Chief was sentenced to confinement and a fine, and was administratively reduced in rank by operation of Article 58a, UCMJ.[23] In holding that a retiree's rank could not be reduced by court-martial, the *Allen* Court cited 10 U.S.C. § 6332 and found "a transfer of a servicemember to the retired list is conclusive in all aspects as to grade and rate of pay based on his years of service."[24] The Court relied in part on a Comptroller General opinion finding a Sailor who was recalled from the Fleet Reserve, court-martialed, and reduced, should be paid at "the higher rate" once he returned to inactive status in the Fleet Reserve.[25]

In *Sloan*, an Army NCO, was confined and reduced in rank, but not

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[23] *Allen*, 33 M.J. at 210.

[24] *Allen*, 33 M.J. at 216-17; *see* 10 U.S.C. § 6332. Congress has not amended 10 U.S.C. § 6332 since 1958. Thus, Congress was fully aware of its implications before enacting UCMJ updates in 1968 and 1983. *Sloan* and *Allen* were decided in 1991 and 1992. There have been no legislative or presidential changes that detract from their effect.

[25] *Allen*, 33 M.J. at 216 (citing B-10520, 20 Comp. Gen. 76, 78 (1940)). The Court found support for this conclusion in a scholarly treatise concluding "forfeiture of pay (and by analogy, reduction) was not necessary to satisfy the military interests" in court-martialing retirees. Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and* Discharged *Prisoners, 112* U. Pa. L. Rev. 317, 356-57 (1964)). *Allen*, 33 M.J. at 216.

discharged. Although section 6332 did not apply to *Sloan* because it was an Army case, *Sloan* relied on *Allen's* underlying logic in finding an adjudged reduction in rate was an illegal punishment.[26]

Similar to reduction in rate, a punitive discharge is an illegal punishment for a retiree. While the C.M.A. in *Sloan* and *Allen* did not explicitly address the issue of discharges, the basis of the Court's determination—that transfer to the retired list is *conclusive* for *all purposes*—precludes punitive discharges for retired Sailors and Marines. "[F]or all purposes" includes courts-martial.[27] As the Attorney General noted in a 1924 opinion, the precursor to §6332 declared transfer to the Fleet Naval Reserve to be final "except by sentence of a court-martial."[28] Congress has since removed that sole exception. Accordingly, Congress intended "conclusive for all purposes" to mean precisely what it says.

If a retiree's status is conclusive for *all* purposes, it follows that the court-

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[26] *Sloan*, 35 M.J. at 11-12. The majority in *Sloan* also relied on 5 U.S.C. § 8312 as support that Congress intended to protect retired pay from being reduced at court-martial. *Id.* at 12, n.6. That statute prohibits, *inter alia*, payment of retired pay to a retired individual for a narrow class of UCMJ offenses such as "aiding the enemy, spying, treason, sedition, and other like offenses that relate to undermining the very government from whom the accused would purport to receive retired pay, as well as perjury or subornation of perjury." *Id.*

[27] *See id.* at 11-12; *Allen,* 33 M.J. at 216-17.

[28] 34 Op. Atty. Gen. 250, 251 (1924) ("Men transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy and shall not be discharged from the Naval Reserve Force without their consent, except by sentence of a court-martial.") (quoting Naval Reserve Act of 1938, Ch. 690, 39 Stat. 591 (1916)).

martial lacks the legal authority to award punishments inconsistent with the retiree's status as it would contradict federal statute. With no statute authorizing retirees to be punitively discharged, a punitive discharge cannot be awarded.

The lower court disregarded the statutory language of section 6332, holding that it does not apply to punitive discharges.[29] Instead, it applied Article 18, UCMJ, holding it authorizes general courts-martial (GCM) to "'adjudge any punishment not forbidden by this code.'"[30] There are at least three problems with the lower court's application of Article 18.

First, Article 18's language was the same when this Court decided *Allen* and *Sloan* as it was when Appellant was tried.[31] If the lower court's analysis were correct, this Court would have held that Article 18 authorized Allen and Sloan to be reduced in rank. It did not. Nonetheless, the lower court rejected the *Allen* and *Sloan* holdings.[32]

Second, the lower court's holding requires an executive order to trump a statute, which the law does not permit. Article 18 authorizes GCMs to "adjudge any punishment not forbidden by this chapter." At the time of the offenses in this

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[29] *Dinger*, 76 M.J. at 558-59.
[30] *Id.* at 558 (misquoting 10 U.S.C. § 818 (2012)). Article 18, UCMJ, states general courts-martial are authorized to "adjudge any punishment not forbidden by this chapter." 10 U.S.C. § 818 (2012).
[31] *Compare* 10 U.S.C. § 818 (1988) *with* 10 U.S.C. § 818 (2012).
[32] *Dinger*, 76 M.J. at 557.

case, "this chapter" did not prescribe any applicable punishments.[33] Article 56, UCMJ, merely limited the maximum punishment, stating it "may not exceed such limits as the President may prescribe."[34] The implication of the lower court's holding is that the President authorized the discharge adjudged in this case through executive order.[35] However, the President may not prescribe punishments that conflict with higher authority. In the hierarchy of authority, executive orders fall under statutes.[36] When a lower authority conflicts with a higher authority, the higher authority prevails.[37] Here, the executive order setting the maximum punishment for the offenses of which Appellant was convicted must give way to the statute that limits that maximum punishment—10 U.S.C. § 6332.

Third, "in cases of direct conflict, a specific statute overrides a general one, regardless of their dates of enactment."[38] If this Court believes

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[33] *See id.* at 558, n.34 (noting Appellant was not subject to any mandatory minimum sentences).
[34] 10 U.S.C. § 856 (2012).
[35] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 12 (2012).
[36] *United States v. Guess*, 48 M.J. 69, 70-71 (C.A.A.F. 1998); *United States v. Davis*, 47 M.J. 484, 485-86 (C.A.A.F. 1998).
[37] *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997).
[38] *United States v. Bartlett*, 66 M.J. 426, 429 (C.A.A.F. 2008) (citing 2B Norman J. Singer, *Statutes and Statutory Construction* § 51.02, at 187 (7th ed. 2000); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *United States v. Mitchell*, 44 C.M.R 649, 651 (A.C.M.R. 1971)); *United States v. Loving*, 68 M.J. 1, 26 (C.A.A.F. 2009) (Ryan, J., dissenting) (relying on "the usual canon of statutory construction that favors specific statutes over general ones") (citing *Hinck v. United States*, 550 U.S. 501, 506 (2007)).

there is a conflict between section 6332 and Article 18, this canon of statutory construction resolves that conflict. Article 18 addresses GCM punishments in the broadest terms without identifying what the punishments are ("any punishment not forbidden by this chapter"). By contrast, section 6332 identifies a particular class (retirees) and mandates how their status is to be treated ("conclusive for all purposes").

As discussed above, the precursor to 10 U.S.C. § 6332 declared transfer to the Fleet Naval Reserve to be final "except by sentence of a court-martial."[39] Thus, the lower court's assertion that Congress has not "directly limited the authority of a court-martial to adjudge a discharge for a member in a retired status,"[40] is contradicted by the congressional amendments to section 6332 doing just that.

In expressly rejecting the import of Congress's amendments, the lower court rejected the statute's plain meaning and defined Title 10 by reference to its "'broader statutory context.'"[41] But its reference to Congress' express exemption of certain classes of personnel from summary courts-martial and limitation on the discharges awarded by courts-martial

[39] Naval Reserve Act of 1938, Ch. 690, 39 Stat. 591 (1916); *Dinger*, 76 M.J. at 558 (recognizing origins of 10 U.S.C. § 6332).
[40] *Dinger*, 76 M.J. at 559.
[41] *Id.* at 558 (quoting *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016)).

does not provide context.[42] These limits and exemptions under Articles 19 and 20, UCMJ, do not undermine the conclusiveness of transfers to the retired list. While the lower court cites to the Rule for Courts-Martial 1003(b)(8), this rule means only what it says: a court-martial cannot award an administrative discharge.[43] That fact does not create authority to adjudge a punitive discharge to a retiree.

Also, in an effort to provide "context" to a statute that is on its face clear, the lower court referred to the mandatory punishments provision in the NDAA 2014 for certain sexual assault cases—a provision that is inapplicable here.[44] However, this adds neither historical light nor provides context.[45] It is a fact that is irrelevant to the analysis of this case.

No case has squarely addressed the legal issue of a punitive discharge for a retiree for offenses committed while in a retired status.[46] The most

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[42] *Id.*

[43] *Id.*; MCM, R.C.M. 1003(b)(8) (2016).

[44] National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 959 (2013); *Dinger*, 76 M.J. at 558, n.34.

[45] *Dinger*, 76 M.J. at 558. The lower court stated, "Recently, Congress directed that any 'person subject to this chapter' guilty of certain offenses must receive a minimum sentence of a dishonorable or bad-conduct discharge, subject only to exceptions not based on personal status." *Id.* The NDAA amendments do not change the fact that the punishment must be within the court's sentencing authority.

[46] The lower court relied on *United States v. Overton,* 24 M.J. 309 (C.M.A. 1987), in finding there is no policy against punitively discharging retirees. *Dinger*, 76 M.J. at 559, n.39. But *Overton* provides no support because it did not address

prominent Navy Reserve court-martial, involving the court-martial of a retired admiral, *United States v. Hooper*, does not prove the case that a retiree can be discharged.[47] The C.M.A. and the Court of Claims "primarily addressed whether there was court-martial jurisdiction" in *Hooper* rather than what sentence was authorized.[48] As the C.M.A. found in *Sloan*, "the probative value of the *Hooper* litigation on the question" of what sentence is authorized "here and in *Allen* is dubious."[49]

Conclusion

Section 6332 plainly states that a retiree's status on the retired list is "conclusive for all purposes." Further, this statute's precursor declared transfer to the Fleet Naval Reserve to be final "except by sentence of a court-martial." Congress' amendment to exclude this language leaves no doubt that the statute means what it says it means. And no executive order can change that. The plain language settles this issue.

Wherefore, GySgt Dinger requests that this Court disapprove his punitive discharge.

Bree A Ermenth

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the issue of what punishment was authorized. It focused on whether a court-martial had jurisdiction over a retiree under Article 2(a)(6), UCMJ.

[47] *United States v. Hooper*, 26 C.M.R. 417 (C.M.A 1958).

[48] *Sloan*, 35 M.J. at 12, n.6 (noting the discussion of entitlement to continued rank and pay was incidental to the primary issue of jurisdiction).

[49] *Id.*

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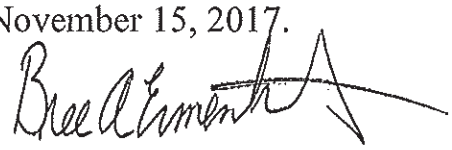

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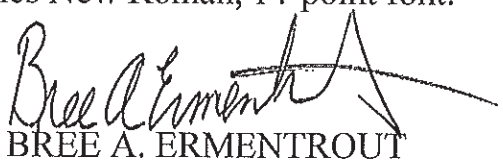

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