IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

BRIAN L. FARRELL
Captain, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36923

KELLI A. O'NEIL
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7687
Bar no. 36883

VALERIE C. DANYLUK
Colonel, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 36770

BRIAN K. KELLER
Deputy Director
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Issue granted

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

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

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of two specifications of committing indecent acts, one specification of attempting to produce child pornography, two specifications of wrongfully making a video recording of his spouse, and one specification of possessing child pornography in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006), and Articles 80, 120c, and 134, UCMJ, 10 U.S.C. §§ 880, 920c, 934 (2012). The Military Judge sentenced Appellant to nine years of confinement and

a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, order the sentence executed. In accordance with a Pretrial Agreement, the Convening Authority suspended confinement in excess of ninety-six months.

Statement of Facts

A. Appellant is a retired servicemember.

Appellant was on active duty from July 18, 1983, until October 31, 2003. (J.A. 65.) He stipulated that he transferred to the Fleet Marine Corps Reserve on November 1, 2003, and then to the Active Duty Retired List on August 1, 2013. (J.A. 56, 65-66.) He stipulated that he was entitled to and received retirement pay during the charged time periods. (J.A. 56, 65-66.)

B. The Secretary of the Navy authorized the exercise of court-martial jurisdiction over Appellant after his transfer to the retired list.

In June 2015, the Secretary of the Navy, citing to Article 2, UCMJ, issued a memorandum authorizing the apprehension, confinement, and referral of charges against Appellant. (J.A. 90.) The United States referred charges to a General Court-Martial against Appellant, alleging indecent acts, attempted production of child pornography, possession of child pornography, and indecent recording between January 2011 and September 2014. (J.A. 40-44.)

C. Appellant signed a Pretrial Agreement agreeing that the Convening Authority could approve a punitive discharge.

Appellant signed a Pretrial Agreement with the Convening Authority on December 4, 2015, agreeing that he "fully underst[oo]d and agree[d] to the . . . terms and conditions" of the Pretrial Agreement. (J.A. 91.) He agreed to plead guilty unconditionally:

> This agreement (Parts I and II) constitutes all the conditions and understandings of both the government and me regarding the plea in this case. There are no other agreements, written, oral or otherwise implied.

(J.A. 91, 103.)

Appellant agreed in two separate provisions of Part I that "My defense counsel has advised me that any punitive discharge that is adjudged and ultimately approved may adversely affect my ability to receive retirement pay and all other veterans benefits." (J.A. 95.) He further agreed in Part I that "the sentence limitation portion of this agreement addresses . . . the sentence that may be adjudged in this case . . . [including a] punitive discharge." (J.A. 91.) Appellant made no objection in Part I to the Court-Martial's authority to adjudge a punitive discharge. (J.A. 91-100.)

Part II, the sentence limitation portion, also signed by Appellant, stated: "Punitive Discharge: May be approved as adjudged." (J.A. 101.)

Appellant continued on the next page: "I fully understand, and have discussed with my counsel, how this agreement will affect any sentence that I may be awarded by the court-martial." (J.A. 102.)

There are several handwritten additions to both pages of the sentence limitation portion of the Pretrial Agreement, signed on December 17, 2015, but nothing in Parts I or II indicate that Appellant and the United States agreed to preserve the ability to conduct appellate review of the authorized punitive discharge or his pretrial motion on that issue. (J.A. 91-103.)

D. Prior to entering pleas, the Military Judge denied Appellant's Motion arguing that punitive discharge was not authorized.

Prior to pleas, Appellant filed a Motion arguing the Military Judge had no authority to adjudge a punitive discharge. (J.A. 49, 104-14.) The Military Judge denied the Motion. (J.A. 49.)

E. Appellant entered unconditional pleas of guilty.

On December 17, 2015, after the Military Judge denied the Motion, Trial Defense Counsel stated: "[t]he mere fact that we are going forward with the plea is not . . . our waiving the issue." (J.A. 51.) She continued: "we are not consenting or agreeing with the ruling, sir, so I just want to preserve that for the record." (J.A. 51-52.)

The Military Judge responded: "I recognize your comment on waiver and whether there is waiver or not, obviously would be at the discretion not of me, but of reviewing courts." (J.A. 52.) He continued: "Based upon my finding that a punitive discharge is authorized . . . does your client still wish to go forward?" (*Id.*) Trial Defense Counsel conferred with Appellant, then stated "Yes, sir. The client still wishes to proceed." (*Id.*) Appellant than directly confirmed to the Military Judge that he had sufficient time to discuss the matter with Trial Defense Counsel, that the guilty plea may "subject [him] to a punitive discharge," but nevertheless he wanted to plead guilty. (*Id.*)

During the Providence Inquiry, the Military Judge returned to the issue, asking Appellant: "Do you still wish to plead guilty in light of the fact that I believe a punitive discharge is authorized." (J.A. 58.) Appellant answered, "Yes, sir." (J.A. 58.)

Later, when discussing the Pretrial Agreement, Appellant acknowledged that Trial Defense Counsel had discussed with him the notification provisions that an approved punitive discharge may have negative effects on his retirement pay and other benefits. (J.A. 59-60.)

The Military Judge accepted Appellant's pleas and found him guilty. (J.A. 61-63.)

F. The Military Judge sentenced Appellant to a dishonorable discharge.

The Military Judge sentenced Appellant to a dishonorable discharge and nine years of confinement. (J.A. 64.)

Argument

I.

APPELLANT LITIGATED THE PUNITIVE DISCHARGE ISSUE PRIOR TO PLEAS, DID NOT PRESERVE APPEAL OF THE MATTER IN HIS PRETRIAL AGREEMENT, EXPLICITLY AGREED IN HIS PRETRIAL AGREEMENT THAT A PUNITIVE DISCHARGE WAS AUTHORIZED, AND ENTERED UNCONDITIONAL GUILTY PLEAS. APPELLANT WAIVED THIS ISSUE.

A. As in *Gladue*, Appellant explicitly agreed that a punitive discharge could be authorized, and the Pretrial Agreement nowhere preserved appeal of his pre-plea Motion. The issue is invited or waived.

In the absence of an explicit prohibition, a party may knowingly and voluntarily waive a nonconstitutional right in a pretrial agreement. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). The Supreme Court has held "absent some affirmative indication of Congress' intent to preclude waiver, [courts] have presumed that statutory provisions are subject to waive by voluntary agreement by the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Although the President has prohibited the waiver of certain fundamental rights in a pretrial

agreement, nothing prohibits an accused from explicitly agreeing, and not preserving appeal of, the availability of a presidentially prescribed maximum punishment for the charged offenses. *See* R.C.M. 705(c)(1)(B).

Appellant explicitly agreed that punitive discharge "may be approved as adjudged." (J.A. 101.) Appellant negotiated the Pretrial Agreement with the Convening Authority and, as indicated by the notification provisions regarding its effects and its inclusion in Part II, it was a key term. Appellant explicitly agreed to the maximum available punishment in his Pretrial Agreement, and did not indicate in his Pretrial Agreement that it was conditional with the consent of the United States as would have been required by R.C.M. 910(a)(2). Appellant thus invited, or waived, any error under *Gladue.*

B. Appellant unconditionally pled guilty after the Military Judge informed him that a punitive discharge was authorized. His unconditional guilty pleas waived the issue.

"An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010); *see also United States v. Lee*, 73 M.J. 166, 168 (C.A.A.F. 2014). "While the waiver doctrine is not without limits, those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained." *Bradley*, 68 M.J. at 282 (citations omitted). The exceptions to guilty

plea waiver do not include "antecedent constitutional violations or a deprivation of constitutional rights that occurred prior to the entry of the guilty plea, rather they apply where on the face of the record the court had no power to enter the conviction or impose the sentence." *Lee*, 73 M.J. at 170 (internal citations omitted).

Double jeopardy, which would bar the conviction, is an exception to guilty plea waiver. *United States v. Broce*, 488 U.S. 563, 574-76 (1989); *Menna v. New York*, 423 U.S. 61, 61-63 (1975). So too are facially duplicative specifications or specifications that fail to state an offense. *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009). But non-constitutional errors, and constitutional violations that do not void the conviction on its face, are not exceptions to guilty plea waiver. *Bradley*, 68 M.J. at 282. Even Sixth and Fifth Amendment unconstitutional delay arising prior to guilty pleas, and all statutory and regulatory allegations of delay, are waived by a later unconditional guilty plea. *See United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007); *Lee*, 73 M.J. at 171.

1. The jurisdictional maximum for general courts-martial is located within the Code.

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

"[T]here is no doubt of the power of a court-martial to try a person receiving retired pay." *United States v. Allen*, 33 M.J. 209, 216 (C.M.A. 1991) (citing *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989)). However, "the nature and types of punishment such a tribunal may impose" is a different issue than jurisdiction. *Id*.

The jurisdictional maximum of a general court-martial is located in Article 18, UCMJ, "Jurisdiction of general courts-martial." Congress has assigned the jurisdictional maximum sentence of general courts-martial to be "any punishment" prescribed by the President and not forbidden by the Code. Thus the maximum jurisdictional sentence includes a punitive discharge.

2. 10 U.S.C. § 6332, a statute outside the Uniform Code, is non-jurisdictional as to courts-martial sentences.

To determine whether a federal statute is jurisdictional, courts "look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). Congress need not use magic words—"Context, including [courts'] interpretation of similar provisions in many years past, is relevant." *Id*. (quoting *Reed Elsevior, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010)).

This Court applied this rationale in *United States v. Rodriguez*, finding that the filing deadlines within Article 67, UCMJ, were jurisdictional because "the statute is clear, unambiguous and mandatory" in imposing said jurisdictional deadlines. 67 M.J. 110, 115 (C.A.A.F. 2009). However, unlike *Rodriguez*, this Court has analyzed 10 U.S.C. § 6332 separately from the jurisdictional issue, finding the United States did have *in personam* jurisdiction while simultaneously finding that reduction in grade is a prohibited punishment for a retiree based on an interpretation of 10 U.S.C. §6332. *United States v. Sloan*, 35 M.J. 4, 11-12 (C.M.A. 1992).

By its plain language, 10 U.S.C. § 6332 is non-jurisdictional. It does not clearly state that it is jurisdictional—nor does it contain the word "jurisdiction." *See Reed Elsevior, Inc.*, 559 U.S. at 163.

Moreover, 10 U.S.C. § 6332, in context, is non-jurisdictional. It is located in a section of Title 10 wholly "separate" from those granting jurisdiction to courts-martial. *See id*. at 164-65; *Arbaugh*, 546 U.S. at 514-15. It appears in a Chapter entitled "Chapter 571 – Voluntary Retirement." The section never mentions or refers to courts-martial or military justice. And in the Chapter, only one of its sixteen total sections refers to courts-martial—10 U.S.C. § 6329—and that section does not limit the jurisdiction of courts-martial; rather, it limits the ability of the

Navy and Marine Corps to *retire* officers "because of misconduct for which trial by court-martial would be appropriate." That is, the sole section that refers to courts-martial, in the Chapter Appellant relies on, cedes authority from the retirement section to the Uniform Code of Military Justice. Needless, 10 U.S.C. § 6332 makes no mention of military justice whatsoever.

Notably, Appellant knew how to raise jurisdictional issues: he raised a jurisdictional error separately, both in his Petition to this Court and in his assignments of error to the lower court. (Appellant Supplement to Pet., Aug. 7, 2017; Appellant N-M. Ct. Crim. App. Br., June 3, 2016.) But the granted issue now before this Court is one of the statutory interpretation of 10 U.S.C. § 6332—a non-jurisdictional statute.

3. Under *Bradley*, Appellant's plea, as it relates to the punitive discharge, was knowing and voluntary and should be upheld.

In *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010), this Court found that a motion litigated prior to entry of unconditional guilty pleas is waived by later entry of unconditional guilty pleas, despite the fact that trial defense counsel continued to assert to the judge that he believed the issue was preserved. The lower court found that the continued objections by trial defense counsel created a "de facto conditional plea." *Id.* at 281. This Court disagreed, noting that the

unconditional guilty plea, which did not preserve issues with the consent of the military judge and Government as required in R.C.M. 910(a)(2), waived both motions litigated prior to entry of the guilty pleas. *Id.* at 282. This Court also found that the result did not render the plea improvident despite trial defense counsel's mistaken belief that the issue was preserved, as there was no allegation of ineffective assistance of counsel. *Id.* at 283.

This Court has already come close to considering guilty plea waiver in a similar context to here. In *United States v. Beaty*, this Court stopped short of whether guilty plea waiver applied to the validity of a presidentially authorized punishment because: (1) the United States did not argue waiver; and, (2) whether the punishment was authorized was linked to the language of the charge to which appellant pled guilty and was convicted. 70 M.J. 39, 41 n.4 (C.A.A.F. 2011); *see also Brady v. United States*, 397 U.S. 742, 755-57 (1970) (guilty plea entered by one fully aware of direct consequences must stand unless induced by threats, misrepresentation, or improper promises). There, this Court affirmed the findings but set aside the sentence—concluding the maximum sentence for the offenses appellant pled guilty to was less than his adjudged sentence. *Id*. at 43-45.

This Court should apply waiver as in *Bradley*, and should proceed to the issue not reached in *Beaty*. The validity of a punitive discharge for Appellant is

not linked to Appellant's pleas or the language of his Charges. All of Appellant's convictions carry a maximum jurisdictionally authorized sentence of a dishonorable discharge, and the statute outside the Code that Appellant points to is, as demonstrated above, non-jurisdictional as to courts-martial. Manual for Courts-Martial (MCM), United States (2012 ed.), Part IV, ¶45c.e.(2); ¶68b.e.(1,4).

The Military Judge informed Appellant and Trial Defense Counsel, prior to his pleas, that a punitive discharge was authorized. (J.A. 49-52; 58-60.) He reminded Appellant multiple times that he could withdraw his pleas based on his Ruling and he ensured Appellant discussed this Ruling with his counsel and knew the potential negative consequences—including affecting his continued retirement pay and benefits. (J.A. 52, 58-60.)

As is clear from the Record, Appellant submitted his plea of guilty knowing the Military Judge could adjudge a punitive discharge. Appellant unconditionally pled guilty and waived this issue. (J.A. 61-63.)

II.

ARTICLE 18 AUTHORIZES PUNITIVE DISCHARGE OF RETIREES TRIED UNDER ARTICLE 2(a)(4) SUBJECT TO LIMITS "IN THIS CHAPTER." THE PRESIDENT AUTHORIZED A PUNITIVE DISCHARGE IN R.C.M. 1003(b)(8). 10 U.S.C. § 6332 IS NOT PART OF THE UNIFORM CODE, IS PART OF A CHAPTER THAT IMPOSES NO LIMITS ON ADJUDGED DISCHARGES IN COURTS-MARTIAL, AND SURROUNDING STATUTES DEMONSTRATE THAT "CONCLUSIVE FOR ALL PURPOSES" DOES NOT LIMIT ADJUDGED DISCHARGES AT COURTS-MARTIAL.

A. Standard of review is *de novo*.

The maximum punishment authorized for an offense is a question of law reviewed *de novo*. *United States v. Beaty*, 70 M.J. at 41.

B. The plain language of Articles 18 and 56, UMCJ, and the Manual for Courts-Martial authorize a punitive discharge for a retiree.

Statutory construction begins with a look at plain language. *United States v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 241-42 (1989). "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000).

Article 18, UCMJ, states that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter." 10 U.S.C. § 818(a) (2012). The word "chapter" in Article 18 refers to Chapter 47 of Title 10, the Uniform Code of Military Justice. 10 U.S.C. §§ 801-946a (2012). By the plain language of Article 18, UCMJ, the President's authority to define the punishments is limited only by what is within the UCMJ. Therefore, this Court should look only within the "chapter" to determine whether a punitive discharge is authorized for a retiree.

1. The Code and President's Rules permit the punitive discharge of retirees in general courts-martial.

In Article 56, UCMJ, Congress defined the maximum limits on sentences, stating: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856(a) (2012). Congress expressly forbade categories of punishments, including flogging, branding, tattooing, and any other cruel or unusual punishment. 10 U.S.C. § 855 (2012).

In *Loving v. United States*, the Supreme Court held that Congress constitutionally "exercised its power in Articles 18 and 56 of the UCMJ" to delegate to the President the authority to authorize and limit the maximum

punishments for offenses committed in violation of the UCMJ. 517 U.S. 748, 769 (1996). In *United States v. Curtis*, this Court held that Articles 18 and 56 together "reveal that—instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishments imposable in trials by courts-martial." 32 M.J. 252, 261 (C.M.A. 1991).

But nowhere has Congress in the Code, or the President by delegation in Part IV, restricted retired servicemembers from receiving a punitive discharge. Congress prohibited dishonorable discharges at special courts-martial. 10 U.S.C. § 819. The President specifically excluded the availability of dishonorable discharges for commissioned officers and warrant officers. R.C.M. 1003(b)(8)(A). Further, the President excluded "punitive separation" from the available punishments for a specific class of individuals based on their status—persons serving with or accompanying an armed force in the field. R.C.M. 1003(c)(4). The President also limited the available punishments for individuals "[b]ased on reserve status in certain circumstances." R.C.M. 1003(c)(3).

But nowhere in the Uniform Code, Rules for Courts-Martial, or Part IV of the Manual, has the President or Congress limited the punishments available for retired servicemembers at general courts-martial.

2. The plain language of R.C.M. 1003 authorizes a punitive discharge for "any person," which includes retired members.

R.C.M. 1003(a) states: "Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial." In the absence of any specific definition, courts should look to any ordinary meaning of words. *United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015). The definition of "any" from Merriam-Webster is "one or some indiscriminately of whatever kind." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/any (last visited December 1, 2017). Retirees fall under the umbrella of "any person," and can therefore be adjudged the punishments authorized in R.C.M. 1003(b)(8).

For each of the offenses underlying Appellant's convictions, the President authorized a dishonorable discharge as the maximum punishment. R.C.M. 1003(B)(8); MCM, Part IV, at para. 68b.e.(1), (4) (2012 ed.); *id*., at para. 45c.e.(2) (2012 ed.); *id*., at 45.f.(6) (2006 ed.).

Even if this Court looks beyond plain language, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode," reflecting the maxim *expressio unius est exclusio alterius*. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)

(quoting *Botany Mills v. United States*, 278 U.S. 282, 289 (1929)). Courts "are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . is not to construe the Act but to amend it." *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)).

The President never limited R.C.M. 1003(b)(8) to enlisted persons on active duty, enlisted persons on active status, or the active-duty list. Each of those terms are incorporated and defined in R.C.M. 103(21) and the President could have easily done so. The President only limited a dishonorable discharge to enlisted persons at a general court-martial.

Appellant is an enlisted person and was tried at a General Court-Martial. A dishonorable discharge is expressly authorized by the plain language of the Code. (J.A. 40-44); *see also* 10 U.S.C. § 101(17); R.C.M. 103(21).

C. 10 U.S.C. § 6332 is in Chapter 571 of Title 10, and falls outside Chapter 47 of Title 10. It cannot and does not limit punishments available at court-martial.

In Chapter 571 of Title 10, 10 U.S.C. § 6332 states:

> When a member of the naval service is transferred by the Secretary of the Navy . . . to the Fleet Marine Corps Reserve . . . or . . . [f]rom the Fleet Marine Corps Reserve to the retired list of the Regular Marine Corps . . . the transfer is conclusive for all purposes. Each Member so transferred is entitled, when not on active duty, to retainer pay or

> retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by the Secretary. The Secretary may correct any error or omission in his determination as to a member's grade and years of creditable service.

10 U.S.C. § 6332. Appellant's argument that this statute restricts availability of punitive discharges for retirees under the Code fails for three reasons: (1) this statute is outside the Code, and under Article 18's explicit language cannot limit punishments; (2) "conclusive for all purposes" does not apply to the ability to punitively discharge servicemembers, but rather speaks only to the grade and rate of pay upon transfer to the retired list; and, (3) *Allen* and *Sloan* are inapplicable, as they dealt with a reduction in grade, not punitive discharge.

1. 10 U.S.C. § 6332 falls outside the Code and cannot limit court-martial punishments authorized by Congress and the President.

As discussed *supra* p. 15, the plain language of Article 18, UCMJ, permits the President to designate any punishment "not forbidden by this chapter." 10 U.S.C. § 818(a). This Court, in *United States v. Sumrall*, stated: "a punitive discharge such as a dismissal might automatically trigger a loss of retirement benefits as a matter of statutory law not found in the Uniform Code of Military Justice." 45 M.J. 207, 208 (C.A.A.F. 1996).

As stated in *Sumrall*, the effect of a punitive discharge on a retiree is a matter of statutory law separate and distinct from the Uniform Code of Military

Justice. 10 U.S.C. § 6332 falls outside Chapter 47, Uniform Code of Military Justice; it falls under Chapter 571, Voluntary Retirement. It is not in the same part, Part II, nor is it even within the same subtitle, Subtitle A, as the Uniform Code of Military Justice. *See* 10 U.S.C. §§ 101, 501.

Congress' plain language of Article 18 requires that only statutes falling under the Uniform Code of Military Justice limit the President's ability to authorize punitive discharges for any person at general court-martial. Appellant's argument that 10 U.S.C. § 6332 precludes a punitive discharge fails.

2. Even if 10 U.S.C. § 6332 could create an exception to Article 18 and the Uniform Code, it does not prohibit punitive discharge of a retiree at a court-martial.

"Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ." *United Sav. Ass'n of Tex v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted). "[A] court should not interpret each word in a statute with blinders on, refusing to look at [a] word's function within the broader statutory context." *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014).

Only viewed in isolation, without looking at surrounding statutes and context, does the phrase "conclusive for all purposes," expansively construed, support Appellant's argument. In context, Appellant's argument fails.

a. Conclusive for all purposes only applies to the date of transfer and a member's grade and years of service.

The remaining language in Section 6332 clarifies what aspects of a transfer to the retired list Congress intended to be "conclusive for all purposes": (1) the date of the transfer; (2) the member's grade at transfer; and, (3) number of years of creditable service upon transfer.

The surrounding sections within Chapter 571 of Title 10, which generally govern transfer of enlisted members to the Fleet Marine Corps Reserve or the retired list, make clear that the broader statutory context of the Section do not apply to the Code. For example, Sections 6228, 6330, and 6331 specify when a service-member is entitled to transfer to the Fleet Marine Corps Reserve or the retired list based on years of service—providing the statutory scheme on the calculation of those years of service—and authorize the payment of retainer and retired pay. 10 U.S.C. §§ 6330, 6331. Further, Section 6333 provides the statutory scheme on the computation of retired and retainer pay. 10 U.S.C. § 6333. And,

Sections 6334-6336 dictate the grade determination upon retirement. 10 U.S.C. §§ 6334-6336.

As noted *supra* p. 10, 10 U.S.C. § 6329 is the only Section within Chapter 571 that even mentions court-martial—making clear that no servicemember may be retired as a result of misconduct that should be at a court-martial. This final section makes sense, in light of provisions throughout the United States Code that "chip away" at Appellant's understanding of "conclusive."

For example, 5 U.S.C. § 8312(b)(3)(B)—cited in a case Appellant relies on, *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991)—explicitly permits the United States, post court-martial, to terminate the retired pay of servicemembers after court-martial for certain offenses. Still other statutes add to the context and demonstrate that "conclusive" does not mean what Appellant thinks it means. For example, 10 U.S.C. § 1408(a)(4)(A)(ii), part of Chapter 71 "Computation of Retired Pay," explicitly notes that forfeitures of "retired pay" may be ordered by courts-martial. *See also* R.C.M. 1003(b)(2). Finally, 10 U.S.C. § 688 authorizes the Secretary to order a retired servicemember back on active duty—which can change their grade upon a subsequent transfer back to the retired list. 10 U.S.C. § 689(d).

Despite Appellant's argument that "conclusive for all purposes" broadly protects everything to do with his retiree status, numerous statutes, in addition to the Code's explicit rejection of that argument, support that this broad reading has no basis.

Chapter 571's limited purpose is to define when transfer to the retired list is authorized, and how grade and rate of pay are to be determined upon transfer. Congress nowhere limits punishments at court-martial, but rather makes clear that once a servicemember is transferred to the retired list, the date of their transfer and determined grade cannot be administratively changed.

b. Adopting Appellant's interpretation and erroneously expanding this interpretation as the Court of Military Appeals did in *Sloan*, will conflict with statutes in the Army and Air Force that have no such "conclusive for all purposes" provisions concerning retirees.

Furthermore, even accepting Appellant's incorrect statutory read of "conclusive for all purposes" to mean that a retiree cannot be discharged at a court-martial, if this Court applies its *Allen* holding to all services as the Court of Military Appeals did in *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992), this Court will find itself in direct conflict with statutes applicable to the Army and Air Force. Subtitles B and D of Title 10, the statutory frameworks for the Army and the Air Force, have no comparable provision to 10 U.S.C. § 6332. 10 U.S.C. §§ 3911-

3992, 8911-8992. The words "conclusive for all purposes" appear in Army and Air Force statutes only once each, stating: "The Secretary's determination as to extraordinary heroism is conclusive for all purposes." 10 U.S.C. §§ 3991, 8991.

The Court of Military Appeals in *Sloan* acknowledged that 10 U.S.C. 6332 "uniquely applies to the Navy." 35 M.J. at 11. The *Sloan* Court, nonetheless, applied the "sound underpinnings" of *Allen*—a Navy case—and extended the *Allen* holding to restrict reduction in rank of a retiree in an Army case. In dissent, Judge Gierke noted: "extend[ing] a statute applicable only to the naval service to a member of the Army . . . is a proper function of Congress, not this Court." *Id*. at 14 (Gierke, J. dissenting).

Appellant now cites to *Sloan*'s application of the "underlying logic" of *Allen* and invites this Court to once again extend 10 U.S.C. § 6332 to limit the availability of punitive discharges. (Appellant Br. at 7.) First, Congress never extended the applicability of § 6332 beyond the Navy and Marine Corps. And second, statutes in the Army and Air Force contain no similar provision—this Court would, by judicial fiat, be legislating for those services. This Court should reject Appellant's invitation to apply the "underlying logic" of *Sloan*—if not in this case, then in the next case, other services would be hamstrung by language Congress never passed as to their servicemembers.

3. Regardless, Article 18, UCMJ—a specific statute addressing punishments at courts-martial—overrides 10 U.S.C. § 6332—a general statute addressing retirement status.

"While statutes covering the same subject matter should be construed to harmonize them if possible, this does not empower courts to undercut the clearly expressed intent of Congress enacting a particular statute." *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (citations omitted). "[I]n cases of direct conflict, a specific statute overrides a general one, regardless of their dates of enactment." *Id*. at 429 (citations omitted).

In *Bartlett*, this Court considered an "apparent tension" between Article 25, UCMJ, and regulations promulgated by the Secretary of the Army pursuant to 10 U.S.C. § 3013 (2000). *Id*. at 428. There, the Secretary of the Army, through regulations pursuant to that federal statute, limited potential members at courts-martial. *Id*. at 427. This Court held that that "general grant of authority to the Secretary to run the Army, broad and necessary as it is, cannot trump Article 25, UCMJ, which is narrowly tailored legislation dealing with the precise question in issue." *Id*. at 429. This Court found important that neither Congress nor the President, who is properly delegated regulatory authority in Article 36, UCMJ, limited the terms of Article 25, UCMJ, consistent with the Army regulations. *Id*.

As in *Bartlett*, this Court once again is considering an "apparent tension" between what Appellant describes as "a lower authority" in the Code and presidentially-prescribed maximum punishment, and "a higher authority" in 10 U.S.C. § 6332. (Appellant Br. at 9.) Also as in *Bartlett*, Article 18, UCMJ, is specific legislation dealing with a subject common to all the armed forces, 10 U.S.C. § 818, while 10 U.S.C. § 6332 is a separate general statute applicable only to a specific branch of service. 10 U.S.C. § 6332. But Congress resolved this issue by expressly legislating their clear intent in Article 18, UCMJ: any punishment may be adjudged at a general court-martial that is "not forbidden by this chapter." Nothing in the Uniform Code prohibits a punitive discharge for a retiree.

4. *Allen* and *Sloan* are inapplicable. If this Court thinks they apply, it should consider overturning them.

In *United States v. Allen*, this Court held that a retired enlisted servicemember of the Navy could not be reduced in rate either by court-martial or by operation of Article 58a, UCMJ. 33 M.J. at 216. This Court relied on a law review article, which "concluded that forfeiture (and by analogy reduction) was not necessary to satisfy the military interests in [retiree] cases." *Id*. (citing *Court-Martial Jurisdiction Over Military-Civilian Hybrid: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U.Pa.L.Rev. 317, 356-57 (1964)). This Court held

that conclusion was consistent with 10 U.S.C. § 6332 and a Comptroller General opinion from 1940. *Id*. (citing 20 Comp. Gen. 76, 78 (1940)).

In *United States v. Sloan*, this Court applied the *Allen* holding to a retired enlisted member of the Army. 35 M.J. at 11. There, the United States argued that 10 U.S.C. § 6332 was unique to the Navy—with no section having similar application to Army personnel. *Id*. The Court held: "our decision [in *Allen*] was not dependent solely upon this statutory provision; rather, that authority was among others that served as the foundation of our holding." *Id*.

Allen and *Sloan* are inapplicable here for two reasons. First, those cases did not—either expressly or by implication—consider the punitive discharge of a retiree. Second, if this Court believes these cases do apply here, they should be overturned.

a. *Allen* and *Sloan* deal with a reduction in pay grade—not a punitive discharge.

As discussed *supra* pp. 21-24, "conclusive for all purposes" applies to a retiree's date of transfer and administrative grade determination. *Allen* and *Sloan* are both cases that analyze the interaction between 10 U.S.C. § 6332 and a retiree's reduction in pay grade at a court-martial. Even if this Court believes *Allen* and *Sloan* were rightly decided, they are inapplicable for two reasons.

First, numerous cases on appeal have affirmed adjudged punitive discharges for retirees without mention. Although this Court could itself specify issues to consider, it has not—surely because of the explicit language of Articles 2 and 18 and 10 U.S.C. § 6332 implicate no such issue. In *United States v. Overton*, this Court affirmed a dishonorable discharge for a retired gunnery sergeant who committed his offenses and was tried while in the "Fleet Marine Corps Reserve." 24 M.J. 309, 310-13 (C.M.A. 1987). This Court found the United States properly had jurisdiction over Appellant under Article 2(a)(6), and affirmed the appellant's approved punitive discharge. *Id*.

So too in *United States v. Hooper*, the appellant, a retired rear admiral, received a dismissal and total forfeitures for offenses that occurred after his retirement while he was on the Regular Navy retired list. 9 C.M.A. 637, 640 (C.M.A. 1958). The *Hooper* court rejected the appellant's argument that jurisdiction could not attach in the absence of an order effecting his return to active duty and did not disturb the dismissal. *Id*. In *United States v. Sumrall*, this Court cited *Hooper* favorably, stating: "the effect of dismissal on retirement pay has long been recognized. *See Hooper v. United States*, *supra* (since plaintiff was validly dismissed from the Navy, his entitlement to retired pay no longer existed)." *Sumrall*, 45 M.J. 207, 210 (C.A.A.F. 2007).

As in both *Overton* and *Hooper*, Appellant was a member of the "Fleet Marine Corps Reserve" and then part of the "retired list" when he committed his misconduct. (J.A. 56, 61-66.) His punitive discharge should be similarly upheld as authorized.

Second, neither *Allen* nor *Sloan* considered the issue of punitive discharges. In *Sloan*, the Convening Authority disapproved the adjudged bad-conduct discharge for the retired sergeant major—removing it from consideration on appeal. *Sloan*, 35 M.J. at 5. In *Allen*, no punitive discharge was adjudged. *Allen*, 33 M.J. at 201. Appellant asks this Court to extend these decisions to his case despite that neither considered the issue of punitive discharges. This Court should decline to do so, and should apply the plain language of Article 18, UCMJ.

b. If they apply, this Court should overturn *Allen* and *Sloan*.[1]

When this Court considers a request to overrule a prior decision, it analyzes the matter under the doctrine of *stare decisis*. *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015). "*Stare decisis* is a principle of decision making, not a rule, and need not be applied when the precedent at issue is 'unworkable or . . . badly reasoned.'" *Id*. (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). "A

[1] Administrative consequences to overturning this line of cases, if any, should be handled by appropriate DoD regulation or Congressional legislation. *See* DoD 7000.14-R, Volume 7B (Feb. 2016).

decision should not be overruled without examining intervening events, reasonable expectations of servicemembers, and the risk of undermining public confidence in the law. *Id*. (citing *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 151-55 (1981) (Stevens, J. concurring)).

In *United States v. Gutierrez*, this Court overruled its prior holding in *United States v. Joseph* defining "likely to inflict grievous bodily injury" because the original definition was "not derived from the statute itself." 74 M.J. 61, 66, 68 (C.A.A.F. 2015) (overruling *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993)). In *United States v. Simmermacher*, this Court overruled two of its prior holdings because they were inconsistent with the plain language of R.C.M. 703(f)(2). 74 M.J. 196, 201 (C.A.A.F. 2015) (overruling *United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995) and *United States v. Madigan*, 63 M.J. 118, 120-22 (C.A.A.F. 2006)). As in those cases, this Court should overrule *Allen* and *Sloan*.

i. *Allen* and *Sloan* are badly reasoned.

In his concurrence in *Allen*, Senior Judge Everett stated: "the issue concerning a servicemember's pay arises as a result of . . . a court-martial proceeding, this Court is empowered to decide whatever issue must be decided in order to assure that the accused receives the relief to which he is entitled under the

Uniform Code of Military Justice." *Allen*, 33 M.J. at 217 (Everett, J. concurring). He continued: "we should abstain from deciding collateral military pay issues" and that "the accused's military pay can best be determined in the United States Claims Court." *Id*.

Allen was once again questioned in *Sloan*. There, in a concurring opinion, Chief Judge Sullivan stated, "I am not adverse to revisiting [*Allen's* holding] in a Navy case." 34 M.J. at 12 (Sullivan, J. concurring). In a dissenting opinion, Judge Gierke stated: "assuming *arguendo* that *Allen* is controlling precedent for appellant's case, I suggest that *Allen* may deserve a second look." *Id*. at 14 (Gierke, J. dissenting).

As discussed *supra* p. 28, this Court already considered a case involving a retired Navy officer, tried in his retired status, who was sentenced to dismissal and total forfeitures. *Hooper*, 9 C.M.A. 637. After that case, Hooper sought in the Court of Claims to save his retired pay. The Court of Claims held that, since he "was validly dismissed from the Navy, his entitlement to retired pay no longer exists." *Hooper v. United States*, 326 F.2d 982, 988 (Ct. Cl. 1964). That court stated: "his dismissal from the Navy was a valid exercise of the powers reposed in the President as Commander-in-Chief." *Id*.

Furthermore, the Supreme Court cited *Hooper* with approval for the proposition that a retiree "may forfeit all or part of his retired pay if he engages in certain activities," including activities subjecting him to trial by court-martial. *McCarty v. McCarty*, 453 U.S. 210, 222 n.14 (1981). *Allen's* holding conflicts with this Supreme Court precedent and should be overturned.

As discussed *supra* pp. 15-20, 10 U.S.C. § 6332 is an administrative pay statute that is not within the Code and cannot, by the plain language of Article 18, UCMJ, limit punishments at a court-martial. The holding in *Allen* was badly reasoned because it ignored the plain language of Article 18, UCMJ, and improperly applied a collateral pay statute to the statutory framework for punishments at court-martial. As in *Gutierrez* and *Simmermacher*, the opinion in *Allen* ignores the applicable statute and should be overruled.

ii. Intervening events.

Since *Allen* and *Sloan*, Congress has directed a mandatory minimum sentence of dishonorable discharge for certain offenses. National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 959 (2013). The implementing statute, Article 56(b), UCMJ, does not limit the mandatory minimum sentence based on an individual's status—rather only if an accused provides substantial assistance to an investigation or prosecution of

another. 10 U.S.C. §§ 856(b), 860(c)(4)(B). This new provision highlights the continued error of the holdings in *Allen* and *Sloan*—since the express language of the new Article 56 mandates a punitive separation for "a person subject to this chapter" without regard to their status.

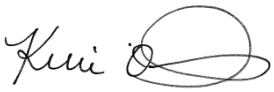
iii. Reasonable expectation of servicemembers and risk to undermining public confidence.

Overruling *Allen* and *Sloan* will not negatively affect the expectations of servicemembers or undermine the public confidence for three reasons. First, any reliance of retired servicemembers on *Allen* is unreasonable since it does not deter criminal conduct—but rather only serves to lessen the consequences at a court-martial. Second, the *Allen* rule only applies to a very small subset of courts-martial and members of society—negating any risk to public confidence in the military justice system. Finally, the public would expect this Court to defer to Congress on matters involving retirement pay and status, and then to the President for authorized punishments at a court-martial based on Congress's express delegation. Especially since Congress has expressly legislated to protect retirement pay, *see* 10 U.S.C. § 1176; 18 U.S.C. § 2071, and neither they, nor the President, did so here. For these reasons, this Court should overturn *Allen* and *Sloan* if it believes they are binding to this case.

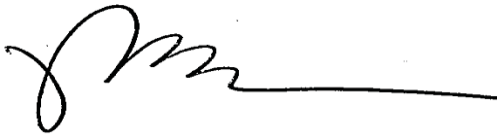
Conclusion

This Court should affirm Appellant's dishonorable discharge and hold a punitive discharge is an authorized punishment at a court-martial for a retiree.

BRIAN L. FARRELL
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687
Bar no. 36923



KELLI A. ONEIL
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976, fax (202) 685-7687
Bar no. 36640



BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

VALERIE C. DANYLUK
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 36770

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I certify that a copy of the foregoing was delivered electronically to the Court and opposing counsel on December 15, 2017.

BRIAN L. FARRELL
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687
Bar no. 36923