**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>Appellee | ) | BRIEF ON BEHALF OF<br>APPELLEE |
| v. | ) | |
| Sergeant (E-5)<br>**ERIC F. KELLY,**<br>United States Army,<br>Appellant | ) | Crim. App. Dkt. No. 20150725 |
| | ) | USCA Dkt. No. 17-0559/AR |


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## Index of Brief

ISSUE PRESENTED:

WHETHER A COURT OF CRIMINAL APPEALS HAS THE AUTHORITY TO DISAPPROVE A MANDATORY MINIMUM PUNITIVE DISCHARGE.

## Table of Authorities

### Supreme Court of the United States



### Court of Appeals for the Armed Forces

**Uniform Code of Military Justice**



**Rules for Courts-Martial**

**Other Statutes, Regulations, and Materials**

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

## ISSUE

WHETHER A COURT OF CRIMINAL APPEALS HAS THE AUTHORITY TO DISAPPROVE A MANDATORY MINIMUM PUNITIVE DISCHARGE.

## STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3) which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." In a case reviewed under subsection (a)(3), "action need be

taken only with respect to issues specified in the grant of review." UCMJ art. 67(c).

## STATEMENT OF THE CASE

On 6 November 2016, a panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of sexual assault and abusive sexual contact in violation of Article 120(b)(1)(B), and 120(d) UCMJ, 10 U.S.C. § 920(b)(1)(b), (d). (JA at 24, 26). The panel sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for one year, and a dishonorable discharge. (JA at 39). On 13 March 2016, the convening authority deferred automatic and adjudged forfeiture of pay and allowances and adjudged reduction in rank until action. (JA at 40). At action, the convening authority approved the sentence as adjudged but waived forfeiture of pay and allowances for two months and seven days. (JA at 40). On 5 July 2017, the Army Court affirmed the findings and sentence. (JA at 21). On 12 October 2017, this court granted appellant's petition for review.

## STATEMENT OF FACTS

Congress amended Article 56, UCMJ, effective on June 24, 2014, to include a new paragraph (b) that states in pertinent part, "While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a

minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (Article 60). National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 2013 U.S.C.C.A.N. (127 Stat.) 672, 959 (2013) (codified at 10 U.S.C. § 856(b)(1)) [hereafter NDAA 2014]. Congress also amended Article 60 to state in pertinent part, "Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." Id. at § 1702, 2013 U.S.C.C.A.N. (127 Stat.) 672, 956 (2013) (codified at 10 U.S.C. § 860(c)(4)(A). The amendment to Article 60 only allows the convening authority to disapprove, commute or suspend a mandatory minimum only upon recommendation by the trial counsel in recognition for substantial assistance rendered by the accused in the investigation or prosecution of another. *Id*. Additionally, a pre-trial agreement allows the convening authority to commute the mandatory dishonorable discharge to a bad-conduct discharge. *Id*.

Appellant's convictions relate to a sexual assault on December 13, 2014. (JA at 24). The military judge properly instructed the members that they were required to adjudge a dishonorable discharge as part of the sentence. (JA at 27). The

members adjudged a dishonorable discharge. (JA at 38). The convening authority approved the mandatory dishonorable discharge. (JA at 40).

The Army court decided Appellant's case on July 5, 2017, by *en banc*, published decision. The court concluded that the Army court "lack[ed] the authority to give appellant his requested relief." (JA at 20). The court focused on the "such punishment must include language" and noted that the amended language included "no exception provided for a sentence reduction as part of our Article 66(c), UCMJ, authority." (JA at 21). Citing this court's decision in *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010), that a Court of Criminal Appeals is empowered to "'do justice,' with reference to some legal standard, but does not grant the CCAs the ability to 'grant mercy.'" (JA at 21). Applying this court's decision, the Army Court recognized that "when a sentence is mandatory as a matter of law, there is no 'legal standard' that would allow us to set the sentence aside." (JA at 21).

Though agreeing in the ultimate judgement to not provide sentence relief in this case, the dissent from the majority opinion on this issue claimed the majority disregarded the language of Article 56, UCMJ, the purpose behind the amendment to Article 56, and previous case precedent concerning Article 66, UCMJ. (JA at 22). The dissent noted this court's statements in *United States v. Cole*, 31 M.J. 270, 272 (C.M.A 1990) that a Court of Criminal Appeals has "an awesome,

plenary, *de novo* power of review," and *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)) that "a clearer *carte blanche* to do justice would be difficult to express." (JA at 22). The dissent did not discuss the purpose behind changing Article 56, UCMJ, but did note that congress had restricted the convening authority's Article 60, UCMJ power to reduce a sentence as a matter of clemency but only with respect to the amendments contained in the National Defense Authorization Act for Fiscal Year 2017. (JA at 22). The dissent did not discuss those changes made to Article 60 by the NDAA 2014.

## SUMMARY OF ARGUMENT

A Court of Criminal Appeals [hereafter CCA] does not have authority to disapprove a mandatory minimum punitive discharge. Congress can change the legal standard by which a CCA determines sentence appropriateness without amending Article 66, UCMJ. The plain language of Articles, 66, 60, and 56, UCMJ, considered together, constrain the legal standard by which CCAs may evaluate sentence appropriateness, and the legal standard by which a CCA may determine sentence appropriateness includes the Article 56, UCMJ mandatory minimums. This interpretation is supported by Executive Orders, this court's subsequent case precedent, and the legislative histories of Articles 66 and 56, UCMJ.

## STANDARD OF REVIEW

A question of statutory construction is a question of law. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). This court reviews questions of law de novo. *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016); *United States v. Nerad*, 69 M.J. 138, 141-42 (C.A.A.F. 2010).

## LAW AND ARGUMENT

### I. WHEN CONSIDERED TOGETHER, THE PLAIN LANGUAGE OF ARTICLES 66, 60, AND 56, UCMJ CONSTRAIN A COURT OF CRIMINAL APPEALS REVIEW POWER SUCH THAT A MANDATORY MINIMUM PUNITIVE DISCHARGE CANNOT BE SET ASIDE AS INAPPROPRIATE.

A court's first step when interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. However, "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (quotations omitted). To that end, "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *Id*. (internal citation omitted).

In specifically interpreting provisions of the UCMJ, "This Court typically seeks to harmonize independent provisions of a statute." *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006); *United States v. Johnson*, 3 M.J. 361, 363 (C.M.A. 1977) ("statutes *in pari materia* are to be construed together"); *United States v. Varnadore*, 9 U.S.C.M.A. 471, 475 (C.M.A. 1958) ("provisions of the uniform code which relate to the same subject matter must be considered together").

Article 66(c), UCMJ states in pertinent part, "In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence *as approved* by the convening authority. Article 66(c), UCMJ (emphasis added). Subsection (c) continues, "[the court] may *affirm* only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, *should be* approved." *Id*. (emphasis added). "In deciphering the meaning of a statute, [the court] normally appl[ies] the common and ordinary understanding of the words in the statute." *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011).

The word "should" acts as a modifier on another verb to communicate duty or propriety in connection with whatever verb "should" is being used to modify. In this case, "should" modifies the verb "approve." A CCA's power to "affirm" cannot mean the same thing as to "approve," as that would violate the cannon of

statutory construction against surplusage. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017); *Nerad*, 69 M.J. at 145. Therefore, the use of "should" does not refer to a standard invented by the CCA itself but to a standard outside established outside the CCA.

Subsection (c) identifies where to look for the source of this standard. "Approve" is used only one other time in the subsection, at the beginning when discussing the sentence the convening authority approved. By using "approved," Congress built in a necessary reference to the convening authority's approval power as the legal standard by which the "should" prong could be judged. See *Nerad*, 69 M.J. at 146 ("'should be approved' does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review"). Therefore, if "should" requires a CCA to determine appropriateness by reference to the legal standard of what a convening authority may approve, then the scope of "should," as reference to a duty or propriety, is bracketed by what is possible for the convening authority to approve. A CCA cannot determine what sentence *should* be approved without knowing what sentence *could* be approved.

The convening authority's approval power is laid out in Article 60, UCMJ and states in pertinent part, "the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in

part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." Article 60(c)(4)(A), UCMJ, 10 U.S.C. §860(c)(4)(A). Congress, by amending Article 60, UCMJ, amended the legal standard by which a CCA judges sentence appropriateness. Because Article 60 limits what a convening authority could approve, this limitation constrains what a CCA can affirm under its appropriateness review. In this way, by constraining the convening authority, Congress also constrained the CCAs, even though Congress did not expressly amend Article 66, UCMJ.

The mandatory minimums prescribed by Article 56, UCMJ constrain a CCA's appropriateness review through operation of Article 60, UCMJ. Article 56 requires in pertinent part, "While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment *must* include, at a minimum, dismissal or dishonorable discharge..." Article 56(b)(1), UCMJ, 10 U.S.C. § 56(b)(1) (emphasis added). The subsection mandates the minimum sentence of dismissal or dishonorable discharge be adjudged for certain offenses. Article 60 mandates approval of the mandatory punitive discharge. These constraints, as a matter of law, logically prevent a CCA from determining that a sentence less than what the convening authority was legally allowed to approve, should be approved.

## II. APPELLEE'S ARGUMENT IS CONSISTENT WITH EXECUTIVE AUTHORITY AND THIS COURT'S PREVIOUS CASE PRECEDENT.

This court's predecessor took up the question of a Board of Review's power to affirm less than the mandatory minimum in *United States v. Jefferson*, 7 U.S.C.M.A. 193 (C.M.A. 1956). In *Jefferson*, the court acknowledged there were two ways of construing the mandatory minimum language in Article 118, UCMJ. The punishment could be construed as an absolute minimum or interpreted as applying only to the court-martial. *Id*. at 194. The court highlighted that, when enacting the Uniform Code, "Congress was greatly concerned with the establishment of a procedure for review of the sentence which would insure a fair and just punishment for every accused." *Id*. (internal quotations omitted). The *Jefferson* court then looked to paragraph 88c of the 1951 Manual for Courts-Martial which stated "when a court has adjudged a mandatory sentence to imprisonment for life . . . the convening authority may approve any sentence included in that adjudged by the court." *Id*. (internal quotations omitted). Agreeing with the manual's interpretive construction of the convening authority's power, the court concluded that like the convening authority, "a board of review can also treat the accused with less rigor than its authority permits." *Id*.

*Jefferson* is useful to the resolution of the certified question for three reasons. First, *Jefferson* demonstrates that the plain language of the mandatory minimum does not, by itself, answer the question. The court acknowledged two

alternate interpretations and looked to other relevant authority to resolve the issue. Therefore, the relevant statutes and other authority must be read in conjunction. Second, *Jefferson* established the legal standard by which a CCA's appropriateness review power is construed. Namely, a CCA's power relies on the scope of the convening authority's approval power for its own scope.[1] Third, a comparison of the law at the time when *Jefferson* was decided with the current law shows that application of *Jefferson*'s reasoning to the current law would compel a different result.

### A. The Rules for Court-Martial promulgated by the President connect a Court of Criminal Appeals' review power to that of a convening authority.

The court in *Jefferson* relied on the President's interpretation of a convening authority's power, to conclude that a CCA could act in like manner. Were the court to do the same in this case, the President's interpretation of the convening authority's power — and the CCAs — would compel the opposite conclusion from that in *Jefferso*n.

Prior to enactment of the NDAA 2014, Rule for Courts-Martial [hereafter RCM] 1107 governed the manner in which a convening authority could approve the findings and sentence of a court-martial and the scope of the approval power. The rule stated in pertinent part, "The action to be taken on the findings and

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[1] The first and second reasons are the focus of Part I of this brief, *supra*.

sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative." R.C.M. 1107(b)(1) (2012). With specific respect to the approval of sentences the rule permitted, "The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." R.C.M. 1107(d)(1) (2012). The rule also provided guidance for determination of sentence. "The convening authority shall approve that sentence which is warranted by the circumstances of the offense and *appropriate* for the accused. When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence." R.C.M. 1107(d)(2) (2012) (emphasis added). Guidance within this rule comported with the old language of Article 60, UCMJ which permitted a convening authority to approve, disapprove, commute, or suspend the sentence in whole or in part and at his sole discretion.

While RCM 1107 governed a convening authority's approval power, RCM 1203 dealt with review of courts-martial by the CCAs. In the discussion on RCM 1203, the President described the power of the CCAs using, word for word, the language in Article 66(c), UCMJ. However, the President then added the following, "A Court of Criminal Appeals has generally the same powers as the

convening authority to modify a sentence (see R.C.M. 1107), but it may not suspend all or part of a sentence." R.C.M. 1203(b) discussion (2012). This demonstrates that, even before the changes enacted by NDAA 2014, the President read the UCMJ to couple the powers of the CCAs to that of the convening authority. This supports the argument in Part I that the correct standard for determining sentence appropriateness is the scope of a convening authority's power.

Passage of the NDAA 2014 enacted major changes in the statutory language of Article 60. The President promulgated changes to the RCM to reflect those changes made to the code. The pertinent portion of RCM 1107 now reads, "the convening authority may not disapprove, commute, or suspend, in whole or in part, that portion of an adjudged sentence that includes: confinement for more than six months; or dismissal, dishonorable discharge, or bad-conduct discharge." R.C.M. 1107(d)(1)(b)(i)-(ii) (2015). The rule continues to permit the convening authority to make an appropriateness determination as to the sentence, but now with limitations. "The convening authority shall, subject to the limitations in subsection (d)(1) above, approve that sentence that is warranted by the circumstances of the offense and appropriate for the accused." R.C.M. 1107(d)(2) (2015). Notably, the language permitting a convening authority to approve less than a mandatory minimum was removed.

Though the President had the opportunity to update RCM 1203, he declined to do so. The rule and its discussion — that a CCA has the same power to modify a sentence as a convening authority — remain the same. This is important for two reasons. First, it shows that despite the changes to the Uniform Code, the executive still interprets that a CCA's power to modify a sentence for appropriateness is coupled to the convening authority's power. Second, by not updating RCM 1203 to exclude the CCA from the limitations placed on a convening authority's power, the plain language of the RCM means that if a convening authority cannot lessen a mandatory minimum sentence, then neither can the CCAs.

The consistency in RCM 1203 after passage of the NDAA 2014 illustrates the scope of a CCA's review power and how it can be changed without amending Article 66 itself. The use of the word "should" refers to some sort of standard of duty or propriety by which a court determines approval of a sentence is appropriate. That standard is not expressly articulated in Article 66. As argued in Part I of this brief, the plain language of Article 66 does indicate that the source of the standard is the power of the convening authority. The plain language of the RCM bolsters this proposition. First, RCM 1107(d)(2) actually uses the word

"appropriate" in discussing a convening authority's power to approve a sentence.[2] The President did not remove this word after the passage of the NDAA 2014, but placed limitations on it consistent with the Uniform Code. Second, the discussion section of RCM 1203 expressly states that a CCA's power to change a sentence is the same as a convening authority's, thereby directly linking the word "should" to its operative standard. Therefore, because the standard by which a CCA may determine sentence appropriateness is not expressed in Article 66, but in Article 60, changes to Article 60 would necessarily constrain the power of the CCA without amending Article 66.

**B. Previous case law evaluated the scope of a Court of Criminal Appeals' review power based on a convening authority's approval power.**

This court should also consider how the case precedent relied upon in Jefferson has changed. To reach its conclusion in *Jefferson*, the court relied on a previous case, *United States v. Lanford*, 6 U.S.C.M.A. 371, 379 (C.M.A. 1955) for language that an appellate court may "treat the accused with less rigor than its authority permits," The *Lanford* court took the language from *United States v. Cavallaro*, 3 U.S.C.M.A. 653, 655 (C.M.A. 1954).

[2] Article 66(c) does not use the word "appropriate." The word's use in relation to Article 66(c) derives from the definition of the word "should," which includes the reference to a standard of propriety.

Significantly, the court in *Lanford* examined whether a Board of Review's power included the ability to exercise clemency. *Lanford*, 6 U.S.C.M.A. at 376. The court relied on the dictionary definition that clemency means the "[d]isposition to treat with less rigor than one's authority or power permits; mercy." *Id*. at 378 (internal quotations omitted). The court then laid out the language defining the powers of the convening authority and Boards of Review side by side. *Id*. The court noted its previous decision wherein it described the difference in language between the statutes "as a slight change in one phrase." *Id*. (quoting *United States v. Goodwin*, 5 U.S.C.M.A. 647, 656 (C.M.A. 1955). From this comparison, the court concluded there was no significant difference in the nature of the power of each authority. *Id*. The court went further and stated that a Board of Review's power can be characterized as either a review of legal appropriateness or clemency. *Id*. at 378-79.

Through subsequent case law, this court has overruled the dicta in *Lanford*, and no longer characterizes a CCAs review power as including the ability to grant clemency. In *United States v. Healy*, this court examined whether a CCA was required to consider evidence submitted post-trial that was relevant only to clemency. 26 M.J. 394, 395 (C.M.A. 1988). The court concluded the CCA was not required to do so. *Id*. at 396. The court drew a distinction between sentence appropriateness and clemency. "Sentence appropriateness involves the judicial

function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves." *Id*. at 395. The court further stated that Article 66 limits a CCA to determining sentence appropriateness — doing justice. *Id*.

This court in *Nerad* reaffirmed its reasoning in *Healy* wherein the court stated, Article 66(c), UCMJ, empowers the CCAs to 'do justice,' with reference to some legal standard, but does not grant the CCAs the ability to 'grant mercy.' 69 M.J. at 146 (citation omitted). This court went further and noted that clemency was within the purview of the convening authority and that the court's reasoning in *Nerad* was contrary to that articulated in *Landford*. *Id*.

*Nerad* also demonstrates that, though Article 66(c), UCMJ does not delineate specific limitations on a CCA's "should be approved" review, those limitations nonetheless exist. In *Nerad*, the Judge Advocate General of the Air Force certified the question of whether a CCA could nullify a legally and factually sufficient finding. 69 M.J. 140. Appellee in the case argued that a "CCA has unfettered discretion to disapprove, for any reason or no reason at all, a finding that is correct in law and fact and that the exercise of that discretion is not subject to appellate review." *Id*. at 142. The government argued the opposite was true, that if findings were correct in law and fact, they must be approved. *Id*. This court rejected both arguments. *Id*.

Instead, this court reiterated its previous characterization of a CCA's Article 66(c) power "as an 'awesome, plenary de novo power of review [that] grants unto the Court . . . authority to, indeed, 'substitute its judgment' for that of the military judge. . . . [and] for that of the court members.'" *Id*. at 144 (citations omitted). However, this court went further and articulated limits on a CCA's power. Relevant to the inquiry in *Nerad*, this court stated, "Congress's statutory grant of authority to the CCAs with respect to findings and sentence is more limited than the authority granted a convening authority." *Id*. at 145. This court also stated, "While the CCA clearly has the authority to disapprove part or all of the sentence and findings, nothing suggests that Congress intended to provide the CCAs with unfettered discretion to do so for any reason, for no reason, or on equitable grounds, which is a function of command prerogative." *Id*.

This court set aside the lower court's decision in *Nerad* because it was not clear from the CCA's opinion whether the court set aside the findings based on a legal standard or an equitable one. *Id*. at 148. In reaching this conclusion, this court stated, "we have never suggested that Article 66(c), UCMJ, permits a CCA to disapprove a legally and factually sufficient finding because it believes that the conduct — while falling squarely within the ambit of behavior prohibited by a constitutional criminal statute — should not be criminalized." *Id*. at 146. This court concluded, "when a CCA acts to disapprove findings that are correct in law

and fact, we accept the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion. *Id*. at 147. A CCA abuses its discretion when it disapproves a finding based on purely equitable factors or because it simply disagrees that certain conduct — clearly proscribed by an unambiguous statute — should be criminal. *Id*.

Though *Nerad* dealt with a CCA's appropriateness review as to findings, this court's logic is applicable to the same question with respect to sentence. Congress enacted a legal minimum sentence for certain criminalized conduct. The legal minimum sentence is analogous to Congress statutorily proscribing some conduct as criminal. Just as a CCA cannot set aside a finding squarely in the ambit of criminal conduct because the court does not think the conduct should be criminalized, a CCA cannot set aside a sentence squarely in the ambit of a required minimum just because the court does not think the related criminal conduct merits the required sentence. See *Id*. at 146. A CCA cannot decide that a minimum mandated sentence is inappropriate despite Congress legislating to the contrary. To do so is akin to a CCA deciding that a finding is inappropriate because an appellant "was in the unique position of having a relationship with someone he could legally see naked and... legally have sex with, but could not legally possess nude pictures of her that she took and sent to him," despite Congress legislating to the contrary. *Id*. at 148. "This, the court may not do." *Id*.

*Jefferson*, *Healy*, and *Nerad* demonstrate that the scope of a CCA's power is illuminated by comparison to that of a convening authority's. But, to the extent *Jefferson* concluded that an appellate court could affirm less than a mandatory minimum sentence because it had clemency power, *Healy* and *Nerad* indicate that such reasoning no longer applies. In fact, *Nerad* went further and highlighted the "should be approved" language of Article 66(c) does not exist in a vacuum. 69 M.J. at 144. "[T]he statutory phrase 'should be approved' does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review." *Id*. at 146.

Appellee's position follows the position articulated by this court in *Nerad*, that the CCA's power to review a sentence is "legality limited by appropriateness." *Id*. at 142. Appellee does not contend that the CCAs no longer have the ability to independently review sentences for appropriateness. They do. See *United States v. Baier, 60 M.J. 382, 384* (C.A.A.F. 2005). However, that appropriateness review is limited by a legal standard. *Id*. at 147. Appellant states, "Mandatory minimum sentences are lawful sentences, but not necessarily appropriate sentences." (Appellant's Br. at 10). But this premise, to comply with this court's reasoning in *Nerad*, requires a legal standard — not equitable — by which a CCA could say that a mandatory minimum is not appropriate. Appellant's argument relies on the *Jefferson* decision for this legal standard. (Appellant's Br. at 9-11). However, the

*Jefferson* court, as argued *supra*, tied the legal standard for a CCA's appropriateness review to the powers of the convening authority. Therefore, if Congress changes the convening authority's powers, and thereby legal standard, the scope of a CCA's appropriateness review power changes with it.

## III. TO THE EXTENT THE LEGAL STANDARD FOR DETERMINING SENTENCE APPROPRIATENESS IS AMBIGUOUS, THE LEGISLATIVE HISTORY OF THE RELEVANT STATUTES DEMONSTRATES CONGRESSIONAL INTENT THAT MANDATORY MINIMUMS APPLY TO COURTS OF CRIMINAL APPEALS.

Appellant relies on the use of the words "court-martial" in Article 56 to support the proposition that the CCAs are excluded from application of the mandatory minimum sentence required by the Article. (Appellant's Br. at 15). As argued in Parts I and II of this brief, a plain and harmonious reading of Articles 56, 60, and 66, UCMJ compel the conclusion that the mandatory minimums do apply to the CCAs. However, in the alternative, should the court find that the plain language of the relevant statutes does not resolve the certified question, an evaluation of the legislative histories of the statutes plainly articulates Congressional intent with respect to application of the mandatory minimums and compels the same conclusion that the minimums apply to the CCAs.

**A. The legislative history of Article 56 shows the intent of Congress is for any servicemember convicted of a specified sexual offense to be punitively discharged from the military.**

The use of the word "court-martial" cannot be construed to exclude application to the CCA if such an interpretation would undermine Congressional intent. "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 in enacting a particular statute." *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008). Like in *Jefferson*, the court faces two potential interpretation of the Article; that the mandatory minimum is an absolute minimum, or that the mandate only applies to courts-martial. Unlike in *Jefferson*, the latter interpretation fails because it undercuts the intent of congress in amending Article 56.

**1. The use of the word "court-martial" in Article 56 is used in the context of identification, not exclusion.**

The pertinent part of Article 56 states, "While a person subject to this chapter who is found guilty of an offense specified in "paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge..." Article 56(b)(1), UCMJ, 10 U.S.C. § 856(b)(1). The use of "court-martial" in this instance identifies the entity that issues the sentence. Articles 51 and 52, UCMJ mandate that the court-martial adjudge the sentence. Articles 51(d) 52(b)(1)-(3), UCMJ, 10 U.S.C. §§ 851(d),

852(b)(1)-(3). It follows that the language in Article 56 would reference the entity responsible for adjudging the sentencing when directing that the sentence must include a mandatory minimum. To read its use as Congressional intent to exclude the CCAs, is to add extra meaning to the subsection when the preceding Articles make clear that Congress was simply identifying the entity vested with the power to initially adjudge the sentence.

*United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) lends credence to this interpretation of Congress' use of language in this context. *Sales* examined the interplay of a CCA's 66(c) power with the requirements of Article 59(a), UCMJ in the context of sentence reassessment. *Id*. at 307-08. The court concluded that a sentence reassessment when prejudicial error occurred requires a CCA to assure the reassessed sentence is no greater than would have been adjudged absent the error. *Id*. Relevant to this case, the court reached this conclusion because "[o]nly in this way can the requirements of Article 59(a), UCMJ, be reconciled with the Code provisions *that findings and sentence be rendered by the court-martial*, see Articles 51 and 52, UCMJ, respectively." *Id*. at 308 (internal citations omitted)(emphasis added).

**2. The legislative history of the NDAA 2014 indicates congressional intent that those convicted of covered offense are to be punitively discharged from the military.**

The origin of the changes to Article 56, UCMJ enacted by the NDAA 2014 demonstrate Congressional intent that servicemembers convicted of a covered offense receive, at minimum, punitive discharges. The amendment adding this provision originated from the Be Safe Act, a bill introduced by Senators Collins and McCaskill in 2013. 159 Cong. Rec. S8146 (daily ed. Nov. 19, 2013)(statement of Sen. Collins). Senator Collins stated "the legislation mandates a dishonorable discharge or dismissal for any servicemember convicted of sexual assault." *Id*. The floor debate in the Senate over enactment of Senators Collins and McCaskill's amendment repeatedly indicated that the intent of the amendment was to guarantee that those convicted of covered offenses would be punitively discharged. "[T]he bill requires a mandatory minimum sentence of dismissal or dishonorable discharge of a servicemember convicted of a sexual assault offense." 159 Cong. Rec. S8311 (daily ed. Nov. 20, 2013)(statement of Sen. Reed). "[The bill] strips commanders of the ability to overturn jury convictions, makes retaliation against victims a crime, requires dishonorable discharge or dismissal for those convicted of sexual assault..." 159 Cong. Rec. S8328 (daily ed. Nov. 20, 2013)(statement of Sen. Fischer). "[T]hose accused of certain sex-related offenses are required to receive dishonorable discharges or dismissals if convicted." 159 Cong. Rec.

S8328 (daily ed. Dec. 19, 2013)(statement of Sen. Leahy). All of these statements indicate that, if a conviction for a covered offense stands, the minimum punishment must be a punitive discharge.

Statements from the House of Representatives concerning the provision mirror those of the Senate in terms of intent. The Be Safe Act had bicameral support and was introduced in the House of Representatives by Congresswoman Tsongas and Congressman Turner. 159 Cong. Rec. S8146 (daily ed. Nov. 19, 2013)(statement of Sen. Collins). During the floor debate in the House of Representatives over the relevant provision, Congressman Turner stated, "we include mandatory minimums that say if you commit a sexual assault, you are out of the military, you will be dishonorably discharged..." 159 Cong. Rec. H3312 (daily ed. Jun. 12, 2013)(statement of Rep. Turner). Congresswoman Tsongas stated the provision "makes sure that those who are convicted of sexual assault will, at a minimum, be dishonorably discharged or dismissed." 159 Cong. Rec. H3338 (daily ed. Jun. 12, 2013)(statement of Rep. Tsongas). In describing the bi-partisan effort to draft the House version of the Be Safe Act, Congressman Turner reiterated the ramifications for the provision's passages, "Basically, this bill will strip commanders of their authority to dismiss a conviction for a serious offense by a court-martial, and it significantly limits the commander's ability to modify or dismiss the sentence determined by a court-martial, but we go even beyond that.

This bill says if you commit a sexual assault, you are out... No longer will it be tolerated for someone to commit a sexual assault and stay in the military." 159 Cong. Rec. H3337 (daily ed. Jun. 12, 2013)(statement of Rep. Turner).

Congresswoman McCollum opposed passage of the House version of the NDAA 2014 for other reasons but noted in her extension of remarks that the bill "requires that service members found guilty of sexual offenses be dismissed or dishonorably discharged." 159 Cong. Rec. E963 (daily ed. Jun. 25, 2013)(statement of Rep. McCollum). Finally, during the floor debate in the House over passage of the final version of the NDAA 2014, Congressman Van Hollen noted that the bill "imposes a minimum sentence of dishonorable discharge or dismissal on those found guilty" of sexual-related offenses. 159 Cong. Rec. E1906 (daily ed. Dec. 19, 2013)(statement of Rep. Van Hollen).

The House Committee on Appropriations expressly described the intent behind the mandatory minimum sentence provision of the NDAA 2014. "The pending fiscal year 2014 National Defense Authorization Act establishes dismissal or dishonorable discharge as the mandatory minimum sentence for a person subject to the Uniform Code of Military Justice who is convicted by court-martial of rape, sexual assault, forcible sodomy, or an attempt to commit those offenses. The Committee supports this action and believes that those servicemembers who are

convicted of committing such crimes should not receive post-retirement benefits." H.R. Rep. No. 113-113, at 16 (2013).

With respect to the changes made to Article 60, UCMJ, the House Armed Services Committee expressly stated the point of the change was "to remove the command prerogative and sole discretion of the court-martial convening authority with regard to the findings and sentence of a court-martial." H.R. Rep. No. 113-102, at 158 (2013). The committee went further and stated the proposed changes to Article 60 "would prohibit, with some exceptions, the convening authority from reducing, disapproving, commuting, or suspending a mandatory minimum sentence, or an adjudged sentence of confinement or a punitive discharge." *Id*. These statement lend further credence that, if the legal standard for sentence appropriateness is the convening authority's power, then Congress intended to constrain that standard. The Senate Armed Services Committee reported a similar intent to those committees in the House dealing with the same provision. "The committee recommends a provision that would amend Article 56... to require that the punishment for convictions of violations of Articles 120, 120b, or 125 of the Uniform Code of Military Justice... include, at a minimum, a dismissal or dishonorable discharge." S. Rep. No. 113-44, at 113 (2013) (internal citations omitted).

**B. <u>Interpreting that Article 66 excludes the Courts of Criminal Appeals from being constrained by mandatory minimum sentences belies the Congressional intent of legislating Article 66 in the first place.</u>**

Passage of Article 66, UCMJ resulted from Congressional concern about undue command influence over the court-martial process. From the end of World War II, "[w]idespread reports asserted that commanders enjoyed undue influence over court-martial members, and wielded this power to produce excessively harsh sentences." Lt. Col. Jeremy S. Weber, Sentence Appropriateness Relief in the Courts of Criminal Appeals, 66 AF. L. Rev. 79, 88 (2010) (discussing the impetus to promulgate Article 66). Undue command influence fostered two problems, first was that military justice sentences were "often harsh and uneven," and second was the "erosion of the public's confidence in the military justice system." *Id*. at 90-91.

The original Article was drafted by a committee chaired by Professor Edmund M. Morgan, Jr.[3] Hearings before a Subcommittee of the Senate Committee on Armed Services on S. 857 and H. R. 4080, 81st Cong., 1st Sess. 34. "As Professor Morgan himself later wrote, allowing a panel of experienced judges to review sentences was seen as an important check to ensure commanders were not influencing courts-martial to hand down excessive sentences. Weber, *supra*, at 90 (citing Edmund M. Morgan, The Background of the Uniform Code of

[3] The language of Article 66, UCMJ has remained substantially the same since its original enactment in 1950. See Article 66(c), UCMJ, 64 Stat. 128, 50 U.S.C. § 653(c) (1950).

Military Justice, 28 Mil. L. Rev. 17, 31 (1965)). Before the Senate subcommittee, Professor Morgan testified that vesting the Board of Military Review with the power to handle law, fact, and sentence, being so far removed from the convening authority, "eliminated a great part of the evils of command control." Hearings on S. 857 *supra*, at 45. Senator Saltonstall questioned Professor Morgan on the ability of the proposed Court of Military Review to consider excessive sentences as a matter of law. *Id*. In response, Professor Morgan testified that the sentence in question would have to be extremely excessive. *Id*. at 46. Professor Morgan also stated,

> We thought that first, in almost every case, the board of review would take care of any excessive sentence: and second, that the secretaries, and usually this means a particular undersecretary who is a civilian, would doubtless exercise his clemency if the sentence was too severe; of course, if the sentence was one that was not authorized — you understand, although practically all the penal articles say that the sentence shall be such as a court martial may adjudge—the President does, as a matter of fact, put limits by regulation upon the sentence for specific offenses.

*Id*. Professor Morgan then reiterated that Congress' concern since the end of World War II was with excessive sentences. *Id*.

The Judge Advocates General testified before the Senate concerning the proposed measures contained in Article 66, but opposed the Boards of Review appropriateness review authority. Hearings on S. 857, *supra*, at 258, 262

(statement of Major General Thomas A. Green, Judge Advocate General of the Army), 287 (statement of Rear Admiral George L. Russell, Judge Advocate General of the Navy). Professor Morgan was then asked his opinion regarding the Judge Advocates General concerns and Professor Morgan. Professor Morgan noted that during World War I, when he chaired a clemency committee, some of the sentences remitted were "just fantastic at times." *Id*. at 311. Senators Saltonstall and Kefauver both replied that they felt the Boards of Review should have the ability to reduce sentences. *Id*.

Beyond Professor Morgan's testimony, the Senate report from the Armed Services Committee expressed how a Board of Review should exercise its Article 66(c) power with respect to sentences. "The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces." S. Rep. No. 81-486, 28 (1949).

Congress established the CCAs to assure uniformity of sentencing and to safeguard against excessive sentences. Congress furthered this intent through Article 66(c), UCMJ. See *Jackson v. Taylor*, 353 U.S. 596, 577-78 (1957). To argue that operation of Article 66(c) excludes a CCA from application of mandatory minimum sentences defies the concerns of Congress in creating the

subsection(c) powers in the first place. It does not follow that Congress intended for a CCA's power to ensure uniformity and protection against excess to extend to a CCA determining that a statutory, and therefore uniform, minimum — meaning it is by definition not excessive — should not apply in some cases. See *Nerad*, 69 M.J. at 148 (quoting *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984)) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement").

## CONCLUSION

Wherefore, the United States respectfully requests that this Honorable Court answer the certified question in the negative, that courts of criminal appeals do not have authority to disapprove a mandatory minimum discharge.

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December 4, 2017

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I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 11th day of December, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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