

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

UNITED STATES,

Appellee,

v.

LADARION D. STANTON
Airman First Class (E-3)
United States Air Force,

Appellant.

REPLY TO FINAL BRIEF
ON BEHALF OF THE
UNITED STATES

Crim. App. Dkt. No. 39161

USCA Dkt. No. 19-0449/AF

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

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Since the summer of 2018, A1C Stanton has advanced two arguments, made in the alternative, as to why the Government is bound by the parties' agreement that A1C Stanton would be administratively discharged in lieu of court-martial. First, in the weeks that followed the parties' agreement, A1C Stanton sought extraordinary relief on the basis that the Government had agreed to administratively discharge him and was thus unlawfully subjecting him to military jurisdiction by proceeding with his court-martial and, at the time,¹ retaining him on active duty.²

¹ A1C Stanton has since been administratively discharged with an Other Than Honorable characterization of service in accordance with the parties' agreement that he would be administratively separated in lieu of court-martial.

² A1C Stanton first sought a writ of mandamus from this Court, which was summarily denied. *Stanton v. United States*, 78 M.J. 258 (C.A.A.F. 2018). Appellant then sought a petition for habeas corpus from the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 2241. *Stanton v. Jacobson*, 2020 U.S. Dist. LEXIS 59040 (D.D.C. 2020). A1C Stanton invoked the two exceptions to *Councilman* abstention set forth in *New v. Cohen*, 129 F. 3d 639, 644 (D.C. Cir. 1997). *See Id.*, Mem. In App. to Resp. Mot. for Summ. Jud. and Cross Motion (June 28, 2019) ("Thus, rather than a collateral attack on a court-martial, Mr. Stanton invokes both exceptions to the rule of comity set forth in *New v. Cohen*, 129 F. 3d 639, 644 (D.C. Cir. 1997)."). As the District Court noted, the parties in *Stanton* "talk[ed] past each other in their motions," with the Government casting A1C Stanton's claim as a collateral attack on his court-martial under the highly deferential standard set forth in *Burns v. Wilson*, 346 U.S. 137, 142 (1953). Unfortunately, the district court also miscast A1C Stanton's petition as a collateral attack on his court-martial, an argument he never advanced, and under the highly

However, if the Government was correct in arguing that the military had “continuing jurisdiction” over A1C Stanton and his court-martial pursuant to *United States v. Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006), then there was continuing jurisdiction to determine if A1C Stanton’s court-martial violated the parties’ agreement that he would be administratively discharged in lieu of court-martial.

As the Government notes in its brief, the Government “has maintained the same position throughout appellate review of this case.” (Gov’t Br. at 12.) According to the Government, it ultimately doesn’t matter if the Government breached its agreement that A1C Stanton would be discharged in lieu of court-martial because the military courts do not have jurisdiction—when reviewing that court-martial—to determine if the Government was bound by an agreement that there

deferential standard of review set forth in *Burns* and *Councilman*, dismissed A1C Stanton’s petition on the basis that “Stanton’s conviction was indeed final before he even initiated the discharge in lieu of court-martial process....” *Stanton*, at *10. Needless to say, A1C Stanton’s court-martial was not final in 2018, and the District Court erred when it miscast A1C Stanton’s petition as a collateral attack on a “final” court-martial and dismissed his petition for habeas corpus on that basis. *See New v. Cohen*, 129 F.3d at 644 (“[A] federal court must await the final outcome of court-martial proceedings in the military justice system before entertaining an action by a service member who is the subject of the court-martial.”).

wouldn't be a court-martial. While consistent, that argument has always been wrong.

First, this Court has jurisdiction to review this case under Article 67(c), Uniform Code of Military Justice (UCMJ), which states that this Court may act with respect to “the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.” 10 U.S.C. § 867(c)(1)(A). Here, A1C Stanton is asking this Court to review the Convening Authority’s (CA) action of approving a sentence of “no punishment” in violation of their pretrial agreement. This finding was affirmed by the Air Force Court of Criminal Appeals (AFCCA) on February 7, 2018 and the sentence was affirmed by the AFCCA on July 16, 2019, giving this Court continuing jurisdiction to determine the issue presented. (JA at 1, 16, 17, 24).

Further, the Government’s reliance on *Clinton v. Goldsmith*, 526 U.S. 529 (1999), is misplaced. There, the Supreme Court held that the President’s “executive action to drop respondent from the rolls falls outside of the CAAF’s express statutory jurisdiction.” *Goldsmith*, 526 U.S. at 540. In contrast, this Court is reviewing the finding and sentence of A1C Stanton’s court-martial and whether the CA’s action on the

sentence violated their pretrial agreement, which is wholly within its jurisdiction.

Second, despite the Government's assertions, A1C Stanton's agreement with the CA to be discharged in lieu of court-martial constituted a pretrial agreement in accordance with Rule for Courts-Martial (R.C.M.) 705 – it was an agreement between A1C Stanton and the CA, which included “[a] promise to waive procedural requirements such as the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings,” was submitted in writing and signed by A1C Stanton and his defense counsel, and accepted and signed by the CA. *See* R.C.M. 705(a), (c)(2)(E), (d)(2), (d)(3)(A).

And the Manual for Courts-Martial (MCM) explicitly recognizes that requests for administrative action in lieu of court-martial are plea negotiations. In fact, under Military Rule of Evidence (M.R.E.) 410(c), an accused's statement “for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-

martial” is considered a “statement made during plea discussions” and is not admissible against an accused at trial.

Indeed, this Court has long recognized that “plea bargaining” may result in “administrative disposition, usually separation in lieu of court-martial.” *United States v. Barunas*, 23 M.J. 71, 71 (C.M.A. 1986); *see also United States v. Gansemer*, 38 M.J. 340, 342 (C.A.A.F. 1993) (“It has long been the law that an accused may ask for an administrative discharge in lieu of a court-martial as one of the ways that he can attempt to negotiate with the authority.”); *United States v. Woods*, 26 M.J. 372, 374 (C.M.A. 1988) (“Nothing presented here prohibits an agreement between an accused and competent authority of the United States which provides for some action other than a court-martial to be taken with respect to criminal charges.”). A1C Stanton’s request for discharge in lieu of court-martial was part of his plea discussions with the CA. Once approved and signed by the CA, it constituted a pretrial agreement under the MCM and this Court’s long-standing precedent.

Third, the Government asserts that the CA did not breach a material term of the agreement because A1C Stanton never requested the CA dismiss his larceny conviction. (Gov’t Br. at 19.) Not so. Again,

using the language set forth in the MCM, A1C Stanton made an unambiguous “Request for Administrative Disposition” of his court-martial. M.R.E. 410(c).

“Like statutory construction, interpretation of a plea agreement begins with plain language.” *United States v. Hunt*, 843 F.3d 1022, 1027 (D.C. Cir. 2016) (citation omitted). And as with statutes, the “plain language of the agreement controls so long as its terms are unambiguous.” *United States v. Obeid*, 707 F.3d 898, 904 (7th Cir. 2013). Here, the intent of the parties is clear from the plain reading of the language in the agreement – that A1C Stanton be discharged *in lieu of* trial by court-martial. (JA at 40, 51).

Additionally, unlike *Montesinos*, where the applicable service regulation had a provision concerning what action the CA should take where the request for discharge is approved after the member is tried (“the officer who convened the court, in his or her action on the case, should not approve any punitive discharge adjudged. The officer should approve only so much of any adjudged sentence as has been served at the time of the action.”), no such provision exists in Air Force Instruction (AFI) 36-3208, Chapter 4. *United States v. Montesinos*, 28

M.J. 38, 45 (C.A.A.F. 1989). Instead, it is clear throughout the entirety of AFI 36-3208, Chapter 4 that the administrative discharge takes the place of the court-martial.

Further, AFI 36-3208 specifically states that where formal charges have been referred for trial and a trial date has been set, as here, the General Court-Martial authority decides whether trial should proceed or be delayed until final action is taken on the request for discharge. (JA at 93). There is no provision that allows the CA to approve the request for discharge and still proceed with an accused's court-martial, by approving the findings or sentence. Thus, when the CA approved a sentence of "no punishment," he breached a material term of the agreement.

Finally, while this case should be resolved on the plain language of the agreement between the parties and AFI 36-3208, and without regard to after-the-fact declarations as to the intent of the parties, the contemporaneous, ancillary documents to the agreement in this case present a far murkier picture as to the CA's intent than is presented by the Government. Indeed, it is far from clear that the CA intended the larceny conviction to stand. (Gov't Br. at 21-22.) In fact, the CA's own legal advisor recommended that he approve A1C Stanton's request for

discharge in lieu of court-martial and “set aside punishment.” (JA at 48). Setting aside punishment is not the same as approving a sentence of “no punishment.” Further, in discussions with A1C Stanton’s defense counsel, Maj M.B. stated “that the CA did not want to disturb the larceny conviction,” but never communicated that the CA intended to approve a sentence of “no punishment.” (JA at 86-87). This is supported by the fact that the General Court-Martial Order was not even originally signed by the CA, but rather by the Staff Judge Advocate. (JA at 52, 82-83).

What is clear is this – the CA agreed to discharge A1C Stanton in lieu of court-martial. Once the CA signed the agreement, he should not have taken any further action as A1C Stanton’s case was abated. In accordance with this Court’s precedent, A1C Stanton’s case should be dismissed. *See United States v. Woods*, 26 M.J. 374 (C.M.A. 1988).

WHEREFORE, A1C Stanton respectfully requests that this Honorable Court set aside the finding and sentence.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Clerk of Court on April 9, 2020, pursuant to this Court's order dated February 5, 2020, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

A handwritten signature in black ink, appearing to read "Amanda Dermady", with a stylized flourish at the end.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 1,736 words.

This brief complies with the typeface and type style requirements of Rule 37.

A handwritten signature in black ink, appearing to read "Amanda Dermady". The signature is fluid and cursive, with a large loop at the end.

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APPENDIX

Stanton v. Jacobson

United States District Court for the District of Columbia

April 3, 2020, Decided; April 3, 2020, Filed

Civil Case No. 19-699 (RJL)

Reporter

2020 U.S. Dist. LEXIS 59040 *

LADARION D. STANTON, Petitioner, v. JAMES A. JACOBSON Major General, U.S. Air Force, UNITED STATES, et al., Respondents.

Defendants: Christopher Charles Hair, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA, Washington, DC.

Prior History: *United States v. Stanton*, 61 M.J. 218, 2005 CAAF LEXIS 546 (C.A.A.F., May 25, 2005)

Judges: RICHARD J. LEON, United States District Judge.

Opinion by: RICHARD J. LEON

Core Terms

court-martial, sentence, convening, military, finding of guilt, discharged, larceny conviction, charges, summary judgment motion, military justice, proceedings, larceny, sexual, summary judgment, material fact, re-sentencing, specification, convicted, assault, courts, court martial, already-affirmed, bargain, genuine

Counsel: [*1] For LADARION D. STANTON, Plaintiff: Brian Lee Mizer, LEAD ATTORNEY, MILITARY COMMISSIONS DEFENSE ORGANIZATION, Washington, DC.

For JAMES A. JACOBSON, Major General, U.S. Air Force Commander, UNITED STATES,

Opinion

MEMORANDUM OPINION

(April 3rd, 2020) [##s 1, 14, 17]

Petitioner Ladarion Stanton ("Stanton" or "petitioner"), a former airman in the United States Air Force, seeks collateral review of his conviction for petty larceny and the punishment of "no sentence" imposed by the military justice system.¹

¹ Stanton styled this matter as a petition for habeas corpus under [28 U.S.C. § 2241](#) because "the writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces." [Parisi v. Davidson](#), 405

Respondent Major James Jacobson ("Jacobson") was the "Convening Authority" of Stanton's general court-martial and imposed the sentence on Stanton after his case wended its way through the military appeals process. (The other respondent is the United States.) The gravamen of Stanton's petition is that, after his earlier convictions on several unrelated charges were overturned and remanded to Jacobson for retrial and resentencing, Jacobson accepted Stanton's offer to resolve his case via a "discharge in lieu of court-martial." [*2] Stanton believed this resolution would not only result in vacating the charges overturned on appeal but also the charge of larceny, to which he had already pled guilty and which had already been affirmed. Stanton also believed the discharge would leave the military without any jurisdiction over him. Although respondents acknowledge, as an administrative matter, that Stanton was discharged when Jacobson accepted Stanton's discharge in lieu of court-martial, they nonetheless contend that this discharge had *no* effect on Stanton's larceny conviction. Indeed, they insist that the military has retained jurisdiction over Stanton's court-martial. The parties' cross-motions for summary judgment are now ripe. After extensive briefing and with the benefit of oral argument,² I have concluded that Stanton's larceny conviction did survive his administrative discharge. Therefore, I GRANT respondents' motion for summary judgment, DENY petitioner's motion for summary judgment, and DISMISS petitioner's petition for habeas corpus.

U.S. 34, 39, 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972). However, as I will explain below, Stanton is now discharged from the armed forces, and he is not in custody. Therefore, this Court does not have jurisdiction under *28 U.S.C. § 2241(c)*, which precludes granting habeas relief unless a petitioner is in custody. However, Stanton also asserts jurisdiction under *28 U.S.C. § 1331*, see Pet. at 3, and this Court does have jurisdiction to entertain a collateral attack on Stanton's conviction under this provision, see *New v. Rumsfeld, 448 F.3d 403, 406, 371 U.S. App. D.C. 107 (D.C. Cir. 2006)*.

²As I explain below, oral argument on Stanton's motion for preliminary injunction was held before one of my colleagues before the case was transferred to me on August 5, 2019. I have reviewed the transcript of those proceedings.

BACKGROUND

The parties generally agree on the facts underlying this collateral attack on Stanton's conviction.³ The matter began with a general court-martial, convened by [*3] Jacobson. Decl. of Maj. Matthew Bush ("Bush Decl.") [Dkt. #14-4] ¶ 1. On June 6, 2016 Stanton went to trial and four days later was convicted of two specifications⁴ of sexual assault and one specification of aggravated sexual contact, Resp't's Statement of Material Facts ("SOMF") ¶ 2.⁵ Prior to his trial, Stanton pled guilty to one charge of larceny. *Id.* As punishment for both the larceny and sexual assault convictions, Stanton was sentenced to confinement for 96 months and a dishonorable discharge.⁶*Id.* ¶ 3. Stanton then appealed his conviction and sentence. *Id.* ¶ 4. On February 7, 2018, the Air Force Court of Criminal Appeals ("AFCCA") affirmed Stanton's larceny conviction but set aside his convictions on the sexual assault charges and authorized a rehearing

³ Indeed, in response to the Government's statement of material facts, Stanton declares that "[o]nly one material fact in this case is in dispute, and it is not advanced by Respondent in this Court." Pet'r's Opp'n 2. In reply, the government agrees, noting that "Stanton does not dispute the material facts advanced by [the Government] in this case, except to disagree with [the government] regarding the legal consequences of Stanton's previously affirmed larceny conviction." Resp't's Reply 1.

⁴ "[A] 'specification is a plain, concise, and definite statement of the essential facts constituting the offense charged.'" *United States v. Fosler, 70 M.J. 225, 234 (C.A.A.F. 2011)* (Effron, C.J., dissenting) (quoting *Manual for Courts-Martial, United [*4] States Rule ("R.C.M.") 307(c)(3)* (2008 ed.)). By contrast, "[a] charge states the article of the UCMJ, law of war, or local penal law . . . which the accused is alleged to have violated." R.C.M. 307(c)(2) (2019 ed.). Multiple specifications can therefore appear under the same "charge."

⁵ Because the parties generally agree (and because Stanton did not file an opposition to the government's SOMF), I will cite to the government's SOMF whenever applicable and not directly disputed by Stanton. See *Fed. R. Civ. P. 56(e)(2)* ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of a fact as required by *Rule 56(c)*, the court may . .

on the findings and as to the sentence.⁷*Id.* A new trial was set for July 23, 2018 on the sexual assault charges, but the alleged sexual assault victims notified the Air Force that they no longer wished to testify at, or participate in, Stanton's rescheduled court-martial. *See id.* ¶ 5. Accordingly, Jacobson withdrew the sexual assault charges against Stanton without prejudice on July 20, 2018. *Id.* ¶ 6.

At this point, Stanton faced a re-sentencing hearing only on his guilty plea to larceny. Seeking to avoid this hearing, Stanton requested to be administratively discharged in lieu of a trial by court-martial pursuant to Chapter 4 of Air Force Instruction ("AFI") 36-3208 ("Chapter 4").⁸*Id.* ¶ 7. Chapter 4 provides that airmen who are "subject to trial by court-martial" may "[r]equest discharge in lieu of trial," AFI 36-3208 4.1.1, provided that "charges have been preferred with respect to an offense for which a punitive discharge is authorized," *id.* 4.1.2. In his request for a discharge under Chapter 4, Stanton affirmed his understanding that he could be discharged under other than honorable conditions. SOMF ¶ 7. Matthew Bush, the Chief of Military Justice in the Office of the Staff Judge Advocate for the Air Force District of Washington ("AFDW"), spoke with Stanton's defense counsel regarding Stanton's Chapter 4 request *before* Bush presented Stanton's

request to Jacobson. *Id.* ¶ 9. During this conversation, Bush noted the Government's belief that Jacobson had limited, to no authority, to disturb the affirmed larceny conviction.⁹*Id.*; Pet'r's Opp'n 2. Stanton's counsel, [*5] however, confirmed Stanton's desire to continue nonetheless with the Chapter 4 request. SOMF ¶ 9.

AFDW proceeded to consider Stanton's request for discharge under Chapter 4, On July 23, 2018, a staff judge advocate in Jacobson's office wrote up a legal review recommending that Jacobson grant the request. *See* Legal Review - Request for Discharge in Lieu of Trial by Court-Martial, *United States v. AIC Ladarion D. Stanton* ("Legal Review") [Dkt. #1-2]. The review noted that although Stanton faced up to six months' confinement and a bad conduct discharge for larceny of less than \$500 in property (i.e., an iPad), the chance of a court-martial panel actually sentencing him to a punitive discharge was "incredibly low." *Id.* at 1-2. What's more, the review reported that the larceny victim supported Stanton's request for a discharge in lieu of court martial. *Id.* Ultimately, on July 25, 2018, Jacobson approved Stanton's Chapter 4 request and directed that Stanton "be discharged with an Under Other Than Honorable Conditions service characterization." SOMF ¶ 10 (quoting Dkt. #1-1) (internal quotation marks omitted). A legal staffer in Jacobson's office then issued an order in Stanton's court-martial proceeding [*6] stating that "[a] rehearing was found to be impracticable" and that "[a] sentence providing for 'no punishment' is approved." General Court-Martial Order No. 45 [Dkt. #1-3].

The case then returned automatically to the AFCCA, over Stanton's strong objection. Shortly after the AFCCA re-docketed the record of Stanton's case, *see* SOMF ¶ 11, Stanton argued that

. consider the fact undisputed for purposes of the motion . . .").

⁶ His sentence included other punishments, but those listed are the ones most relevant to the present petition. SOMF ¶ 3.

⁷ At the time of Stanton's sentencing, courts martial imposed a single sentence for all offenses. *See* R.C.M. 1002(b) (2016 ed.) ("Sentencing by a court-martial is unitary. The court-martial will adjudge a single sentence for all the offenses of which the accused was found guilty."); *see also* R.C.M. App'x 22 Rule 1006(c) (recognizing same unitary sentencing concept under 2012 rules that applied to Stanton's sentencing). Therefore, overturning Stanton's conviction on any charge or specification required reconsideration of his entire sentence.

⁸ Available at https://static.e-publishing.af.mil/production/1/af_al/publication/afi36-3208/afi36-3208.pdf. Although the version of AFI 36-3208 available at this website carries an issuance date of 14 June 2018 (and a reissuance date of 13 June 2019), the applicable provisions of Chapter 4 appear not to have changed since at least 2013.

⁹ According to Stanton, the sole material fact in the case that is in dispute is whether or not Mr. Stanton's former counsel agreed with Bush about the Government's inability to disturb Stanton's larceny conviction. *See* Pet'r's Opp'n 2. Because I conclude that this fact is ultimately immaterial to my legal analysis, I include here the version of the facts set forth by Stanton.

the court lacked jurisdiction over him because he had been administratively discharged and was not subject to a sentence that would provide the court a basis for continuing jurisdiction, *see* Stanton's AFCCA Mot. to Dismiss, Def.'s Opp'n to Mot. for Preliminary Injunction Ex. C [Dkt. #10-1 at 5]. After the Government filed an opposition, the court summarily denied the motion. *See id.* at 1. Stanton then petitioned the Court of Appeals for the Armed Forces for a writ of mandamus, but this petition was also summarily denied. *See Stanton v. United States*, 78 M.J. 258 (CAAF 2018). Undaunted, Stanton filed the present petition for habeas corpus and a motion for a preliminary injunction on March 12, 2019. *See* Petition [Dkt. #1]; First Mot. for a Preliminary Injunction [Dkt. #2]. The case was assigned to one of my colleagues who set a briefing schedule and held oral argument on April 18, 2019. [*7] *See* Minute Entry for Proceedings Held on 4/18/2019. After hearing argument, my colleague declined to grant a preliminary injunction but set a further briefing schedule for summary judgment motions. *See id.*

Meanwhile, proceedings continued on a parallel track in the military justice system. On March 21, 2019, the AFCCA remanded the case on procedural grounds, noting that Stanton's no-punishment sentence was imposed in an order signed by a member of Jacobson's staff, when only Jacobson himself could impose the sentence. AFCCA Order Remanding Case [Dkt. #8]. After Jacobson signed the "no punishment" order himself on remand, *see* SOMF ¶ 14, the case returned to the AFCCA, which issued an opinion on July 16, 2019. *See United States v. Stanton, No. ACM 39161 (reh), 2019 CCA LEXIS 306 (AFCCA July 16, 2019)* ("*Stanton*") [Dkt. #20-1]. In its opinion, the AFCCA rejected two arguments Stanton had raised before it. First, the court concluded that it did retain jurisdiction over Stanton even after his administrative discharge. *Stanton, 2019 CCA LEXIS 306 at *9-11*. Second, the court declined to set aside Stanton's larceny conviction in order to avoid a "manifest injustice." Thus, as things stand now, Stanton has been administratively discharged

from the [*8] Air Force under other than honorable conditions and with an affirmed conviction for larceny for which he received a punishment of "no sentence."

LEGAL STANDARDS

Both parties seek summary judgment. Summary judgment is appropriate "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." *Airlie Foundation v. IRS*, 283 F. Supp. 2d 58, 61 (D.D.C. 2003) (citing *Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir. 1975)); *see also Fed. R. Civ. P. 56(a)* ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether there exists a genuine issue of material fact, the court must view all facts, and reasonable inference drawn therefrom, in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The legal question at issue on summary judgment involves review of the military justice system's jurisdiction [*9] over Stanton. Article III courts have long had the authority to consider collateral attacks challenging a court-martial tribunal's jurisdiction to try a case. *See In re Grimley*, 137 U.S. 147, 150, 11 S. Ct. 54, 34 L. Ed. 636 (1890) ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge

him from the sentence."). In cases involving collateral attacks by members of the military who are not in custody, our Circuit Court has opined that in order "for a court to grant any relief to such plaintiffs, the military court judgment must be 'void,' meaning the error must be fundamental."¹⁰[*Sanford v. United States*, 586 F.3d 28, 32, 388 U.S. App. D.C. 303 \(D.C. Cir. 2009\)](#) (quoting [*Schlesinger v. Councilman*, 420 U.S. 738, 753, 95 S. Ct. 1300, 43 L. Ed. 2d 591 \(1975\)](#)).

Stanton identifies both jurisdictional and non-jurisdictional errors here. Jurisdictional errors are, of course, fundamental. See [*Councilman*, 420 U.S. at 747](#) (stating district courts may grant relief where court martial suffered from "lack of jurisdiction or some other equally fundamental defect" (emphasis added)); see also [*Toth v. Quarles*, 350 U.S. 11, 14, 76 S. Ct. 1, 100 L. Ed. 8 \(1955\)](#) ("[I]t has never been intimated by this Court. . . that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions."). Whether a non-jurisdictional error is [*10] fundamental "may turn on [1] the nature of the alleged defect, and [2] the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress." [*Sanford*, 388 U.S. App. D.C. at 307](#).

ANALYSIS

For the most part, the Government and Stanton talk

¹⁰Filing his own motion for summary judgment before the military justice system had completed its process, Stanton argued that he was not collaterally attacking a completed court martial but rather attacking the right of a court martial to try him in the first place, which our Circuit Court has recognized as an exception to the general requirement that servicemembers exhaust the military justice process before seeking review in a civilian court. See Pet'r's Opp'n at 4-5 (citing [*New v. Cohen*, 129 F.3d 639, 644, 327 U.S. App. D.C. 147 \(D.C. Cir. 1997\)](#)). As the military justice process has now run its course in any event, I need not consider whether Stanton was required to exhaust its processes.

past each other in their motions. The Government contends that Jacobson lacked the authority to vacate Stanton's already-affirmed conviction on remand and that the AFCCA properly retained jurisdiction over Stanton's sentence even post-discharge. Stanton argues that Chapter 4 authorized Jacobson to grant a discharge in lieu of a court-martial regardless of the AFCCA's previous decision, that Stanton was entitled to the full benefit of his bargain (a discharge without a conviction), and that the AFCCA lacked jurisdiction over Stanton once he was discharged from the Air Force by Jacobson. I conclude that because Stanton's conviction was indeed final before he even initiated the discharge in lieu of court-martial process, that conviction (and the sentence of "no punishment") survived his administrative "discharge in lieu of court-martial." [*11] How so?

A. The Larceny Conviction Was Final

At the time Stanton requested a discharge in lieu of court-martial, the conviction had already been affirmed by the AFCCA, which, according to statute, executive order, and military legal precedent, accorded it finality. First, under the Uniform Code of Military Justice ("UCMJ"), the AFCCA's findings as to guilt are final and binding (both on the Air Force and on this Court):

The appellate review of records of trial provided by this chapter [and] the . . . findings . . . of courts-martial as . . . affirmed as required by this chapter . . . are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to [[articles 73](#) and [74](#) of this title¹¹] and the authority of the President.

¹¹[Article 73](#) deals with newly discovered evidence or fraud on the court. See [10 U.S.C. § 873](#). [Article 74](#) provides for remission or suspension of "any sentence" by certain officials but says nothing

10 U.S.C. §876.

Next, the Manual for Courts Martial ("MCM"), an Executive Order issued by the President, recognizes that a military Court of Criminal Appeals may affirm some findings of guilt and effectively lock them in while ordering further proceedings below (which must be consistent with those affirmed findings): [*12]

If a superior competent authority has approved some of the findings of guilty and has authorized a rehearing as to other offenses and the sentence, the convening authority may, unless otherwise directed, reassess the sentence based on *the approved findings of guilty* and dismiss *the remaining charges*. Reassessment is appropriate only where ... the reassessed sentence is *appropriate in relation to the affirmed findings of guilty*.

R.C.M. 1107(e)(2)(B)(iii) (2016 ed.) (emphasis added); *see also* R.C.M. 1107(e)(1)(B)(iv) (2012 ed.) (same). By contrast, the MCM nowhere authorizes a convening authority to dismiss already-affirmed charges.

Finally, as the Government points out, the military courts long ago held that a convening authority was not empowered to overturn an already-affirmed conviction in a case like Stanton's:

Nothing in the terms of the remand [in the case under review] . . . permitted the convening authority to take any action as to the findings of guilty. Indeed, those findings had already been affirmed by the Court of Military Review "[A]fter remand of a case, a lower court, *or in the military any lower echelon*, is without power to modify, amend, alter, set aside, or in any [*13] manner disturb or depart from the judgment of the reviewing court."

United States v. Montesinos, 28 M.J. 38, 43 (C.M.A. 1989) (quoting United States v. Stevens, 10

C.M.A. 417, 27 C.M.R. 491, 492 n.1 (C.M.A. 1959)). Thus, Stanton's conviction was final and unalterable *before* he sought a discharge in lieu of court-martial from Jacobson.

Because Stanton did not frame his argument in terms of finality, he does not *directly* challenge the finality of the conviction. Instead, he contends that the Chapter 4 discharge in lieu of court-martial *could* set aside the conviction. As I explain below, I disagree.

B. The Discharge in Lieu of Court-Martial Had No Effect on Stanton's Conviction

Stanton's successful request for a discharge in lieu of court-martial had no effect on his already-final larceny conviction.

Several CAAF cases, taken together, provide a framework for considering Stanton's jurisdictional challenge here. First, longstanding CAAF precedent establishes that a servicemember's administrative discharge has no effect on a pre-existing conviction (and sentence), nor on further actions by the military justice system pursuant to that conviction (and sentence):

This Court has held that, if a person is discharged administratively while appellate review is pending, there is "no good reason to hold the findings and sentence of the [*14] court-martial are impaired by the discharge." Similarly, the power of review authorities over the court-martial is unaffected by the administrative discharge. Moreover, the administrative discharge does not negate the responsibility of the convening authority to act on the findings and sentence; nor does it restrict his power to do so.

Steele v. Van Riper, 50 M.J. 89 (C.A.A.F. 1999) (quoting United States v. Speller, 8 C.M.A. 363, 24 C.M.R. 173, 178 (C.M.A. 1957)). Next, another CAAF case explains that when a finding of guilt is affirmed on appeal but a sentence is vacated, the

about convictions. 10 U.S.C. § 874 (emphasis added). Neither provision applies here.

military courts retain jurisdiction even when a defendant has been administratively discharged in the meantime:

The question before us is, when an appellate court approves the findings of a court-martial, disapproves the sentence, and orders a sentence rehearing, does a post-trial administrative discharge preclude completion of the sentence proceedings ordered by an appellate court? . . . [O]ur precedent recognizes that there is "continuing jurisdiction" over a case that has been tried and in which the accused was convicted while in a status that subjected him or her to the UCMJ.

United States v. Davis, 63 M.J. 171, 176 (C.A.A.F. 2006).¹² A third CAAF case applying *Steele* explains that while a pretrial administrative discharge terminates a court-martial's jurisdiction over the accused, [*15] "[a] post-trial administrative discharge operates to remit the unexecuted punitive discharge portion of an adjudged court-martial sentence." United States v. Watson, 69 M.J. 415, 416-17 (C.A.A.F. 2011). Finally, a fourth CAAF case, albeit in a different factual context, makes clear that a convening authority's powers on remand are circumscribed to just those necessary to accomplish what was ordered by the superior court:

It is well established that in a case subject to review under Article 66, UCMJ, a convening

authority "loses jurisdiction of the case once he has published his action or has officially notified the accused' of that action. At that point, the 'only further contact that the convening authority has with the case occurs in the event of a remand" or the exercise of his clemency powers. . . . [E]ven when acting on remand, a convening authority may still only take action "that conforms to the limitations and conditions prescribed by the remand." The AFCCA's remand "did not purport to confer upon [the] convening authority all the powers that a convening authority would have possessed on the initial appellate review of the case pursuant to Article 60." Instead, the convening authority acted "by delegation from the [Court of Criminal [*16] Appeals]—to which he was subordinate" because he possessed "no independent statutory authority at that time to act on the findings and sentence."

United States v. Carter, 76 M.J. 293, 295-96 (C.A.A.F. 2017) (quoting Montesinos, 28 M.J. at 42, 44). Taken together, these four cases stand for the proposition that a finding of guilty, once affirmed on appeal, remains final on remand despite an intervening administrative discharge and that the convening authority has no power over this finding of guilty on remand for resentencing. In other words, in cases like Stanton's, Jacobson could not set aside Stanton's conviction.

Stanton makes three arguments why his conviction should be (or, more accurately, was) set aside based on the discharge in lieu of a court martial. First, he contends that different military legal precedent stands for the proposition that a request for discharge in lieu of a court-martial that is granted after a conviction causes that conviction to be vacated. In United States v. Woods, 26 M.J. 372 (C.M.A. 1988), the Court of Military Appeals did indeed order a court-martial conviction to be "abated" because of a discharge in lieu of court-martial that was granted after the conviction was entered. In addition to that factual setup, there is

¹² Stanton attempts to distinguish both *Steele* and *Davis* on the grounds that they both involved servicemen who were administratively discharged by mistake. This matters, he contends, because while an administrative error does not divest the military courts of jurisdiction, a discharge pursuant to a binding contract does. But *Steele* cites *Speller* for its jurisdictional holding, and *Speller* cites cases involving a variety of discharges in different contexts dating back at least as far as the latter half nineteenth century. See *Speller*, 24 C.M.R. at 176 ("[T]he general rule has long obtained that jurisdiction once acquired is not lost by a change in the status of a defendant."); see also *id.* (citing Carter v. McClaughry, 183 U.S. 365, 383, 22 S. Ct. 181, 46 L. Ed. 236 (1902); Coleman v. Tennessee, 97 U.S. 509, 24 L. Ed. 1118 (1878)). So whether the discharge was based on mistake is irrelevant. I respond to Stanton's contractual argument below.

language in the opinion [*17] that is helpful to Stanton:

The power of the Secretary to approve or disapprove resignations in accordance with his own regulations and the power of a convening authority to convene courts-martial harmoniously coexist. Just as we have recognized that an administrative action cannot divest a court-martial of its judicial power, we likewise recognize that a court-martial can neither deprive the Secretary of his powers nor defeat a lawful agreement between an accused and the secretary.

[Woods, 26 M.J. at 375](#).¹³ Petitioner also cites [United States v. Patterson, 1998 CCA LEXIS 300, 1998 WL 433963 \(N.M. Ct. Crim. App. July 7, 1998\)](#), in which the Navy-Marine Court of Criminal Appeals similarly overturned a conviction that was followed by an approved request for discharge in lieu of court-martial, [1998 CCA LEXIS 300, \[WL\] at *2](#).

But there are four crucial differences that lead me to disregard [Woods](#) and [Patterson](#) in this case. First, in both cases, the *request* for discharge was made *before* the actual finding of guilty was entered. [*18]¹⁴ Second, in both cases, it was the negligence (in *Patterson*, an outright misrepresentation) of military officials that led to

¹³A concurrence in the opinion has even better language for petitioner:

It seems clear that [the Army's discharge in lieu of court-martial] Regulation contemplates that, if a resignation is accepted after a conviction has occurred, the result will be the same as if a court-martial had never taken place. Such an outcome seems implicit in the concept of a resignation in lieu of court-martial.

[Woods, 26 M.J. at 375](#) (Everett, C.J., concurring).

¹⁴It is not clear to me that the Chapter 4 discharge in lieu of court-martial regulation was even intended to apply in a case like Stanton's, where a conviction had been affirmed on appeal, but I need not decide that question to conclude that there is a fundamental difference between a request made before a court-martial took place and one made after a court-martial's finding of guilty had been affirmed on appeal.

the discharge not being approved until after the conviction had been entered. Once again, in the present case, the discharge was not even requested until after the conviction had been approved by the convening authority (and affirmed on appeal). Third, relatedly, the benefit for which the defendants in *Woods* and *Patterson* bargained was that there would be no court-martial at all. Just because one was ultimately conducted (again, because of negligence on the part of military officials charged with processing the discharge request) does not change the nature of the original bargain. Here, by contrast, the court martial had already happened. What was bargained away was a re-sentencing hearing.¹⁵ So it makes sense that here the sentence, rather than the court-martial itself, would be "abated." Finally, in both *Woods* and *Patterson*, the discharge was approved *before* the case ever went up for appellate review. Thus, at the time each defendant was actually discharged, the finding of guilty had not yet been affirmed on appeal and was not yet law of the case. In light of [*19] these differences, I do not find *Woods* and *Patterson* persuasive here.

Stanton's second argument is that he did not receive the benefit of his bargain with the Air Force. He argues that he forewent the statutory and constitutional rights afforded him at a court-martial sentencing rehearing in exchange for his case being resolved administratively instead of criminally. As such, he contends that the Air Force violated its contract with him by maintaining his conviction and imposing a sentence of no punishment. *See* Pet'r's Opp'n 7-8 (citing [United States v. Henry, 758 F.3d 427, 431, 411 U.S. App. D.C. 236 \(D.C. Cir. 2014\)](#) ("In interpreting the terms of a plea agreement, we look to principle of contract law."); [United States v. Lundy, 63 M.J. 299, 301 \(C.A.A.F. 2006\)](#) ("[A] pretrial agreement is a constitutional rather than a commercial contract.")). I disagree. Stanton's case is simply different from the normal discharge in lieu of court-martial in that his was a

¹⁵Stanton disagrees with this characterization, as I address more fully below.

discharge in lieu of re-sentencing. His *court-martial* had already taken place, and he faced no prospect of a new court-martial. Benjamin Beliles, Stanton's trial counsel who assisted him with the Chapter 4 request, insists that he believed the convening authority's understanding that nothing could be done about the affirmed larceny conviction was incorrect, *see* Decl [*20] of Benjamin Beliles, Pet'r's Opp'n Ex. 1 ¶ 4, but even Beliles acknowledges that the convening authority did not represent that he intended to do anything about that already-affirmed conviction, *see id.*

Another AFCCA case, which Stanton does not cite but did rely on before the AFCCA, is instructive because it demonstrates what true reliance by Stanton on receiving a discharge would have looked like. In [United States v. Perez, No. ACM 38559, 2019 CCA LEXIS 101, 2019 WL 1110433 \(A.F. Ct. Crim. App. March 8, 2019\)](#), the AFCCA reviewed a situation almost identical to the one in this case—the AFCCA previously had affirmed a finding of guilt on one specification, set aside other specifications and the sentence, and remanded to the convening authority for further action, but on remand, the convening authority accepted a discharge in lieu of court-martial, *see* [2019 CCA LEXIS 101, \[WL\] at *2](#). One key difference between *Perez* and Stanton's case, however, is that in *Perez*, the convening authority explicitly purported to set aside the affirmed conviction. *See id.* On appeal, the AFCCA made clear, consistent with its later ruling in Stanton's case, that the convening authority lacked the power to set aside an already-affirmed conviction. *See* [2019 CCA LEXIS 101, \[WL\] at *4](#) ("[W]e find inconsistent with the remand and thus improper the convening authority's withdrawal [*21] and dismissal of Specification 4 Because this court had already affirmed Appellant's conviction . . . the convening authority could not dismiss the specification and charge."). But because the defendant in *Perez* had "*reasonably relied on the convening authority's belief that he could withdraw and dismiss*" the already affirmed charge, the AFCCA upheld the dismissal because it concluded that to do otherwise

would be a "manifest injustice." [2019 CCA LEXIS 101, \[WL\] at *5](#) (emphasis added). Here, Stanton could not *reasonably* have relied on the convening authority's belief that he could dismiss Stanton's already affirmed charge because, as Stanton himself agrees, the convening authority did not purport to believe that.¹⁶ Here, Stanton's sentence was abated, which was the appropriate outcome for a discharge in lieu of a re-sentencing hearing.

Third, Stanton insists that the AFCCA had no jurisdiction at all after his administrative discharge and so erred in once more taking up his case after that discharge. Stanton cites *Clinton v. Goldsmith*, 525 U.S. 961, 119 S. Ct. 402, 142 L. Ed. 2d 326 (1998), for this proposition, but his reliance is misplaced. In *Goldsmith*, the Supreme Court held that the Court of Appeals for the Armed Forces could not enjoin the Secretary of the Air Force from administratively [*22] discharging an airman simply because that airman was also serving out a sentence imposed by court-martial. *See id. at 536-37*. But here, the AFCCA made no attempt to interfere with Stanton's *discharge*; instead, it reviewed his conviction and sentence of no punishment. Stanton argues that the conviction itself was voided, causing the AFCCA to lose its jurisdiction, but as I have explained, the conviction survived his discharge. And there is no question that the AFCCA retains "jurisdiction over a case that has been tried and in which the accused was convicted while in a status that subjected him or her to the UCMJ." [Davis, 63 M.J. at 176](#).

CONCLUSION

¹⁶ Stanton does not argue before this Court, nor could he, that the AFCCA erred in declining to use its authority to correct a manifest injustice in his case. That is precisely the sort of discretionary action by the military courts that I cannot set aside as void on collateral review. *See* [Sanford, 388 U.S. App. D.C. at 307](#) (noting that military cases must be "assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress" (quoting [Councilman, 420 U.S. at 753](#)) (internal quotation marks omitted)).

For the foregoing reasons, petitioner's Motion for Summary Judgment is DENIED. Respondents' Motion for Summary Judgment is GRANTED. Petitioner's Petition for a Writ of Habeas Corpus is DISMISSED. A separate Order consistent with this decision accompanies this Memorandum Opinion.

/s/ Richard J. Leon

RICHARD J. LEON

United States District Judge

ORDER

(April 3rd, 2020) [##s 1, 14, 17]

This case comes before the Court upon respondents James A. Jacobson and the United States of America's Motion for Summary Judgment and petitioner Ladarion D. Stanton's Motion for Summary Judgment.

Upon consideration [*23] of the motions, the pertinent portions of the record, and being otherwise fully advised on the matter, it is

ORDERED that, for the reasons stated in the accompanying memorandum opinion, the respondents' motion is GRANTED and the petitioner's motion is DENIED; it is further

ORDERED that petitioner's Petition for a Writ of Habeas Corpus is DISMISSED.

SO ORDERED.

/s/ Richard J. Leon

RICHARD J. LEON

United States District Judge