IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40321 (f rev)
	)	
Senior Airman (E-4)	)	USCA Dkt. No. 24-0212/AF
MONICA R. ARROYO	)	
United States Air Force	)	17 December 2024
Appellant.	)	

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

ISSUE PRESENTED

DURING ITS SENTENCE SEVERITY ANALYSIS, THE AIR FORCE COURT CONSIDERED THE BENEFIT ENJOYED BY SRA ARROYO WHEN THE GOVERNMENT DISMISSED SPECIFICATIONS. DID THE AIR FORCE COURT ERR?

INTRODUCTION

This case—like many others—features an accused who promised to accept specific punishments in exchange for the dismissal with prejudice of serious offenses that carried even harsher penalties.

Article 66's mandate that Courts of Criminal Appeal (CCAs) determine sentence appropriateness "on the basis of the entire record" accounts for such bargain-driven sentences. 10 U.S.C. § 866(d). This requirement recognizes that

the propriety of sentences resulting from negotiated pleas—like the one in this case—cannot be assessed without considering how they formed part of a quid-pro-quo exchange.

Plea bargains are compromises between the Government and the accused that are informed by society's "powerful and legitimate interest in punishing the guilty, an interest shared by the [Government] and the victims of crime alike." Shinn v. Ramirez, 596 U.S. 366, 377 (2022). This interest is why the Government might accept a negotiated plea to a lesser offense if an accused is willing to agree to certain punishment—to ensure that the accused will be held accountable and that victims will see justice done. Such plea bargains are "important components of this country's criminal justice system." Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978). And when "[p]roperly administered, they can benefit all concerned." Id. at 362. This is why CCAs *must* consider such plea agreements when framing their sentence appropriateness review. *See* 10 U.S.C. § 866(d). Absent this context, the CCAs would be forced to evaluate certain sentences in a vacuum, which could lead to serious miscarriages of justice.

Considering the above, this Court should find that the Air Force Court of Criminal Appeals did not err by considering the impact of Appellant's plea agreement on her sentence.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), UCMJ, 10 U.S.C. § 866(d).[1] This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On 9 March 2022, a general court-martial convicted Appellant, consistent with her plea, of one specification of assault consummated by battery in violation of Article 128, UCMJ. (JA at 94.) The military judge sentenced Appellant to reduction in grade to E-2, 37 days of confinement, and a bad conduct discharge. (Id.) The convening authority took no action on Appellant's case. (Id.) On 25 August 2023, AFCCA remanded the case to the Air Force Trial Judiciary for corrective action. (JA at 1-6.) Following corrective action, the case was re-docketed on 21 December 2023. (JA at 9.) On 18 June 2024, AFCCA affirmed the findings but found that confinement for 37 days was inappropriately severe and modified the sentence to "affirm only so much of the sentence that includes a bad-conduct discharge, confinement for 14 days, and reduction to the grade of E-2." (JA at 23.)

[1] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2019 ed).

STATEMENT OF THE FACTS

Appellant Offers to Plead Guilty

In mid-2021, Appellant's commander preferred one charge with two specifications alleging sexual assault in violation of Article 120, UCMJ—for digital and oral penetration of the victim's vulva, respectively—against Appellant. (JA at 27.) In the months that followed, Appellant's trial defense counsel moved to suppress the prosecution's evidence, including L.P.'s statements to a Sexual Assault Nurse Examiner (SANE) as well as the SANE report itself. (JA at 146-189.) With a few limited exceptions, the military judge ruled against Appellant and determined that the report and the majority of L.P.'s statements would be admissible at trial. (App. Ex. XVIII.)

On the Monday that trial was scheduled to begin, Appellant offered to plead guilty to assault consummated by battery in exchange for the dismissal with prejudice of the sexual assault offenses. (JA at 37, 191.) The parties subsequently requested a two-day continuance to deal with the plea agreement, which the military judge granted. (JA at 37.) Pursuant to the plea agreement, Appellant's commander referred an additional charge (for assault consummated by battery) later the same day. (JA at 29.) The next day, the convening authority accepted the plea agreement, and trial began the day after that. (Id.)

Appellant Agrees to Accept a Bad Conduct Discharge

In her written offer to plead, Appellant agreed, *inter alia*, that "[a] bad conduct discharge *must* be adjudged." (JA at 191) (emphasis in original). The plea agreement contained no other limitations on the sentence. (Id.)

At trial, while reviewing the plea agreement with Appellant, the military judge addressed the ramifications of a bad-conduct discharge in detail—its adverse stigma, impact on potential employment and schooling opportunities, and attendant loss of military benefits. (JA at 62-64.) Appellant indicated that she understood the potential consequences. (Id.) The military judge then asked Appellant: "Is it your express desire to be discharged from the service with a bad conduct discharge?" (JA at 63.) Appellant responded, "Yes, Your Honor." (JA at 64.) When asked if she consented to her trial defense counsel arguing for a bad conduct discharge, Appellant again responded: "Yes, Your Honor." (Id.)

The military judge then asked counsel if their interpretation of the plea agreement was that "requiring the court to adjudge a bad conduct discharge [was] akin to setting a minimum punishment." (JA at 71.) Both counsel confirmed that this was their interpretation, with trial defense counsel noting that Appellant agreed to this provision "to get the benefit of the bargain." (Id.)

The Evidence

After placing Appellant under oath and warning her that anything she said could be used against her in the sentencing portion of trial, the military judge questioned her about the offense. (JA 40-77.) While describing why she was guilty of the assault consummated by battery, Appellant admitted that she intentionally touched L.P.'s leg without her permission, and that she had no excuse for doing so:

> [L.P.] had not told me she was comfortable with physical contact and I had not seen anyone else touch [L.P.] that night. I knew it was offensive because *she had not acted in any manner that indicated to me that she wanted to be touched*. She did not ask me to touch her leg, I did not ask her before I touched her leg, and she had not previously given me permission to touch her leg. The setting was not one that would typically involve physical contact and it was not part of a game or sporting event. I have no excuse for my behavior.

(JA at 43) (emphasis added).

After finding that Appellant's plea was made voluntarily and knowingly, the military judge accepted it and convicted her of the assault consummated by battery. (JA at 77.)

In the sentencing proceedings that followed, the prosecution presented Appellant's service and performance data, which established that (1) she had been on the active duty for approximately two years at the time of her crime, and (2) she had promoted to Senior Airman six months prior to assaulting A1C L.P. (JA at

107.) L.P. then gave an unsworn, unobjected-to victim impact statement in which she described the emotional impact of Appellant's crime. (JA at 110-112.)

Appellant's sentencing presentation consisted of character letters; an award nomination form; a certificate of promotion to Senior Airman Below-the-Zone; a copy of her associate's degree; a photo compilation; and an unsworn statement. (JA at 113-145.) The military judge sentenced Appellant to be reduced to the grade of E-2, 37 days of confinement, and a bad-conduct discharge. (JA at 94.) After announcement of the sentence and prior to adjournment, the prosecution dismissed the sexual assault charge and its specifications with prejudice. (Id.)

AFCCA Reviews Appellant's Sentence

On appeal, Appellant alleged, inter alia, that her sentence to a bad-conduct discharge was inappropriately severe. (JA at 7-26.) AFCCA disagreed. (JA at 22-23.) In so doing, the Court noted first that a bad-conduct discharge was part of the "maximum punishment authorized based on Appellant's plea alone." (JA at 21.) The Court then observed that Appellant's bad-conduct discharge was part of the minimum agreed-to punishment from her own plea agreement:

> It is also worth noting in this case that Appellant, with the assistance of competent counsel, negotiated and secured a plea agreement, where she received the benefit of having two specifications of sexual assault withdrawn and dismissed with prejudice, in exchange for her plea of guilty to a separate offense. This benefit not only reduced Appellant's criminal exposure, but it also ensured Appellant would not be exposed to additional significant

> collateral consequences that were possible under the dismissed specifications. In exchange for this benefit, Appellant agreed to a minimum punishment that would include at least 14 days of confinement and a bad-conduct discharge . . . As her counsel stated during pre-sentencing, Appellant received the benefit of her bargain.

(JA at 22.)

The Court opined that "when an appellant bargains for a specific sentence with the advice of counsel, and then argues for a sentence consistent with the agreed-upon terms, that is a 'reasonable indication of its probable fairness to h[er].'" (JA at 23) (citing United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979)). Though the Court did not disturb the bad-conduct discharge, it ultimately gave Appellant some sentence relief by reducing her confinement from 37 to 14 days, to be "[c]onsistent with Appellant's plea agreement." (JA at 23.)

SUMMARY OF ARGUMENT

In exchange for the dismissal with prejudice of sexual assault offenses—evidence of which her counsel tried and failed to suppress—and a negotiated plea to a lesser offense, Appellant agreed to a minimum sentence of 14 days of confinement and a bad-conduct discharge. AFCCA appropriately considered the "entire record" in finding that this minimum agreed-upon sentence was not inappropriately severe, given the circumstances of Appellant's case. 10 U.S.C. § 866(d).

In so doing, AFCCA never compared the sentence adjudged to the maximum authorized punishment for the dismissed sexual assault specifications. (*See generally* JA 7-26; *cf.* App. Br. at 10.) Rather, it noted that Appellant offered to agree to a mandatory bad-conduct discharge in exchange for the dismissal of the two sexual assault specifications, in order to limit her punitive exposure. (JA at 22.) This consideration did not violate Appellant's right to the presumption of innocence because it was simply a factual observation about the difference in maximum authorized punishment before and after the plea agreement. (Id.)

In addition to considering the circumstances under which the bad-conduct discharge was adjudged, AFCCA also considered the aggravating circumstances of the crime. The evidence presented at trial revealed that Appellant assaulted a vulnerable, inebriated junior Airman in the presence of her peers and subordinates—mere months after promoting to Senior Airman and being reminded that she had to meet a high standard since her "peers and subordinates" were watching.

Based on this—as well as Appellant's express desire that she receive a bad-conduct discharge—AFCCA affirmed the minimum agreed-to sentence (14 days of confinement and a bad-conduct discharge). (JA at 23.) In so doing, AFCCA implicitly recognized that because Appellant used her willingness to accept a bad-conduct discharge as a bargaining chip to negotiate a favorable plea agreement,

setting aside that agreed-upon punishment would "strain the spirit of [the] agreement to benefit one party." United States v. Cook, 12 M.J. 448, 455 (C.M.A. 1982). Not only would set-aside have deprived the Government of the most significant component of its punishment, but it would also have given Appellant an undeserved windfall. That is, Appellant would have benefited from the imposition of the bad-conduct discharge—which enabled AFCCA's automatic review and action—without truly being punished.

Failure to account for such nuances would be error, considering society's "powerful and legitimate interest in punishing the guilty." Shinn, 596 U.S. at 377. Because the public interest in justice informs plea agreements like the one in this case, CCAs cannot properly review sentence appropriateness without considering how the agreement shaped the outcome. *See* 10 U.S.C. § 866(d). If the CCAs could not consider how a plea agreement might have driven the sentence, they would be forced to operate with a distorted sight picture, which would produce the very "miscarriages of justice" that this Court seeks to prevent. United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999). Accordingly, this Court should affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

THE AIR FORCE COURT APPROPRIATELY CONSIDERED APPELLANT'S PLEA AGREEMENT AS PART OF ITS SENTENCE APPROPRIATENESS ANALYSIS.

Standard of Review

In reviewing a Court of Criminal Appeals (CCA)'s decision on sentence appropriateness, this Court is "limited to the narrow question of whether there has been an obvious miscarriage[] of justice or abuse[] of discretion." United States v. Swisher, No. 24-0011, 2024 CAAF LEXIS 395, at *5 (C.A.A.F. July 11, 2024) (quoting United States v. Behunin, 83 M.J. 158, 161 (C.A.A.F. 2023)) (alterations in original); *see also* United States v. Flores, 84 M.J. 277, 282 (C.A.A.F. 2024) (noting that this Court asks whether the CCA "acted inappropriately—i.e., arbitrarily, capriciously, or unreasonably—as a matter of law.").

Law & Analysis

Article 66(d), UCMJ, requires the service Courts of Criminal Appeals (CCA) to review sentences adjudged by courts-martial and affirm "the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the *entire record*, should be approved." 10 U.S.C. § 866(d) (2019) (emphasis added). "The power to review the entire record for sentence appropriateness includes the power to consider the allied papers, as well as the record of trial proceedings." United States v. Hutchison, 57 M.J. 231, 234

(C.A.A.F. 2002); *see also* United States v. Bethea, 46 C.M.R. 223, 225 (C.M.A. 1973) (noting that while an appellate court's review of findings is limited to the evidence produced at trial, "[d]ifferent considerations apply to the sentence.").

A court-martial's "entire record" consists of the record of proceedings, evidence, exhibits, and various other documents required by the Rules for Courts-Martial. *See* R.C.M. 1112(b), (f). Here, the record included the plea agreement in which Appellant agreed that a bad-conduct discharge "*must* be adjudged." (JA at 191) (emphasis in original). This agreement was not only attached to the record of trial as an appellate exhibit, but also discussed at length on the record and therefore captured as a part of the "substantially verbatim recording of the court-martial proceedings." (JA at 49-73, 190-194); *see* R.C.M. 1112(b)(1), (6). Thus, AFCCA was "statutorily required" to consider the fact that Appellant's bad conduct discharge was the result of a plea agreement from which she had already benefited. (JA at 22.) And as discussed further below, this neither involved a measure-to-measure comparison of the adjudged sentence to the maximum available punishment for dismissed offenses, nor did it violate Appellant's presumption of innocence. Rather, AFCCA's consideration of the entire record allowed it to put the adjudged sentence into its proper context.

A. AFCCA never compared the adjudged sentence with the maximum authorized sentence for the dismissed sexual assault offenses.

To start, Appellant misstates how AFCCA considered the dismissed specifications in its sentence severity analysis. Although she claims AFCCA "compare[d] the sentence she could have received for two specifications of sexual assault with what she received for a leg touch," that is simply not true. (*See* App. Br. at 10; *cf.* JA 7-26.) Nowhere in its opinion did AFCCA mention the maximum authorized punishment for sexual assault,[2] much less compare it to the sentence adjudged. (*See generally* JA at 7-26.)

In its sentence severity analysis, AFCCA alluded to the dismissed sexual assault offenses once—during its discussion of the plea agreement, where it noted that Appellant agreed to a "minimum punishment" that included a bad-conduct discharge, in exchange for the "benefit of having two specifications of sexual assault withdrawn and dismissed with prejudice." (JA at 22.) But beyond observing that this benefit "reduced Appellant's criminal exposure" and "ensured [she] would not be exposed to additional significant collateral consequences," AFCCA did not discuss the potential punishment for the sexual assault offenses at all. (JA at 22.)

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[2] The maximum authorized punishment for a single specification of sexual assault includes a mandatory dishonorable discharge, confinement for 30 years, and forfeiture of all pay and allowances. Manual for Courts-Martial, United States part IV, para. 60.d(2) (2019 ed.) (MCM).

Considering the above, there is no merit to the suggestion that AFCCA determined the bad-conduct discharge was appropriate "[i]n comparison to the sentence [Appellant] could have received absent the plea agreement." (App. Br. at 12.) Far from being a sentence comparison, AFCCA's comments regarding Appellant's "criminal exposure" were simply factual statements about the plea agreement.

B. AFCCA's commentary about Appellant eliminating the risk of harsher penalties did not violate the presumption of innocence.

That AFCCA considered how Appellant benefited from the plea agreement—i.e., "reduced [her] criminal exposure"—does *not* mean it "presume[d] [she] would have been convicted of the dismissed specifications." (App. Br. at 11; JA at 22.) This was simply an observation about the punishment Appellant could have faced versus what she actually faced after the plea agreement.

"Criminal exposure" refers to the maximum *possible* punishment a court-martial can adjudge based on an accused's alleged crimes. *See* United States v. Hardy, 77 M.J. 438, 444 (C.A.A.F. 2018) (Stucky, J., concurring) (describing maximum authorized punishment as "punitive exposure). An accused's criminal exposure is "reduced" when the maximum potential punishment is lowered in some way. *See* United States v. Campbell, 71 M.J. 19, 25 (C.A.A.F. 2012) (noting that appellant's criminal "exposure" was reduced from 31 to 11 years based on the prosecution's decision to charge "divers occasions" instead of individual offenses).

Here, based on the original sexual assault offenses, Appellant could have faced a mandatory minimum of a dishonorable discharge, with a maximum punishment of confinement for 60 years and forfeiture of all pay and allowances. *See* MCM part IV, para. 60.d(2). But by pleading guilty to the lesser offense of assault consummated by battery in exchange for the dismissal (with prejudice) of the sexual assault offenses, Appellant reduced her exposure to a bad-conduct discharge, confinement for a maximum of six months, and forfeiture of all pay and allowances. MCM part IV, para. 77.d(2)(a).

Considering the above, AFCCA's remark that Appellant "reduced [her] criminal exposure" was simply a statement of fact. (JA at 22.) It was similar to this Court's observations in United States v. Furth about how an appellant's plea agreement "protected him from convictions for desertion and larceny" and "significantly limited [his] sentencing exposure." 81 M.J. 114, 117-18 (C.A.A.F. 2021). In making this observation, this Court was not presuming that the appellant would have been guilty of desertion or larceny—it was simply describing the risk he avoided by negotiating a favorable plea agreement. Id.; *see also* United States v. Bradley, 71 M.J. 13, 17 (C.A.A.F. 2012) (noting that the appellant's plea agreement allowed him to avoid a possible life sentence). Such is the case here. By noting that Appellant had "received the benefit of her bargain," AFCCA was not presuming that she would have been guilty—it was simply recognizing that the

bad-conduct discharge was part-and-parcel of a larger deal from which Appellant had already benefited. As a result, AFCCA's comment did nothing to undermine Appellant's presumption of innocence.

C. AFCCA appropriately considered Appellant's plea agreement in reviewing her sentence because it contextualized the adjudged sentence.

In reviewing the "entire record," AFCCA appropriately considered the fact that Appellant agreed to a bad-conduct discharge as part of a "bargained-for exchange." Ricketts v. Adamson, 483 U.S. 1, 9 n.5 (1987). The requirement to review the "entire record" recognizes that sentence appropriateness analysis is a contextual endeavor that is aimed at achieving "*relative* uniformity rather than an arithmetically averaged sentence." United States v. Olinger, 12 M.J. 458, 461 (C.M.A. 1982) (emphasis added). Put differently, it is only fair that a sentence's propriety be evaluated in relation to the circumstances under which it arose. And here, those circumstances include a plea agreement, which, "like other contracts[,] must be construed and applied in accord with its basic purpose." United States v. Hannan, 17 M.J. 115, 124 (C.M.A. 1984) (citation omitted).

Like "any other bargained-for exchange," the basic purpose of a plea agreement is for each side—both the accused and the Government—to "obtain advantages." Ricketts, 483 U.S. at 9. For an accused, such advantages translate into "limit[ing]…sentencing exposure," Furth, 81 M.J. at 118, and/or withdrawal and dismissal of certain charges with prejudice. *See, e.g.,* United States v.

Malacara, 71 M.J. 380 (C.A.A.F. 2012) (dismissing charge and specifications with prejudice to give appellant "the benefit that he bargained for"). An accused's interest in the dismissal of charges is often tied to the threat of other collateral consequences, which "may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does." Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

On the flipside, when an accused "chooses to bypass the orderly procedure for litigating his [case] in order to take the benefits, if any, of a plea of guilty, the [Government] acquires a legitimate expectation of finality in the [judgment] thereby obtained." Lefkowitz v. Newsome, 420 U.S. 283, 289 (1975). Both parties to a plea agreement are equally entitled to their respective benefits. Cook, 12 M.J. at 455 (recognizing that the convening authority is entitled to the "expected benefit of his bargain"); United States v. Smith, 56 M.J. 271, 280 (C.A.A.F. 2002) (noting that findings and sentence must be set aside if an appellant has not received "full consideration in return for his pleas of guilty").

The "give-and-take" required to accommodate both parties' desired benefits often drives the terms of a plea agreement, and this case is no exception. Bordenkircher, 434 U.S. at 362. Here, Appellant agreed to a minimum sentence of 14 days' confinement and a bad-conduct discharge. In exchange, the Government dismissed the original sexual assault offenses with prejudice and allowed

Appellant to plead to assault consummated by battery, which this Court has recognized is "a far better tactical outcome" than a conviction for sexual assault. *See* United States v. Terlep, 57 M.J. 344, 349 (C.A.A.F. 2002). For this arrangement not only reduced Appellant's punitive exposure, but also eliminated the risk of "additional significant collateral consequences." (JA at 22.) Through the dismissal of the sex offenses, Appellant eliminated the threat of sex offender registration. *See* Padilla, 559 U.S. at 373 (noting that competent defense counsel may plea bargain "creatively" to avoid a conviction that automatically triggers deportation). She also "avoid[ed] the stress of trial." Kingsbury v. United States, 783 F. App'x 680, 682 (9th Cir. 2019).

Given that the Government dismissed the original sexual assault specifications with prejudice prior to the court-martial's adjournment, Appellant has received these benefits. (JA at 94.) And now, having secured her benefit, Appellant seeks to deprive the Government of the very consideration she offered in exchange.

But as this Court's predecessor recognized, there is "no reason to strain the spirit of an agreement to benefit [only] one party." Cook, 12 M.J. at 455. Here, in assigning significance to the fact that Appellant had already secured the benefit of her bargain, AFCCA properly considered the "entire record," Hutchison, 57 M.J. at 234, including the plea agreement and its "basic purpose." Hannan, 17 M.J. at

124. And by affirming the minimum agreed-to punishment (14 days of confinement and a bad-conduct discharge) from the plea agreement, AFCCA implicitly recognized that when Appellant took advantage of a negotiated plea to obtain that benefit, the Government "acquire[d] a legitimate expectation of finality" in the agreed-upon sentence. Lefkowitz, 420 U.S. at 289. In other words, AFCCA correctly declined to set aside the bad-conduct discharge, as that would have deprived the Government of its primary benefit.

Any other result would have been a "miscarriage of justice," Swisher, 2024 CAAF LEXIS 395, at *5, for Appellant is "entitled to [her] bargain, but not to a windfall." Cook, 12 M.J. at 455. By agreeing to a bad-conduct discharge, Appellant not only obtained a plea to a lesser offense and minimized her criminal exposure, but also ensured automatic review of her case on appeal. *See* 10 U.S.C. § 866(b)(3). Had AFCCA affirmed the findings but set the discharge aside, it would have solidified Appellant's initial benefit (a conviction to a lesser offense) while eliminating the very sentencing component that enabled its review in the first place. *See* 10 U.S.C. § 866(b)(3). Put differently, Appellant would have benefited from the imposition of the bad-conduct discharge in every way without *actually* being punished—this would have been the appellate equivalent of receiving a refund for an item without returning the item in question.

It was not error for AFCCA to take this nuance into account in approving the bad-conduct discharge, given that it was part of a "bargained-for exchange." Ricketts, 483 U.S. at 9. In determining whether Appellant's court-martial sentence "should be approved," 10 U.S.C. § 866(d), AFCCA was required to assess whether the sentence was a "fair and just punishment" for "this particular offender," and whether it was "justified by the *whole* record." United States v. Atkins, 23 C.M.R. 301, 303 (C.M.A. 1957); United States v. Baier, 60 M.J. 382, 383-84 (C.A.A.F. 2005); Jackson v. Taylor, 353 U.S. 569, 576-77 (1957) (emphasis added). Thus, it was only right for AFCCA to consider that "this particular offender" agreed to a bad-conduct discharge as part of a plea agreement designed to minimize her criminal exposure. Baier, 60 M.J. at 383-84. If AFCCA could not consider what an appellant gained in exchange for pleading guilty and making sentencing concessions, many punishments could look inappropriately severe on their face and result in windfall relief for appellants who have already benefited from the bargain. To allow such windfall relief would be "to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the [Government] and the victims of crime alike." Shinn, 596 U.S. at 377.

This, in turn, would disincentivize convening authorities from accepting offers to plead: "[P]rosecutors may understandably be less willing to offer generous plea agreements when courts refuse to afford the government the benefit

of *its* bargain." Garza v. Idaho, 586 U.S. 232, 258 (2019) (Thomas, J., dissenting) (emphasis in original). And in a world where "the vast majority of criminal convictions result from such pleas," society's ability to hold offenders accountable and secure justice for victims will suffer as a result. United States v. Timmreck, 441 U.S. 780, 784 (1979).

D. AFCCA's determination that the bad-conduct discharge was not inappropriately severe is supported by other evidence.

While significant, Appellant's express agreement to a bad-conduct discharge and the benefit she received in return were not the sole bases for AFCCA's sentence severity determination. To start, as AFCCA noted in its opinion, a bad-conduct discharge is an authorized punishment for assault consummated by battery. (JA at 21.) In concluding that the bad-conduct discharge was not inappropriately severe punishment for this particular assault, AFCCA also considered (1) the evidence itself, and (2) the conduct of the parties at trial, as it related to the bad-conduct discharge.

As AFCCA aptly observed, Appellant "assault[ed] another Air Force member" after the victim had been drinking "and in the presence of Appellant's peers and subordinates." (JA at 22.) Although AFCCA did not label this "aggravation evidence," that does not mean it does not count as such. A close look at the underlying facts reveals that Appellant promoted to Senior Airman only six months prior to the assault, at which time she was reminded that the promotion

entailed "increased responsibilities" and that "[t]he standard [was] set high and [her] subordinates, peers, and supervisors [were] watching." (JA at 107, 133.) Mere months later, "in the presence of [her] peers and subordinates," Appellant assaulted a junior Airman while the latter was inebriated and vulnerable. (JA at 22.) And as AFCCA noted, there were no extenuating circumstances that could pave the way for sentencing relief. (Id.)

The fact that Appellant responded by introducing "twenty exhibits including character letters" does not automatically warrant the conclusion that she had compelling mitigation evidence, such that her sentence should have been further reduced. (*See* App. Br. at 15.) Though "evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember" may constitute matters in mitigation, every appellant's record must be put into its proper context. R.C.M. 1001(d)(B). Appellant's record was unremarkable and contained no "particular acts of good conduct or bravery" that warranted sentence relief. R.C.M. 1001(d)(B).

Based on the presentation by both parties—and the mandatory minimum sentence contained within the plea agreement—there was a sufficient "factual predicate on the record justifying the sentence." (*See* App. Br. at 16.) Appellant admitted to an assault consummated by battery—for which a bad-conduct

discharge is authorized—and the other evidence established that she had no excuse for doing what she did, when she should have known better. Accordingly, it was reasonable for the military judge to sentence Appellant to a bad-conduct discharge, and equally reasonable for AFCCA to affirm it on the grounds that "when an appellant bargains for a specific sentence with the advice of counsel, and then argues for a sentence consistent with the agreed-upon terms, that is a 'reasonable indication of its probable fairness to h[er].'" (JA at 23).

CONCLUSION

The issue before this Court is "not whether [it] would have reached the same result, but whether the Court of Criminal Appeals abused its discretion in doing so." Hutchison, 57 M.J. at 234. "To reverse for an abuse of discretion involves far more than a difference in opinion." United States v. Hyppolite, 79 M.J. 161, 166 (C.A.A.F. 2019). Put differently, even if this Court disagrees with the sentence affirmed by the lower court, it cannot disturb it unless there was an "obvious miscarriage of justice." Swisher, 2024 CAAF LEXIS 395, at *5. There was no miscarriage of justice in this case. The record demonstrates that the bad-conduct discharge was agreed to and requested by Appellant as a condition of her plea agreement, from which she had already significantly benefited by the time of appeal. Based on this, it was reasonable for AFCCA to determine that Appellant's "own sentence proposal"—a bad-conduct discharge and 14 days of confinement—

"*should* be approved." Hendon, 6 M.J. at 175; 10 U.S.C. § 866(d) (emphasis added). This result ensures "'that justice is done and that the accused gets the punishment [she] deserves.'" United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (quoting United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)). Accordingly, Appellant is unentitled to relief.

WHEREFORE, the United States respectfully requests that this Court affirm Appellant's conviction and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 17 December 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because:

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Dated: 17 December 2024