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.

USCA Dkt. No. 19-0449/AF

Crim. App. Dkt. No. 39161

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

THE CONVENING AUTHORITY AND APPELLANT ENTERED INTO AN AGREEMENT THAT APPELLANT WOULD BE ADMINISTRATIVELY DISCHARGED IN LIEU OF THE SENTENCE REHEARING AUTHORIZED BY THE LOWER COURT. THE CONVENING AUTHORITY THEN PROCEEDED WITH APPELLANT'S COURT-MARTIAL BY APPROVING A SENTENCE OF "NO PUNISHMENT" AND FORWARDING THIS CASE TO THE LOWER COURT FOR FURTHER APPELLATE REVIEW. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE FOR BREACH OF A MATERIAL TERM OF APPELLANT'S PRETRIAL AGREEMENT WITH THE CONVENING AUTHORITY?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2018). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

Airman First Class (A1C) Stanton pleaded guilty at a general court-martial to one charge and specification of larceny of non-military property of a value of $500 or less, or more specifically a set of headphones and an iPad. (JA at 1-2). Contrary to his pleas, he was convicted by officer members of two specifications of sexual assault and

one specification of aggravated sexual contact in violation of Article 120, UCMJ. 10 U.S.C. § 920 (2012). (JA at 2). The members sentenced A1C Stanton to a dishonorable discharge, confinement for ninety-six months, total forfeiture of pay and allowances, reduction to E-1, and a reprimand. (JA at 2). The Convening Authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. (JA at 2).

On February 7, 2018, the AFCCA affirmed A1C Stanton's larceny conviction, but set aside the remaining charge and specifications in accordance with this Court's decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). (JA at 12, 16). A rehearing as to the set-aside findings and the sentence was authorized. (JA at 16).

On July 20, 2018, the CA, after determining a rehearing as to findings to be impracticable, withdrew the alleged violations of Article 120, UCMJ, from a rehearing he had previously ordered on March 20, 2018. (JA at 35, 39). On July 25, 2018, the CA approved A1C Stanton's request for discharge in lieu of court-martial for the only remaining charge and specification, the previously affirmed larceny violation of Article 121, UCMJ. (JA at 51).

On July 27, 2018, two days after agreeing to discharge A1C Stanton in lieu of court-martial, the CA also approved a sentence of "no punishment" for the offense previously affirmed by the AFCCA. (JA at 52). A1C Stanton's court-martial was then forwarded to the AFCCA for docketing.

The lower court affirmed the sentence on July 16, 2019. (JA at 24). A1C Stanton petitioned this Court for review on September 13, 2019.

Statement of Facts

In the summer of 2018, both the CA and A1C Stanton had decisions to make, and time was of the essence. On July 20, 2018, the CA withdrew and dismissed one charge and three specifications alleging violations of Article 120, UCMJ, due to the complaining witnesses not wanting to participate in a second court-martial. (JA at 39, 41). That same day, A1C Stanton submitted a request for discharge in lieu of trial by court-martial via Air Force Instruction (AFI) 36-3208, Chapter 4. (JA at 40). Only one charge and specification of larceny of property of a value of $500 or less remained. And A1C Stanton's sentencing rehearing for that offense, scheduled for July 24, 2018, was fast approaching. (JA at 45).

The maximum possible sentence that A1C Stanton faced at the sentencing rehearing was reduction to E-1, forfeiture of all pay and allowances, six months of confinement, and a bad-conduct discharge. MCM (2016 ed.), Part IV, ¶ 46.e.(1)(b). A1C Stanton had been credited with 192 days of pretrial confinement at his first court-martial, and he had remained in confinement serving a previously adjudged ninety-six month sentence, which was imposed on June 10, 2016 (JA at 1, 12). Additionally, the trial judge awarded A1C Stanton ten-for-one credit for illegal pretrial punishment. (JA at 12). Thus, any panel convened to sentence A1C Stanton at the rehearing would have been informed of years of pretrial confinement credit before deliberating on an appropriate sentence. R.C.M. 1001(b)(1) (2016); *United States v. Miller*, 58 M.J. 266, 269 (C.A.A.F. 2003). Thus, the crux of A1C Stanton's sentencing rehearing would have focused on a potential bad-conduct discharge.

Had A1C Stanton not received a bad-conduct discharge at the sentencing rehearing, he still could have been involuntarily discharged via AFI 36-3208, ¶ 5.52 for commission of a serious offense. Air Force Instruction 36-3208, *Administrative Separation of Airmen* (Incorporating Through Change 7, July 2, 2013). However, had the CA wished to

discharge him with an Under Other Than Honorable Conditions (UOTHC) service characterization, A1C Stanton would have been entitled to an administrative discharge board and the UOTHC characterization would require approval by the Secretary of the Air Force (SECAF). AFI 36-3208, ¶ 1.18.3, 1.21.3.

The 11th Wing Staff Judge Advocate (SJA) identified "significant litigation risk for the government [at the rehearing], as the likelihood of a court-martial panel adjudging a punitive discharge for the larceny alone is incredibly low." (JA at 42). Further, he justified approval of the discharge in lieu of court-martial, stating, "the Air Force can still mark A1C Stanton as someone who fell well below standards and earned the stigma associated with the characterization." (JA at 42-43). The Air Force District of Washington (AFDW) SJA similarly recommended the CA approve the Chapter 4 request, "set aside punishment and direct a UOTHC service characterization." (JA at 48). On July 25, 2018, the CA approved A1C Stanton's Chapter 4 request with a UOTHC service characterization. (JA at 51).

Summary of Argument

The CA was authorized to enter into a Chapter 4 agreement with A1C Stanton via AFI 36-3208. The plain reading of the agreement is that A1C Stanton would be administratively discharged in lieu of court-martial. A1C Stanton entered into the agreement with the understanding that he would no longer have a criminal conviction. When the CA proceeded with the court-martial by approving a sentence of "no punishment," he breached a material term of the agreement, and A1C Stanton no longer received the benefit of his bargain. Thus, A1C Stanton is entitled to relief and his case should be dismissed with prejudice.

Argument

THE CONVENING AUTHORITY AND APPELLANT ENTERED INTO AN AGREEMENT THAT APPELLANT WOULD BE ADMINISTRATIVELY DISCHARGED IN LIEU OF THE SENTENCE REHEARING AUTHORIZED BY THE LOWER COURT. THE CONVENING AUTHORITY THEN PROCEEDED WITH APPELLANT'S COURT-MARTIAL BY APPROVING A SENTENCE OF "NO PUNISHMENT" AND FORWARDING THIS CASE TO THE LOWER COURT FOR FURTHER APPELLATE REVIEW. THIS CASE SHOULD BE DISMISSED WITH PREJUDICE FOR BREACH OF A MATERIAL TERM OF APPELLANT'S PRETRIAL AGREEMENT WITH THE CONVENING AUTHORITY.

Standard of Review

This Court reviews pretrial agreements de novo. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006).

Law and Analysis

1. The CA was authorized to enter into a Chapter 4 agreement with A1C Stanton via AFI 36-3208.

"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. Gansemer*, 38 M.J. 340, 342 (C.A.A.F. 1993). In the Air Force, this request is made via Chapter 4 of AFI 36-3208, which authorizes discharge *in lieu of* trial by court-martial (emphasis added). *See* BLACK'S LAW DICTIONARY 907 (10th ed. 2014) ("**in lieu of.** Instead or in place of; in exchange or return for."); AFI 36-3208, amendment to ¶ 1.30.1.4 ("**NOTE:** An administrative separation in lieu of court-martial under Chapter 4 of the instruction does not constitute a 'court-martial, or other proceeding conducted pursuant to the UCMJ' for purposes of this paragraph.").

Airmen may request a discharge in lieu of trial by court-martial if they are subject to trial by court-martial for an offense for which a

punitive discharge is authorized and charges have been preferred. AFI 36-3208, ¶ 4.1. A general court-martial convening authority (GCMCA) takes final action on the request. *Id.* at ¶ 4.11. Generally, Airmen discharged via a Chapter 4 receive a UOTHC service characterization. *Id.* at ¶ 4.2.

Airmen may request to be discharged in lieu of trial by court-martial any time after charges have been preferred, and the request may occur in the middle of a court-martial, as it did here. *Id.* at ¶ 4.1, Table 4.1, Rule 4. This Court has endorsed the vacation of convictions even if the request is approved after the court-martial is completed. *See United States v. Woods*, 26 M.J. 372 (C.M.A. 1988). "It seems clear that this Regulation contemplates that, if a resignation is accepted after 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).

In *Woods*, the Court addressed the simultaneous existence of administrative and judicial actions:

> 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.

26 M.J. at 375. The Air Force has delegated the authority to approve requests for discharge in lieu of trial by court-martial to the GCMCA. Thus here, upon the AFCCA's remand, the CA had three options: (1) order the sentence rehearing authorized by the AFCCA; (2) determine a sentence rehearing to be impracticable and approve a sentence of "no punishment" pursuant to Rule for Courts-Martial (R.C.M.) 1107(e)(2)(C)(iii); or (3) approve A1C Stanton's request for discharge in lieu of trial by court-martial in accordance with AFI 36-3208. He chose the latter.

Instead of *Woods*, which the AFCCA didn't address, the lower court relied upon *Montesinos*. There, this Court stated that the CA is bound to the terms of the lower court's remand. *United States v. Montesinos*, 28 M.J. 38, 42-44 (C.A.A.F. 1989). However, citing *Woods*, this Court also found that, as here, if a "[service] regulation clearly contemplates that findings of guilty *must* be set aside as a prerequisite for an accused to be discharged for the good of the service, the remand order of the [lower

court] might be interpreted to vest in the convening authority a power to set aside the findings of guilty that he otherwise would lack." *Id.* at 45.

2. A material term of the agreement was that A1C Stanton would be administratively discharged *in lieu of* court-martial

"In interpreting the terms of a plea agreement, we look to principles of contract law." *United States v. Henry*, 758 F.3d 427, 431 (D.C. Cir. 2014); *United States v. Lundy*, 63 M.J. 299, 302 (C.A.A.F. 2006). The leading indicator of a plea agreement is the agreement's plain language. *Ramsey v. United States Parole Comm'n*, 840 F.3d 853, 860 (D.C. Cir. 2016). A plea agreement in the military justice system establishes a constitutional contract between the accused and the convening authority. *See Lundy*, 63 M.J. at 301. "Typically, an accused foregoes his or her constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by members, and the right to confront witnesses against him in exchange for a reduction in sentence or other benefit." *Id.*

Here, the plain reading of the agreement established that A1C Stanton would be administratively discharged in place of trial by court-martial. A1C Stanton gave up the statutory right afforded to him at an administrative discharge board, and the constitutional right afforded to

him at a court-martial sentence rehearing, in exchange for the benefit of his case being resolved administratively with a UOTHC discharge characterization instead of criminally.

"In evaluating whether a plea agreement has been breached, we look to the reasonable understanding of the parties and construe any ambiguities in the agreement against the government." *Henry*, 758 F.3d at 431. "In an appeal that involves a misunderstanding or nonperformance by the Government, the critical issue is whether the misunderstanding or nonperformance relates to the material terms of the agreement." *United States v. Smith*, 56 M.J. 271, 273 (C.A.A.F. 2002) (internal quotation marks and citation omitted). A term is material when it "can be said to be part of the inducement or consideration." *Santobello v. New York*, 404 U.S. 257, 262 (1971).

Here, A1C Stanton entered into the agreement with the understanding that his conviction would be vacated. (JA at 86-87). In exchange for that bargained for benefit, A1C Stanton agreed to be administratively discharged with a UOTHC, the worst type of service characterization that Airmen can receive outside of a punitive discharge at court-martial. In light of the shared recognition that A1C Stanton was

unlikely to receive a punitive discharge at a rehearing, this term was A1C Stanton's only consideration for entering the agreement.

Alternatively, had A1C Stanton not received a discharge in lieu of trial by court-martial, he would have proceeded to the sentence rehearing, most likely not received a bad-conduct discharge, and been administratively separated with a general discharge – a more favorable type of service characterization that still entitles him to certain military benefits. AFI 36-3208, ¶ 1.22.1.

The AFCCA disagreed that the removal of A1C Stanton's criminal conviction was his only consideration for the agreement, stating that it also "enabled him to avoid the potential embarrassment and likely delay involved in such a proceeding" and allowed him to avoid a bad-conduct discharge. (JA at 23). However, these were not reasonable considerations for A1C Stanton. A1C Stanton had already faced a fully litigated trial for sexual assault charges involving three complaining witnesses, of which he was ultimately found guilty and received a significant sentence. It is unlikely that a one-day sentencing rehearing involving petty theft would generate more embarrassment than he had already endured. Further, A1C Stanton's sentencing rehearing had

already been scheduled for July 24, 2018; thus, the agreement avoided no delay. Finally, even the Government agreed that the likelihood of a bad-conduct discharge at the rehearing was "incredibly low." (JA at 42). This is clear given that the offense was minor, involving the larceny of property under $500, and that A1C Stanton had years of pretrial confinement credit that would be taken into consideration before deliberation on an appropriate sentence.

The Government also understood the agreement to mean that A1C Stanton would be discharged in lieu of the sentencing rehearing. The Government recognized the significant litigation risk at the rehearing, stating it was unlikely A1C Stanton would receive a bad-conduct discharge and acknowledging that he was permitted to withdraw his plea prior to sentencing. (JA at 42, 45). Further, the Government recognized that approving A1C Stanton's discharge in lieu of trial by court-martial with a UOTHC discharge characterization was a better alternative than proceeding to the sentencing rehearing, having him not receive a bad-conduct discharge, and having to spend additional time processing an administrative separation. Even worse, had the GCMCA wanted A1C Stanton to receive a UOTHC discharge characterization, the Government

would have had to receive SECAF approval, adding months of time to the separation process. Alternatively, the discharge in lieu of trial by court-martial ensured A1C Stanton's "swift separation" while still marking him with "the stigma associated with the characterization." (JA at 43). Finally, the CA's own legal advisor recommended that he approve the discharge in lieu of trial by court-martial and "set aside punishment," indicating that the discharge would take the place of the court-martial. (JA at 48).

The reasonable understanding of both A1C Stanton and the Government was that A1C Stanton's administrative discharge with a UOTHC service characterization was in place of continuing with his court-martial. Further, any ambiguities must be construed against the Government and in A1C Stanton's favor. *See Henry*, 758 F.3d at 431. Because this term was a material term in the agreement, when the CA approved a sentence of "no punishment" two days after he approved A1C Stanton's discharge in lieu of court-martial, he breached the agreement.

3. Because a material term of A1C Stanton's agreement was breached, remedial action is required.

An accused is entitled to the benefit of his bargain on which his guilty plea is based. *Santobello*, 404 U.S. at 262. Where an accused does

not receive the benefit of his bargain, "remedial action, in the form of specific performance, withdrawal of the plea, or alternative relief, is required." *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003) (internal citation omitted). This Court has not hesitated "to set aside a court-martial action which violates a pretrial agreement. By the same token, [it] should not hesitate to set aside [a] court-martial conviction, which conflicts with the agreement implicit in the acceptance of appellant's resignation." *Woods*, 26 M.J. at 375 (Everett, C.J. concurring).

Because the CA breached the agreement with A1C Stanton, remedial action is required in the form of specific performance. This Court should set aside the findings and sentence and dismiss the charge and its specification with prejudice.

Conclusion

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

Respectfully submitted,

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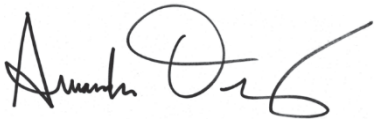

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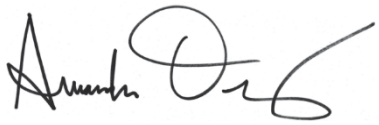
CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Clerk of Court on March 4, 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.



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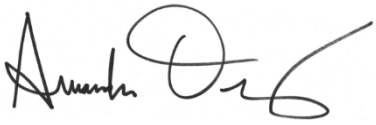

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