3 April 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Airman First Class (E-3), LADARION D. STANTON, USAF, *Appellant.*	))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 19-0449/AF Crim. App. No. 39161

FINAL BRIEF ON BEHALF OF THE UNITED STATES

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 34088

BRIAN C. MASON, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 33634

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 33821

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

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 REVIEW. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE FOR A 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) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C § 866(c) (2016). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C § 867(a)(3).

STATEMENT OF THE CASE

At his initial court-martial, Appellant pled guilty to and was convicted of one charge and one specification of larceny of non-military property in violation of Article 121, UCMJ (Charge III and its specification). (JA at 2, 16.) Contrary to his pleas, Appellant was found guilty of two specifications of sexual assault and one specification of aggravated sexual contact in violation of Article 120, UCMJ (Charge II, Specifications 1, 2, and 5). (Id.) Appellant was originally sentenced to a dishonorable discharge, confinement for 96 months, total forfeiture of pay and allowances, reduction to the grade of E-1, and a reprimand. (Id.) The convening authority approved that sentence as adjudged. (Id.)

On appeal, in an opinion dated 7 February 2018, AFCCA affirmed Charge III and its specification, the larceny conviction. (JA at 16.) However, AFCCA set aside Charge II, Specifications 1, 2, and 5 and the sentence. (Id.) The opinion further stated, "A rehearing as to the set-aside findings and as to the sentence is

authorized. The record is returned to the Judge Advocate General for remand to the convening authority for action in accordance with this opinion." (Id.)

On 20 March 2018, the General Court-Martial Convening Authority (GCMCA) ordered a rehearing on the findings of Specifications 1, 2, and 5 of Charge II, and on the sentence. (JA at 35.) On 19 April 2018, the charges were referred to a general court-martial convened by Special Order A-10, "[f]or a rehearing in full on Specifications 1, 2, and 5 of Charge II, and on the sentence for Charge III and its specification, in accordance with the decision of the Air Force Court of Criminal Appeals (ACM 39161), dated 7 February 2018, and General Court-Martial Order No. 26, HQ, AFDW, dated 20 March 2018." (JA at 36-37.)

On 20 July 2018, however, the GCMCA withdrew Specifications 1, 2, and 5 of Charge II and directed that they be dismissed without prejudice. (JA at 39.) On the same day, Appellant submitted a Request For Discharge in Lieu of Trial by Court-Martial ("Chapter 4"), which stated "I request that I be discharged from the United States Air Force according to AFI 36-3208, Chapter 4, in lieu of trial by court-martial." (JA at 40.) Appellant's document did not request that the GCMCA dismiss the larceny charge and specification that had been affirmed and was still pending a sentence rehearing at the general court-martial convened by Special Order A-10. (Id.)

On 23 July 2018, Appellant's commander recommended to the Special Court-Martial Convening Authority (SPCMCA) that the Chapter 4 request be

approved, but did not state that the larceny charge would be dismissed as part of such a transaction. (JA at 44-46.)

On 23 July 2018, the Staff Judge Advocate to the SPCMCA signed a legal review for the SPCMCA and GCMCA recommending approval of Appellant's Chapter 4 request. (JA at 41-43.) This legal review did not state that the larceny charge would or should be dismissed as part of the transaction. (Id.)

Also on 23 July 2018, the SPCMCA signed a memorandum recommending to the GCMCA that Appellant's Chapter 4 request be approved. (JA at 47) This memorandum did not discuss the larceny charge. (Id.).

In an undated memorandum that appears to be signed on or after 24 July 2018, AFDW/JA advised the GCMCA that he should approve Appellant's Chapter 4 request. (JA at 48-50.) The memorandum informed the convening authority that if he approved the Chapter 4 request, the larceny conviction would likely stand, because nothing in AFCCA's remand permitted the convening authority to take action on the already affirmed finding of guilty. (Id.) The memorandum further advised that Appellant's defense counsel had been informed of the possibility that the larceny conviction would still remain after the Chapter 4 was approved and that, even with that risk, Appellant still desired the convening authority to act on his request. (Id.)

On 25 July 2018, the GCMCA signed a memorandum which stated "The request for discharge in lieu of trial by court-martial submitted by A1C Ladarion D.

Stanton, under AFI 36-3208, Chapter 4, is approved. I direct A1C Stanton be discharged with an Under Other Than Honorable Conditions service characterization." (JA at 51.) This memorandum did not state that the larceny charge would be dismissed. (Id.)

The corrected copy of General Court-Martial Order (GCMO) No. 45, dated 27 July 2018, and signed by the GCMCA states, in relevant part:

> upon appellate review, the findings of guilty as to Charge III and the Specification thereunder were affirmed. The findings of guilty as to Specifications 1, 2, and 5 of Charge II and the sentence . . . have been set aside. A rehearing was found to be impracticable. A sentence providing for "no punishment" is approved. All rights, privileges, and property of which the accused was deprived due to the sentence that was set aside will be restored. That sentence was adjudged 10 June 2016.

(JA at 52.)

Upon further review under Article 66(c), AFCCA ultimately affirmed the sentence to no punishment. United States v. Stanton, 2019 CCA LEXIS 306 (A.F. Ct. Crim. App. 16 July 2019) (unpub. op.) (JA at 24.)

STATEMENT OF FACTS

On 17 May 2019, Maj MB, the Chief of Military Justice at AFDW/JA, the legal office for the GCMCA, signed a declaration relevant to this case. (JA at 84-85.) In this declaration, Maj MB recounts internal discussions between AFDW/JA and 11 WG/JA (the base legal office) about Appellant's Chapter 4 request. (JA at 84.) Based on United States v. Montesinos, 28 M.J. 38 (C.M.A. 1989), AFDW/JA

came to the conclusion that the convening authority could not disapprove the affirmed guilty finding for Appellant's larceny charge. (JA at 85.) They concluded, however, that the convening authority could determine that a rehearing on sentence was impracticable and approve a sentence of no punishment pursuant to R.C.M. 1107(e)(2)(C)(iii). (Id.)

Maj MB further states in the declaration that he spoke with Appellant's trial defense counsel, Mr. BB about the Chapter 4 request and the limitation on the convening authority's ability to dismiss the larceny charge. (Id.) According to Maj MB, Appellant's trial defense counsel agreed "that the Convening Authority could not disturb the larceny conviction that was affirmed by AFCCA and further relayed that a Chapter 4 discharge versus a sentence rehearing on the larceny charge was in the best interest of his client and was what his client wanted based on this understanding." (Id.)

Appellant's civilian trial defense counsel, Mr. BB, submitted a declaration, in which he acknowledged that Maj MB had conveyed to him that the GCMCA "did not want to disturb the larceny conviction because it had been affirmed by AFCCA." (JA at 86.) Mr. BB stated that he disagreed with AFDW/JA's legal analysis, but "acknowledged [he] understood their position." (Id.) Mr. BB also claimed he believed that if Appellant accepted the Chapter 4 and no sentencing rehearing was held, the larceny conviction would no longer exist by virtue of the

fact that there was no adjudged sentence to accompany the conviction. (JA at 86-87.)

SUMMARY OF ARGUMENT

Although this Court has continuing jurisdiction to review the findings and sentence of Appellant's court-martial under Article 67(a)(3), UCMJ, this Court does not have jurisdiction to review the propriety of Appellant's administrative discharge executed under Air Force Instruction 36-3208, *Administrative Separation of Airman,* 9 July 2004, Incorporating through Change 7, 2 July 2013. Even if this Court did have jurisdiction to review this administrative matter, Appellant would still not be entitled to relief because Appellant's administrative discharge was properly executed, and the convening authority never agreed to dismiss Appellant's previously affirmed larceny conviction.

ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE PROPRIETY OF APPELLANT'S ADMINISTRATIVE DISCHARGE. EVEN IF THIS COURT DID HAVE JURISDICTION, APPELLANT'S ADMINISTRATIVE DISCHARGE WAS PROPERLY EXECUTED AND NO MATERIAL TERM WAS BREACHED.

Standard of Review

Questions of jurisdiction are reviewed de novo. United States v. Hale, 78 M.J. 268, 270 (C.A.A.F. 2019). Interpretation of a service regulation is a question

of law, reviewed de novo. United States v. Castillo, 74 M.J. 160, 164 (C.A.A.F. 2015).

Law and Analysis

a. This Court does not have jurisdiction to review the propriety of Appellant's administrative discharge.

(1) This Court has no jurisdiction to review this issue under Clinton v. Goldsmith.

According to Article 67(c), "in any case reviewed by it," this Court "may only act with respect to the findings and sentence as approved by the convening authority and as affirmed . . . by the Court of Criminal Appeals." This Court "is not given authority . . . to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." Clinton v. Goldsmith, 526 U.S. 529, 536 (1999).

The request and approval of Appellant's administrative discharge is an administrative matter governed by an Air Force Instruction, AFI 36-3208. It is not a "finding" or a "sentence" that "was (or could have been) imposed in a court-martial proceeding." Goldsmith, 526 U.S. at 535. Under Goldsmith the fairness of the Chapter 4 process leading to Appellant's administrative discharge "appears straightforwardly to [be] beyond [this Court's] jurisdiction to review." Id.

In Appellant's case, this Court has continuing jurisdiction to review the finding for the larceny conviction[1] and the sentence to no punishment, but that is the extent of its jurisdiction. *See* Steele v. Van Riper, 50 M.J. 89, 91 (C.A.A.F. 1999) (The power of reviewing authorities over the court-martial is unaffected by an administrative discharge). In Goldsmith, the Supreme Court acknowledged that a military appellate court *might* have jurisdiction "if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ, and [especially] when such a judgment had been affirmed by an appellate court." 526 U.S. at 536. That is similar to what happened in United States v. Perez, ACM 38559 (f rev) (A.F. Ct. Crim. App. 8 March 2019) (unpub. op.), where the convening authority dismissed a court-martial finding that had already been affirmed by an appellate court. (JA at 26-34.) *See also* United States v. Quick, 2018 CCA LEXIS 165 (N-M. Ct. Crim. App. 30 March 2018) (unpub. op.). But it is not the case here: the convening authority did not erroneously set aside a previously-affirmed conviction. Unlike the convening authorities in Perez and Quick who acted outside their authority, the action taken by the convening authority here was within the scope of AFCCA's remand and was in accordance with the Rules for Courts-Martial (R.C.M.s) and the UCMJ. The convening authority had the authority under R.C.M.

[1] Appellant has alleged no prejudicial error in the finding of guilty to the larceny charge itself.

1107(e)(2)(C)(iii) to dispense with a sentence rehearing and approve a sentence to no punishment instead.[2] Since the convening authority adhered to the R.C.M.s and the UCMJ with respect to the findings and sentence in this case, the fairness of the administrative discharge is a purely administrative matter, and this Court has no jurisdiction to review it.

Significantly, even before Goldsmith, this Court and the Army Court of Military Review (ACMR) both questioned whether it was appropriate for them to review the validity of an administrative discharge. In Montesinos, this Court found that the convening authority exceeded the scope of the ACMR's remand by dismissing charges that the ACMR had already affirmed. 28 M.J. at 44. In conjunction with dismissing the charges, the convening authority also approved a request for an administrative discharge. Id. at 41. Nonetheless, this Court acknowledged "we are not concerned directly with the validity of the administrative discharge approved by the convening authority." Id. at 47. Likewise, the court below had stated, "we express no opinion as to the validity of the administrative discharge approved by the convening authority in this case." United States v. Montesinos, 24 M.J. 682, 686, n.3 (A.C.M.R. 1987.) This Court should follow suit and find that it does not have jurisdiction to evaluate the validity

[2] R.C.M. 1107(e)(2)(C)(iii) authorizes the convening authority to approve a sentence of no punishment without conducting a sentencing rehearing if the convening authority deems a rehearing to impracticable.

of Appellant's administrative discharge. Instead, it should be solely concerned with whether the convening authority acted in accordance with the R.C.M.s and UCMJ, which he did by foregoing the sentence rehearing and approving a sentence to no punishment for the remaining affirmed larceny charge.

(2) Appellant himself originally agreed that this Court did not have jurisdiction to review his administrative discharge.

Notably, Appellant's own position on military appellate courts' jurisdiction to review his case has fluctuated. Appellant first asked AFCCA to dismiss his case on Article 66 review for lack of jurisdiction because "[the convening authority] and [Appellant] agreed to an administrative separation in lieu of the sentence hearing authorized by this Court on remand" and "[AFCCA] is not the 'plenary administrator' of that administrative process." (JA at 53-55.) When AFCCA denied the motion to dismiss, Appellant maintained the same position in a petition for extraordinary relief to this Court, which this Court denied. (JA at 67, 70.) Petitioner also filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Columbia, in which he argued, "[t]here is no statutory basis for AFCCA to assert jurisdiction over Petitioner and his administrative discharge." (JA at 77.) That petition is still pending in federal court.

Having failed in his endeavor to avoid Article 66 and Article 67 review of his remaining larceny conviction, Appellant now takes the view that this Court not

only has jurisdiction to review his case under Article 67, but has jurisdiction to review the fairness of his administrative discharge – a matter that was executed entirely outside the bounds of the UCMJ.

In contrast, the United States has maintained the same position throughout appellate review of this case: although Appellant has been administratively discharged, AFCCA and this Court have continuing jurisdiction to review Appellant's *case* under Articles 66 and 67, UCMJ. *See e.g.* United States v. Johnson, 45 M.J. 88, 90 (C.A.A.F. 1996); United States v. Davis, 63 M.J. 171, 177 (C.A.A.F. 2006). But neither Court has jurisdiction to review the specific *issue* raised by Appellant on appeal because the matter falls outside the scope of Articles 66 and 67. Goldsmith, 526 U.S. at 535-36.

(3) The administrative discharge proceedings under AFI 36-3208, Chapter 4 do not constitute a "pretrial agreement" under the R.C.M.s.

Having abandoned the jurisdictional argument he originally asserted at AFCCA and that is still pending in federal court, Appellant seeks to compare his administrative discharge to a "pretrial agreement" or "plea agreement" that this Court may review under Article 67. (App. Br. at 1,10-11.) This Court should reject that characterization.

Plea or pretrial agreements are not addressed in the Uniform Code of Military Justice, but are governed by R.C.M. 705. *See* Drafters' Analysis, Manual for Courts-Martial, United States A21-38 (2016 ed.) (MCM). Nothing in the

paperwork submitted by Appellant to the convening authority or the paperwork signed by the convening authority suggested this was a "pretrial agreement" entered into pursuant to R.C.M. 705. Instead, Appellant's request and all further documentation specifically cite Air Force Instruction 36-3208, *Administrative Separation of Airman*, Chapter 4 as the authority for Appellant's separation in lieu of court-martial. (JA at 40-51.)

A separation under AFI 36-3208 cannot be properly categorized as an "agreement" that is covered by R.C.M. 705. Instead, it is framed by the Air Force regulation as a "request" by the airman, and an approval or disapproval of that request by the convening authority. *See* AFI 36-3208, para. 4.1.1.2, 4.4, and 4.12. (JA at 91.) Indeed, Chapter 4 itself is entitled "*Request* for Discharge in Lieu of Trial by Court-Martial" (emphasis added). (Id.)

Therefore, the Chapter 4 process was a purely administrative matter authorized under an Air Force regulation. It was not governed by R.C.M. 705 and, as stated above, it was not a "finding" or a "sentence" that this Court may review under Article 67, UCMJ.

(4) United States v. Woods does not give this Court jurisdiction to review the propriety of administrative discharges.

Appellant cites United States v. Woods, 26 M.J. 374 (C.M.A. 1988) throughout his brief for the proposition that an administrative discharge in lieu of court-martial abates any court-martial proceedings. (App. Br. at 8, 9, 10, 15.) As

will be discussed later in the brief, Woods differs substantially from Appellant's case and does not dictate any result here. Woods also was also decided a decade before the Supreme Court's decision in Goldsmith reinforced this Court's very limited ability to address administrative matters. Thus, it is, at best, unclear that Chief Judge Everett's statement in concurrence, "we should not hesitate to set aside this court-martial conviction, which conflicts with the agreement implicit in the acceptance of appellant's resignation," should have any resonance, post-Goldsmith. Woods, 26 M.J. at 375 (Everett, CJ, concurring). In short, Woods' holding cannot be read to suggest that this Court has jurisdiction to review the propriety of all administrative discharges granted in lieu of court-martial.

(5) Appellant can seek relief in more appropriate venues.

Appellant has alternate venues in which he can seek relief. If Appellant believes his administrative discharge was based on an unfair agreement (which, as discussed below, the United States does not concede), he can seek relief through the Board of Correction of Military Records (BCMR) or the United States Court of Federal Claims. *See* Goldsmith, 526 U.S. at 539. For example, the BCMR can review a servicemember's discharge, "other than a discharge . . . by sentence of a general court-martial" or remove an injustice in a military record. Id. (quoting 10 U.S.C. §1553(a) and (a)(1)).

In sum, because this Court has no jurisdiction to review the administrative Chapter 4 proceedings, this Court should affirm the finding and sentence.

b. Even if this Court has jurisdiction to review Appellant's administrative discharge, Appellant is not entitled to relief because his administrative discharge was valid and he received adequate consideration.

(1) The convening authority's disposition of Appellant's case after remand conformed to the scope of the remand, to the guidelines of AFI 36-3208, to the UCMJ, and to the Rules for Courts-Martial.

All of the convening authority's actions in Appellant's case were in accordance with the applicable law and regulations. AFCCA remanded this case to the convening authority and authorized "a rehearing as to the set-aside findings and as to the sentence." (JA at 16.) AFCCA did not authorize the convening authority to take any action on the affirmed larceny conviction. (Id.) This Court has made it abundantly clear that a convening authority may only take actions within the scope of the CCA's remand. United States v. Carter, 76 M.J. 293, 295-96 (C.A.A.F. 2017); Montesinos, 28 M.J. at 44. It would have been error for the convening authority to dismiss Appellant's affirmed larceny conviction, and the convening authority adhered to the scope of the remand by declining to do so.

Appellant quotes Montesinos for the notion that "the remand order of the [lower court] might be interpreted to vest in the convening authority a power to set aside the findings of guilt that he otherwise would lack" if a "[service] regulation clearly contemplates that findings of guilt *must* be set aside as a prerequisite for an accused to be discharge for the good of the service." (App. Br. at 9-10 (citing Montesinos, 28 M.J. at 45)). But Appellant fails to identify any provision in AFI 36-3208, Chapter 4 that shows the instruction contemplates that a finding of guilty

must be set aside before an accused can be administratively discharge under that chapter. And AFI 36-3208 simply does not contain such a provision. Instead, AFI 36-3208, para. 4.3.2. states that applications for discharge in lieu of trial "may be submitted *anytime* [sic] after the criteria in paragraph 4.1. are met." (emphasis added). The relevant criteria are that the member is "subject to trial by court-martial," that "charges have been preferred with respect to an offense for which a punitive discharge is authorized,"[3] and that the member "[r]equest[s] discharge in lieu of trial." AFI 36-3208, para. 4.1. (JA at 91.) AFI 36-3208, Table 4.1, Rule 4 also contemplates that an accused may submit a request for discharge after "the trial has begun." (JA at 93.)

Since the instruction provides that a member can request discharge at *any time* after charges have been preferred for a qualifying offense so long as the member is "subject to trial by court-martial," it follows that Appellant could have properly requested discharge while pending a court-martial sentence rehearing on a charge already affirmed by the CCA. Again, nothing in the instruction states or even suggests that an affirmed finding of guilty must be set aside before a member is discharged, under AFI 36-3208, Chapter 4. Thus, Appellant's citation to Montesinos is inapt.

[3] This criterion was met in Appellant's case, as larceny of non-military property of a value less than $500 under Article 121, UCMJ can be punished with a bad conduct discharge. MCM, part IV, para. 46e(1)(b) (2016 ed.).

The convening authority's actions were allowed under a plain reading AFI-36-3208. Appellant was "subject to trial by court-martial." *See* para. 4.1.1.1. A sentence rehearing is a phase of a trial by court-martial.[4] The charge sheet itself stated that the charges were "referred to *trial* for the general court-martial convened by Special Order A-10 dated 19 April, 2018" with special instructions saying that the court-martial was for a "rehearing in full on Specifications 1, 2 and 5 of Charge II, and *on the sentence for Charge III and its specification.*" (JA at 37)

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[4] In United States v. Turner, ___ M.J. ___, No. 19-0158/AR (C.A.A.F. 25 March 2020), this Court recently determined that the words "after trial" as used in the case United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986) referred to the time period after the verdict was issued, but before sentencing. Turner, slip. op. at 8. Nonetheless, Turner should have little bearing on this Court's interpretation of AFI 36-3208. First, Turner interpreted the term "trial" as used by the Court in the Watkins opinion. It did not seek to interpret the meaning of the term "trial" as used in other authorities. Furthermore, before Turner, this Court often referred to "the sentencing phase of the trial" (*see e.g.* United States v. Chikaka, 76 M.J. 310, 313 (C.A.A.F. 2017); United States v. Kulathungam, 54 M.J. 386, 387 (C.A.A.F. 2001); United States v. Manns, 54 M.J. 164, 165 (C.A.A.F. 2000)) or "the sentencing portion of the trial" (*see e.g.* United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014); United States v. Dinges, 55 M.J. 308, 311 (C.A.A.F. 2001)). Such language was common parlance at the time the version of AFI 36-3208 at issue was drafted in 2004, and it indicates that sentencing proceedings were indeed considered part of the "trial." Similarly, the script from the Military Judges' Benchbook calls for the military judge to announce, "Members of the Court, at this time, we will begin the sentencing phase of the trial." Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 2-5-17 (29 February 2020). In light of the well-accepted understanding that the term "trial" includes sentencing proceedings, there is no indication that the drafters of AFI 36-3208 intended to exclude sentence rehearings from the definition of "trial" in Chapter 4. Hence, a member who is subject to a sentence rehearing is "subject to trial by court-martial" and may request discharge "in lieu of" his sentence rehearing.

(emphasis added). The convening authority dismissed Charge II and all specifications without prejudice on the same day Appellant submitted his discharge request, but the rehearing on the sentence for Charge III and its specification remained referred to the court-martial. (JA at 39.) Ultimately, the trial by court-martial convened by Special Order A-10 never took place, because the convening authority approved Appellant's request for discharge "in lieu of trial." *See* AFI 36-3208, para. 4.1.1.2. Appellant was indeed "discharged in lieu of trial by court-martial," as the title to AFI 36-3208, Chapter 4 provides.

Finally, as discussed above, it was also appropriate under the UCMJ and Rules for Courts-Martial for the convening authority to approve a sentence to no punishment after dispensing with the sentence rehearing. In fact, he had to take some action. "[T]he administrative discharge does not negate the responsibility of the convening authority to act on the . . . sentence; nor does it restrict his power to do so." Steele, 50 M.J. at 91. *See also* Article 60(c)(2)(A) ("Action on the sentence *shall* be taken by the convening authority or by another person authorized to act under this section.") (emphasis added); United States v. Sala, 30 M.J. 813, 815 (A.C.M.R. 1990) (approving a sentence to no punishment for remaining convictions where the convening authority had erroneously failed to do so on remand after approving the appellant's administrative discharge). Since the convening authority decided not to hold a sentence rehearing, he properly fulfilled his duties under Article 60 by approving a sentence of no punishment for the

remaining affirmed larceny conviction in accordance with R.C.M. 1107(e)(2)(C)(iii).

(2) The convening authority neither breached a "material term" of the Chapter 4 process, nor did he mislead Appellant as to its terms.

Even if this Court had jurisdiction to review the propriety of Appellant's administrative discharge, the convening authority did not breach a "material term" of the "agreement" as Appellant claims. Significantly, the request for discharge in lieu of court-martial was initiated by Appellant himself. In that request for discharge, Appellant never asked the convening authority to dismiss his larceny conviction in exchange for his agreement to be discharged. The convening authority also never promised Appellant, orally or in writing, that he would dismiss Appellant's larceny conviction.

The convening authority did not make any attempt to mislead Appellant as to the outcome of the Chapter 4 process. In fact, the convening authority's legal office specifically contacted Appellant's trial defense counsel to tell him that the convening authority did not believe he could dismiss the previously affirmed larceny charge and would not be doing so. Appellant's trial defense counsel concedes that he was told that the convening authority "did not want to disturb the larceny conviction because it had been affirmed by AFCCA." (JA at 86.) Armed with that understanding, Appellant still chose to maintain his request for administrative discharge. (JA at 87.) If Appellant and his counsel believed that

failure to hold the sentence rehearing would effectively erase the larceny conviction, such a belief was not supported by any law or by any promise made or manifested by the convening authority.[5]

Moreover, the convening authority did not "continu[e] with the court-martial" as Appellant claims. (App. Br. at 14.) The court-martial convened by Special Order A-10 (JA at 37) never took place. But since, under the scope of AFCCA's remand, the convening authority could not dismiss the larceny conviction, he was still required under Article 60 to act on the sentence, and he was authorized under R.C.M. 1107 to approve a sentence to no punishment. The convening authority plainly acted within the confines of all laws and regulations.

(3) Woods does not stand for the proposition that an administrative discharge vacates all prior court-martial proceedings.

Appellant cites Woods for the proposition that this Court can vacate a conviction if a request for discharge is approved in the middle of a court-martial. (App. Br. at 8.) But Appellant spends much time quoting the concurring opinion from Woods, and, in any event, attempts to stretch the majority's holding too far. Woods does not mean that every administrative discharge granted in lieu of court-martial vacates a previous court-martial conviction. Woods involved the specific

[5] Despite Appellant's ability to do so before AFCCA, Appellant never personally submitted an affidavit or declaration stating that he believed his larceny conviction would be vacated as a result of the Chapter 4 or that he would not have maintained his Chapter 4 request had he known the larceny conviction would still stand.

circumstance where the convening authority chose to convene a court-martial, and Secretary of the Army, as he was authorized by Army regulation to do, decided after the court-martial concluded to grant the appellant's request to resign in lieu of the court-martial. In short, there was a conflict between the intentions of the convening authority and the Service Secretary as to whether the appellant would be court-martialed at all. The CMA in Woods held that the convening authority's actions in holding the court-martial could not override the Secretary's power to grant the administrative discharge in lieu of trial or defeat the appellant's and Secretary's agreement to the discharge in lieu of trial. Id. at 375.

But as Appellant recognizes, the Air Force instruction at issue here authorizes the GCMCA to approve requests for discharge in lieu of court-martial for enlisted members.[6] (App. Br. at 9.) Since, in the Air Force, the same individual has the authority to both convene a court-martial and grant discharge in lieu of court-martial, this is not a circumstance, as in Woods, where the court-martial convened by the convening authority "defeat[ed] a lawful agreement between the an accused and the Secretary." 26 M.J. at 375. Unlike the Secretary of the Army in Woods, the convening authority here did not intend to dismiss the charge against Appellant. Rather, the convening authority intended both that the

[6] Woods was also an officer, whereas Appellant was an enlisted member. In the Air Force, officer and enlisted discharges are governed by different regulations. *See* AFI 36-3207, *Separating Commissioned Officers*, Section 2C.

larceny conviction would stand and that no court-martial would be convened to hold a sentence rehearing. This in no way leads to the conclusion that Appellant's larceny conviction should now be vacated on appeal.

In short, Woods cannot and should not be interpreted to mean that any discharge in lieu of court-martial, under any military regulation, abates all court-martial actions for officers and enlisted members alike. The holding can only be considered as it related to the facts and to the Army regulation at issue in that case. It has no application to Appellant's circumstances.

(4) Appellant received adequate consideration for his administrative discharge.

Appellant alleges the Chapter 4 process was unfair because the only consideration he could have possibly received for his agreement to be administratively discharged was the dismissal of the larceny conviction. (App. Br. at 12.) Even assuming such a claim is within this Court's purview to review, it is inaccurate. Appellant did receive other consideration for his administrative discharge request.

First, Appellant did not have to go through the stress and embarrassment of having his misdeeds showcased again in a public setting. Although, Appellant dismisses this as a reasonable consideration (App. Br. at 12), it should be indisputable that the Chapter 4 process provided Appellant with a measure of privacy and some certainty as to his fate, which he would not have had if he had

chosen to proceed to the court-martial sentence rehearing.

Next, the Chapter 4 process guaranteed that Appellant would not receive a punitive discharge.[7] A punitive discharge deprives an individual of substantially all benefits administered by the Veterans Administration and the Air Force. United States v. Simpson, 16 M.J. 506 (A.F.C.M.R. 1983). In contrast, "[d]ischarge under other than honorable conditions *may* deprive a veteran of benefits based on military service. The agency that administers the benefits makes a determination in each case." AFI 36-3208, para. 1.22.2 (emphasis added) (JA at 90.) In short, when it comes to veterans' benefits, an under other than honorable conditions discharge is preferable to a punitive discharge. Although Appellant now speculates that he was unlikely to have been adjudged a punitive discharge at a rehearing, there was a benefit to Appellant in eliminating that risk altogether by requesting discharge under Chapter 4.

Finally, as a result of Appellant's administrative discharge and the approved sentence to no punishment, all of Appellant's rights, privileges, and property of which he was deprived due to the original sentence were ordered restored by the

[7] It was not a foregone conclusion that Appellant would not have received a bad conduct discharge for the larceny conviction at a sentence rehearing. Appellant stole an Apple iPad and Beats headphones from a fellow airman while Appellant was engaged in Air Force duties– specifically acting as a bay orderly. (JA at 41.) Appellant then sold the iPad for profit to himself. (Id.) A trier of fact could reasonably have found that this breach of trust was highly prejudicial to good order and discipline in the Air Force, and thus warranted a punitive discharge.

convening authority. (JA at 52.) Since Appellant was originally adjudged reduction in rank, a punitive discharge and total forfeitures and would have also been subject to automatic forfeitures (*see* Article 58b, UCMJ) at his original court-martial, he would have been entitled to back pay after having his rights restored. *See generally,* Department of Defense Financial Management Regulation 7000.14-5, Section 7A, Chapter 48, paragraph 480801 ("When a court-martial sentence is set aside . . . and a . . . rehearing is not ordered, all rights privileges, and property affected by the executed part of the sentence are restored to the member. Such restoration includes any executed forfeiture and any pay and allowances lost as a result of an executed reduction in grade.") (JA at 108.)

In contrast, if Appellant had proceeded to a sentence rehearing, he chanced that he would be again adjudged forfeitures (including the possibility of total forfeitures) or be adjudged a bad conduct discharge and some period of confinement, which would have resulted in automatic forfeitures under Article 58b, UCMJ. This new sentence would have diminished the back pay Appellant was entitled to receive. *See* Id. at paragraph 480802.A. (JA at 109.) Had Appellant been adjudged a reduction in rank at a sentence rehearing, this also would have diminished his pay entitlement. Id. (Id.) By asking to be administratively discharged in lieu of a sentence rehearing, Appellant guaranteed that *all* of his rights, privileges, and property would be restored, and that he would maximize the back pay that he was eligible to receive. For the above reasons, Appellant gained

at least some benefit from the Chapter 4 process, and his claims otherwise are without merit.

There was no error in the convening authority's handling of Appellant's larceny conviction or in his approval of a sentence to no punishment. Moreover, the Chapter 4 administrative discharge proceedings were fair. The discharge conformed to AFI 36-3208, and the convening authority did not breach any agreement with Appellant. There being no error, the finding and sentence should be affirmed.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court affirm the finding and sentence in Appellant's case.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
(240) 612-4800
mary.e.payne46.civ@mail.mil
Court Bar No. 34088

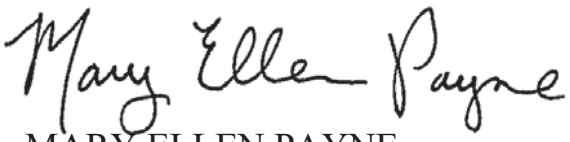
BRIAN C. MASON, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency

United States Air Force
(240) 612-4800
Court Bar No. 33634

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 33821

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 April 2020.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
(240) 612-4800
mary.e.payne46.civ@mail.mil
Court Bar No. 34088

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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/s/
MARY ELLEN PAYNE
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 3 April 2020

APPENDIX

United States v. Quick

United States Navy-Marine Corps Court of Criminal Appeals

March 30, 2018, Decided

No. 201300341

Reporter
2018 CCA LEXIS 165 *; 2018 WL 1550817

UNITED STATES OF AMERICA, Appellee v. CHRISTOPHER A. QUICK, Sergeant (E-5), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: **[*1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Lieutenant Colonel Chris Thielemann, USMC. Convening Authority: Commanding General, 3d Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA. Staff Judge Advocate's Recommendation: Lieutenant Colonel K.C. Harris, USMC.

United States v. Quick, 74 M.J. 332, 2015 CAAF LEXIS 703 (C.A.A.F., Aug. 11, 2015)

Counsel: For Appellant: Major David A. Peters, USMCR.

For Appellee: Captain Brian L. Farrell, USMC; Captain Sean M. Monks, USMC.

Judges: Before HUTCHISON, FULTON, and SAYEGH, Appellate Military Judges. Judge FULTON and Judge SAYEGH concur.

Opinion by: HUTCHISON

Opinion

HUTCHISON, Senior Judge:

A panel of officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of conspiring to distribute an indecent visual recording, wrongfully viewing an indecent visual recording, and indecent conduct in violation of *Articles 81*, *120c*, and *134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 881*, *920c*, and *934 (2012)*. The convening authority (CA) approved the adjudged sentence of six months' confinement, reduction to paygrade E-3, and a bad-conduct discharge. In a previous published opinion, we set aside and dismissed the appellant's conviction for wrongfully viewing an indecent recording but **[*2]** affirmed the appellant's remaining convictions. *United States v. Quick, 74 M.J. 517 (N-M. Ct. Crim. App. 2014)*, *aff'd*, *74 M.J. 332 (C.A.A.F. 2015)*. We also set aside the sentence and authorized a new sentencing hearing.

I. Background

Following remand, the CA issued a letter to the Trial Counsel in which he withdrew and dismissed the remanded charges and stated that he had approved the appellant's Request for Separation in Lieu of Trial.[1] When the case returned to us we specified two issues: 1) Did the CA have the authority to withdraw and dismiss the affirmed findings in this case; and 2) if the CA exceeded his authority, what is the appropriate relief?

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[1] CG, 3d Marine Aircraft Wing ltr 5814 Ser SJA of 17 Mar 16. On 30 July 2016, the appellant was discharged "Under Other than Honorable Conditions." DD Form 214.

II. Discussion

The appellant and the government agree that the CA's purported withdrawal and dismissal of affirmed findings exceeded the scope of his mandate. We also agree.

The CA "loses jurisdiction of the case once he has published his action[.]" *United States v. Montesinos, 28 M.J. 38, 42 (C.M.A. 1989)*. "At that point, the 'only further contact that the convening authority has with the case occurs in the event of a remand[.]'" *United States v. Carter, 76 M.J. 293, 295-96 (C.A.A.F. 2017)* (quoting *Montesinos, 28 M.J. at 42*). But, "when acting on remand, a convening authority may still only take action that conforms to the limitations and conditions prescribed by the remand." *Id. at 296* (citation and internal quotation marks omitted).

Here the CA was **[*3]** authorized to conduct a rehearing on the sentence, nothing more. The appellant's criminal convictions—affirmed by this court—were final and the CA had no authority to dismiss them. As a result, the CA's action purporting to withdraw and dismiss the affirmed findings of guilty is invalid and therefore, set aside. Thus, the findings of guilty to conspiring to distribute an indecent visual recording and indecent conduct in violation of Articles 81 and 134, UCMJ, as originally affirmed in our previous opinion, remain.

Where excessive action by a CA impacts affirmed findings, appellate courts have affirmed sentences of no punishment where doing so is consistent with the entire record and is in the interests of justice. *United States v. Sala, 30 M.J. 813, 815 (A.C.M.R. 1990)* ("Rather than protract the litigation in this matter, we will, in the interest of justice . . . affirm a sentence of no punishment.") (citation omitted); *see also United States v. Montesinos, 24 M.J. 682, 686 (A.C.M.R. 1987)*, *aff'd 28 M.J. 38 (C.M.A. 1989)* (voiding CA's remedial action purporting to dismiss affirmed findings and affirming a sentence of no punishment following the appellant's administrative discharge).

We can infer from the record that the CA, by agreeing to administratively separate the appellant, did not desire to approve any punishment. **[*4]** Accordingly, we conclude a sentence of no punishment is consistent with the record and the interests of justice.[2]

III. Conclusion

The findings of guilty to Charge I and its specification and to Charge IV and its specification having already been affirmed, a sentence of no punishment is affirmed.

Judge FULTON and Judge SAYEGH concur.

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[2] Both the appellant and the government agree that affirming a sentence of no punishment is appropriate in this case. *See* Appellant's Brief of 21 Feb 2018 at 8; Appellee's Brief of 6 Mar 2018 at 5.