IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Crim. App. No. ARMY 20230534
Private (E-1) **ZACKERY M. ARMSBURY,** United States Army, Appellee	)	USCA Dkt. No. 25-0233/AR

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

Issues Presented

I. WHETHER THE ARMY COURT, PURSUANT TO A "HIGHLY DISPARATE" SENTENCE THEORY, POSSESSED THE AUTHORITY TO SET ASIDE APPELLANT'S BAD CONDUCT DISCHARGE WHEN IT WAS A NEGOTIATED TERM OF THE PLEA AGREEMENT.

II. WHETHER THE ARMY COURT ABUSED THEIR DISCRETION IN FINDING APPELLEE'S SENTENCE "HIGHLY DISPARATE" AND IN SETTING ASIDE APPELLEE'S BAD CONDUCT DISCHARGE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals ["ACCA" or "the Army Court"] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10

U.S.C. § 866 (2022) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(2), UCMJ, 10 U.S.C. § 867 (a)(2).

Statement of the Case

On October 10, 2023, a military judge, sitting as a general court-martial convicted Appellee, pursuant to his plea, of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019).[1] (JA at 029; JA 065). Consistent with the plea agreement, the Government dismissed the maiming and conspiracy charges. The military judge sentenced Appellee to be confined for 60 days and to be discharged from the service with a bad-conduct discharge. [2] (JA at 197). The convening authority approved the findings and sentence as adjudged. (JA at 075).

On April 4, 2025, the Army Court of Criminal Appeals affirmed Appellee's finding of guilt but set aside the bad-conduct discharge Appellee bargained for and agreed to in the guilty plea. *United States v. Armsbury*, 2025 CCA LEXIS 149, *7

[1] All references to the UCMJ are to the versions in the manual for Courts-Martial, United States (2019 ed.) (2019 MCM) with the 2020 and 2021 National Defense Authorization Act Amendments.

[2] The military judge granted the government's motion to dismiss, without prejudice to ripen into prejudice upon completion of appellate review, the excepted language of the first specification, a specification of maiming, and a specification of conspiracy to commit an assault consummated by battery, in violation of Articles 128, 128a and 81, UCMJ, 10 U.S.C. § 928, 928a, 881 (2019). (JA at 75-76). The STR incorrectly indicates the court-martial found the appellant not guilty of those offenses. (JA at 065).

(Army Ct. Crim. App. Apr. 4, 2025) (Mem. Op.). The Army Court, pursuant to Article 66, UCMJ, concluded the sentence was inappropriate because the Government did not present a rational basis for Appellee's highly disparate sentence with another closely related case. *Id.* at *6-9.

On May 5, 2025, the Government filed a motion for reconsideration. (JA at 014). The Army Court subsequently denied this motion on June 9, 2025. (JA at 026).

Statement of Facts

A. Appellee's Charged Misconduct.

Appellee joined the U.S. Army on August 3, 2021. (JA at 057). He arrived at his first duty station, Fort Bliss, Texas, on February 8, 2022. (JA at 057). Soon after, his unit deployed to South Korea. (JA at 057).

In the early morning hours of May 8, 2022, Appellee was at a bar near Camp Humphreys, South Korea.[3] (JA at 058). Appellee was there with five other members of his unit, to include both SPC JW and SGT JH. (JA at 058). After leaving the bar, the group observed a commotion across the street between a woman and a group of "belligerent" men. (JA at 058). The group of Army Soldiers observed the woman shouting at the group of men and accusing one of the men of

[3] During his unsworn statement Appellee acknowledged he was not supposed to be consuming alcohol because he was underage. (JA at 194).

sexually assaulting her. (JA at 058). Appellee, SPC JW, and SGT JH approached to investigate. (JA at 058). The situation escalated when one of the men in the group pushed SPC JW and another individual attempted to put SPC JW in a chokehold. (JA at 058). Appellee joined the altercation in an attempt to assist SPC JW. (JA at 058).

A fight ensued between the two groups wherein one of the men, later identified as LCpl KC, fell to the ground. (JA at 058). While LCpl KC lay on his back, SGT JH approached him and violently kicked him in the head. (JA at 058).[4] After the kick, LCpl KC appeared to go unconscious. (JA at 058). Immediately after, Appellee approached the unconscious body of LCpl KC and struck him in the head with his foot. (JA at 058). Lastly, SPC JW stood over LCpl KC and proceeded to strike him multiple times in the head and torso with his fists. (JA at 058). A security camera recorded this entire encounter, and the footage was admitted into evidence at Appellee's trial. (JA 198).

The Government charged Appellee, SGT JH, and SPC JW with aggravated assault, maiming, and conspiracy in violation of Article 128, 128a, and 81, UCMJ,

[4] During SGT JH's trial the parties stipulated LCpl KC "suffered extreme physical pain and was rendered unconscious for a period of time and suffered leakage of cranial fluid/blood from his ears. [LCpl KC] was later diagnosed with a traumatic brain injury resulting from the combination of the kick and subsequent blows to the head during the incident." (JA at 063).

respectively. *Armsbury*, 2025 CCA LEXIS 149, at *3. Ultimately, all three soldiers entered into their own individualized plea agreements.[5]

B. Plea Agreements of Co-Conspirators.

SPC JW was the first soldier to plead guilty, at a special court martial, pleading to assault consummated by a battery in violation of Article 128, UCMJ. *Armsbury*, 2025 CCA LEXIS 149, *4. In exchange for SPC JW's plea of guilty, the Government dismissed the other charges against him, the confinement range was between 60-120 days, and the deal did not include a mandatory punitive discharge. *Id*. SPC JW agreed to testify against Appellee at Appellee's court martial. (JA at 167-68). The military judge sentenced SPC JW to 75 days confinement and reduction to E-2. *Id*.

Appellee was the second to plead guilty, on October 10, 2023, at a general court martial. (JA 065). He pleaded guilty to assault consummated by a battery in exchange for dismissal of the other charges, a confinement range of 60 to 120 days, and a mandatory bad-conduct discharge. (JA at 050). The military judge

[5] Although not weighed by ACCA, at least one additional soldier was disciplined for this event through administrative means. During his unsworn, Appellee referenced another soldier, PFC JJ, who "received a Chapter 10" as a result of this altercation. (JA at 194). The convening authority granted PFC JJ testimonial immunity for testimony at the military criminal proceedings of Appellee and SGT JH. (JA at 069).

sentenced appellee to a bad-conduct discharge and 60 days of confinement. (JA at 065).

Lastly, on January 17, 2024, SGT JH pleaded guilty, at a general court-martial, to aggravated assault in violation of Article 128, UCMJ. (JA at 067). In exchange for SGT JH's plea of guilty, the Government dismissed the other charges against him, the confinement range was between 121 and 365 days, and the deal did not include a mandatory punitive discharge. (JA at 053). The same military judge who presided over Appellee's court-martial sentenced SGT JH to 121 days of confinement and reduction to E-2. (JA 065; JA 067).

On April 4, 2025, ACCA affirmed Appellee's finding of guilt but set aside his bad-conduct discharge. *Armsbury*, 2025 CCA LEXIS 149, at *11. The Army Court, pursuant to Article 66, UCMJ, concluded the sentence was inappropriately disparate with the companion case of SGT JH. *Id*.

C. Appellee's Sentencing Case.

On the day Appellee pleaded guilty, the military judge asked him about the terms of his plea agreement. Specifically, the military judge asked Appellee, "[p]aragraph 7(a)(3) states that I shall adjudge a bad-conduct discharge. Do you understand this?" (JA at 126). To which, Appellee stated "Yes, your honor." The military judge further explained that he did not have discretion over whether or not he adjudged a bad-conduct discharge due to the terms of the plea agreement. (JA at

126). Next, the military judge informed appellant that a bad-conduct discharge would "forever adversely stigmatize the character of your military service and it could limit your future employment and schooling opportunities." (JA at 126). Finally, the military judge ensured Appellee was aware that this characterization of service could result in him losing benefits from the Department of Veteran's Affairs. (JA at 127).

Despite these warnings, Appellee indicated that he understood the terms of his deal, he had thoroughly discussed the terms with his defense counsel, and that it was his express desire to be discharged from the service with a bad-conduct discharge. (JA at 128). Appellee's defense counsel reiterated his wishes during sentencing argument, "[t]he facts as they have been presented today in front of this court-martial demonstrate that an appropriate sentence for [Appellee] would be a bad-conduct discharge, and 2 months confinement."

Prior to his attorney making this argument, Appellee, during his unsworn statement, lamented the way his case had been handled compared to that of his co-actors,

> "Specialists [JW] received a 75 day sentence, and was returned to our unit. He was not discharged. PFC [JJ] is receiving a Chapter 10. I don't know what SGT [JH] will end up with, but I am curious, Your Honor. I know what we did was wrong, and I know that each one of us did something different that night, and I know that we all deserve to be punished. But I just wish the Uniform Code of Military Justice was more uniform for us." (JA at 194).

Summary of Argument

Appellee knowingly and voluntarily accepted a bad-conduct discharge as a term of his plea deal with the convening authority. In exchange, the convening authority agreed to dismiss the most serious offense he was charged with and provide a ceiling to the amount of potential jail time he faced. During the plea inquiry, Appellee expressly agreed to the term of his deal which mandated a bad-conduct discharge and his attorney expressly argued that a bad-conduct discharge was appropriate for his misconduct. Appellee took these actions despite knowing that at least two of his co-actors had not received a punitive discharge. Notwithstanding all of this, on appeal Appellee requested, and was granted, relief from the bad-conduct discharge.

When two statutes appear to conflict, courts should not interpret either statute in a manner that would render another provision superfluous. Article 53a, UCMJ, permits an accused and a convening authority to enter into plea agreements and dictates that the terms of the plea shall be binding on all parties. The Army Court exceeded its authority when they wielded their power under Article 66, UCMJ, and permitted Appellee to effectively renegotiate the terms of his plea deal on appeal. The Court's insertion of itself into the plea negotiation process eroded the meaningfulness of the bargain struck between Appellee and the Convening Authority and unnecessarily eroded the binding nature of the agreement under Article 53a.

Separately, the Army Court abused their discretion in two primary ways when they conducted their disparate sentence analysis pursuant to *Lacy*. First, ACCA disregarded their own precedent in *Pleasant* when they found Appellee's bad-conduct discharge alone made his sentence highly disparate with the sentence of SGT JH. Second, ACCA gave no weight to Appellee's "benefit of the bargain" as a rational basis for the sentence disparity.

Argument

I. WHETHER THE ARMY COURT, PURSUANT TO A "HIGHLY DISPARATE" SENTENCE THEORY, POSSESSED THE AUTHORITY TO SET ASIDE APPELLANT'S BAD CONDUCT DISCHARGE WHEN IT WAS A NEGOTIATED TERM OF THE PLEA AGREEMENT.

Standard of Review

The construction of a statute is a question of law this Court reviews *de novo*. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

Law and Argument

When an accused enters into a plea agreement with the convening authority, that agreement represents a binding contract between the parties. Article 53a, UCMJ; *see also United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009). In the present case, Appellee entered this contract, fully aware that he would receive a different sentence from at least one of his co-defendants. When the Army Court

granted Appellee relief from a specific term of his plea agreement, they eroded the binding nature of the plea agreement, and thus exceeded their authority.

A. The Army Court's setting aside of a specifically bargained-for punitive discharge severely undermines the binding and contractual nature of Plea Agreements under Article 53a, UCMJ.

When two statutes appear to conflict, courts should not interpret either statute in a manner that would render another provision superfluous. *See Corley v. United States*, 556 U.S. 303 (2009). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). As such, this Court "typically seeks to harmonize independent provisions of a statute." *United States v. Christian,* 63 M.J. 205, 208 (C.A.A.F. 2006). The Army Court's decision in the present case unnecessarily placed Article 66 and Article 53a at odds with each other. In so doing, the Army Court arrived at a conclusion that violated basic principles of contract law.

Article 66(d)(1) provides, in part, that Courts of Criminal Appeal (CCA) "may affirm only… 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." It is within this context that this Court has spelled out the analytical approach a CCA must employ when confronted with the sentences in

two or more cases that appear to be disparate. *United States v. Swisher*, 85 M.J. 1, 4 (C.A.A.F. 2024). While Article 66(d), UCMJ, "empowers the CCAs to do justice," it does not confer the unfettered power to grant clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (internal quotation marks and citations omitted). Principles of law, not of equity, guide the determination of whether a sentence should be approved. *Id*. at 146–47.

On the other hand, Article 53a, UCMJ, permits an accused and a convening authority to enter into plea agreements. 10 U.S.C. § 853a. These agreements may include limitations on the sentence that may be adjudged. 10 U.S.C. § 853a(a)(1)(B). Additionally, a plea agreement which limits the sentence may contain a specified sentence or portion of a sentence that shall be imposed by the court-martial. 10 U.S.C. § 853a(a)(1)(B); R.C.M. 705(d)(1)(D).

Plea agreements are "created through the process of bargaining, similar to that used in creating any commercial contract." *United States v. Acevedo*, 50 M.J.169, 172 (C.A.A.F. 1999). Upon acceptance by the military judge, a plea agreement shall bind the parties and the court-martial. Article 53a(e), UCMJ; *see also United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) ("A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority."). The Supreme Court has affirmed this view, holding that "plea bargains are essentially contracts." *Puckett v.*

United States, 556 U.S. 129, 137 (2009). Contract theory thus offers a paradigmatic framework to evaluate plea agreements. Robert E. Scott & William J. Stuntz, *Plea-Bargaining as a Social Contract*, 101 YALE L.J. 1909, 1968 (1992) (arguing to "view plea bargaining through the lens of contract").

Previously, when this Court has been asked to perform a similar analysis and balance the vast powers of Article 66 with mandatory minimum sentence requirements under Article 56, this Court declined to read an implied repeal of a CCA's Article 66 power. *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018). This Court found that mandatory minimums were an imposed limit on the court martial and were not to be read as a limitation on a CCA's broad powers under Article 66. *Id*. Applying this Court's ruling here, Article 53a can be read as a restriction on the court martial. However, unlike *Kelly*, Article 53a is also a restriction on the accused and requires them to be bound by their agreement with the convening authority.

When the Army Court permitted Appellee to circumvent the convening authority to seek to renegotiate his plea deal on appeal, they did not consider Article 53a and the contractual nature of a plea agreement. Rather, the court wielded its Article 66 power, pursuant to Appellee's request, to grant relief from a specifically negotiated deal. Appellee's request ignored the language in Article

53a(e) that "[u]pon acceptance by the military judge, a plea agreement *shall bind the parties* and the court-martial." (emphasis added).

If Appellee is permitted to plead guilty at a court martial while fully apprised of the terms of his deal, ask for a specific punishment in front of the military judge, and then on appeal ask for relief from the very deal he entered, he does not satisfy fulfillment of the contract he entered with the convening authority nor the language of Article 53a(e). This is especially true, as is the case here, where the term Appellee requested to be released from is likely the term that induced the convening authority to agree to the deal in the first place. When ACCA granted Appellee's request to be released from this term of his deal, they left unaddressed the question of whether setting aside a material term of the deal voided the agreement and required the case be returned to the convening authority.[6]

While the Government acknowledges a CCA's power of de novo review to find sentences disparate and grant relief, interfering with bargained-for plea agreements undermines their essential nature and upends future negotiations. The Army Court's actions in the present case illustrate the need for this court to

[6] "Material" means to be "of such a nature that knowledge of the item would affect a person's decision making; significant; essential." *Material*, Black's Law Dictionary (8th ed. 2004). A material term of a contract is a provision or clause that is so essential to the agreement that, without it, the parties would not have entered into the contract. *Trapkus v. Edstrom's*, Inc., 140 III. App. 3d 720, 725 (Ill. App. Ct. 1986); *See also* Restatement of the Law, Contracts 2d., § 241 (Am. Law Inst. 2024).

harmonize Article 53a and Article 66. If ACCA's decision is left uncorrected, it leaves open the possibility to create a chilling effect on the plea negotiation process and will disincentivize a convening authority from entering into agreements if they are only enforceable against the government. The binding nature of a plea agreement, and the language of Article 53a(e), is eroded when a military court of appeals grants an appellant relief from a specifically bargained for term of their agreement with the convening authority.

B. The Army Court's precedent did not support setting aside a bargained-for punitive discharge.

While ACCA has not written directly on the interplay between Art. 53a and Art. 66 in the context of disparate sentence analysis, the Court has appeared to recognize the limitations of the reasonableness of the exercise of their power under a sentence severity analysis in the context of negotiated pleas. In the present case, the Army Court departed from their position that plea agreements are binding and that their terms should be afforded deference. *See United States v. Hunter*, 84 M.J. 715, 719 (Army Ct. Crim. App. 2024) (stating "an accused should always enter into a plea agreement with the assumption that the terms are binding and enforceable"); *see also United States v. Abdullah*, 85 M.J. 501, 2024 CCA LEXIS 479, at *20 (Army Ct. Crim. App. 5 Nov. 2024) (*en banc*) ("To set aside a punitive discharge altogether, under the circumstances of this case, would undermine the process of an accused entering into a plea agreement with a convening authority . .

. .").[7] Until *Armsbury*, it appeared as though ACCA had taken the position that the setting aside of a punitive discharge as part of a negotiated plea would constitute an abuse of discretion by the court.

In *Hunter*, while ACCA lowered a bargained-for dishonorable discharge to a bad-conduct discharge, it also declined to remove the punitive discharge entirely.[8] 84 M.J. at 717. For its reasoning, the court cited "appellant's desire to negotiate favorable confinement limits in his plea agreement." *Id*. at 718–19. ACCA also recognized that removing the punitive discharge would "undermine the process of an accused entering into a plea agreement with a convening authority." *Id*. at 719.

In *Abdullah*, the court again declined to remove a bargained-for punitive discharge. 2024 CCA LEXIS 479, at *19. ACCA held that doing so on the case's facts "would demonstrate a disregard for appellant's agreement with the convening authority and would constitute an abuse of this court's discretion." *Id*. at *20.

As in *Abdullah* and *Hunter*, Appellee here bargained for a punitive discharge. In keeping with the reasoning of the Army Court in these two cases, the

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[7] The Court of Appeals for the Armed Forces has granted review of this case for a separate issue. *United States v. Abdullah*, 2025 CAAF LEXIS 426 (C.A.A.F. 30 May 2025) (order). Additionally, although this case is published, Lexis has not updated the opinion with pin cites to the Military Justice Reporter, therefore the Government refers to the pin cites using the Lexis formatting.

[8] In *Hunter*, the Appellant negligently killed a pedestrian with his truck. 84 M.J. at 716–17. In modifying his discharge, ACCA held that "dishonorable discharges for negligent acts are almost non-existent . . . ." *Id*. at 718.

setting aside of the punitive discharge in the present case constitutes at best an abuse of discretion, and at worst, an over extension of the Appellate Court's authority to alter the terms of a negotiated plea deal.

II. WHETHER THE ARMY COURT ABUSED THEIR DISCRETION IN FINDING APPELLEE'S SENTENCE "HIGHLY DISPARATE" AND IN SETTING ASIDE APPELLEE'S BAD CONDUCT DISCHARGE.

Standard of Review

This Court's review of decisions by the Courts of Criminal Appeals on issues of sentence appropriateness is limited to the narrow question of whether there has been an obvious miscarriage of justice or abuse of discretion. *United States v. Behunin*, 83 M.J. 158, 161 (C.A.A.F. 2023). There is an abuse of discretion, in relevant part, when a "court's decision is influenced by an erroneous view of the law." *Id* (internal quotation marks omitted) (quoting *United States v. Ayala*, 81 M.J. 25, 27-28 (C.A.A.F. 2021).

Law and Argument

The Government starts from the premise that Appellee's misconduct warranted a bad-conduct discharge. Both parties agreed to that term of the deal and the military judge accepted the plea. Appellee's defense counsel's first statements during sentencing argument were "[t]he facts as they have been presented today in front of this court-martial demonstrate that an appropriate sentence for [Appellee]

would be a bad-conduct discharge, and 2 months confinement." Additionally, as this court has held, an accused's own sentence proposal is a reasonable indication of the sentence's probable fairness to the accused. *United States v. Arroyo*, 2025 CAAF LEXIS 688, *2 (C.A.A.F. August 19, 2025).

Separate from the severity of Appellee's misconduct, the Army Court abused their discretion in two primary ways in the present case. First, ACCA's decision was influenced by a clearly erroneous view of the law when they found Appellee's bad-conduct discharge alone made his sentence highly disparate with the sentence of SGT JH. Second, ACCA did not weigh Appellee's "benefit of the bargain" as a rational basis for his disparate sentence. Appellee is not entitled to a windfall from an otherwise appropriate sentence just because a co-actor, who may even be more culpable, received a more lenient sentence. *United States v. Martinez*, 76 M.J. 837, 842 (C.A.A.F. 2017).

A. Sentence Comparison – *U.S. v. Lacy*.

Sentence comparison, unlike sentence appropriateness, is required only in "those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). The burden is on the appellant seeking relief to show that his or her case is "closely related" to the cited cases and that the

sentences are "highly disparate." *Id*. Once met, the burden shifts to the government to show a rational basis for the disparity. *Id*.

Cases are considered "closely related" if they fit within at least one of the following three categories: (1) the servicemembers were "coactors involved in a common crime," (2) the servicemembers were "involved in a common or parallel scheme," or (3) there was "some other direct nexus between the servicemembers whose sentences are sought to be compared." *Armsbury*, 2025 CCA LEXIS 149, *5-6 (Army Ct. Crim. App. April 4, 2025) (citing *Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

For purposes of this appeal, the government concedes that SGT JH and Appellee's cases are closely related. As ACCA correctly pointed out, Appellee and SGT JH engaged in a fight against LCpl KC together, both kicked LCpl KC seconds apart while he lay on the ground, and both soldiers were initially charged with the same offenses with the intent to prosecute them at a joint court-martial. *United States v. Armsbury*, 2025 CCA LEXIS 149, *6 (Army Ct. Crim. App. 4 April 2025). However, the Army Court abused their discretion throughout the remainder of their analysis.

B. The Army Court's reliance on Appellee's bad-conduct discharge alone to find his sentence was highly disparate from SGT JH constituted an abuse of discretion.

In finding the sentence of Appellee and SGT JH highly disparate, the Army Court recognized the "significant adverse stigma of a punitive discharge" and the negative impacts it would bring throughout the rest of Appellant's life. *Armsbury,* 2025 CCA LEXIS 149, *7 (Army Ct. Crim. App. April 4, 2025). The Court then found that based on the severity and long-term impacts of a bad-conduct discharge, this alone makes the sentences highly disparate. *Id*.

1. In accordance with *Pleasant*, a bad-conduct discharge alone does not make two sentences highly disparate.

In *Pleasant*, ACCA considered the sentences of MSG Pleasant and LTC Lethers following their courts-martial for larceny of military equipment while deployed to Iraq. *United States v. Pleasant*, 71 M.J. 709, 710-11 (Army Ct. Crim. App. 2012). While the court-martial only sentenced LTC Lethers to eleven months confinement and no discharge, MSG Pleasant's approved sentence included eleven months confinement, reduction to E-1, and a bad-conduct discharge. *Id*. at 715-16. Nevertheless, ACCA found that while the cases were "closely related," the sentences, while disparate, were not "highly disparate" and did not warrant relief. *Id.* at 716.

This is clearly contradictory to ACCA's ruling in the present case wherein the Court relies upon the effects of a punitive discharge to make the finding that the sentences were highly disparate, without factoring in the negative consequences of a felony conviction for SGT JH.

2. The Army Court erred when it did not consider the adverse stigma of a felony conviction to that of a bad-conduct discharge during its "highly disparate" analysis.

In focusing solely on the bad-conduct discharge, not only did the court incorrectly apply *Lacy*, the court also ignored the fact Appellee, pursuant to the deal he negotiated, avoided the significant adverse consequences of a felony conviction when he pleaded to a misdemeanor. SGT JH did not avoid a felony conviction for his role in the assault.

While a bad-conduct discharge carries with it certain significant inescapable consequences, a felony conviction also carries a substantial social stigma and civil consequences. "Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *United States v. Macias*, 53 M.J. 728, 731 (Army Ct. Crim. App. 1999). These "civil disabilities" include limitations on the right to vote, hold public office, serve on juries, possess a firearm, live in public housing, and loss of employment opportunities. *Id*. It is appropriate for a CCA to consider the elimination of the potential for collateral consequences through a negotiated plea when conducting their sentence appropriateness review. *United States v. Arroyo*, 2025 CAAF LEXIS 688, *12 (C.A.A.F. Aug. 19, 2025). For a young soldier at the beginning of their

military career, receiving the brand of "felon" may incur greater consequences in the long-term than a punitive discharge.[9]

3. The Army Court misapplied *Lacy*.

The Army Court's misapplication of the law continued when it did not properly consider the disparity of the sentences in proportion to their maximum punishment. *Lacy*, 50 M.J. at 289. The court in *Lacy* considered the sentences of three service members who all committed the same crime in each other's presence. Though their sentences were the same in all other respects, for confinement Lacy received 18 months while his codefendants received 15 months and 8 months. While acknowledging the disparity, CAAF declined to find that the sentences were highly disparate, as all "are relatively short compared to the maximum confinement of 27 years appellant was facing." *Id*.

Similarly, Appellee's sentence of 60 days confinement and a bad-conduct discharge were relatively lenient compared to the maximum he faced. Prior to his negotiated plea, Appellee faced a charge of aggravate assault, the same offense SGT JH pleaded guilty to, which carries a maximum sentence of 5 years of

[9] As discussed *infra*, appellate courts are unable to discern what may have been most valued to an accused at the time they entered their plea. It is inappropriate now to speculate as to whether the felony conviction or bad-conduct discharge were used as bargaining chips in reaching a plea deal, and whether Appellee had the option to avoid a punitive discharge had he plead guilty to a felony. Or, like SPC JW, had he agreed to testify at a future court martial.

confinement and a dishonorable discharge. However, unlike SGT JH, Appellee successfully negotiated down the offense to assault consummated by a battery, lowering his punitive exposure to six months. He then received only one third of the maximum confinement for the already negotiated down sentence.

C. Rational Basis.[10]

1. The Army Court erred when it elected not to weigh the benefit of Appellee's bargain as a rational basis for the disparate sentences.

ACCA failed to address the negotiated nature of the punishment in its sentence disparity review pursuant to its own precedent in *Hunter*. In considering sentence appropriateness, military courts of appeals "start by highlighting that appellant bargained for a [punitive discharge] in his plea agreement which was agreed to by both parties." *United States v. Hunter*, 84 M.J. 715, 718 (Army Ct. Crim. App. 2024); *see United States v. Jacks*, 2021 CCA Lexis 476, at *7 (N.M. Ct. Crim App. Sep. 20 2021) (court denied relief for a highly disparate sentence, in

[10] The Army Court, in addition to its sentence comparison analysis, also found Appellee's sentence inappropriate under a sentence appropriateness analysis. While not the subject of this brief, the Government contends that a specifically bargained for sentence by a criminal accused is appropriate barring a showing of prosecutorial misconduct, due process violation, or ineffective assistance of counsel.

part, because appellant received the benefit of the deal that he bargained for with the convening authority).[11]

Although not dispositive, this Court has long recognized that, "[a]bsent evidence to the contrary, [an] accused's own sentence proposal is a reasonable indication of its probable fairness." *United States v. Arroyo*, 2025 CAAF LEXIS 688, *2 (C.A.A.F. Aug 19, 2025) (citing *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979) (plurality opinion)). Accordingly, a CCA may—to ascertain the fairness and thus appropriateness of an adjudged sentence—consider the context in which the parties reached the plea agreement, including the benefits from that agreement to the accused. *Arroyo*, 2025 CAAF LEXIS 688, at *2.

"[W]hen an accused who is represented by competent counsel bargains for a specific sentence, that is strong evidence that the sentence is not inappropriately severe and it will likely not be disturbed on appeal." *United States v. Avellanda*, 84 M.J. 656, 663 (N. M. C.C.A. 2024); *see United States v. Mora*, ARMY 20170270, 2018 CCA LEXIS 605, at *6 (Army Ct. Crim. App. Oct. 5, 2018) (summ. disp.)

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[11] *See also United States v. Matichuk*, 2020 CCA Lexis 278, at *6-7 (A.F. Ct. Crim App. Aug. 19, 2020) (court denied relief for an alleged inappropriately severe sentence, in part, when appellant received some benefit from his plea that dismissed a specification and reduced the maximum sentence he was facing); *United States v. Fuster*, 2021 CCA LEXIS 503 at *8 (N. M. Ct. Crim. App. Sep. 29, 2021)(court denied relief for sentence severity when appellant knowingly and voluntarily entered into a plea agreement that explicitly permitted a BCD and he received the benefit of his bargain).

("Appellant's request for a punitive discharge is probative of the seriousness of his crimes and the appropriateness of his sentence.").

During sentence proceedings, Appellee affirmed his "expressed desire" to receive a bad-conduct discharge in exchange for limited confinement. (JA 154-55). This repeated desire for a bad-conduct discharge favors a finding of sentence appropriateness; though not dispositive, it demonstrates Appellee appreciated the gravity of his criminal conduct. In comparing the sentences of Appellee and SGT JH, ACCA stressed that SGT JH didn't receive a punitive discharge even though he pleaded guilty to a more severe charge. The implication that it would have been more appropriate for SGT JH to receive a punitive discharge than Appellee ignores the nature of negotiated guilty pleas. Pretrial agreements are the product of *quid pro quo* bargaining. *United States v. Cook*, 12 M.J. 448, 450 (C.M.A. 1982). Disparity between pretrial agreements more often reflect the individual concerns and preferences of each accused. "[A]ppellee is not entitled to a windfall from an otherwise appropriate sentence just because a coactor, who may even be more culpable, received a more lenient sentence." *United States v. Martinez*, 76 M.J. 837, 842 (C.A.A.F. 2017).

Lastly, although the Army Court only found Appellee's sentence to be inappropriately disparate with that of SGT JH, they also compared his sentence to that of SPC JW. This further muddied the waters and highlighted the error in their

logic. "Watching the video and reading the Stipulation of Fact clearly demonstrate appellant's act was the least egregious of the three actors, all of whom physically assault a man on the ground and out of the fight. However, appellant was the only one who receive a punitive discharge." *United States v. Armsbury*, 2025 CCA LEXIS 149 (Army Ct. Crim. App. Apr. 4, 2025).

In referencing SPC JW, the Army Court further emphasized the error in their logic when they did not weigh the benefit of the bargain for the reason each soldier received a different sentence. SPC JW was the first in time to plead guilty of the three servicemembers. He had also agreed to testify at the later court martial of Appellee and SGT JH.[12] In exchange, SPC JW was permitted to plead guilty at a Special Court Martial. This bargaining process illustrates why CCAs should weigh negotiated pleas as a rational basis for different results in their *Lacy* analysis.

2. Based on their military career, a bad-conduct discharge would have impacted SGT JH and Appellee differently.

Lastly, an additional rational basis for the disparate sentences between SGT JH and Appellee is that both possessed different military careers. Appellee's career began in August of 2021. At the time of this offense, he had been on active duty for only 9 months. SGT JH had promoted to the rank of SGT and had the awards and accolades expected of his grade and experience. (JA at 234).

[12] The convening authority granted SPC JW testimonial immunity at the military criminal proceedings for Appellee and SGT JH.

While this rational basis was raised at the Appellate level, the Army Court was unconvinced and rejected the Government's argument.[13] In so doing, the Court expressed frustration that the judiciary was not involved in the negotiation process of the deal between the accused and the convening authority. *Armsbury*, 2025 CCA LEXIS 149, at *9 ("This completely ignores the fact the military judge was prevented from making that differential evaluation, because the plea agreement required a punitive discharge.").[14] Had the military judge felt it appropriate, he could have rejected the deal or recommended clemency to the convening authority.[15] The military judge did neither.

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[13] "None of that matters when in a situation where the terms of the plea agreement *did not give* the military discretion to weigh such evidence in determining whether a punitive discharge was even appropriate." *Armsbury*, 2025 CCA LEXIS 149, at *10 (emphasis in original).

[14] The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement. Art. 53a(2), UCMJ.

[15] The military judge has the authority and "responsibility to police the terms of the pretrial agreement[] to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness." *United States v. Soto*, 69 M.J. 304, 307 (C.A.A.F. 2011) (quoting *United States v. Partin*, 7 M.J. 309 (C.M.A. 1979). The Navy-Marine CCA has continued to apply *Soto* following the Military Justice Act of 2016, holding "military judges are still empowered to decline to accept terms contained in plea agreements that violate public policy, appellate case law, or failed to adhere to basic notions of fundamental fairness." *United States v. Alkazahg*, 81 M.J. 764, n.129 (N-M. Ct. Crim. App. 2021) (citing *Soto*, 69 M.J. at 307); *see also United States v. Raines*, 82 M.J. 608, 610 (N-M. Ct. Crim. App. 2022); *United States v. Kerr*, 2023 CCA LEXIS 434, at *7 (N-M. Ct. Crim. App. 17 Oct. 2023) (unpublished).

Conclusion

The United States respectfully request this Court remand this case to the Army Court of Appeals.

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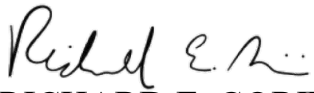

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(b) because this brief contains **7,279** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 5th day of September, 2025.

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