IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
USCAAF Bar No. 38091

Peter M. Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 38209

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36867

Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 35108

Table of Contents

Statement of Statutory Jurisdiction **1**
Statement of the Case **2**
Statement of Facts **3**
A. Background. 3
B. Plea Agreements of the Co-Conspirators. 4
C. The Defense Sentencing Case. 4
Summary of Argument **6**
Certified Issue **8**
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 **8**
Standard of Review **8**
Law and Argument **8**
A. The Army Court of Criminal Appeals Acted Within its Discretion When it Set Aside Appellant's Bad Conduct Discharge. 11
1. ACCA Has Broad Discretion In Its Article 66 Sentence Review Despite the Addition of Minimum Sentences Under Article 53a. 11
2. Congress Intended for CCAs to Have Broad Discretion Under Article 66 12
3. CAAF is Limited in its Narrow Review of Sentence Appropriateness. 13
4. The Government Incorrectly Analogizes to Contract Law. 14
5. This Court Recently Held that Appellant's Entry of a Plea Agreement was not Dispositive on Sentence Appropriateness. 15
B. The Army Court of Criminal Appeals Followed Its Precedent in Setting Aside Appellee's Punitive Discharge. 15

II. WHETHER THE ARMY COURT ABUSED THEIR [ITS] DISCRETION IN FINDING APPELLEE'S SENTENCE "HIGHLY DISPARATE" AND IN SETTING ASIDE APPELLEE'S BAD CONDUCT DISCHARGE. 17

Standard of Review 17

A. ACCA Correctly Determined that SGT JH's and Appellee's Cases were Closely Related. 18

B. ACCA Correctly Found that SGT JH's and Appellee's Sentences were "Highly Disparate." 18

C. The Army Court Did Not Contradict *Pleasant* in Finding that the Sentences were "Highly Disparate." 19

Conclusion 27

Certificate of Compliance with Rules 24(c) and 37 28

Table of Authorities

SUPREME COURT OF THE UNITED STATES

Johnson v. United States, 559 U.S. 133, 151-52 (2010).....22

COURT OF APPEALS FOR THE ARMED FORCES & COURT OF MILITARY APPEALS

United States v. Arroyo, 2025 CAAF LEXIS 688 (C.A.A.F. Aug. 19, 2025) . 14, 15
United States v. Ballard, 20 M.J. 282 (C.M.A. 1985).....9, 10
United States v. Boone, 49 M.J. 187 (C.A.A.F. 1998) 9
United States v. Csiti, 85 M.J. 414 (C.A.A.F. 2025) 8
United Sates v. Durant, 55 M.J. 258, 261 (C.A.A.F. 2001) 9, 10
United States v. Henry, 42 M.J. 231 (C.A.A.F. 1995).....11
United States v. Kazena, 11 M.J. 28 (C.M.A. 1981) 14
United States v. Kelly, 77 M.J. 404 (C.A.A.F. 2018) ..... passim
United States v. Lacy, 50 M.J. 286 (C.A.A.F. 1999)..... passim
United States v. Noble, 50 M.J. 293 (C.A.A.F. 1999) 10
United States v. Smead, 68 M.J. 44 (C.A.A.F. 2009) 14
United States v. Snelling, 14 M.J. 267 (C.M.A. 1982) 9
United States v. Swisher, 85 M.J. 1 (C.A.A.F 2024)..... 10, 14, 18, 26

SERVICE COURTS OF APPEAL

United States v. Abdullah, 85 M.J. 501 (Army Ct. Crim. App. 2024) 15, 16, 17
United States v. Anderson, 67 M.J. 703 (A.F. Ct. Crim. App. 2015 9
United States v. Behunin, CCA LEXIS 412 (A.F. Ct. Crim. App. 18 Jul. 2022).....9
United States v. Blair, 72 M.J. 720 (Army Ct. Crim. App. 2013).....24
United States v. Blow, 2022 CCA LEXIS 495 (A.F. Ct. Crim. App. 23 Aug. 2022) 10
United States v. Hunter, 84 M.J. 715 (Army Ct. Crim. App. 2024)..... 15, 16, 17
United States v. Kerr, 2023 CCA LEXIS 434 (N-M.C.C.A. 2023) 16
United States v. Martinez, 76 M.J. 837 (Army Ct. Crim. App. 2017)..... 23, 24
United States v. Pleasant, 71 M.J. 709 (Army Ct. Crim. App. 2012)..... 19, 20, 21

United States v. Sauk, 74 M.J. 594 (A.F. Ct. Crim. App. 2015) 8
United States v. Wooddell, ACM S29651, 2000 CCA LEXIS (A.F. Ct. Crim. App. 2000).....22

FEDERAL COURTS

Cooper v. United States, 94 F. 2d 12, 17 (4th Cir. 1979) 14

UNIFORM CODE OF MILITARY JUSTICE

Article 56, UCMJ, 10 U.S.C. § 856 ..... 11, 12, 13
Article 66, UCMJ, 10 U.S.C. § 866 ..... passim
Article 67, UCMJ, 10 U.S.C. § 867 2
Article 81, UCMJ, 10 U.S.C. §881 2
Article 128a, UCMJ, 10 U.S.C. § 928a 2
Article 128, UCMJ, 10 U.S.C. § 928 2

REGULATIONS

Army Regulation 635-500 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Certified Issues

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 (Army Court or ACCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2022). This Honorable Court has

jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867 (a)(2) (2021).

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 a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928.[1] (JA at 100, 135). The military judge sentenced Appellee to sixty days of confinement and a bad conduct discharge. (JA at 197). On November 17, 2023, the convening authority disapproved Appellee's request, to reduce the adjudged confinement to time served and to grant any other lawful relief, and approved the findings and sentence. (JA at 075, 076). On November 20, 2023, the military judge entered judgment. (JA at 076).

On April 4, 2025, the Army Court of Criminal Appeals affirmed Appellee's finding of guilt but set aside the bad-conduct discharge. (JA at 013). Specifically, ACCA determined: 1) Appellee's case was closely related to a co-conspirator's (Sergeant Jacob Hagerman); 2) the sentences were highly disparate; and 3) the Government failed to show a rational basis to justify the disparity in sentencing.

[1] The military judge granted the Government's motion to withdraw and dismiss one specification of aggravated assault, one specification of maiming, and one specification of conspiracy to commit assault consummated by a battery in violation of Articles 128, 128a, and 81, UCMJ, 10 U.S.C. §§ 928, 928a, and 881.

(JA at 010-012). Considering the highly disparate sentences as one factor among several others in their sentence appropriateness review, ACCA determined that Appellee's approved sentence was not appropriate and set aside the bad conduct discharge. (JA at 012). On May 5, 2025, the Government filed a motion for en banc consideration, which Appellee opposed. (JA at 026, 027, 030). The Army Court subsequently denied the Government's motion on June 9, 2025. (JA at 026). The Judge Advocate General thereafter certified two issues for this Court's review. (JA at 001).

Statement of Facts

A. Background.

On May 7, 2022, Appellee was returning to Camp Humphreys, Korea after a night off-post in the 'Ville.' (JA at 104-105). At the time, Appellee was nineteen years old and had joined the United States Army less than a year prior. (JA at 104-107). Appellee, along with two more seasoned soldiers, Specialist (SPC) Jacob Wynns and Sergeant (SGT) Jacob Hagerman, and another work colleague, Private (PVT) Javon Johnson, all walked back to the gate together. (JA at 105, 170-172). They witnessed a confrontation between a distressed young female and a group of heavily intoxicated Marines. The female was accusing the Marines of sexual assault. (JA at 058, 105, 110).

Appellee and his two companions became worried about the young woman's safety and decided to intervene. (JA at 105). The Marines pushed SPC Wynns, put

him in a headlock, and physically assaulted him. (JA at 105, 163). In an effort to assist SPC Wynns, Appellee, SGT Hagerman, and PVT Johnson joined the fight. (JA at 105, 177, 178). One of the Marines, Lance Corporal (LCpl) KC[2], was knocked to the ground by someone. (JA at 105). Afterward, SGT Hagerman stomped on LCpl KC's head and appeared to knock him unconscious. (JA at 063, 105, 111, 198). Following SGT Hagerman's stomp, Appellee kicked LCpl KC once and walked away.[3] (JA at 106, 198). Specialist Wynns then repeatedly punched LCpl KC in the head and torso area. (JA at 198).

B. Plea Agreements of the Co-Conspirators.

Appellee agrees with and adopts the Government's recitation of facts regarding the sequence of guilty pleas and agreement terms among SPC Jacob Wynns, Appellee, and SGT Jacob Hagerman. (Gov't Br. at 5-6).

C. The Defense Sentencing Case.

Specialist Wynns and PVT Johnson presented significant mitigation evidence, as did Appellee. (JA at 157-172, 176-182, 185-195). Appellee's adoptive mother revealed that when she met Appellee, when he was two and half

[2] The government admitted at Appellee's trial that this rank was inaccurate because KC was a corporal during the incident and at trial. (JA at 138-139).
[3] During the incident, Appellee was wearing soft Vans skating shoes and lightly grazed LCpl KC's head with his foot using minimal force. (JA at 113).

years old, he had been physically neglected and sexually abused. (JA at 186). She later adopted Appellee when he was six years old. (JA at 186).

Appellee was determined to overcome his past abuse. Throughout his childhood, Appellee was appreciative and respectful of service members. (JA at 188). While in high school (and prior to joining the Army), Appellee worked at a tire store assisting with vehicle maintenance. (JA at 187-188). Eventually, he was motivated to serve his country by joining the military himself. (JA at 188).

Appellee, in his unsworn statement, took full responsibility for his actions. (JA at 193-194). He apologized to the victim, the Government, his unit, and everyone in the courtroom. *Id*.

Appellee also pointed out the Government's unfair treatment of his case. *Id*. He highlighted the Preliminary Hearing Officer's (PHO) recommendation to only charge him with a single assault consummated by a battery specification. Appellee further noted that despite the PHO's recommendation, the Government pursued much more serious charges of conspiracy, maiming, and aggravated assault at a general court-martial. (JA at 193). He stated that "Specialist Wynns received a 75-day sentence and was returned to our unit. He was not discharged. PFC

Johnson is receiving a Chapter 10.[4] I don't know what SGT Hagerman will end up with, but I am curious, Your Honor." (JA at 194).

In contrast, the Government's sentencing case was weak. The Government did not introduce aggravation evidence, and the victim declined to testify despite being present at the hearing.

Sergeant Hagerman was sentenced to 121 days of confinement and reduction to E-2.[5] (JA at 067). Despite the identical charge sheet, SGT Hagerman's much higher rank, and the primacy and forcefulness of his assault on LCpl KC, Appellee received the much harsher punishment of a bad conduct discharge. (JA at 065, 197).

Summary of Argument

The Army Court of Criminal Appeals has broad power to review sentence appropriateness under Article 66, UCMJ, 10 U.S.C. § 866. In *U.S. v. Kelly*, 77 M.J. 404 (C.A.A.F. 2018), this Court found that when Congress added mandatory minimum sentences for certain offenses, that this did not impliedly repeal the

[4] Army Regulation (AR) 635-500 covers administrative separations of enlisted personnel on active duty. Chapter 10 refers to "Discharge in Lieu of Trial by Court-Martial." A "Chapter 10 Request" allows a Soldier who has committed an offense subject to a bad conduct or dishonorable discharge under the Uniform Code of Military Justice and the Manual for Court-Martial to request a discharge in lieu of a trial by court-martial. *See* AR 635-500, Para. 10-1.

[5] PVT Javon Johnson, who was also involved in this incident, testified that he received a "Chapter 10." (JA at 182). The military judge said he would not consider those sentences when adjudging appellant's sentence. (JA at 169-170).

CCAs' authority to evaluate sentences. The Court should use the same logic in this case. Even if an accused servicemember agrees to a minimum sentence, pursuant to a plea agreement under Article 53a, UCMJ, 10 U.S.C. § 853a, ACCA still has the power to set aside or modify that sentence. The Government improperly analogizes to civilian commercial contract law, which is contrary to statute and regulation.

The Army Court of Criminal Appeals was within its power to set aside Appellee's bad conduct discharge. The Government confuses the limits placed on a court-martial pursuant to Article 53a with a CCA's broad power under Article 66. The Government also cites factually distinct cases in support of the erroneous proposition that ACCA contradicted its own precedent and is therefore prohibited from setting aside a bargained-for punitive discharge.[6]

The Government also argues that a punitive discharge cannot make a sentence highly disparate from another sentence. Despite the Government's focus on sentence disparity, that was only one of eight factors that ACCA used in determining the appropriateness of Appellee's sentence. (JA at 15) (discussing all of the factors besides disparate sentencing that the Army Court considered in reaching its decision)). Thus, even assuming that this Court agreed with the

[6] Even if the government were correct here, ACCA could change its own precedent as long as it did not conflict with that of a higher court.

Government and held that the two sentences were not "highly disparate," the Court could still uphold the Army Court's decision to set aside the bad conduct discharge based on the numerous other factors ACCA considered.

Certified Issue

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 Court of Appeals for the Armed Forces addresses questions of statutory interpretation *de novo*. *United States v. Csiti*, 85 M.J. 414, 417 (C.A.A.F. 2025).

Law and Argument

Courts of Criminal Appeals may affirm only "the sentence or such part or amount of the sentence" as it finds "correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). In determining whether a sentence "should be approved" under Article 66, they "assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in

original) (quoting *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2015*)); See also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Courts of Criminal Appeals can also consider the results in other cases in conducting their review for relative uniformity as part of their Article 66, UCMJ, 10 U.S.C. § 866, sentence review. *United States v. Behunin*, CCA LEXIS 412, at *24 (A.F. Ct. Crim. App. 18 Jul. 2022) (unpub. op.) (aff'd 83 M.J. 158 (C.A.A.F. 2023) (quoting *United Sates v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001) ("[t]he military justice system promotes sentence uniformity through Article 66 and the requirement that the [CCAs] engage in a sentence appropriateness analysis."). Courts "utilize the experience distilled from years of practice in military law" when examining questions of sentence disparity. *United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985) (observing that "judges on the courts of military review have a solid feel for the range of punishments typically meted out in courts-martial."); *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999) (emphasizing that "utiliz[ing] the experience distilled from years of practice in military law […]" the Congress hoped to attain *relative* uniformity…"); *United States v. Boone*, 49 M.J. 187, 191-92 (C.A.A.F. 1998) (noting that CCAs "would have the high responsibility of ensuring uniformity and evenhandedness, values that could not be assured if final decision making were left at the local command level").

Courts are "not required […] to engage in sentence comparison with specific cases, 'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *Lacy*, 50 M.J. at 288 (quoting *Ballard*, 20 M.J. at 283). However, they are required to engage in a comparison analysis when it "can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Swisher*, 85 M.J. 1, (C.A.A.F 2024) (quoting *United States v. Noble*, 50 M.J. 293, 294 (C.A.A.F. 1999)). If an appellant meets the burden of demonstrating that the cases are closely related but the sentences are highly disparate, "then the Government must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

Cases are closely related when there is a "direct nexus" between the two servicemembers, such as "coactors involved in a common crime." *Id*. at 288; *See also United States v. Blow*, 2022 CCA LEXIS 495, *38 (A.F. Ct. Crim. App. 23 Aug. 2022) (unpub. op.) (finding a direct nexus where both appellant and a coactor "were convicted of committing assault consummated by a battery on RM at the same time and place," despite appellant's additional convictions). Courts have found a sentence involving a bad-conduct discharge and a sentence with no punitive discharge are highly disparate. *Durant*, 55 M.J. at 262; *See also Blow*.

To show a rational basis, the Government must prove other factors, such as the seriousness of the offense, as well as mitigation and aggravation evidence in the related cases, to justify the disparity. *United States v. Henry*, 42 M.J. 231, 234 (C.A.A.F. 1995) (comparing the similarity of the convicted actors and their relative roles in the acts, such as initiation and relative culpability.).

A. The Army Court of Criminal Appeals Acted Within its Discretion When it Set Aside Appellant's Bad Conduct Discharge.

1. ACCA Has Broad Discretion In Its Article 66 Sentence Review Despite the Addition of Minimum Sentences Under Article 53a.

The Army Court was well within its power and authority to set aside Appellee's bad conduct discharge. The Government attempts to distinguish *United States v. Kelly*, where this Court found that mandatory minimums imposed a limit on the court martial under Article 56, UCMJ, but did not limit a CCA's broad power under Article 66, UCMJ. (Gov't Br. at 12); *United States v. Kelly*, 77 M.J. 404, 408 (C.A.A.F. 2018).

Nevertheless, the Government conflates Article 53a, UCMJ, which limits the sentence that a court-martial may impose, with a CCA's broad power under Article 66, UCMJ. Consistent with *Kelly*, if a CCA's Article 66 power can override a statutory mandatory minimum requirement, it can certainly also supersede a party's agreed-upon plea agreement.

While a plea agreement may place some limits on the parties at a court-martial, that plea agreement does not limit the reviewing authorities. To suggest otherwise would largely strip the CCA of its sentence review power for any case in which there is a plea agreement. Additionally, the parties negotiating a plea agreement would be given more power than Congress to decide whether a sentence is just.

2. Congress Intended for CCAs to Have Broad Discretion Under Article 66.

As the Court noted in *Kelly*, Congress was well aware of Article 66(c)'s broad scope when it enacted Article 56 and would have explicitly limited Article 66(c) review if it wished to do so. *United States v. Kelly*, 77 M.J. 404, 407-408 (C.A.A.F. 2018). While Congress has made numerous changes to the UCMJ over the years, it has left the language in Article 66(c) virtually the same since 1950. *Kelly* at 407. Over the years, Congress has imposed new limits on the convening authority's power while failing to place similar constraints on the CCAs. *Id*.

In other words, Congress knows how to limit the broad discretion of the CCAs but has repeatedly declined to do so. In *Kelly*, this Court found that a CCA had the power to disapprove a mandatory minimum sentence under Article 56. *Id*. at 408. In this case, the Court is similarly able to disapprove a sentence agreed upon through a plea agreement by the parties. Unless and until Congress revises Article 66, the CCAs retain their broad discretion in their review of sentences.

This court did not read the mandatory minimums in Article 56 as implicitly repealing part of Article 66. Congress was familiar with the background of Article 66 prior to enacting Article 53a. Particularly after *Kelly*, this Court should not read Article 53a as a Congressionally mandated limitation on a CCA's power under Article 66.

3. CAAF is Limited in its Narrow Review of Sentence Appropriateness.

Sentence comparison and sentence appropriateness review are both "highly discretionary" functions of courts of criminal appeals [CCAs], and CCAs are not required "to articulate their reasons." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

In this case, ACCA amply justified its reasoning for setting aside Appellee's sentence.[7] Furthermore, ACCA has broad discretion and is not required to articulate every factor in its analysis. This Court applies a deferential, narrow standard of review of CCA decisions on issues of sentence appropriateness limited to whether there was an obvious miscarriage of justice or abuse of discretion.

[7] JA at 011. ("We closely reviewed the CCTV video of the incident."); JA at 012 ("Here, in addition to the sentence comparison analysis above, we have also considered appellant's status as a young soldier only three months into his first assignment; appellant's initial intent to help a distraught woman outside a bar; the attack on SPC JW that immediately preceded the assault offense; appellant's observation of SGT JH's violent kick to LCpl KC's head; appellant's light kick to LCpl KC's head using minimal force; appellant's plea of guilty to one charge and specification of assault consummated by a battery; the lack of injury evidence or any victim impact statement; and the lack of aggravation evidence in sentencing.")

United States v. Arroyo, 2025 CAAF LEXIS 688, *8 (C.A.A.F. Aug. 19, 2025)(citing *United States v. Swisher*, 854 M.J. 1, 4 (C.A.A.F 2024)).

4. The Government Incorrectly Analogizes to Contract Law.

The Government improperly analogizes this case to contract law. Contracts are typically arm's length transactions between similarly situated parties. The parties in this case are not equal and the Government has significantly more bargaining power.

Plea agreements in the military are created entirely by statute and policy and should not be likened to contracts as the Government argues. For these reasons, this Court has recognized that "when interpreting pretrial agreements, 'contract principles are outweighed by the Constitution's Due Process Clause protections for an accused." *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009). This Court has noted that "conventional contract law does not apply fully to the plea bargaining process," *United States v. Kazena*, 11 M.J. 28, 34-35 (C.M.A. 1981) (discussing some ways that plea bargaining differs from commercial contracts and the reasons for the difference); *See also Cooper v. United States*, 94 F. 2d 12, 17 (4th Cir. 1979) (discussing in detail the limitations of the contract law analogy).

During their negotiation of the plea agreement in this case, the parties were aware of the applicable background law. The parties knew that ACCA would eventually review the sentence's appropriateness pursuant to Article 66. As a

result, ACCA could set aside and/or modify the sentence upon appellate review. This Court should consider the fact that the parties knew about the laws pertaining to their plea agreement (including ACCA's review) during the negotiation process.

5. This Court Recently Held that Appellant's Entry of a Plea Agreement was not Dispositive on Sentence Appropriateness.

In *US v. Arroyo*, 2025 CAAF LEXIS 688, *11 (C.A.A.F. Aug. 19, 2025), this Court considered a challenge to an agreed-upon term in a plea agreement. In upholding the plea agreement, this Court stated that "the sentence agreed to by Appellant in the plea agreement is a reasonable—but not dispositive— indication of the sentence's fairness to Appellant." (internal citations omitted). This statement that Appellant's agreement to a sentence is "not dispositive" is not mere dicta. The Court went on to analyze the AFCCA's review of the sentence. Importantly, the Court did not disclaim the CCA's ability to review the sentence at all. There is not a compelling reason in this case for the Court to reverse course.

B. The Army Court of Criminal Appeals Followed Its Precedent in Setting Aside Appellee's Punitive Discharge.

The Government claims that prior to *Armsbury*, ACCA's position was that "…setting aside a punitive discharge as of a negotiated plea would constitute an abuse of discretion by the court." (Gov't Br. at 15). The Government reaches this position by misreading *United States v. Abdullah* and *United States v. Hunter* to suggest that ACCA departed from binding precedent in this case.

The Government's reasoning is flawed. On a broad level, the Government misconstrues the highly discretionary and fact-specific nature of ACCA's sentence appropriateness review. Contrary to the Government's argument, *Hunter* reaffirmed the standard under Article 66(d)(1), UCMJ, in which ACCA must consider all matters in the record of trial. *U.S. v. Hunter*, 84 M.J. 715, 718 (Army Ct. Crim. App. 2024).

The Government's argument is also contradictory. On one hand, the Government acknowledges that in *Hunter*, ACCA set aside a negotiated dishonorable discharge under a sentence appropriateness review. (Gov't Br. at 15). On the other hand, the Government then argues that ACCA erred in setting aside the negotiated bad-conduct discharge in this case. The analysis of the Army Court in this case is consistent with the Navy-Marine Court of Criminal Appeals' application of the same statute. *See e.g.*, *United States v. Kerr*, 2023 CCA LEXIS 434, *7-8 (N-M.C.C.A. 2023) (setting aside a negotiated BCD for appellant's theft of military property as well as stealing and damaging another Marine's vehicle and losing the victim's issued military equipment)).

The Government also cites to *United States v. Abdullah*, where ACCA declined to set aside a bad conduct discharge. The facts of that case are wholly distinct. In *Abdullah*, the appellant was a non-commissioned officer with a "course of misconduct involv[ing] multiple incidents in which he demonstrated a disregard

for military authority, military regulations, and lawful military orders." *United States v. Abdullah*, 85 M.J. 501, (Army Ct. Crim. App. 2024) (*en banc*).[8]

The repeated pattern of misconduct from an NCO in *Abdullah* is entirely different from this case, in which a junior enlisted soldier played the least serious role of three different individuals in a physical assault, yet was the only one who received a punitive discharge. Neither *Hunter* nor *Abdullah* create a bright line rule that ACCA must always defer to a parties' negotiated discharge, that ACCA cannot set aside a punitive discharge, or that ACCA must articulate every factor in its sentence appropriateness analysis.

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

Standard of Review

The Court of Appeals for the Armed Forces review of CCA decisions 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*

[8] *Abdullah*, *2-4. (Abdullah was driving drunk near an on-post Halloween event; had a positive urinalysis; was absent without leave (AWOL) for a month and a half; disobeyed multiple orders not to leave Fort Carson and not consume alcohol; drove an unregistered vehicle with expired plates without a valid driver's license or insurance; traveled to Texas for five days without permission or authority; and after marijuana was discovered in his barracks room, fled his escorts by running and scaling a motor pool fence).

States v. Swisher, 85 M.J. 1, 4 (C.A.A.F. 2024) (internal citations omitted). There is an abuse of discretion when a court's decision is influenced by an erroneous view of the law. *Id*.

A. ACCA Correctly Determined that SGT JH's and Appellee's Cases were Closely Related.

ACCA correctly determined that SGT Jacob Hagerman and Appellee's cases are closely related. (JA at 012). Contrary to its argument at ACCA, the Government now concedes the cases are closely related but claims "the Army Court abused their [its] discretion throughout the remainder of their analysis." (Gov't Br. at 18). The Army Court correctly found that the cases were closely related. Both Appellee and SGT Jacob Hagerman engaged in a fight, kicked LCpl KC while he was on the ground, and were then charged with the same exact offenses, which were then referred to the same exact court-martial to be tried jointly. (JA at 010).

B. ACCA Correctly Found that SGT JH's and Appellee's Sentences were "Highly Disparate."

The Army Court correctly found that SGT Jacob Hagerman and Appellee's sentences were highly disparate based on SGT Jacob Hagerman pleading guilty to a more severe charge of aggravated assault and receiving no punitive discharge while appellant pled to a lesser offense but received a bad-conduct discharge. (JA at 010-011). The court noted the "severity and long-term effects" of a punitive

discharge, including the adverse stigma, negative future impact on legal rights, employment, and social acceptability, and the loss of significant benefits from the Department of Veterans Affairs. *Id*.

This Court has not defined what makes one sentence "highly disparate" from another. Nevertheless, this Court clearly explained that the sentence review function of CCAs is "highly discretionary" and that it generally does not require CCAs to "expressly distinguish the case on appeal from the sentence adjudged in a separate case." *Lacy*, 50 M.J. at 288. Congress specifically granted CCAs, rather than this Court, the broad power to review sentence appropriateness under Article 66(c). *Id*.

C. The Army Court Did Not Contradict *Pleasant* in Finding that the Sentences were "Highly Disparate."

The Government also relies on *Pleasant* to suggest that ACCA erred in its analysis and did not follow precedent. In *Pleasant*, ACCA compared the sentences of a master sergeant and a lieutenant colonel after both were convicted at courts-martial for larceny of military equipment while deployed in Iraq. *United States v. Pleasant*, 71 M.J. 709, 710-11 (Army Ct. Crim. App. 2012). After a contested trial, the panel sentenced Pleasant, the master sergeant, to a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Id*. at 715. The convening authority approved only part of MSG Pleasant's sentence – the bad-conduct discharge, confinement for 11 months, and

reduction to the grade of E-1. *Id*. Master Sergeant Pleasant's co-accused, LTC Lethers, was tried and convicted by a military judge alone and sentenced to 11 months of confinement, which was approved by the same convening authority. *Id*. at 716.

The Army Court found that the cases were closely related and that the sentences were disparate, but not "highly disparate." *Id*. The Government ignores the fact mentioned in the court's opinion that unlike Pleasant, an enlisted soldier, the only possible punitive discharge for a lieutenant colonel was a dismissal, generally seen as equivalent to a dishonorable discharge. *Id*.

Unlike *Pleasant*, in this case, the military judge was given discretion to decide whether to sentence SGT Jacob Hagerman to a punitive discharge. In contrast, for Appellee, the military judge was required to adjudge a punitive discharge, even though Appellee played a less serious role in the crime and pled guilty to a lesser offense.

In *Pleasant*, ACCA also found that even if MSG Pleasant's sentence was "highly disparate" in comparison to that of his co-accused, a rational basis existed for the disparity. *Id*. at 716-717. The Army Court pointed to multiple factors that differentiated the two soldiers, namely: their significantly different disciplinary and deployment histories as well as the fact that Pleasant testified at trial (whereas the lieutenant colonel did not). *Id*. By testifying, Pleasant risked the panel taking his

mendacity in sentencing into account with regard to his rehabilitative potential. *Id*. Unlike *Pleasant*, the Government in this case provides no such rational basis, such as a difference in disciplinary histories, which would justify the discrepancy between SGT Jacob Hagerman and Appellee's sentences.

The Army Court correctly found that the sentences were "highly disparate." Furthermore, the Army Court weighed not only the highly disparate nature of the sentences, but also a variety of other factors including the sentence's severity, the record of trial, Appellee's character and military service, and the facts and circumstances of the offense. (JA at 012); *See supra* FN 2; *United States v. Armsbury*, 2025 CCA LEXIS 149, *6 (listing other factors the court considered in addition to sentence disparity). Sentence disparity was only one of many factors ACCA considered when it determined that Appellee's sentence was inappropriate. *Id*.

1. The Army Court Did Not Err by Failing to Consider the Adverse Stigma of a Felony Conviction.

The Government raises arguments before this Court for the first time but also claims that ACCA erred by failing to consider these arguments, which the Government never previously articulated. For example, the Government now claims the Army Court erred by not considering the adverse stigma of a felony conviction to that of a punitive discharge in its "highly disparate" analysis, even though this argument was not part of its original brief (Gov't Br. at 20).

"Many of the states classify [non-violent but unlawful and offensive batteries] as felonies or make them punishable by imprisonment for more than one year." *Johnson v. United States*, 559 U.S. 133, 151-52 (2010) (Alito, J., dissenting); *see also United States v. Wooddell*, ACM S29651, 2000 CCA LEXIS 284, at *6 (A.F. Ct. Crim. App. 2000) ("among the states, a variety of tests exist to determine whether a crime is a felony or misdemeanor.") (citing 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 1.6 (1986)).

In this case, the Government is erroneously claiming that the civilian distinction in offense types also exists in military law and was at play in this case. However, the UCMJ does not differentiate between felony and misdemeanor offenses. As the Government acknowledges in a footnote:

> …[A]ppellate 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.

Gov't Br. at 21. In other words, the Government invites this Court to speculate on Appellee's reasoning for accepting his particular plea deal, which the Government attributes in part to a non-existent distinction between felonies and misdemeanors in military court. At the same time, the Government simultaneously acknowledges

such speculation is inappropriate. Indeed, speculation about possible collateral consequences of a conviction does not amount to a rational basis.

2. The Army Court Did Not Misapply *Lacy*.

The Government argues that the Army Court misapplied *Lacy* by not comparing the disparity of the sentences of SGT JH and Appellee in proportion to their maximum punishment. *United States v. Lacy*, 50 M.J. at 289. The Government argues Appellee's sentence was "relatively lenient compared to the maximum he faced" in that prior to negotiating a plea, Appellee faced an "aggravate[d] assault, the same offense SGT JH pleaded guilty to, which carries a maximum sentence of 5 years and a dishonorable discharge." (Gov't Br. at 21-22).

The Government's argument fails for multiple reasons. First, in *Lacy*, this Court did not compare the appellant's sentence with the maximum punishment of a *dismissed* specification. *Id*. at 289. Furthermore, unlike *Lacy*, the disparity in this case relates to Appellee receiving a punitive discharge after pleading guilty to a lesser charge, rather than the difference between terms of confinement.

Moreover, this Court did not create a bright line rule in *Lacy* requiring a service court to compare sentences with the potential maximum punishment. *See id*. ("the [highly disparate] test…*may* include consideration of the disparity in relation to the potential maximum punishment.") (emphasis added); *see also United States v. Martinez*, 76 M.J. 837, 841 (Army Ct. Crim. App. 2017) ("[w]hile

comparing the percentages of the potential maximum punishment is a useful consideration, it is not dispositive to the question of whether two sentences are highly disparate.") In this case, ACCA was not required to compare the sentences in proportion to the maximum punishment in its analysis of sentence disparity.

D. The Army Court Correctly Determined the Government Offered No Rational Basis For the Disparate Sentences.

The Army Court evaluated whether there was a rational basis to justify the difference in sentences, such as 1) aggravating evidence; 2) difference in forums and potential punishments; and 3) worse conduct than a co-actor. (JA at 011); *United States v. Armsbury*, 2025 CCA LEXIS 149, *6. (citing *United States v. Blair*, 72 M.J. 720, 724-26 (Army Ct. Crim. App. 2013)). The Army Court found that none of the factors in *Blair* are present in this case. *Id*.

Here, the Government introduced no aggravating evidence. (JA at 011, 146-183). Furthermore, the Government's argument that Appellee's actions were "gratuitous" was not convincing. The Army Court considered Appellee's acts and determined that his actions were the least severe of the three actors, yet he was the only one who received a punitive discharge. (JA at 011, 057, 198). Furthermore, ACCA also determined that the length and content of an unsworn statement were irrelevant to the court's evaluation of a mandatory sentence term. (JA at 011-012). The Army Court noted Appellee took full responsibility for his actions and apologized to the victim, the Government, and his unit. (JA at 012, 193).

Finally, ACCA rejected the Government's argument that Appellee failed to present significant mitigation or rehabilitation evidence in comparison to SGT JH. (JA at 012). During sentencing, Appellee did present impactful mitigation evidence about childhood neglect and abuse. (JA at 185-188). Finally, the Government's argument that the military judge had "a rational basis" for seeing higher rehabilitative potential in SGT Jacob Hagerman is not appropriate. As the Army Court noted, in Appellee's case the military judge had no discretion to determine whether Appellee should receive a punitive discharge. (JA at 012).

The Government claims that the Army Court "expressed frustration that the judiciary was not involved in the negotiation process of the deal between the accused and convening authority." (Gov't Br. at 26). Nothing in the Army Court's opinion supports this notion. The Government confuses the difference between sentence limitations on a court-martial versus the discretion of an appellate court to reject a sentence. Furthermore, not all of the co-actors in the case had been sentenced at the time of Appellee's trial. Therefore, unlike ACCA, the military judge was not in a position to compare all of the sentences simultaneously to ensure uniformity and fairness.

E. The Army Court Did Not Err by Failing to Consider the Benefit of Appellee's Bargain or the Differing Impact of the Sentences on SGT JH and Appellee.

The Government repeats its earlier argument that the existence of a plea deal and "benefit of Appellee's bargain" provided a rational basis for the sentence disparity in this case. The Government ignores the fact-specific nature and broad discretion of ACCA in its sentence appropriateness analysis. It also incorrectly argues that an appellate court is necessarily limited by the terms of a plea deal in evaluating sentence appropriateness, rather than recognizing that while a plea agreement limits the court-martial, it does not place such a limitation on reviewing authorities. *See United States v. Kelly*, 77 M.J. 404, 408 (C.A.A.F. 2018).

Furthermore, the Government's argument that ACCA "muddied the waters and highlighted the error in their logic" by comparing Appellee's sentence to that of SPC Jacob Wynns is flawed. As noted in its opinion, the Army Court's authority to take judicial notice of relevant portions of other pertinent records in its sentence comparison analysis is well-established. (JA at 009).

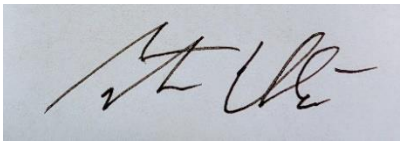
In *Swisher*, this Court clarified that if cases are closely related, the CCAs must then determine whether the sentences imposed in each case are highly disparate. *United States v. Swisher*, 85 M.J. 1, 6-7 (C.A.A.F. 2024) (emphasis added). In other words, ACCA acted in accordance with its mandatory duty under *Swisher* by comparing co-actor SPC Jacob Wynns's sentence in its analysis.

Finally, the Government also claims that ACCA erred by failing to consider the different military careers of SGT Jacob Hagerman and Appellee as a "rational basis" for the disparity of sentences but cites to nothing in support of this proposition.

Conclusion

For all of these reasons, Appellee asks that this Court affirm the Army Court's decision.

Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar Number 38091



Peter M. Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 38209

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36867

Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 35108

Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 5,990 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
USCAAF Bar No. 38091

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Armsbury, Crim. App. Dkt. No. 20230534, USCA Dkt. No. 25-0233/AR was electronically submitted to the Court of Appeals for the Armed Forces and the Government Appellate Division on **3 November 2025**.

Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
(703) 693-0692