No.

In the Supreme Court of the United States

DEREK L. DINGER, *Petitioner,*

v.

UNITED STATES, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Eugene R. Fidell
Counsel of Record
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Suite 400
Washington, DC 20036
(202) 256-8675, efidell@ftlf.com

Captain Bree Ermentrout, JAGC, USN
Navy-Marine Corps App. Rev. Activity
Washington Navy Yard, DC 20374
(202) 685-7290
bree.ermentrout@navy.mil

Counsel for Petitioner

October 5, 2018

QUESTION PRESENTED

After petitioner's offenses, the Court of Appeals for the Armed Forces overruled two precedents without fair warning and held that a court-martial can sentence retired Navy and Marine Corps personnel to a dishonorable discharge. Did it violate due process to apply the new rule to him? *See Bouie v. City of Columbia*, 378 U.S. 347 (1964).

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PETITION FOR A WRIT OF CERTIORARI

Derek L. Dinger[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces ("CAAF").

ORDERS AND OPINIONS BELOW

CAAF's order granting review, Pet. App. 1a, is reported at 77 M.J. 65. The decision below, Pet. App. 3a, is reported at 77 M.J. 447. CAAF's order denying reconsideration, Pet. App. 21a, and mandate, Pet. App. 23a, are not yet reported. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals ("the CCA"), Pet. App. 25a, is reported at 76 M.J. 552.

JURISDICTION

The judgment below was entered on June 18, 2018. CAAF denied petitioner's timely petition for reconsideration on August 2, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1259(3). *See Ortiz v. United States*, 138 S. Ct. 2165 (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The governing provision of the Constitution is the Due Process Clause of the Fifth Amendment.

The governing statute is 10 U.S.C. § 6332. It

[1] Petitioner's first name is misspelled in CAAF's decision. It is correctly spelled in the CCA's decision.

provides:

> When a member of the naval service is transferred by the Secretary of the Navy—
>
> (1) to the Fleet Reserve;
>
> (2) to the Fleet Marine Corps Reserve;
>
> (3) from the Fleet Reserve to the retired list of the Regular Navy or the Retired Reserve; or
>
> (4) from the Fleet Marine Corps Reserve to the retired list of the Regular Marine Corps or the Retired Reserve;
>
> *the transfer is conclusive for all purposes*. Each member so transferred is entitled, when not on active duty, to retainer pay or retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by the Secretary. The Secretary may correct any error or omission in his determination as to a member's grade and years of creditable service. When such a correction is made, the member is entitled, when not on active duty, to retainer pay or retired pay in accordance with his grade and number of years of creditable service, as corrected, from the date of transfer.

[Emphasis added.]

STATEMENT

A. Introduction

In 1991 and 1992 CAAF decided two cases that together stand for the proposition that 10 U.S.C. § 6332 limits the sentencing powers of courts-martial in cases involving Navy and Marine Corps retirees, *United States v. Allen*, 32 M.J. 209 (C.A.A.F. 1991); *United States v. Sloan*, 35 M.J. 4 (C.A.A.F. 1992). Petitioner was tried for offenses committed between 2011 and 2014. In 2018, CAAF overturned *Allen* and *Sloan* in his case without fair warning and applied its new interpretation to him. Although the setting from which this case arises happens to be military, the resulting constitutional issue is generic and would be no different if it had arisen in a federal district court or state criminal trial. *Bouie v. City of Columbia*, 378 U.S. 347 (1964), governs.

B. Facts

Petitioner is a retired gunnery sergeant in the Marine Corps. He served on active duty from 1983 to 2003, at which time he was honorably discharged and transferred to the Fleet Marine Corps Reserve. *See* 10 U.S.C. § 6330(b). Ten years later he was further transferred to the retired list in accordance with 10 U.S.C. § 6331(a)(1). At the time of the offenses he was a civilian contractor of the Marine Corps in Okinawa.

The Naval Criminal Investigative Service identified petitioner as the person associated with an Internet Protocol address that was using a peer-to-peer network to search for and download child por-

nography. A consent search, questioning, deportation from the Philippines (to which he and his family had traveled) to the United States, arrest, and removal from the Central District of California to the District of Columbia ensued.

C. Legal framework

"Retired members of a regular component of the armed forces who are entitled to pay" and "Members of the Fleet Reserve and Fleet Marine Corps Reserve" are subject to the Uniform Code of Military Justice ("UCMJ"). 10 U.S.C. §§ 802(a)(4) & (a)(6). As of June 30, 2017, 79,775 enlisted retirees were on the Marine Corps retired list or in the Fleet Marine Corps Reserve and 353,062 enlisted retirees were on the Navy retired list or in the Fleet Reserve. Dep't of Defense, Off. of the Actuary, Statistical Report on the Military Retirement System, Fiscal Year 2017, at 17 (July 2018), *available at* https://media.defense.gov/2018/Jul/30/2001948113/-1/-1/0/MRS_STATRPT_2017%20V4.PDF (last visited Sept. 17, 2018).

The UCMJ authorizes summary, special and general courts-martial. These are trial courts. *See generally Weiss v. United States*, 510 U.S. 163, 167 (1994). A general court-martial—the military equivalent of a felony court—can impose any punishment authorized by law, up to and including the death penalty. 10 U.S.C. § 818(a). A general court-martial's sentencing powers for enlisted personnel like petitioner include two kinds of punitive separations: a bad-conduct discharge ("BCD") and a dishonorable discharge ("DD"). A DD is an integral part of the sentence, not a collateral consequence.

Compare Clinton v. Goldsmith, 526 U.S. 529, 535 & n.7 (1999) ("dropping from the rolls" not part of a court-martial sentence).

Rule for Courts-Martial ("R.C.M.") 1003(b)(8)(B), which is part of the *Manual for Courts-Martial* promulgated by the President under 10 U.S.C. § 836(a), explains:

A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment . . . .

Members of the Fleet Marine Corps Reserve receive retainer pay and those on the Marine Corps retired list receive retired pay. 10 U.S.C. § 6333. A retiree who has been dishonorably discharged is no longer within § 6333 and hence no longer entitled to retainer or retired pay.

A DD is highly stigmatizing and carries lifelong economic, legal, and social consequences. Its seriousness and uniqueness are apparent from its name, its pervasive legal consequences, *e.g.*, 18 U.S.C. § 922(g)(6) (right to possess firearms), and how it figures in military sentencing. *See* pp. 14-15 *infra*.

D. Proceedings below

In 2015, a federal grand jury in the District of Columbia indicted petitioner for receipt, attempted receipt, and possession of child pornography in violation of various provisions of title 18, U.S. Code, and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. § 3261(a)(1). A superseding indictment added charges of production and attempted production of child pornography. The indictment was dismissed without prejudice when the Department of Justice realized that its assertion of jurisdiction over petitioner was improper because MEJA does not apply "against a member of the Armed Forces subject to" the UCMJ. 18 U.S.C. § 3261(d). *United States v. Dinger*, Crim. No. 1:15-cr-00047-CKK (D.D.C. July 14, 2015) (dismissing without prejudice).

A general court-martial followed. The military judge ruled, notwithstanding § 6332, that petitioner's sentence could include a DD or a BCD. Record of Trial 31-33. Pursuant to a pretrial agreement, petitioner was convicted and sentenced to nine years' confinement and a DD. As agreed, the confinement in excess of 96 months was suspended. Petitioner is confined in the Marine Brig at Camp Pendleton, California. His DD cannot be executed until appellate review is complete. 10 U.S.C. § 871(c)(1); R.C.M. 1113(c)(1), 1209.

On mandatory review under 10 U.S.C. § 866(b)(1), the CCA affirmed, rejecting petitioner's claims that the UCMJ provision authorizing the court-martial of retirees is unconstitutional and that in any event § 6332 precluded a DD for Navy

and Marine Corps enlisted retirees. The government requested panel reconsideration and *en banc* consideration on the basis that the CCA's rationale with respect to the jurisdictional issue was incorrect even if its conclusion was not. The CCA denied the request. Pet. App. 46a.

Petitioner sought discretionary review by CAAF with respect to both the jurisdictional and DD issues. *See* 10 U.S.C. § 867(a)(3). The court granted review of only the DD issue. Affirming the CCA, CAAF determined that its precedents on the effect of § 6332, decided years before petitioner's offenses, were incorrect and expressly overruled them. Pet. App. 4a, 19a. Nonetheless, it upheld his DD.

Mindful of what this Court said in *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987), petitioner filed a timely petition for reconsideration inviting CAAF's attention to *Bouie*, and explaining that it was a violation of due process to deny him the benefit of the case law that was in effect at the time of the charged offenses.[2] CAAF denied reconsideration, noting without further explanation that it was doing so "in light of *Bouie v. City of Columbia*, 378 U.S. 347 (1964)." Pet. App. 21a.

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[2] This Court declined to reach Petty Officer Solorio's *Bouie* issue because he had never raised it at the Court of Military Appeals (CAAF's name at the time). In contrast, petitioner raised his *Bouie* issue with CAAF, and did so as soon as it was presented: when that court repudiated its own precedents.

REASONS FOR GRANTING THE PETITION

1. CAAF violated *Bouie* by not affording petitioner the benefit of the case law that was in effect at the time of the charged offenses. *Bouie*, arising from a desegregation era lunch counter "sit-in," turned on whether the petitioners had been denied fair warning of a new and more expansive judicial construction of the conduct criminalized by the state's trespass statute.[3] The state court's failure to provide fair warning was held to violate due process. The same principle applies here; the same vice is present (this time involving permissible punishments rather than what conduct is criminalized).[4] The delphic reference to *Bouie* in CAAF's denial of reconsideration was either mere lip service or evidence that that court misunderstood the important

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[3] *See generally Rogers v. Tennessee*, 532 U.S. 451, 456-58 (2001). To the extent that *Rogers* rested on the fact that Tennessee's abandonment of the year-and-a-day rule concerned a quintessentially common law doctrine, with its inherent mutability, rather than the judicial interpretation of a legislative act, *id*. at 461, this is a materially stronger case in which to find a denial of fair warning.

[4] *Bouie* itself indicates that it applies to judicial decisions that increase punishments, 378 U.S. at 353-54 (quoting *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390 (1798)), and the case has been so understood. *E.g., Stevens v. Warden*, 114 Nev. 1217, 969 P.2d 945 (1998) (per curiam); *Fite v. State*, 1994 Okla. Crim. App. LEXIS 21 (1994); *People v. Ramey*, 152 Ill.2d 41, 64, 604 N.E.2d 275, 285-86 (1992); *In re Baert*, 205 Cal. App. 3d 514, 252 Cal. Rptr. 418 (1988); *Ex parte McAtee*, 586 S.W.2d 548, 549-50 (Tex. Crim. App. 1979); *see also State v. Baker*, 970 So. 2d 948, 959 (La. 2008) (Calogero, C.J., dissenting from denial of rehearing).

principle for which the case stands. Either way, review here is warranted because of the fundamental nature of the issue, its settled application across the broad sweep of federal, state, and military criminal justice, and the tension between CAAF's ruling and other courts' disposition of *Bouie* permissible-sentence issues in comparable circumstances. *See* cases cited in note 4 *supra*.

2. There are four elements to any *Bouie* claim. First, the decisional law of the jurisdiction must have changed either as to the scope of the offense or the potential punishment. Second, the change must have been applied to the defendant. Third, the change must be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960)). And finally, in the subset of cases where the change increases the potential punishment, the difference must be substantial. All four elements are satisfied here.

a. Nothing in the military judge's cursory bench ruling or the CCA and CAAF decisions supports the notion that, at the time of the offenses at issue here, a person covered by § 6332 would have reasonably understood that *Allen* and *Sloan* were no longer good law or had no bearing on the availability of either a DD or a BCD. The CCA struggled to cobble up an argument that § 6332 did not bar such a sentence. For example, it cited a decades-old article by a professor who "suggested that punitively discharging a retiree was a more appropriate punishment than reduction in rank." Pet. App. 38a & n.24 (citing Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired*

Regulars, Reservists, and Discharged Prisoners, 112 U. Pa. L. Rev. 317, 353 (1964)). A policy preference expressed in an academic journal is scarcely fair warning that *later* CAAF decisions were not good law. Conversely, but equally unavailingly, the CCA also relied on legislation enacted by Congress *after* the charged offenses. Pet. App. 41a n.34. To its credit, the CCA at least acknowledged that "none of the appellant's offenses occurred exclusively after the effective date" of that legislation. *Id*. But the CCA's bits and pieces do not provide anything even remotely approaching a reasonable basis on which to conclude that petitioner had fair warning that CAAF would later find § 6332 no bar to a DD. The CCA made no claim to the contrary.

b. Neither did CAAF. Quite the reverse. It had stood its ground when the government sought to challenge *Allen* in *Sloan*. *See* 35 M.J. at 11, Pet. App. 13a. The *Sloan* court was badly divided, with five judges producing four opinions. Judge Wiss, writing for the court, defended *Allen* as "not, in other words, a decision that is feebly supported." 35 M.J. at 11. "[W]hatever may be the merit of the Government's argument in support of a contrary position, the interests of *stare decisis* in a decision of such recent vintage is [*sic*] more weighty." *Id*. Judge Gierke, concurring in part and dissenting in part, offered that *Allen* "may deserve a second look." 35 M.J. at 14. Chief Judge Sullivan, concurring, was "not adverse to revisiting [it] in a Navy case." *Id*. at 25. Nonetheless, CAAF set aside the part of Sergeant Major Sloan's sentence that violated § 6332. *Id*. at 12. There matters stood at the

time of petitioner's offenses.[5]

c. That *Sloan* was not fair warning of a change in CAAF's understanding of § 6332 is clear not only from the outcome, but also from the court's treatment of the issue in petitioner's case. Having experienced a complete turnover in membership, it took a fresh look and concluded that *Allen* and *Sloan*, which by then were 27 and 26 years old, respectively, were "badly reasoned." Pet. App. 18a. Explicitly overruling them, Pet. App. 4a, 19a, Chief Judge Stucky wrote: "We hold that in § 6332 Congress did not prohibit a court-martial from sentencing a retiree to a punitive discharge or any other available punishment established by the President." Pet. App. 4a. The opinion pulled no punches:

The Government argues that § 6332 does not limit the punishments available at court-martial, which are established by Congress in the UCMJ and by

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[5] In opposing petitioner's request for reconsideration below, the government pointed to a grand total of three cases in which retirees had been punitively discharged or dismissed (the form of punitive separation that applies only to commissioned officers) as part of court-martial sentences. Appellee's Opp. to Motion for Reconsideration, at 3, *United States v. Dinger*. *United States v. Sumrall*, 45 M.J. 207 (C.A.A.F. 2007), is inapposite because it arose in the Air Force, to which § 6332 does not apply. *United States v. Overton*, 24 M.J. 309 (C.M.A. 1987) (Marine Corps), and *United States v. Hooper*, 9 C.M.A. 637, 26 C.M.R. 417 (1958) (Navy), never mention § 6332 and were decided before *Allen* and *Sloan*. *Hooper*, on which the military judge based his determination "for the most part," Record of Trial at 32, is also inapposite because the accused there was a Rear Admiral (*i.e.*, a commissioned officer, 10 U.S.C. § 5501(3)), and § 6332 applies only to enlisted personnel. *See* 10 U.S.C. § 6330(b); *see also* 10 U.S.C. § 5001(a)(4)-(5).

the President under the authority granted to him in Article 67(a), UCMJ, 10 U.S.C. § 856(a). Our decisions in *Allen* and *Sloan* held otherwise.

Pet. App. 15a. CAAF made no claim that the law had been unsettled or that intervening developments dictated a different outcome. It simply decided that its earlier cases had been wrong.

d. In *United States v. Rodgers*, 466 U.S. 475, 484 (1984), this Court noted that fair warning could arise from a split in the circuits. Whether or not the point was well-taken, *see* Trevor W. Morrison, *Fair Warning and the Retroactive Expansion of Federal Criminal Statutes*, 74 So. Cal. L. Rev. 455, 483-89 (2001), petitioner had no such warning because there was no such split. Nor could there have been one, since all decisions of the Navy-Marine Corps CCA—the only one that hears cases involving retirees protected by § 6332, *see* 10 U.S.C. § 866(b)(1)—are subject to direct review only by CAAF. 10 U.S.C. § 867(a). *See also* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE § 4.7, at 256 (10th ed. 2013) ("no conflict with a decision of one of the regional courts of appeals is likely to arise" in CAAF or Fed. Cir. cases). To treat the mere fact that CAAF itself had been divided in *Sloan* as rendering it "reasonably foreseeable" that the court would someday overrule that case and *Allen* would blow a gaping hole in *Bouie* and erode *stare decisis*.

e. The strongest evidence of whether *Allen* and *Sloan* were good law at the time of the offenses and that they meant what petitioner says they meant is what CAAF itself has said. If, as the decision below makes clear, all five judges thought they were good

law until *Dinger* was decided, and that those cases meant that a retiree like Gunnery Sergeant Dinger could not be sentenced to a DD, there can be no plausible claim that he was somehow on notice that they either did not stand for the cited proposition or had lost their authority as precedent of the highest court of the jurisdiction. For this Court to supplant CAAF's own stated understanding of *Allen* and *Sloan* would run counter to *Ortiz* by treating CAAF as something less than a proper court, and trench on its role as "the principal source of authoritative interpretations of the law." S. Rep. No. 98-53, at 33 (1983); *see also* H.R. Rep. No. 98-549, at 17 (1983) ("primary source of judicial authority under" UCMJ). The language quoted in ¶ 2c above therefore conclusively demonstrates that petitioner and others similarly situated[6] were denied fair warning of the changed judicial gloss on § 6332. CAAF also expressly rejected the government's contention that

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[6] CAAF affirmed *United States v. Larrabee*, 2018 CAAF LEXIS 553 (C.A.A.F. 2018) (mem.), "in light of" its decision in the instant case. It summarily rejected a § 6332 contention arising from a third retired Marine's BCD in *United States v. Reynolds*, 2017 CCA LEXIS 282, at *9 (N.-M. Ct. Crim. App. Apr. 27, 2017). We do not know how many of the thousands of other Navy and Marine Corps enlisted retirees are in the same position as petitioner, but retiree courts-martial are far from unheard of. An Army retiree is currently on death row at the U.S. Disciplinary Barracks, Ft. Leavenworth. *See United States v. Hennis*, 77 M.J. 7 (C.A.A.F. 2017). Charges against a retired major general were dismissed earlier this year as barred by the statute of limitations following CAAF's overruling of two more of its own precedents. *See* Todd South, *Citing statute of limitations, military judge dismisses child rape charges against retired Army 2-star,* Army Times, Mar. 27, 2018; *see United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018).

Allen and *Sloan* were inapplicable to punitive discharges. In response to the government's request that it overrule them if it disagreed with the government's position, the court acknowledged that its cases had "not discussed the [e]ffect of § 6332 on adjudged punitive discharges," but pointedly (and correctly) observed that "if the statute's language applies to reductions in grade, there is little reason to believe it does not apply to punitive discharges." Pet. App. 15a. For these reasons, whether or not CAAF was right to overrule *Allen* and *Sloan*, doing so was "unexpected and indefensible by reference to the law which had been expressed prior to" petitioner's offenses, as *Bouie* requires.

e. Adding a DD as a permissible punishment is a significant change in the defendant's exposure. A DD inflicts a stigma beyond that attached to criminal convictions in general. Under the *Manual for Courts-Martial*, a DD comes automatically whenever a death sentence is adjudged. R.C.M. 1004(e). Congress has made the DD (or its officer equivalent, dismissal) a mandatory minimum sentence for a narrow set of heinous sex offenses such as rape, sexual assault, and forcible sodomy, 10 U.S.C. § 856(b), and a permissible sentence for cases in which a sentence of life without parole is authorized. 10 U.S.C. § 856a. It has further provided that, except for the purpose of clemency, neither the discharge review boards nor the boards for correction of military or naval records may disturb a DD. 10 U.S.C. §§ 1552(f), 1553(a).

3. "[A]fter-the-fact switches [are] inherently unfair." *Hanratty v. FAA*, 780 F.2d 33, 35 (Fed. Cir. 1985). Under *Bouie*, they are also unconstitutional when there is no fair warning. Some constitutional

principles, such as the reasonable expectation of privacy, *e.g., United States v. Bowersox*, 72 M.J. 71, 76 (C.A.A.F. 2013), or freedom of speech, *e.g.*, 10 U.S.C. § 888 (criminalizing certain contemptuous speech), may operate differently in the military, *see United States v. Easton*, 71 M.J. 168, 174-75 (C.A.A.F. 2012), as a "specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). This is also true of due process. *Weiss*, 510 U.S. at 177. But where, as here, fair warning through judicial interpretation is the issue, there is no "balance struck by Congress" to overcome and the usual constitutional standards apply.[7] Retired gunnery sergeants gain many skills over the course of their military careers, but they are no more endowed with the gift of clairvoyance than were the *Bouie* petitioners. Nor is what constitutes fair warning one of those arcane questions of military law as to which CAAF is entitled to deference. *See Middendorf v. Henry*, 425 U.S. 25, 43 (1976). While its new interpretation "is valid for the future, it may not be applied retroactively." *Bouie*, 378 U.S. at 362.

4. "It is in fact one of the glories of this country that the military justice system is so deeply rooted in the rule of law." *Ortiz*, 138 S. Ct. at 2176 n.5. CAAF has done its share since 1951 to carry forward that tradition and has recognized its duty in that regard. *E.g., Mangahas*, 77 M.J. at 223 ("This

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[7] "The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174 (citing 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1–7, at 50 (9th ed. 2015)).

Court is 'generally not free to "digress" from applicable Supreme Court precedent' on matters of constitutional law," citing *United States v. Witham*, 47 M.J. 297, 300 (C.A.A.F. 1997)). But more is required than the lip service CAAF paid to *Bouie* when Gunnery Sergeant Dinger called its attention to the obvious due process problem in its decision.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed to the extent that it affirmed petitioner's DD. In the alternative, the Court should grant, vacate and remand to afford CAAF a further opportunity to explain how he had fair warning of its new interpretation of the effect of § 6332.

Respectfully submitted.

Eugene R. Fidell
Counsel of Record
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Suite 400
Washington, DC 20036
(202) 256-8675
efidell@ftlf.com

Captain Bree A. Ermentrout, JAGC, USN
Appellate Defense Division
Navy-Marine Corps Appellate
Review Activity
Washington Navy Yard, DC 20374
(202) 685-7290
bree.ermentrout@navy.mil

Counsel for Petitioner

October 5, 2018

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

October 16, 2017

No. 17-0510/MC

United States v. Derrick L. Dinger

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is ordered that said petition is hereby granted on the following issue:

10 U.S.C. § 6332 STATES THAT WHEN A PERSON IS PLACED IN A RETIRED STATUS, THIS "TRANSFER IS CONCLUSIVE FOR ALL PURPOSES." CAN A COURT-MARTIAL LAWFULLY SENTENCE A RETIREE TO A PUNITIVE DISCHARGE?

Briefs will be filed under Rule 25.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

April 5, 2018, Argued; June 18, 2018, Decided

No. 17-0510

UNITED STATES, Appellee

v.

Derrick L. DINGER, Gunnery Sergeant (Ret.), United States Marine Corps, Appellant

Counsel: For Appellant: Captain Bree A. Ermentrout, JAGC, USN (argued).

For Appellee: Captain Brian L. Ferrell, USMC (argued); Colonel Valerie C. Danyluk, USMC, Major Kelli A. O'Neil, USMC, and Brian Keller, Esq. (on brief).

Judges: Chief Judge STUCKY delivered the opinion of the Court, in which Judges RYAN, OHLSON, SPARKS, and MAGGS, joined.

Chief Judge STUCKY delivered the opinion of the Court.[1]

Appellant, a retiree, was convicted by a general court-martial. His approved sentence includes a

[1] We heard oral argument in this case at Fort Hood, Killeen, Texas, as part of the Court's Project Outreach. This practice was developed as a public awareness program to demonstrate the operation of a federal court of appeals and the military justice system.

dishonorable discharge. We granted review to determine whether such a sentence is prohibited for a Marine Corps retiree by 10 U.S.C. § 6332 (2012). We hold that a court-martial is not prohibited from adjudging a punitive discharge in the case of such a retiree and, to the extent our precedents suggest otherwise, they are overruled.

I. Background

Appellant served on active duty in the United States Marine Corps from July 18, 1983, until October 31, 2003. He transferred to the Fleet Marine Corps Reserve on November 1, 2003, and then to the active duty retired list on August 1, 2013. In June 2015, the Secretary of the Navy authorized the Commander, Marine Corps Installations National Capital Region, to apprehend and confine Appellant and to exercise general court-martial convening authority in Appellant's case.

Before entering his pleas, Appellant argued, apparently in a Rule for Courts-Martial (R.C.M.) 802 conference, that the maximum sentence that could be adjudged in his case did not include a punitive discharge. The military judge rejected that argument on the record.

As part of a plea agreement, Appellant agreed to plead guilty to (1) two specifications of indecent acts, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Supp. II 2008); (2) one specification each of wrongfully possessing and wrongfully receiving and viewing child pornography; (3) one specification of attempting to employ and use a minor for producing child pornog-

raphy;[2] and (4) two specifications of recording images of the private areas of his stepdaughter and wife. Article 120, 134, 80, 120c, UCMJ, 10 U.S.C. §§ 920, 934, 880, 920c (2012). He also agreed (1) to waive certain discrete motions and (2) that the convening authority could approve a punitive discharge if adjudged. In exchange, the convening authority agreed to withdraw certain specifications and suspend all confinement in excess of ninety-six months for the period of confinement plus twelve months.

During the plea inquiry, the military judge specifically asked Appellant: "Do you still wish to plead guilty in light of the fact that I believe a punitive discharge is authorized?" Appellant answered: "Yes, sir." The military judge accepted Appellant's guilty plea, found him guilty, and sentenced him to a dishonorable discharge and confinement for nine years.[3] Pursuant to the plea agreement, the convening authority suspended all confinement in excess of ninety-six months and waived for six months the automatic forfeitures but otherwise approved the sentence. After considering the same issue upon which we granted review, the United States Navy-Marine Corps Court of Crimi-

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[2] This specification was merged with wrongfully possessing child pornography.

[3] None of the offenses of which he was convicted were subject to the mandatory minimum sentences made applicable to some offenses by the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705(a)(1), (2)(A), 127 Stat. 672, 959 (2013), or the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301(a), § 5542(a), 130 Stat. 2000, 2919, 2967 (2016).

nal Appeals (CCA) affirmed the findings and approved sentence. *United States v. Dinger*, 76 M.J. 552, 559 (N-M. Ct. Crim. App. 2017).

II. The Law

The issue presented has its origins in the Naval Reserve Act of 1938, Pub. L. No. 75-732, 52 Stat. 1175 (1938). Title I of the statute—entitled "Dissolution of Existing Reserve and Organization of New Reserve"—abolished the Naval Reserve and Marine Corps Reserve as established under previous provisions of law and created a new Naval Reserve and a new Marine Corps Reserve. *Id.* § 1, 52 Stat. at 1175. It provided for the establishment of the Fleet Reserve to which enlisted men were transferred after retirement until they completed thirty years of service, at which time they could, at their own request, be transferred to the honorary retired list with pay. Persons so transferred:

> shall at all times be subject to the laws, regulations, and orders for the government of the Navy, and shall not be discharged therefrom prior to the expiration of their term of service, without their consent, except by sentence of a court martial, or, in the discretion of the Secretary of the Navy, when sentenced by civil authorities to confinement in a State or Federal penitentiary as a result of a conviction for a felony.

Id. § 6, 52 Stat. at 1176.

In Title II—entitled "Fleet Reserve"—the Act stated:

> For all purposes of this Act a complete enlistment during minority shall be counted as four years' service and any enlistment terminated within three months prior to the expiration of the term of such enlistment shall be counted as the full term of service for which enlisted; *Provided*, That all transfers from the Regular Navy to the Fleet Naval Reserve or to the Fleet Reserve, and all transfers of members of the Fleet Naval Reserve or the Fleet Reserve to the retired list of the Regular Navy, heretofore or hereafter made by the Secretary of the Navy, shall be conclusive for all purposes, and all members so transferred shall, from the date of transfer, be entitled to pay and allowances, in accordance with their ranks or ratings and length of service as determined by the Secretary of the Navy: *Provided further*, That the Secretary of the Navy, upon discovery of any error or omission in the service, rank, or rating for transfer or retirement, is authorized to correct the same and upon such correction the person so transferred or retired shall be entitled to pay and allowances, in accordance with his rank or rating and length of service as determined by the Secretary of the Navy.

Id. § 202, 52 Stat. at 1178.

Two years after enactment of the 1938 legislation, the Comptroller General was asked to render an opinion on the Act's effect on retainer pay for members of the Fleet Reserve *recalled to active duty*, who had been reduced in grade by a summary court-martial. 20 Comp. Gen. 76 (1940). The Comptroller General ruled that "[i]n the absence of clear and definite language a court-martial sentence imposing a reduction in grade or a forfeiture in pay will be interpreted as applicable only to the period the man is on active duty." *Id.* at 78.

Congress repealed the Naval Reserve Act of 1938 in 1952, except for Title II and parts of Title III. Armed Forces Reserve Act of 1952, Pub. L. No. 82-476, § 803, 66 Stat. 505, 505 (1952). Thus, the provision in Title I, § 6, stating that members of the Fleet Reserve and retirees were subject to the laws and rules for the government of the Navy and could not be discharged except by sentence of court-martial, was deleted. The "unrepealed provisions of the Naval Reserve Act of 1938, as amended," were to continue to apply to the Marine Corps as well as the Navy. *Id.* § 803, 66 Stat. at 505. Therefore, Title II, § 202, of the 1938 act, concerning the conclusive nature of the transfer to the retired list, remained in effect.

In 1956, that provision, in a different form, was moved from Title 34, which at the time covered United States Navy matters, to Title 10 of the United States Code—Armed Forces—Chapter 571, entitled "Voluntary Retirement," covering Navy and Marine Corps personnel. Act of Aug. 10, 1956, ch. 571, 70A Stat. 1, 393 (1956). It currently reads:

When a member of the naval service is transferred by the Secretary of the Navy—

(1) to the Fleet Reserve;

(2) to the Fleet Marine Corps Reserve;

(3) from the Fleet Reserve to the retired list of the Regular Navy or the Retired Reserve; or

(4) [f]rom the Fleet Marine Corps Reserve to the retired list of the Regular Marine Corps or the Retired Reserve;

the transfer is conclusive for all purposes. Each member so transferred is entitled, when not on active duty, to retainer pay or retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by the Secretary. The Secretary may correct any error or omission in his determination as to a member's grade and years of creditable service. When such a correction is made, the member is entitled, when not on active duty, to retainer pay or retired pay in accordance with his grade and number of years of creditable service, as corrected, from the date of transfer.

10 U.S.C. § 6332 (2012) (emphasis added).

This Court first considered that statute in *United States v. Allen*, a case in which a retired Navy E-8 was convicted, inter alia, of espionage on behalf of the Republic of the Philippines under both Article 106a, UCMJ, 10 U.S.C. § 906a, and 18 U.S.C. 793(d), as a crime or offense not capital under Article 134, 10 U.S.C. § 934. 33 M.J. 209, 210 (C.M.A. 1991). His offenses occurred while he was in retired status. *United States v. Allen*, 28 M.J.

610, 611 (N.M.C.M.R. 1989). The court-martial sentenced him to confinement for eight years and to pay a fine of $10,000. 33 M.J. at 210. The convening authority approved the sentence and the appellant was administratively reduced to the lowest enlisted grade pursuant to Article 58a, UCMJ, 10 U.S.C. § 858a, which required that an enlisted person sentenced to confinement be reduced to the grade of E-1 unless the Secretary concerned had promulgated a regulation to the contrary. *Id.* at 210 & n.2. Apparently no such regulation was in effect in the Navy at the time of the appellant's court-martial.

As a result of his conviction for violating the Federal Espionage Act, 18 U.S.C. § 793(d), Allen's retirement pay became subject to forfeiture under 5 U.S.C. § 8312.[4] 33 M.J. at 215. Within one week of the announcement of the sentence, Navy officials took action to terminate his pay. *Id.* Allen argued that this action was premature as his conviction was not final, and that his pay grade could not be reduced by operation of law. *Id.* at 215-16. The Court of Military Appeals agreed that the Navy's termination of his retired pay was premature but proclaimed it was powerless to correct the pay issue under Article 67, UCMJ, 10 U.S.C. § 867. *Id.* at 215.

In analyzing whether Allen could be reduced by operation of law, the Court of Military Appeals relied heavily on a law review article that discussed the power of courts-martial over retirees and reservists:

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[4] This statute provides that individuals convicted of certain enumerated national security offenses under the UCMJ or federal civilian statutes, including espionage, may not be paid retired pay. 5 U.S.C. § 8312(a)-(c) (2012).

> Professor Bishop concluded that forfeiture of pay (and by analogy reduction) was not necessary to satisfy the military interests in those cases. Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. Pa. L. Rev. 317, 356-57 (1964). This is consistent with the long-standing proposition that a transfer of a servicemember to the retired list is conclusive in all aspects as to grade and rate of pay based on his years of service." 10 U.S.C. § 6332. Further, the Comptroller General has held that a member of the Fleet Reserve (legally, an almost identical status) who was court-martialed during a period of active duty and reduced in rating was to be paid at the higher rate once he returned to inactive duty. B—10520, 20 Comp. Gen. 76, 78 (1940); *see also* A—32599, 10 Comp. Gen. 37 (1930). From this we conclude that, because appellant was tried as a retired member, he could not be reduced for these offenses either by the court-martial or by operation of Article 58a.

Id. at 216. The Court set aside that portion of the convening authority's action administratively reducing the appellant to the lowest enlisted grade.[5]

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[5] Where the sentence is illegal, it would normally make sense to send the case back for a rehearing in which the court-martial would be on notice of the correct maximum punishment.

Id. at 217. Senior Judge Everett concurred but wanted to "qualify some of the majority's language," concluding that "the effects of our decision on the accused's military pay can best be determined in the United States Claims Court." *Id.* at 217 (Everett, S.J., concurring).

The following year, Senior Judge Everett retired and three new judges were appointed to an enhanced five-judge Court. The Court reviewed a case of an Army retiree. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992). Based on his guilty pleas, the appellant had been convicted of carnal knowledge and indecent acts, all of which were committed before he retired from active duty. *Id.* at 5. He was sentenced to a BCD, confinement for three years, and reduction to E-1. *Id.* Pursuant to a plea agreement, the convening authority approved the sentence, except for the BCD. *Id.* The Court specified the *Allen* issue. *Id.*

The Government asked the Court to overrule *Allen*. *Id.* at 11. It further contended that the statute on which *Allen* was based was limited to Navy retirees and that Congress had not enacted a similar statute for the Army. *Id.*

In the opinion of the Court, Judge Wiss declined to discuss how the Navy statute could apply to Army personnel, other than to assert that the Court's decision in *Allen* did not depend solely upon

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But in *Allen*, the court-martial did not adjudge an illegal sentence. The sentence became illegal only because, in the absence of any regulation to the contrary, Article 58a required the reduction in grade. Thus, there was no reason to send it back for a new sentencing hearing.

10 U.S.C. § 6332, as "there are other sound underpinnings of that decision." *Id.* (citing 5 U.S.C. § 8312). The Court concluded that *Allen* was not "feebly supported," and set aside the reduction in grade. *Id.* at 12

Chief Judge Sullivan concurred. He thought "that, as a matter of constitutional law and codal intent," retirees from the different services should be treated similarly, but was willing to reconsider *Allen* in a Navy case. *Id.* (Sullivan, C.J., concurring).

Judge Gierke, along with Judge Crawford, disagreed. First, *Allen* was based on a statute, 10 U.S.C. § 6332, that applied only to members of the naval service. *Id.* at 13 (Gierke, J., concurring in part and dissenting in part); *see id.* (Crawford, J., concurring with reservations and dissenting in part). "Furthermore, the *Allen* case involved an 'administrative' reduction pursuant to Article 58a, whereas appellant's case involves a reduction in grade imposed as punishment by a court-martial." *Id.* at 13 (Gierke, J., concurring in part and dissenting in part). Judge Gierke also criticized the majority's conclusion that 5 U.S.C. § 8312 supported its position by "protect[ing] retired pay from being diminished by a court-martial sentence," except for specified offenses. *Id.* at 14. Judges Gierke and Crawford correctly understood § 8312 to actually support the opposite conclusion: the statute "mandates termination of retired pay upon conviction of certain offenses, even if the sentence does not include dismissal or punitive discharge. Furthermore, termination of retired pay occurs upon con-

viction rather than, as under the UCMJ, upon completion of appellate review." *Id.* Judge Gierke also suggested that the Court revisit *Allen*. *Id.*

III. Discussion

Whether, as a result of a court-martial conviction, Appellant is subject to a punitive discharge is a question of law we review *de novo*. *See United States v. Busch*, 75 M.J. 87, 92 (C.A.A.F. 2016).

The Government asserts that, by entering an unconditional guilty plea pursuant to a plea agreement that authorized the convening authority to approve a punitive discharge if adjudged, and specifically agreeing to plead guilty despite the military judge's ruling on the maximum punishment, Appellant voluntarily waived his right to appeal the dishonorable discharge. We disagree.

Although an accused may waive many of the most fundamental constitutional rights, he "does not waive his right to appeal a sentence that is unlawful because it exceeds the statutory maximum." *United States v. Guillen*, 561 F.3d 527, 531, 385 U.S. App. D.C. 216 (D.C. Cir. 2009); *see United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014) (concluding there is no waiver "where on the face of the record the court had no power to ... impose the sentence." (citation omitted) (internal quotation marks omitted)). If § 6332 prohibits retirees from being sentenced to a punitive discharge, Appellant's sentence would be unlawful.

Appellant contends that if § 6332 prohibited Allen and Sloan from being reduced in grade then it

surely precludes him from being sentenced to a punitive discharge. The Government argues that § 6332 does not limit the punishments available at court-martial, which are established by Congress in the UCMJ and by the President under the authority granted to him in Article 56(a), UCMJ, 10 U.S.C. § 856(a). Our decisions in *Allen* and *Sloan* held otherwise. In those cases we concluded that, in light of § 6332, 5 U.S.C. § 8312, and 20 Comp. Gen. 76 (1940), a retiree "could not be reduced [in grade] either by the court-martial or by operation of Article 58a." *Allen*, 33 M.J. at 216; *see Sloan*, 35 M.J. at 11-12.

The Government asserts that *Allen* and *Sloan* are not applicable because those cases involved reductions in grade, not punitive discharges. If we disagree, the Government asks that we overrule those precedents. Our precedents have not discussed the affect [*sic*] of § 6332 on adjudged punitive discharges. But if the statute's language applies to reductions in grade, there is little reason to believe it does not apply to punitive discharges.

When asked to overrule one of our precedents, we analyze the matter under the doctrine of stare decisis. *United States v. Blanks*, 77 M.J. 239, 240-41 (C.A.A.F. 2018). Stare decisis is a principle of decision-making, under which a court follows earlier judicial decisions when the same issue arises in other cases. *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); *Black's Law Dictionary* 1626 (10th ed. 2014). "Although the doctrine of stare decisis is of fundamental importance to the rule of law, our precedents are not sacrosanct. We have overruled prior decisions where the necessity and propriety of doing so has

been established." *Hurst v. Florida*, 136 S. Ct. 616, 623, 193 L. Ed. 2d 504 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), and *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (alterations in original omitted) (citation omitted) (internal quotation marks omitted)). This is such a case.

In evaluating the application of stare decisis, we consider: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *United States v. Andrews*, __ M.J. __, __, 2018 CAAF LEXIS 294 (C.A.A.F. 2018) (citation omitted) (internal quotation marks omitted).

Appellant argues that the language of 10 U.S.C. § 6332 "plainly states that a retiree's status on the retired list is 'conclusive for all purposes.'" "If a retiree's status is conclusive for *all* purposes, it follows that the court-martial lacks the legal authority to award punishments inconsistent with the retiree's status as it would contradict a federal statute."

Appellant seems to consider the word "conclusive," as used in § 6332 to mean permanent, final, or immutable. It does not. It means "[a]uthoritative; decisive; convincing." *Black's Law Dictionary* 351 (10th ed. 2014). Although § 6332, like the UCMJ, is part of Title 10, entitled "Armed Forces," it is not part of the integrated UCMJ, nor does it mention the UCMJ, courts-martial, or sentences adjudged at courts-martial. The plain language of the statute does not purport in any way to limit the

authority of a court-martial to impose any authorized sentence.

The Constitution grants Congress the authority to establish the "'regulations, procedures, and remedies related to military discipline.'" *Weiss v. United States*, 510 U.S. 163, 177, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)); U.S. Const. art. I, § 8, cl. 14. Congress exercised that authority by enacting the UCMJ "'an integrated system of investigation, trial, and appeal.'" *United States v. Muwwakkil*, 74 M.J. 187, 195 (C.A.A.F. 2015) (quoting *United States v. Dowty*, 48 M.J. 102, 106 (1998)).

"Retired members of a regular component of the armed forces who are entitled to pay" are subject to the UCMJ and, therefore, trial by court-martial. Article 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4) (2012); *Pearson v. Bloss*, 28 M.J. 376, 380 (C.M.A. 1989). A general court-martial "may adjudge any punishment not forbidden by" the UCMJ. Article 18(a), UCMJ, 10 U.S.C. § 818(a) (2012). "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 56(a), UCMJ. The President has decreed in R.C.M. 1003(a) that: "Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial." The President has not limited the punishments that may be adjudged against retirees.

Allen and *Sloan* are badly reasoned. The UCMJ is a self-contained statute that both defines criminal offenses and promulgates the procedures by which those offenses are to be prosecuted and adjudicated. In it, Congress specifically provided for the court-martial of "[r]etired members of a regular component of the armed forces who are entitled to pay." Article 2(a)(4), UCMJ. Congress also established mandatory sentences for some offenses (Article 106, UCMJ, 10 U.S.C. § 906 (2012)), and minimum punishments for others (Article 118(1)-(4), UCMJ, 10 U.S.C. § 918(1)-(4) (2012)), and authorized the President to set the maximum punishments for the remainder. Article 56, UCMJ. Had Congress intended to restrict the court-martial sentences adjudged in retiree cases, and particularly to abandon the principle of uniformity of treatment so essential to the UCMJ, one would expect it to have done so explicitly in either Article 2 or Article 56 of the UCMJ, not in some other statutory provision with no reference to its applicability to courts-martial. Congress has not done so.[6]

We have considered the other factors affecting our application of stare decisis and concluded that they do not save *Allen* and *Sloan* from being over-

[6] This analysis is consistent with application of the canon of statutory interpretation that if there is a conflict between a general provision and a specific provision, the specific provision prevails. *Edmond v. United States*, 520 U.S. 651, 657, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997); *United States v. Yarbrough*, 55 M.J. 353, 356 (C.A.A.F. 2001). The UCMJ, which authorizes the court-martial of retired military members and does not limit punishments to which a retiree may be sentenced, is the more specific provision.

ruled. We hold that in § 6332 Congress did not prohibit a court-martial from sentencing a retiree to a punitive discharge or any other available punishment established by the President.

IV. Conclusion

Insofar as *Allen* and *Sloan* support a different outcome, they are overruled. Although a court-martial is not prohibited from sentencing a retiree to a punitive discharge or any other authorized punishment, the collateral effect of such a sentence on a retiree is a different question that is not within the scope of our review. Congress saw fit to give jurisdiction over pay claims and related matters to other federal courts, and it is to them that such questions should be directed.

V. Judgment

The judgment of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

August 2, 2018

No. 17-0510/MC

United States v. Derrick L. Dinger

On consideration of the petition for reconsideration of this Court's decision, *United States v. Dinger*, 77 M.J 447 (C.A.A.F. 2018), Appellant's motion to submit a corrected petition for reconsideration, and in light of *Bouie v. City of Columbia*, 378 U.S. 347 (1964), it is ordered that [the] motion to file a corrected petition for reconsideration is granted, and the petition for reconsideration is denied.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States, Appellee

v.

Derrick L. Dinger, Appellant

USCA Dkt. No. 17-0510/MC
Crim. App. No. 201600108

JUDGMENT

MANDATE
Pursuant to Court Rule 43A
ISSUED: 08/09/2018
By: D.A. Anderson
OPINION ATTACHED

This cause came before the Court on appeal from the United States Navy-Marine Corps Court of Criminal Appeals and was argued by counsel on April 5, 2018. On consideration thereof, it is, by the Court, this 18th day of June, 2018,

ORDERED and ADJUDGED:

The judgment of the United States Navy-Marine Corps Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court,

/s/ Michael R. Perlak
Clerk of the Court

UNITED STATES COURT
OF APPEALS FOR THE
ARMED FORCES

CERTIFIED TO BE
A TRUE COPY
OF THE JUDGMENT

Michael R. Perlak
CLERK

Appendix E

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
March 28, 2017, Decided
No. 201600108

UNITED STATES OF AMERICA, Appellee
v.
DEREK L. DINGER, Gunnery Sergeant (E-7),
U.S. Marine Corps (Retired), Appellant

Counsel: For Appellant: Captain Bree A. Ermentrout, JAGC, USN.

For Appellee: Major Tracey L. Holtshirley, USMC; Lieutenant Taurean Brown, JAGC, USN; Lieutenant Robert J. Miller, JAGC, USN.

Judges: Before GLASER-ALLEN, RUGH, and HUTCHISON, Appellate Military Judges. Chief Judge GLASER-ALLEN and Judge HUTCHISON concur.

RUGH, Judge:

A military judge sitting as a general court-martial convicted the appellant pursuant to his pleas of two specifications of committing indecent acts, one specification of attempting to produce child pornography, two specifications of wrongfully making an indecent visual recording, and one specification of receiving, viewing, and possessing child pornography, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2006),

and Articles 80, 120c, and 134, UCMJ, 10 U.S.C. §§ 880, 920c, and 934 (2012). The military judge sentenced the appellant to nine years' confinement and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but suspended all confinement over 96 months pursuant to a pretrial agreement.

The appellant now asserts two assignments of error (AOE): (1) that his court-martial lacked personal jurisdiction over him in light of the U.S. Supreme Court's holding in *Barker v. Kansas*, 503 U.S. 594, 605, 112 S. Ct. 1619, 118 L. Ed. 2d 243 (1992), that for tax purposes, military retirement benefits are not current compensation for reduced services; and (2) that Congress' statement in 10 U.S.C. § 6332 that the transfer of a member of the naval service to a retired status "is conclusive for all purposes" precludes the issuance of a punitive discharge to a retiree.[1]

Having carefully considered the record of trial, the pleadings, and oral argument, heard on 15 February 2017 at the George Washington University School of Law, we disagree and affirm the findings and sentence as approved by the CA.

I. BACKGROUND

From 1 November 2003 to 1 August 2013, following his service on active duty in the Marine Corps, the appellant was a member of the Fleet Marine

[1] This court restyled the AOEs from the appellant's brief. Oral Argument Order of 5 Dec 2016.

Corps Reserve List ("Fleet Marine Reserve").[2] He was then transferred to the active duty retired list ("retired list").[3] He received retirement benefits after transferring to the Fleet Marine Reserve.

Of the offenses to which the appellant pleaded guilty, two were committed solely while he was a member of the Fleet Marine Reserve[4] and one was committed solely after his transfer to the retired

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[2] An enlisted member of the Marine Corps may, after 20 years of active duty, elect transfer to Fleet Marine Reserve. 10 U.S.C. § 6330(b). In this status the member receives "retainer pay" based primarily on years of active duty service. *Id.* § (c)(1). After 30 total years, the member is transferred "to the retired list of the . . . regular Marine Corps" and receives "retired pay" at "the same rate as the retainer pay[.]" 10 U.S.C. § 6331(a), (c).

[3] We will refer generally to Fleet Marine Reserve and retired list membership as "retired status," as military courts have treated the two statuses interchangeably for purposes of court-martial jurisdiction. *See, e.g., Pearson v. Bloss*, 28 M.J. 376, 379-80 (C.M.A. 1989) (treating a member of the Air Force "Retired Reserve" as a retiree because "[w]hile there still may be some difference between the obligations of these service groups . . . their common pay entitlement, access to military bases and services, and general duty obligations strongly support" treating both as "part of the armed forces for purposes of court-martial jurisdiction") (citations and internal quotation marks omitted). Since personnel in either status are subject to similar obligations, we too find no grounds to distinguish between the two categories with respect to the jurisdiction of a court-martial.

[4] Charge I, Specifications 1 and 2, alleging separate instances of indecent conduct committed by the appellant against his daughter and stepdaughter between on or about January 2011 and on or about January 2012.

list.[5] The remaining offenses were committed on divers occasions,[6] overlapping the dates he was a member of the Fleet Marine Reserve and on the retired list.[7] The appellant committed each of the offenses in Okinawa, Japan, where he and his family lived.

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[5] Additional Charge II, Specification 2, alleging that the appellant made indecent recordings of his wife without her consent between on or about 1 June 2014 and on or about 31 June 2014.

[6] *See* Record at 101; Appellate Exhibit XI (the consolidated Charge II, Specification 1, alleging that between on or about 11 October 2012 and on or about 4 September 2014, the appellant received, possessed, and viewed child pornography images and videos); Record at 59, 73-80 (Additional Charge I and its sole specification, alleging that the appellant between on or about 11 October 2012 and on or about 4 September 2014, attempted to produce child pornography; and Additional Charge II, Specification 1, alleging that between on or about 11 October 2012 and on or about 4 September 2014, the appellant made indecent recordings of his stepdaughter). The latter specifications were merged for sentencing. *Id.* at 86, 101-02.

[7] We note that the consolidated specification of Charge II, the specification of Additional Charge I, and Specifications 1 and 2 of Additional Charge II erroneously describe the appellant as having exclusively been "on the active duty retired list" through his commission of the offenses. Per our discussion *supra* at note 3, the appellant was equally amenable to court-martial jurisdiction whether as a Fleet Marine Reserve member or on the retired list. As a result, we find no prejudice from this error, and we correct the specifications in our decretal paragraph.

Based on a Naval Criminal Investigative Service investigation, the Secretary of the Navy, per Department of the Navy policy,[8] specifically authorized the CA "to apprehend, confine, and exercise general court-martial convening authority" over the appellant while he remained in a retired status.[9] At the appellant's court-martial, the military judge held, over trial defense counsel's objection, "that a punitive discharge is an authorized punishment" for the appellant.[10]

II. DISCUSSION

A. Court-martial jurisdiction over those in a retired status

Jurisdiction is a legal question we review *de novo*. *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006).

By act of Congress, the appellant was subject to the UCMJ when he committed the offenses. Art. 2(a), UCMJ ("The following persons are subject to this chapter . . . . Retired members of a regular component of the armed forces who are entitled to pay. . . . [and] Members of the Fleet Reserve and Fleet Marine Corps Reserve."). Congress has continually

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[8] Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F § 0123a.(1) (26 Jun 2012).

[9] Appellate Exhibit III.

[10] Record at 31.

subjected some Naval retirees to court-martial jurisdiction since long before enactment of the UCMJ.[11]

The Supreme Court first tacitly recognized the power of Congress to authorize court-martial jurisdiction in *United States v. Tyler*, when it held that Tyler, who was retired, should benefit from a Congressionally-authorized military pay increase because, among other reasons, Congress had subjected Tyler "to the . . . [A]rticles of [W]ar" and "a military court-martial[] for any breach of those rules[.]" 105 U.S. 244, 244-46, 26 L. Ed. 985, 17 Ct. Cl. 437 (1882). The Court explained that because Tyler's "retirement from active service" came with "compensation . . . continued at a reduced rate, and

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[11] *See, e.g.* Act of Aug. 3, 1861, Ch. 42, 12 Stat 287 (1861) (enacting that "retired officers shall be entitled to wear the uniform of their respective grades, shall continue to be borne upon the navy register, shall be subject to the rules and articles governing the Navy, and to trial by general court-martial.")In contrast, Congress has disclaimed broad court-martial jurisdiction over retired members of the Naval Reserve. *Compare* Naval Reserve Act of 1938, ch. 690, 52 Stat. 1175, 1176 ("[M]embers of the Fleet Reserve and officers and enlisted men . . . transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay . . . shall *at all times* be subject to the laws, regulations, and orders for the government of the Navy and shall not be discharged . . . without their consent, except by *sentence of a court martial*[.]") (emphasis added), *with* Act of May 5, 1950, Ch. 169, 64 Stat. 107, 109 (subjecting "[r]etired personnel of a reserve component" to the UCMJ only if "receiving hospitalization from an armed force), *and* S. Rep. No. 81-486, at 7 (1949) (describing the UCMJ as "a lessening of jurisdiction over retired personnel of a Reserve component" since "existing law" gave "jurisdiction over retired Reserve personnel").

the connection" between Tyler and the government thus "continue[d]." *Id.* at 245. Later courts have cited *Tyler* for the proposition that receipt of retirement pay is one reason Congress may constitutionally authorize courts-martial of those in a retired status.[12]

However, three developments have undermined this rationale for court-martial jurisdiction. First, the Supreme Court held that this theory did not justify trial by court-martial of military dependents. *Reid v. Covert*, 354 U.S. 1, 19-20, 23, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (denying court-martial jurisdiction over "civilian wives, children and other dependents" stationed overseas, even though "*they may be* accompanying a serviceman abroad *at Government expense* and *receiving other benefits from the Government*.") (emphasis added). Second, in 1992 the Supreme Court decided in *Barker* that at least for tax purposes, "military retirement benefits are to be considered deferred pay for past services" instead of "current compensation" to retirees "for reduced current services." 503 U.S. at 605. Third, recent decisions have allowed courts-martial of former members of the active duty military who, rather than separating, remain in the Active Re-

[12] *See, e.g. United States v. Hooper*, 9 C.M.A. 637, 26 C.M.R. 417, 425 (C.M.A. 1958) (allowing the court-martial of a retired admiral for offenses he committed while in a retired status in part because "[o]fficers on the retired list" continue to "receive[] a salary"); *Hooper v. United States*, 326 F.2d 982, 987, 164 Ct. Cl. 151 (Ct. Cl. 1964) (holding in a review of a suit brought by the accused in *United States v. Hooper, supra*, that "jurisdiction by military tribunal" over the appellant was "constitutionally valid," because "the salary he received was not solely recompense for past services").

serves or the Individual Ready Reserve in a "nonduty, nonpay status"[13] (albeit only for offenses previously committed on active duty).[14]

From these developments it is clear that the receipt of retired pay is neither wholly necessary, nor solely sufficient, to justify court-martial jurisdiction. As a result, we must call upon first principles to assess the jurisdiction of courts-martial over those in a retired status.

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[13] *United States v. Nettles*, 74 M.J. 289, 290, 292-93 (C.A.A.F. 2015) (noting that the convening authority had ordered the appellant from the "Individual Ready Reserve" to "active duty for [court-martial] proceedings," and then "allowed him to return to a nonduty, nonpay status"); *see also Lawrence v. Maksym*, 58 M.J. 808, 814 (N-M. Ct. Crim. App. 2003) (denying application for extraordinary writ by "the inactive reserve petitioner" because he "is subject to court-martial jurisdiction under Articles 2 and 3[, UCMJ] for offenses alleged to have been committed while on reserve active duty"). *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22, 76 S. Ct. 1, 100 L. Ed. 8 (1955) (denying court-martial jurisdiction over crimes allegedly committed while Toth was on active duty, because he was prosecuted while an "ex-servicem[a]n" already "wholly separated from the service").

[14] These members must be recalled to active duty for court-martial proceedings, while those in a retired status like the appellant, by contrast, need not be recalled to active duty as a prerequisite to prosecution at court-martial. *See United States v. Morris*, 54 M.J. 898, 900 (N-M. Ct. Crim. App. 2001) ("If a member of the Fleet Marine Corps Reserve needed to be ordered to active duty to be subject to the jurisdiction of a court-martial, there would be no need to separately list members of the Fleet Marine Corps Reserve as being persons subject to the UCMJ.").

The Constitution allows "Congress to authorize military trial of *members* of the armed services[.]"[15] *Reid*, 354 U.S. at 19 (emphasis added). The Constitution requires a close relationship between those subject to court-martial and the military establishment,[16] because:

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction . . . and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

Id. Those subject to trial by court-martial lose some procedural rights guaranteed ordinary citizens.[17] They are also subject to prosecution for acts or

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[15] There are other theories of jurisdiction which are not generally applicable to those in a retired status, and thus outside the scope of this opinion. *E.g.* Art. 2(a)(10), UCMJ (claim over those "serving with or accompanying an armed force in the field").

[16] *See Reid*, 354 U.S. at 30 ("The Constitution does not say that Congress can regulate . . . 'all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.'").

[17] For instance, there is "no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen," all of which are guarantees in civilian trials by jury. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004).

speech otherwise protected from civilian prosecution by the Constitution.[18]

That said, "judicial deference" is "at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged,"[19] and the Court has correspondingly acknowledged that Congress could define "a person [as] 'in' the armed services" and subject to court-martial jurisdiction "even [if] he [or she]. . . did not wear a uniform"— indeed, even if he or she had only

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[18] *E.g.* Art. 88, UCMJ (prohibiting "contemptuous words" against some public officials). For an historical example of a retiree court-martialed for such conduct, *see Closson v. United States*, 7 App. D.C. 460, 470-71 (D.C. Cir. 1896) (considering petition of a retired Army officer charged at court-martial for an "intemperate and improper letter written . . . to the general commanding the army"). And note, that even the potential for such prosecutions can have a chilling effect on the behavior of those in a retired status. *See UCMJ: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed* Services, 81st Cong. 706-07 (1949) (statement of Col. Melvin J. Maas, President, Marine Corps Reserve Association) (recounting how after a military retiree had published an article critical of the War Department, an official warned the retiree against "mak[ing] any public statement[,] under penalty of being court-martialed and losing his retired pay"); *UCMJ: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Services*, 81st Cong. 99 (1949) (statement of Col. Maas) ("You certainly ought not to put the retired military personnel under this control. . . . [T]hey get their retirement because they earned it. . . . [To] prevent dictatorship, you must unmuzzle them . . . .").

[19] *Solorio v. United States*, 483 U.S. 435, 447, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987) (citations and internal quotation marks omitted).

been sent a notice of induction and "not [yet] formally been inducted into the military[.]" *Reid*, 354 U.S. at 22-23; *Billings v. Truesdell*, 321 U.S. 542, 544, 556, 64 S. Ct. 737, 88 L. Ed. 917 (1944) (finding "no doubt of the power of Congress to enlist the [citizens] of the nation" into the military, and "to subject to military jurisdiction those who are unwilling" to take the oath of induction into the military, if Congress desired to do so).

The appellant had a closer relationship with the military than the pre-induction draftee, whom the Supreme Court has repeatedly suggested is subject to court-martial jurisdiction. Unlike the wholly discharged veteran in *Toth* whose connection with the military had been severed, a "retired member of the . . . Regular Marine Corps" and a "member of the . . . Fleet Marine Corps Reserve" may be "ordered to active duty by the Secretary of the military department concerned at any time."[20] "[I]n both of our wars with Iraq, retired personnel of all services were actually recalled,"[21] demonstrating Congress'

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[20] 10 U.S.C. § 688. This is also similar to the scenario of the inactive Reservist who was subject to court-martial in *Lawrence*, 58 M.J. at 814. *See* 10 U.S.C. § 12304(a) (stating that the President "may authorize the Secretary of Defense . . . without the consent of the members concerned, to order. . . any member in the Individual Ready Reserve . . . under regulations prescribed by the Secretary concerned . . . to active duty for not more than 365 consecutive days").

[21] Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure*, § 2-20.00, 24 (4th ed. Matthew Bender & Co. 2015) ("In recent years, for example, the Army has instituted a policy of issuing recall orders to selected retired personnel with the orders to be effective in case of national emergency.").

continued interest in enforcing good order and discipline amongst those in a retired status.

As the Court stated in *Tyler*:

> It is impossible to hold that [retirees] who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, . . . are still not in the military service.

105 U.S. at 246.[22]

Notwithstanding *Barker* and its implications regarding the tax status of retired pay, we are firmly convinced that those in a retired status remain "members" of the land and Naval forces who may face court-martial. As the appellant was in a retired status during the offenses and the proceedings, he was validly subject to court-martial.

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[22] *See also Barker*, 503 U.S. at 599 ("Military retirees unquestionably remain in the service and are subject to restrictions and recall . . . ."); *Kahn v. Anderson*, 255 U.S. 1, 6-7, 41 S. Ct. 224, 65 L. Ed. 469 (1921) (allowing those in a retired status to serve as members at courts-martial because "retired . . . officers are officers in the military service of the United States").

B. Punitive discharge of those in a retired status

The second AOE presents a question of statutory construction, an issue of law reviewed *de novo*. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014). Title 10 U.S.C. § 6332 provides that "[w]hen a member of the naval service is transferred by the Secretary of the Navy" from active duty to a retired status or transferred from one retired status to another:

> [T]he transfer is conclusive for all purposes. Each member so transferred is entitled, when not on active duty, to retainer pay or retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by the Secretary. The Secretary may correct any error or omission in his determination as to a member's grade and years of creditable service. When such a correction is made, the member is entitled, when not on active duty, to retainer pay or retired pay in accordance with his grade and number of years of creditable service, as corrected, from the date of transfer.

In *United States v. Allen*, our superior court cited this statute, among other factors,[23] to support its holding that "because appellant was tried as a retired member, he could not be reduced [in rank].

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[23] *See United States v. Sloan*, 35 M.J. 4, 11 (C.M.A. 1992) ("*Allen* itself clearly reflects [that] our decision there was not dependent solely upon this statutory provision").

. . by the court-martial[.]" 33 M.J. 209, 216 (C.M.A. 1991) (citing Navy policy, a law review article espousing that retiree "forfeiture of pay, and by analogy reduction, was not necessary to satisfy the military interest[,]"[24] and a Comptroller General opinion). The appellant claims the statute also precludes punitive discharge of retirees.[25] We disagree.

We define terms in a statute based on their "ordinary meaning" and the "broader statutory context." *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016). "We are also guided by the following rules of statutory construction: (1) a statute will not be dissected and its various phrases considered

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[24] Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. Pa. L. Rev. 317, 356-57 (1964). Of note, Bishop suggested that punitively discharging a retiree was a more appropriate punishment than reduction in rank. *Id.* at 353 ("[T]he appropriate punishment should . . . be distinctively military. Practically speaking, in the case of retired personnel, this means dismissal . . . or dishonorable discharge . . . .")

[25] Critically, in *Sloan*, our superior court recognized the potential for disparate treatment between the branches of service when 10 U.S.C. § 6332, a Department of Navy-only statute, was read to limit the reach of the UCMJ. While the court resolved the disparity through other means in *Sloan* (*see* n. 24, *supra*), it remained a concern of Chief Judge Sullivan, who wrote in concurrence, "I join the principal opinion today in its decision not to overturn that portion of [*Allen*] concerning the reduction in grade and pay of court-martialed retired members. However, I am not adverse to revisiting this issue in a Navy case. As for appellant [an Army retiree], I think that, as a matter of constitutional law and codal intent, he is entitled to equal treatment." 35 M.J. at 12 (Sullivan, C.J., concurring).

in vacuo; (2) it will be presumed Congress had a definite purpose in every enactment; (3) the construction that produces the greatest harmony and least inconsistency will prevail; and (4) statutes in *pari materia* will be construed together." *United States v. Ferguson*, 40 M.J. 823, 830 (N.M.C.M.R. 1994) (citing *United States v. Johnson*, 3 M.J. 361 (C.M.A. 1977)).

Title 10 U.S.C. § 6332 has its origins in legislation creating the United States Naval Reserve,[26] in which Congress provided that "[m]en transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy and shall not be discharged from the Naval Reserve Force without their consent, except by sentence of a court-martial."[27] But, Congress replaced

[26] Naval Appropriations Act of 1916, Ch. 417, 39 Stat. 589, 590 ("[T]he Secretary of the Navy is authorized to transfer to the Fleet Naval Reserve at . . . his discretion any enlisted man of the naval service with twenty or more years naval service . . . .").

[27] *Id.* at 591 (emphasis added).

those provisions with language similar to the present statute in 1938,[28] which it re-enacted in 1952.[29]

Since then, and with the enacting of the UCMJ in 1950, Congress has subjected retirees to court-martial.[30] It has allowed general courts-martial to, "under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code."[31] Congress has excluded some personnel from prosecution at certain types of courts-martial,[32] and entirely prohibited special and summary

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[28] Naval Reserve Act of 1938, ch. 690, 52 Stat. 1175, 1178 ("Provided, That all transfers from the Regular Navy to the Fleet Naval Reserve or to the Fleet Reserve, and all transfers of members of the Fleet Naval Reserve or the Fleet Reserve to the retired list of the Regular Navy, heretofore or hereafter made by the Secretary of the Navy, shall be conclusive for all purposes, and all members so transferred shall, from the date of transfer, be entitled to pay and allowances, in accordance with their ranks or ratings and length of service as determined by the Secretary of the Navy . . . .").

[29] Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481, 505 ("The unrepealed provisions of the Naval Reserve Act of 1938 . . . continue to apply . . . .").

[30] Act of May 5, 1950, Ch. 169, 64 Stat. 107, 109.

[31] *Id.* at 114. The current article, Article 18(a), UCMJ, remains substantially the same.

[32] *Id.* ("[S]ummary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen . . . ."). The current article, Article 20, UCMJ, remains substantially the same.

courts-martial from adjudging dismissals or dishonorable discharges.[33] Recently, Congress directed that any "person subject to this chapter" guilty of certain offenses must receive a minimum sentence of a dishonorable or bad-conduct discharge, subject only to exceptions not based on personal status.[34]

Likewise, under authority delegated by Congress, the President has consistently declined to allow courts-martial to adjudge "administrative separation[s] from the service[s.]"[35] The President has provided that a "dishonorable discharge... may be adjudged only by a general court-martial. . . for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment."[36]

Neither Congress—through the UCMJ—nor the President—through the Rules for Courts-Martial—has directly limited the authority of a court-martial

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[33] *Id.* Articles 19 and 20 of the current version of the UCMJ retain the same prohibitions.

[34] National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 959 (2013). As none of the appellant's offenses occurred exclusively after its effective date of 24 June 2014, we cite this provision for interpretative purposes only, and not as substantive law dictating the appellant's sentence. *See* FY 2015 NDAA, Pub. L. No. 113-291, 128 Stat. 3292, 3365 (2014).

[35] Manual for Courts-Martial (MCM), United States, 1968, ¶ 126a. The rule applicable at the appellant's court-martial, Rule for Courts-Martial (R.C.M.) 1003(b)(8), MCM (2012 ed.), was substantially the same.

[36] R.C.M. 1003(b)(8)(B).

to adjudge a discharge for a member in a retired status.

For this reason, we decline to override long-standing, military justice-specific provisions in the MCM subjecting those in a retired status to courts-martial and broadly authorizing those courts-martial to adjudge a punitive discharge. We make this decision particularly in light of the fact that Congress expressly exempted other classes of personnel from dismissal or dishonorable discharge within the UCMJ, *but not retirees*.[37]

We agree that "[t]he only consistent, contextual reading of [the statute] is that a transfer to the retired list is conclusive in all aspects as to the fact that the member was transferred to the retired list on a certain date, in a certain grade, and with creditable service as determined by the Secretary."[38] We thus find that the statute does not preclude removal from the Fleet Marine Reserve or the retired list of a member who received a punitive discharge or dismissal from court-martial, when approved by the CA and affirmed by our court.

Such a reading harmonizes the statute with the other UCMJ provisions discussed *supra*. Unlike the reduction in rank of a retiree prohibited by *Allen*

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[37] *See United States v. Wilson*, 66 M.J. 39, 45-46 (C.A.A.F. 2008) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)) (alterations in original) (additional citation omitted).

[38] Appellee's Brief of 7 Sep 2016 at 13 (citation omitted).

and *Sloan*, there is neither long-standing Navy policy against the punitive discharge of retirees,[39] nor other factors which might support an expansive reading of the statute. Here, the appellant committed felony-level offenses meriting a dishonorable discharge. Collateral effects on issues like retired pay are policy matters within the discretion of Congress.

C. Incorrect court-martial order

Although not raised by the appellant, we note that the court-martial order (CMO) fails to reflect that the military judge consolidated Specifications 1 and 2 of Charge II into one specification after ruling the specifications an unreasonable multiplication of charges as applied to findings.[40]

Likewise, we note that the consolidated specification of Charge II, Specification 1 of Additional Charge I, and Specifications 1 and 2 of Additional Charge II each erroneously describe the appellant as having exclusively been "on the active duty retired list" through his commission of the offenses. Though, per our discussion *supra* at note 3, the appellant was equally amenable to court-martial jurisdiction whether as a Fleet Marine Reserve member or on the retired list.

The appellant now does not assert, and we do not find, any prejudice resulting from these errors. Nevertheless, the appellant is entitled to have the

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[39] *See, e.g. United States v. Overton*, 24 M.J. 309 (C.M.A. 1987); *Hooper*, 26 C.M.R. at 419.

[40] Record at 101; Appellate Exhibit XI.

CMO accurately reflect the results of the proceedings. *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998). We thus order corrective action in our decretal paragraph.

III. CONCLUSION

The findings and sentence, as approved by the CA, are affirmed.

The supplemental court-martial order shall reflect that in the consolidated specification of Charge II, the specification of Additional Charge I, and Specifications 1 and 2 of Additional Charge II, the appellant was "on the active duty retired list or on the Fleet Marine Corps Reserve List."

The supplemental court-martial order shall also reflect that the military judge consolidated Specifications 1 and 2 of Charge II into a single specification for findings and sentence, to read as follows:

> In that Gunnery Sergeant Derek L. Dinger, U.S. Marine Corps (Retired), on the active duty retired list or on the Fleet Marine Corps Reserve List, did, at or near Okinawa, Japan, between on or about 11 October 2012 and on or about 4 September 2014, knowingly and wrongfully receive, possess and view child pornography, to wit, images and videos of minors engaging in sexually explicit conduct, which conduct was of a nature to bring discredit upon the armed forces.

Chief Judge GLASER-ALLEN and Judge HUTCHISON concur.

Appendix F

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	NMCCA NO. 201600108 GENERAL COURT-MARTIAL

v.

Derek L. Dinger
Gunnery Sergeant (E-7)
U. S. Marine Corps
Appellant

ORDER

On 28 March 2017, the Court released its opinion in the appellant's case affirming the findings and sentence as approved by the convening authority. On 27 April 2017, the appellee filed a Motion for *En Banc* Consideration and Panel Reconsideration contending that the panel opinion "deviates from the current legal basis for jurisdiction over paid retirees[.]"

The appellant filed a pleading captioned as a Reply to Appellee's Motion for *En Banc* Consideration and Panel Reconsideration on 5 May 2017, in which, without filing his own Motion for Reconsid-

eration, he states that "[t]his Court should reconsider its decision affirming jurisdiction over Appellant, a retired Marine, but not for the reasons urged by the Government." The appellant advises that his pleading, which he calls a brief in his "Statement of the Case," supports the first assignment of error and that he "continues to rely on [his] earlier filing in support of the second Assignment of Error."

Upon consideration of the pleadings and the record of trial, it is, by the Court, this 16th day of May 2017,

ORDERED:

That the Motion for *En Banc* Reconsideration is denied. Panel reconsideration is also denied.

R.H. TROIDL
Clerk of Court

Copy to: NMCCA (51.3)
45 (CAPT Ermentrout)
46 (LT Brown)
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