**IN THE UNITED STATES COAST GUARD COURT**
**OF CRIMINAL APPEALS**

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| UNITED STATES,<br>Appellee | ) | 28 August 2019 |
| | ) | ANSWER TO APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR ON BEHALF OF THE UNITED STATES |
| v. | ) | Dkt. No. 1466<br>Case No. CGCMG 0370<br>Before McClelland, Judge, and Brubaker |
| EVAN K. GOODELL<br>Machinery Technician Chief (E-7),<br>U.S. Coast Guard,<br>Appellant | ) | Tried at Norfolk, Virginia on 5 June and 7 September 2018 by general court-martial convened by Commander, Coast Guard Personnel Service Center |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES**
**COAST GUARD COURT OF CRIMINAL APPEALS**

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 17 of this Honorable Court's Rules of Practice and Procedure.

## STATEMENT OF STATUTORY JURISDICTION

This Honorable Court has jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

## STATEMENT OF THE CASE

On May 30, 2018 then Seaman Recruit Goodell (Appellant) signed a Pretrial Agreement (PTA) in which he agreed to plead guilty to conspiracy in violation of Article 81, UCMJ, and soliciting another to commit an offense in violation of Article 134, UCMJ. App. Ex. XIV. On

June 5, 2018, Appellant pleaded guilty in accordance with his PTA at a general court martial convened by Commander, Personnel Service Center to conspiracy to commit aggravated assault in violation of Article 81, UCMJ, and soliciting another to commit aggravated assault an offense in violation of Article 134, UCMJ. R. at 13-15. The military judge accepted Appellant's pleas, found him guilty of the offenses to which he plead guilty, and sentenced Appellant to four years confinement, a dishonorable discharge, a $10,000 fine, and reduction to E-1. R. at 14.

Subsequently, the recording of the June 5th proceeding was lost. App. Ex. XVIII at 5. A rehearing was ordered by the Convening Authority under R.C.M. 1103(f)(2). *Id.* On August 17, 2018 the Coast Guard Chief Trial Judge, who was also the military judge in the June 5, 2017 proceeding, requested the cross service detailing of a U.S. Navy judge with no knowledge of this case. *Id*. at 1. On the same day, CDR [redacted], JAGC, USN, was detailed to be the trial judge. App. Ex. XX.

The rehearing was held on September 7, 2018. R. at 347. Appellant was convicted at the hearing pursuant to his pleas, of conspiracy to commit aggravated assault in violation of Article 81, UCMJ and soliciting another to commit aggravated assault in violation of Article 134, UCMJ. R. at 443. Appellant was sentenced to two years confinement and a bad conduct discharge. R. at 503.

The Convening Authority took action on November 21, 2018 approving the sentence but suspended confinement in excess of 11 months for the period of confinement adjudged plus 12 months thereafter. R. at 4. The Convening Authority's actions were in accordance with the PTA dated May 30, 2018. App. Ex. XIV.

## STATEMENT OF FACTS

In June 2016, MK1 [redacted]. asked Appellant for a divorce. R. at 480, 810. A request, by Appellant's own admission, he did not want to accept. R. at 480. From June 2016 until January 2017, Appellant frightened and harassed MK1 [redacted] through attempting to extort her for sexual intercourse, assaulting her, breaking into her home, posting revenge pornography in the form of nude photographs of MK1 [redacted] and identifying her as a U.S. Coast Guard member on the internet, and violating various Military Protective Orders (MPO). Pros. Ex. 1; R. at 810-19.

On May 26, 2017, Appellant pleaded guilty at a Special Court-Martial to the following: four specifications of violating lawful orders in the form of Military Protective Orders; three specifications of making false official statements; one specification of stalking MK1 [redacted]; two specifications of extorting MK1 [redacted]; two specifications of assault consummated by battery upon MK1 [redacted].; and one specification of obstruction of justice. Pros. Ex. 1. During the proceedings, MK1 [redacted]. testified that she lived in perpetual fear of Appellant. App. Ex. XI at 96. Appellant was sentenced to one year confinement, reduction in rate to E-1, and a Bad Conduct Discharge. *United States v. Goodell*, __ M.J. __, Dkt, 1458, 2019 WL 2895575 (C.G. Ct. Crim. App. 2019) (*Goodell I*).

### Conspiracy to Commit Aggravated Assault

MK1 [redacted]'s fear of Appellant was well founded. Three days before Appellant's Special Court Martial, the Air Force Office of Special Investigation notified CGIS that a USCG member at the Transient Personnel Unit (TPU) solicited for aggravated assault against his wife. Pros. Ex. 2 at 5. Appellant was the only USCG member at the TPU at the time. *Id*. at 6. U.S. Air Force Senior Airman [redacted] reported that Appellant sought someone to "take care of" MK1 [redacted] between three and four times during Appellant's pretrial confinement. Pros. Ex. 1 at 3; Pros. Ex. 2 at 6. [redacted] provided Appellant with a name of a cousin who [redacted] said would hurt MK1 [redacted] Pros. Ex. 1 at 3.

Any relief MK1 [redacted] may have felt from Appellant's guilty plea and confinement at Naval Brig Charleston, SC was short lived because on June 12, 2017 MK1 [redacted] and her Special Victims Counsel were informed of CGIS's investigation and the Baldwin County Sheriff's began extra patrols of her home. Pros. Ex. 2 at 11.

Appellant was not only searching for someone in TPU to harm MK1 [redacted], but while in confinement in Jacksonville was simultaneously working with his mother, [redacted] to contract a hit on MK1 [redacted] Pros. Ex. 1 at 2. After conversations with Appellant between January and March 2017, [redacted] solicited [redacted] to kill MK1 [redacted] in late March 2017. *Id.* [redacted] offered [redacted] \$2,000-\$4,000 in money for travel and balance of the \$20,000 after MK1 [redacted] was killed. Pros. Ex. 2 at 13.

Neither attempt was carried out nor did Appellant pursue any further attempts on MK1 [redacted]'s life once he was transferred to the Naval Consolidated Brig in Charleston. *Id.*

**Pretrial Agreement**

On May 30, 2018, Appellant signed a PTA. App. Ex. XIV, XV. In the agreement, Appellant agreed to plead guilty to one specification of violating Article 81 and one specification of violating Article 134, UCMJ with the condition that "murder" be replaced with "aggravated assault." App. Ex. XIV at 2. In exchange for the guilty plea, the Convening Authority agreed to: (1) limit confinement to 11 months of confinement (with the remainder suspended for the duration of the period of confinement plus 12 months); and (2) if a dishonorable discharge was adjudged, only approve a bad conduct discharge.  App. Ex. XV at 1.

**Trial and Rehearing**

On June 5, 2018, Appellant pled guilty before a military judge at a general court martial in accordance with his pretrial agreement.  R. at 13.  Appellant was sentenced to four years confinement, dishonorable discharge, a $10,000 fine, and reduction in rate to E-1. R. at 14. The trial counsel compiled a Report of Results. R. at 13-14.

Sometime between June 5 and August 2, 2018 the Convening Authority was made aware that a verbatim transcript of Appellant's trial could not be produced due to a "loss of recording of the proceedings."  App. Ex. XVIII at 5.  Based on the advice of the PSC Staff Judge Advocate, the Convening Authority ordered a rehearing under R.C.M. 1103(f)(2).  *Id*.  On August 17, 2018 the Coast Guard Chief Trial Judge requested a cross service detailing from the Chief Judge, Navy-Marine Corps Trial Judiciary, for the rehearing on September 7, 2018.  *Id*. at 1.  A Navy judge was assigned the same day.  App. Ex. XX.  On September 7, 2019, Appellant again plead guilty before a military judge at a general court martial in accordance with his pretrial agreement. R. at 368-69.

During the Government's sentencing case, trial counsel introduced a promulgating order under R.C.M. 1001(b)(3) in which the Convening Authority approved the findings and sentence in *United States v. Goodell*, __ M.J. __, Dkt. 1458, 2019 WL 2895575 (C.G. Ct. Crim. App. 2019) (*Goodell I*).  Pros. Ex. 5 at 6.  The convictions were also included in the Stipulation of Fact.  Pros Ex. 1 at 1.  However, the military judge sustained a defense objection to trial counsel entering in evidence the Stipulation of Fact and military protective order from *Goodell I*. R. at 458-9.

During the presentencing hearing in this case, the military judge articulated how he would consider the Appellant's prior special court-martial convictions:

> "The court does note that paragraphs three, four, and five indicate a prior special court-martial that Seaman Recruit Goodell faced and was convicted of it appears. At this time, the court is only going to utilize paragraph three, four, and five to ascertain jurisdiction over the accused and the fact that is also placed the accused's timeline of events into context and to greater clarity for the court..."
>
> "The Court will not consider his prior special court-martial to punish him as he has already been punished for that. The court simply will use that to place into context the crimes for which he's pled guilty as it relates to the victim. The Court will not increase the sentence just based on the fact the characterizations the trial counsel is making on something he's already pled guilty to."

R. at 378; 484.

Following Appellant's guilty plea, the judge sentenced Appellant to two years confinement and a bad conduct discharge. R. at 503. This Court subsequently set aside Appellant's convictions in *Goodell I*. *United States v. Goodell*, __ M.J. __, Dkt, 1458, 2019 WL 2895575 (C.G. Ct. Crim. App. 2019).

## Argument

### I. THE INTRODUCTION OF APPELLANT'S PREVIOUS CONVICTIONS WAS NOT PREJUDICIAL

#### Standard of Review

When assessing a trial judge's decision on whether to admit evidence the standard of review is when a military judge "clearly abused his discretion." *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999) (quoting *United States v. Rust*, 41 M.J. 472, 478 (C.M.A. 1995).

"To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney,* 54 M.J. 120, 132 (C.A.A.F.2000).

### A. The Evidence Of Appellant's Conduct Would Have Been Introduced Regardless Of Whether He Had Been Previously Convicted

In cases where a previous conviction has been introduced as sentencing evidence in a subsequent court-martial and the previous conviction is set aside, the legitimacy of the sentence in the subsequent case may be impacted. *See United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Alderman*, 46 C.M.R. 298, 302 (C.M.A. 1973). In this instance, the sentence is not immediately invalidated. *See Alderman*, 46 C.M.R. at 302. A court must determine if the sentence "might have been different" if the fact of a conviction had not been introduced. *Tucker*, 404 U.S. at 447. To do so, a court "consider[s] whether the same information otherwise would have been admissible at the sentence proceeding and at a sentence rehearing. *United States v. Tanner*, 63 M.J. 445, 447 (C.A.A.F. 2006). "The fact that information is inadmissible on sentencing as a record of conviction does not preclude its admission on other grounds under R.C.M. 1001(b) if relevant and reliable." *Id.* This practice reflects the judgment that, "[t]here would be little point in setting aside the sentence if the challenged evidence clearly would be admissible at a rehearing." *United States v. Wingart*, 27 M.J. 128, 134 (C.M.A. 1988).

Under R.C.M. 1001(b)(4), during a presentencing hearing the Government may introduce evidence of "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact. . . to any person. . . who was the victim of an offense." Directly related means the evidence must be, "[c]losely related in time, type, and/or often outcome, to the convicted crime." *United States v. Hardison*, 64 M.J. 279, 282 (C.A.A.F. 2007). As this Honorable Court recognized, the explicit purpose of aggravating evidence is to "make the charged offense appear 'worse, more serious, or more severe' than it otherwise would." *United States v. O'Donnell*, 65 M.J. 795, 799 (C.G. Ct. Crim. App. 2007) (quoting *Hardison*, 64. M.J. at 283). The evidence must also pass the M.R.E. 403 balancing test. *Hardison*, 64 M.J. at 281. M.R.E. 403 states in pertinent part, "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues. . ."

One way the Government can show the seriousness of the charged offense is to show that if the evidence "is part of a continuous course of conduct involving similar crimes and the same victims, it is encompassed within the language 'directly relating to or resulting from the offenses of which the accused has been found guilty' under R.C.M. 1001(b)(4)." *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001) (quoting R.C.M. 1001(b)(4)). Indeed one of the purposes of allowing aggravation evidence is to educate the "'sentencing authority'" of the "'circumstances surrounding the offense.'" *United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003) (quoting *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982). In that way, the rule allows the Government to introduce evidence that "provide[s] for accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case." *United States v. Terlap*, 57 M.J. 344, 350 (C.A.A.F. 2002).

In this case, evidence of the conduct forming the basis for Appellant's convictions in *Goodell I* would have been introduced at his pre-sentencing hearing because that conduct directly related to the charges here. There are numerous connections between the conduct which formed the basis of Appellant's first court-martial, and his conduct in this case. In that way, conduct that formed the basis of his first court-martial falls squarely within the *Hardison* criteria for evidence in aggravation. Therefore, the introduction of Appellant's convictions was not prejudicial.

First, the conduct underlying both of Appellant's courts-martial were close in time. Appellant, committed the offenses in this case, in part, while he was in-custody for his now set aside convictions. Combining both pretrial and post-trial confinement, for his first court-martial Appellant was in-custody from 21 January 2017 to 8 November 2017. Pros Ex. 1 at 1. He committed both the conspiracy and solicitation offenses from January through May of 2017. *Id*. The Appellant was alleged to have committed the acts in *Goodell I* starting in June 2016. R. at 810. In this case, he pled guilty to both a conspiracy and solicitation offense from January-November 2017, just six months after the Appellant's alleged conduct in *Goodell I*. Pros. Ex. 1 at 1.

Second, the Appellant's conduct underlying both courts-martial is similar. In both cases, the Appellant was accused of crimes related to assaulting MK1 [redacted] Pros. Ex. 1. While the offenses in *Goodell I* were complete and the offenses in this case were inchoate, this makes no difference when considering evidence under R.C.M. 1001(b)(4). Without the evidence of the previous allegations the military judge would not be able to understand how serious the charges were in this case. Appellant allegedly committed multiple assaults on MK1[redacted]. prior to conspiring to commit another, aggravated assault just six months later. *See* Pros. Ex. 1. The fact that MK1 [redacted] alleged Appellant had previously assaulted her would actually increase the "psychological. . . impact" of these offenses. This impact would have been increased by the short time span between the two crimes. Without the evidence underlying Appellant's conduct in *Goodell I,* military judge would have been deprived of "'the circumstances surrounding [the] offense.'" *Gogas*, 58 M.J. at 98 (quoting *Vickers*, 13 M.J. at 406).

Finally, the alleged victim in both cases is MK1 [redacted]. *Id.* Here, the Appellant pled guilty to both conspiring to commit aggravated assault against MK1 [redacted], his wife, as well as soliciting another to commit an aggravated assault against MK1 [redacted] R. at 3-4. The allegations underlying his first court-martial consist of stalking, extorting, and assaulting MK1 [redacted] Pros. Ex. 1 at 1. MK1 [redacted] also alleged Appellant violated a military protective order. *Id*.

C.A.A.F. has upheld the introduction of similar evidence in other cases. In *United States v. Nourse*, the accused pleaded guilty with to stealing rain ponchos from a local sheriff's office. *Nourse*, 55 M.J. at 230. During the presentencing portion of the court-martial, the Government sought to introduce testimony from a witness to show that he and the accused committed other thefts from the property of the same sheriff's office. *Id*. C.A.A.F. upheld the introduction of the evidence because "Appellant was found guilty of larceny and conspiracy to commit larceny of goods from the Sheriff's Office on one occasion. Evidence was admitted showing that appellant had committed the same crime on the same victim in the same place several times prior to the charged offenses." *Id*. at 232. Key to the decision in *Nourse* was that the "evidence of a continuous course of conduct was admissible to show the full impact of appellant's crimes upon the Sheriff's Office." *Id*.

Appellant's actions in this case, as in *Nourse*, are a direct continuation of his alleged conduct against MK1 [redacted] that resulted in *Goodell I*. Appellant admitted that he committed the offenses in this case because he "was angry with [his] wife due to her allegations against [him] that caused [him] to be in pre-trial confinement and face court-martial." Pros. Ex. 1 at 2. Further, during the providency inquiry Appellant elaborated on specifically how and why the conduct was connected. He described how he believed that MK1 [redacted] was responsible for his pending court-martial, that she was responsible for him being in pre-trial confinement, and that she was withholding his son from visiting him. R. at 386-388. Finally, Appellant described how he connected the previous assault charge and his conspiring to commit aggravated assault were connected.

> MJ: So describe the first conversation to me of how this notion of hiring or finding some who could beat up your wife came up?
>
> ACC: Like I said, Your Honor, I was very distraught at the time. And one of the charges that they were -- that was pending against me at the time was assault. And… I wanted her assaulted if I was going to be charged with it.

R. at 388-89.

While case law defines limits as to what information can be admitted as aggravation evidence, Appellant's conduct from his first court-martial falls well within those limits. In *United States v. Wilson*, 64 M.J. 152, 155 (C.A.A.F. 1997), CAAF upheld the introduction of testimony from a victim of disrespectful language when the victim was not present when the language was spoken, and only learned of the language weeks later from a third party. In contrast, this Honorable Court, acknowledging *Wilson* stretched the definition of the word "direct," overturned the military judge's admission of aggravation evidence under R.C.M. 1001(b)(4). *United States v. James*, 64 M.J. 514, 515 (C.G. Ct. Crim. App. 2006). The military judge erred because he allowed testimony about the "impact on community relations," of a Coast Guard member's drug use conviction because the witness "offered an opinion on what *would be* the impact *if* the local law enforcement community learned that appellant was using illegal drugs[.]" *Id*. (emphasis in original).

These cases show that evidence that has a direct, but relatively limited, connection to the victim is admissible under R.C.M. 1001(b)(4). In contrast, evidence that is purely speculation is not admissible. Here, the connection between Appellant's conduct from his first court-martial and his second court-martial is much stronger than the connection in *Wilson*. Appellant's alleged conduct in *Goodell I*, including assault, stalking, and extortion, were necessarily committed directly upon MK1 [redacted], and not to a third person as in *Wilson*. Additionally, MK1 [redacted]'s testimony from the sentencing hearing in this case shows she had a stronger reaction to Appellant's conduct than the victim in *Wilson*, and that this case was part of a continuous course of conduct of the allegations in *Goodell I.*

> Q: Can you tell the military judge a little bit about the emotional toll that that, that the crime that was committed against you has taken on you?
>
> A: I can. I live in fear just about every day. It just depends what the level is and how bad it gets. There's a constant state of rage. . . And it's embarrassing to still be married to someone just has just, for the last – over 2 years, attempted to ruin my life and to cause me physical and emotional harm.

R. at 466.

Finally, the evidence of Appellant's conduct in *Goodell I* passes the M.R.E. 403 balancing test. Here, the evidence would not cause unfair prejudice or confuse the issues. As Appellant's conduct underlying *Goodell I* is connected to the charges here, that evidence has a high probative value as evidence in aggravation. Despite that connection, a sentencing authority, through proper instruction of members or the experience of a military judge, would be able to understand the evidence is just an "aid. . . in determining the appropriate sentence." R.C.M. 1001(a)(1). This understanding was shown by the military judge at the sentencing hearing. *See* R. at 378, 484. The overall probative value of the evidence heavily outweighs any danger of unfair prejudice or confusing the issues.

The introduction of Appellant's convictions from *Goodell I* during the presentencing hearing in this case, though now set aside, was not prejudicial. Case law requires that, in this circumstance, an appellate court review the conduct underlying the set aside convictions to determine whether it would be admissible as evidence in aggravation under R.C.M. 1001(b)(4). In this case, the conduct underlying Appellant's first court-martial was directly related to his convictions in this case. To show how Appellant's conduct in this case impacted MK1 L.G., it is necessary to allow a sentencing authority to consider the conduct from his first court-martial. Only this way could there be the "accuracy in the sentencing process" necessary for a military judge to consider "the true plight of" MK1 L.G. *Terlap*, 57 M.J. at 350. Consequently, this Honorable Court should affirm Appellant's sentence.

## II. EVEN IF THE ADMISSION OF APPELLANT'S CONVICTIONS WAS PREJUDICIAL, THIS COURT SHOULD REASSES AND AFFIRM HIS SENTENCE

**Standard of Review**

"A military judge's decision to exclude evidence is reviewed for an abuse of discretion." *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019). "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015).

### A. The *Winckelmann* Factors Support Affirming The Sentence In This Case

When an appellate court finds prejudicial error it must then determine whether it should reassess the sentence or order the case remanded for a sentencing hearing. *United states v. Winckelmann*, 73 M.J. 11, 13-16 (C.A.A.F. 2013). The Courts of Criminal Appeal have "broad discretion" when reviewing sentences. *Id*. at 15. If this Honorable Court "can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." *United States v. Sale*, 22 M.J. 305, 308 (C.M.A. 1986).

To determine whether it should reassess a sentence or order a rehearing, an appellate court must "apply the totality of the circumstances of each case to make sentence reassessment determinations." *United States v. Hernandez*, 78 M.J. 643, 647 (C.G. Ct. Crim. App. 2018). The analysis is guided by the following non-exhaustive factors:

> (1) dramatic changes in the penalty landscape and exposure; (2) whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming; (3) whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (4) whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

*Winckelmann*, 73 M.J. at 12, 15–16.

In this case, the *Winckelmann* factors strongly favor this Honorable Court reassessing Appellant's sentence. First, the penalty landscape did not change in this case as a result of Appellant's convictions being set aside. This lends certainty to Appellant's sentence as the scope of Appellant's exposure to punishment has not changed. *See United States v. Bridges*, 74 M.J. 779, 782 (A. Ct. Crim. App. 2015). Appellant's PTA also limited the his exposure to punishment as it limited confinement to 11 months, with the remainder suspended for the duration of the period of confinement plus 12 months. App. Ex. XV at 1. And if a dishonorable discharge was adjudged, the Convening Authority would only approve a bad conduct discharge. *Id*.

Second, the Appellant was sentenced by a military judge. R. at 503. As C.A.A.F. recognized in *Winckelmann*, “courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members.” *Winckelmann*, 73 M.J. at 16. This factor becomes especially important in Article 134 cases. *Id*. Additionally, Appellant pleaded guilty to an Article 134 charge, which alleged service discrediting conduct. R. at 4. As noted in *Winckelmann*, “This factor could become more relevant where charges address. . . service discrediting conduct…” *Winckelmann*, 73. M.J. at 16.

Third, no offenses were set aside in this case, meaning all of Appellant’s conduct is captured in the remaining offenses. While it is true the promulgating order of Appellant’s first court-martial would be inadmissible, that evidence was admitted under R.C.M. 1001(b)(3), and not as evidence in aggravation. R. at 453-454. All the evidence admitted under R.C.M. 1001(b)(4) as evidence in aggravation remains admissible. And, as demonstrated, Appellant’s conduct underlying *Goodell I* is admissible. This is a key consideration under the third *Winckelmann* factor.

Further, the military judge specifically limited the use of the evidence of Appellant’s prior convictions when he stated he would only use evidence of the prior convictions, “to ascertain and ensure this court-martial has jurisdiction over the accused and the fact it also placed the accused’s timeline of events into context and to greater clarity for the court.” R. at 378. Additionally, the military judge sustained a defense objection regarding the use of the promulgating order during trial counsel’s sentencing argument. R. at 484. The military judge again stated, “The court will not consider his prior special court-martial to punish him as he has already been punished for that. . . The court will not increase the sentence just based on the fact that the characterizations trial counsel is making on something that he's already pled guilty to." R. at 484.

Finally, Appellant pleaded guilty to offenses which this Honorable Court has sufficient experience and familiarity with to reliably determine a sentence. Even though this case involved a conspiracy charge, assault is a type of charge which this court has familiarity with when determining whether to reassess a sentence. *See Hernandez*, 78 M.J. at 648. This Court also has experience in reassessing offenses which allege service discrediting conduct, as is the case here. *See United States v. Rogers*, 78 M.J. 813, 822-3 (C.G. Ct. Crim. App. 2019).

Appellate courts routinely reassess the sentence in cases in which the findings and evidence change more dramatically than here. In *Winckelmann*, C.A.A.F. upheld the Army Court of Criminal Appeals decision to reassess the sentence of a member after multiple charges and specifications alleging enticement of a minor, possession of child pornography, and indecent language had been set aside. *Winckelmann*, 73 M.J. at 16. Notably C.A.A.F. did not find it necessary to order a sentence rehearing after the maximum amount of confinement was reduced from 115 to 51 years. *Id*. at 15-6. In *United States v. Entzminger*, 76 M.J. 518, 521 (A. Ct. Crim. App. 2017), the Army Court of Criminal Appeals reassessed a sentence after setting aside an indecent exposure charge. In *Bridges* the Army Court of Criminal Appeals reassessed a sentence after finding a military judge improperly instructed the members when admitted evidence of a fifteen year old sexual assault allegation. *Bridges*, 74 M.J. at 781-782.

In this case, no findings have been set aside, and the evidence which was introduced was more limited than in *Bridges*. Setting aside charges or specifications can dramatically change the scope of punishment, and gravamen of an accused's conduct. Importantly, while Appellant's convictions for *Goodell I* are no longer admissible, his conduct underlying those convictions remains admissible.  Further, the military judge limited both what evidence of *Goodell I* was introduced at the sentencing hearing, and how trial counsel could comment on that case.  R. at 378, 484.  The limited evidence of *Goodell I* that was admitted in this case is much less detailed than the evidence admitted in *Bridges*.  *Bridges*, 74 M.J. at 781-782.

If this Honorable Court finds prejudice in this case, it should reassess the sentence without further hearing, and affirm the adjudged sentence.  Taking into account the totality of the circumstances, and when looking at the *Winckelmann* factors, this case falls well within this Honorable Court's reassessment authority.  The penalty landscape has not changed, appellant was sentenced by a military judge, the gravamen of Appellant's conduct remains, and the type of charges are familiar to this Honorable Court.  And the military judge also appropriately limited how he considered the promulgating order from *Goodell I*.  The sentence of a bad conduct discharge and confinement for two years should be affirmed.

## CONCLUSION

This Honorable Court should find no error and affirm the sentence in this case.  Since the findings and sentence in *Goodell I* were set aside, evidence of those convictions is no longer admissible at sentencing in this case.  Despite that, Appellant's conduct which formed the basis of the charges in *Goodell I* is still admissible as evidence in aggravation under R.C.M. 1001(b)(4).  Therefore, this Honorable Court should find Appellant suffered no prejudice. However, if prejudice is found, the *Winckelmann* factors support this Honorable Court reassessing and affirming Appellant's sentence as approved by the Convening Authority.

## PRAYER FOR RELIEF

WHEREFORE, the United States prays this Honorable Court affirm the sentence in this case.

Respectfully submitted,

DATE: 28 August 2019

//S//

[redacted]
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 28 August 2019.

//S//

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