UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**ACM 37057**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Senior Airman (E-4)	)	
KYLE J. DALTON,	)	
USAF,	)	
Appellant	)	**Panel No. 3**
	)	

On 24 December 2008, appellee submitted a Motion for *En Banc* Reconsideration in the above matter. Specifically requesting that the Court reconsider *en banc,* its reassessment of the Appellant's confinement sentence from ten years to eight years and six months.

Accordingly, it is by the Court on this 22nd day of January, 2009,

ORDERED:

Appellee's Motion for *En Banc* Reconsideration is hereby **denied**.

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION FOR *EN BANC* RECONSIDERATION
v.	)	ACM No. 37057
Senior Airman (E-4), KYLE J. DALTON, USAF, *Appellant.*	)	Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 17 and 19 of this Court's Rules of Practice and Procedure (herein "Rules"), the United States moves this Court to reconsider *en banc* its 25 November 2008 opinion in the case *sub judice*. Specifically, the United States requests the Court to reconsider its reassessment of Appellant's confinement sentence from ten years to eight years and six months. Pursuant to Rule 19.1(b)(1) of this Court's Rules, the United States believes this Court misapplied a material legal or factual matter in its decision.

SPECIFIED ISSUE FOR RECONSIDERATION

ASSUMING, *ARGUENDO*, THAT THIS COURT DETERMINES THAT THE APPELLANT'S PLEA TO DISOBEDIENCE TO [sic] AFI 31-207 CANNOT STAND BECAUSE THE INSTRUCTION DID NOT APPLY IN A COMBAT ZONE, CAN THIS COURT NONETHELESS AFFIRM A CONVICTION TO THE LESSER INCLUDED OFFENSE OF WILLFUL DERELICTION OF DUTY AND REASSESS THE SENTENCE. IF SO, WHAT EVIDENCE MAY BE CONSIDERED IN THE REASSESSMENT AND WHAT IS THE APPROPRIATE SENTENCE IN SUCH A CIRCUMSTANCE.

STATEMENT OF FACTS

Appellant was tried and convicted, pursuant to his pleas, of involuntary manslaughter and violating a lawful general regulation. (R. at 44.) Appellant was sentenced to a reduction to E-1, forfeiture of all pay and allowances, confinement for 10 years, and a dishonorable discharge. (R. at 247.)

The charges and specifications arose from Appellant's deployment to Capt Bucca, Iraq. While assigned to Camp Bucca, Appellant and the other Airmen were required to be armed at all times. (Pros. Ex. 2.) As a result, Appellant, who performed escort duties for the detainees, carried an M9 handgun and an M4 rifle. (Pros. Ex. 2.) Given the requirement to carry weapons and ammunition, various safety rules regarding weapons status were enacted at Camp Bucca. (Pros. Ex. 2.) One of these rules required Appellant and other Airmen to keep no magazine in his weapon and the weapon on safe except in certain situations Appellant did not face. (Pros. Ex. 2.) As a Security Forces member, Appellant was given regular and routine training on a number of weapons and on weapons safety. (Pros. Ex. 2.) Appellant received weapons safety training innumerable times in a variety of formats. (R. at 21.)

As a member of the ESFS at Camp Bucca, Appellant was also given weapons safety briefings at guard mount every day before he went on duty. (Pros. Ex. 2; R. at 21.) This safety guidance

included, among other things, warnings to always treat a weapon as if it is loaded, always be aware of the weapons status in effect at one's location, never joke or jest with a weapon, and to never point a weapon at anything you do not intend to shoot. (Pros. Ex. 2.) These were the same safety warnings Appellant received in his initial weapons qualification training and at his biannual weapons qualification training. (Pros. Ex. 2.) Indeed, Appellant acknowledged that he heard "all the time . . . don't joke or jest with your weapon, . . . don't point at anything you don't intend to shoot, be aware of your surroundings, and treat every weapon as if it is loaded . . . ." (R. at 21.)

Between 14 June 2006 and 1 July 2006, Appellant twice violated this regulation, the second time with tragic consequences. On the first occasion, Appellant grabbed the M4 weapon of a fellow Airman, placed the magazine in it, pulled the charging handle, and pointed the weapon in the direction of two Airmen, including his roommate, A1C Carl Ware. (R. at 9-21; Pros. Ex. 2.) Appellant grabbed the rifle, and aware there was ammunition in the magazine, "in a jesting manner . . . put the magazine in and pulled the charging handle" placing a round in the chamber. (Pros. Ex. 2; R. at 19-21.) Appellant then pointed the weapon in the direction of two Airmen, though angled toward the ground. (Pros. Ex. 2.) The other Airman, A1C Ryan

Gasper, told Appellant to immediately clear the weapon. (Pros. Ex. 2.) Appellant complied. (R. at 19.)

A few weeks later, Appellant, A1C Ryan Booth and A1C Ware returned to their "pod" (their living quarters) after lunch. (Pros. Ex. 2.) A1C Gasper, having just returned from work, was in the pod preparing to go to the gym. (Pros. Ex. 2.) A1C Ware and A1C Booth left the pod momentarily, leaving A1C Gasper and Appellant in the room. (Pros. Ex. 2.) At some point, Appellant picked up his own M9 pistol. (R. at 24.) There was a magazine in the weapon, but Appellant claimed to be unaware of that fact and to have no idea how the magazine got inserted into the pistol. (R. at 24-25.) Appellant also stated that he did not check to determine whether there was a magazine in his pistol. (R. at 29).

As A1C Ware walked into the room, Appellant raised the weapon to chest height with both hands, and pointed it at A1C Ware. (Pros. Ex. 2.) As A1C Ware walked across the room, Appellant kept the pistol pointed at him by moving the pistol to follow A1C Ware as he moved toward his bunk. (Pros. Ex. 2.) When asked by the military judge if he was pointing the weapon "directly at" A1C Ware, Appellant responded, "In his location yes, sir" (R. at 25), though later when discussing the Stipulation of Fact, Appellant admitted pointing the weapon at A1C Ware. (R. at 29.)

While pointing his pistol at A1C Ware, Appellant began tapping the trigger and also pulling the trigger all the way back. (R. at 26.) With no bullet in the chamber, pulling the trigger did not cause the weapon to discharge. However, as A1C Ware approached his bunk, Appellant, while still pointing his pistol at A1C Ware, pulled the charging handle, chambering a live round. (R. at 26.) A1C Gasper heard this, but did not immediately look up from the book he was reading. (Pros. Ex. 2.) Appellant then pulled the trigger. (Pros. Ex. 2.) The pistol went off with a loud pop and the bullet hit A1C Ware in the chest. (Pros. Ex. 2.) A1C Gasper's first thought upon hearing the discharge was that it was a blank round because there was "no reason a round should have gone off." (R. at 58.) Then A1C Gasper heard A1C Ware utter, "You shot me," and he heard Appellant say, "Oh shit, oh shit. I shot him." (Pros. Ex. 2.) A1C Gasper looked up to see A1C Ware falling over and he saw the spot of blood on the right side of A1C Ware's chest. (Pros. Ex. 2.) Appellant and A1C Gasper ran out of the pod to get help.

Airman First Class Aaron Beverly, who had been in the adjacent pod watching a movie, heard the gun shot and the Appellant say, "I shot him." (Pros. Ex. 2.) He ran over to A1C Ware's pod to find A1C Ware lying on the floor clutching the right side of his chest with blood flowing through his hand,

groaning, and with white foam coming out of his mouth. (Pros. Ex. 2.) He also noticed there was blood "all over the place." (R. at 70-1.) Seeing A1C Ware was conscious, he ran over to him and grabbed his left hand. (Pros. Ex. 2.) A1C Ware's eyes were open, and he was aware, but when A1C Beverly spoke to him, A1C Ware did not respond. (R. at 70.) All A1C Beverly could hear was the croaking sound made by the breath escaping from A1C Ware's chest wound. (R. at 70.) Despite the arrival of help, including medical personnel, A1C Ware died from the gunshot wound only a short time later. (Pros. Ex. 2.)

According to Lieutenant Colonel Steven Chapman, a pathologist with the Armed Forces Institute of Pathology, the bullet would possibly have caused A1C Ware to feel like he had been punched in the chest, and his blood loss would have been quick and significant as the result of the damage to his heart. (R. at 54.) As blood filled the space around his lungs, A1C Ware would have had increasingly more difficulty breathing. (R. at 54.) Due to the blood loss and drop in blood pressure, "A1C Ware would have lost consciousness in a matter of moments, and most likely died in a matter of minutes." (R. at 54).

While medical personnel were in the pod trying to save A1C Ware's life, Appellant was outside the pod with two other medical personnel who had been asked to check on him. (Pros. Ex. 2.) Appellant admitted to them that he shot A1C Ware.

(Pros. Ex. 2.) He also said, "I didn't know the bolt was in the weapon"; "I racked the M9 in an effort to clear and clean. The weapon then clicked and fired"; "I don't know how it was loaded I never have rounds in it." (Pros. Ex. 2.)

The United States Army Criminal Investigation Laboratory determined that the weapon, along with its incorporated safety features, and the magazines were all functioning properly. (Pros. Ex. 2.) The trigger pull was also set to manufacturer's specifications. (Pros. Ex. 2.) Finally, the lab determined the bullet that killed A1C Ware (found lodged in a locker in the next pod) was fired from the Appellant's M9 pistol. (Pros. Ex. 2.) Given that the M9 was operating properly, it was not possible for it to fire unless the trigger is pulled back all the way. (Pros. Ex. 2.) Pulling the slide back to chamber a round will not cause the weapon to fire; it is still necessary to pull the trigger. (Pros. Ex. 2.)

Appellant's M9 pistol was found on the floor at A1C Ware's feet with the safety in the "fire" position but no magazine in the weapon. (Pros. Ex. 2.) There was also another live round in the chamber. (Pros. Ex. 2.) For that round to have been in the chamber, other than by manual loading, the magazine must have been in the weapon when it was fired. (Pros. Ex. 2.) There were two magazines found in Appellant's locker - one contained all 15 rounds and was in the ammo pouch of the

holster; the other contained only 13 rounds and was found on a pile of clothes in the bottom of the locker. (Pros. Ex. 2.) It is not possible for the magazine to simply fall out; the magazine release button must be pressed to remove the magazine. (Pros. Ex. 2.) The magazine was not removed from the weapon by any of the people who entered the room after A1C Ware was shot. (Pros. Ex. 2.) When A1C Beverly first arrived on the scene and was attending to A1C Ware, he saw Appellant come in the room alone and then leave again before others began arriving. (R. at 71.)

As a result of Appellant's killing of A1C Ware, A1C Beverly began to experience recurrent nightmares and medical problems. A1C Beverly was the first person in the room immediately after the shooting and after Appellant and A1C Gasper left to get help. (R. at 70.) He found himself alone, trying to provide aid and comfort to a mortally wounded Airman in the last minutes of life. (R. at 70-1.) As a result of this trauma, he began to experience a variety of nightmares, including watching his wife or 3-year-old son dying in his arms and shooting his 3-year-old son in the head as the boy walks into the bedroom. (R. at 72-3.) Since the shooting, A1C Beverly suffered from constant headaches, nausea, and fatigue, and he has experienced incidents that induce fright, panic, and anxiety. (R. at 72-4.) He also started smoking three packs of cigarettes a day. (R. at 72.)

He has been diagnosed with Post Traumatic Stress Disorder and depression and is on medication for depression, to reduce his anxiety, and to help him sleep. (R. at 74.)

A1C Beverly also recalled for the court two encounters with Appellant after the shooting. (R. at 75.) On the first occasion, A1C Beverly saw appellant at a sandwich shop on the installation. (R. at 75.) He told Appellant he hoped that everything would work out. (R. at 75.) He then reported that Appellant acted as though and in fact told him that he would "be able to get off easy" and that Appellant did not appear to have any remorse. (R. at 75.) A1C Beverly described Appellant as happy and more interested in going to barbecues. (R. at 75.) On the second occasion, A1C Beverly saw Appellant at a barbecue, where again he did not seem to exhibit any remorse but was instead "happy and flamboyant like he didn't do anything." (R. at 75.)

Like A1C Beverly, A1C Booth also endured nightmares and problems sleeping as a result of the shooting. (R. at 91.) One recurrent nightmare, in particular, involves A1C Booth and A1C Ware sitting on a bed with A1C Ware covered in blood, shaking his head, and saying it should not be like this. (R. at 91.) Unable to sleep, he was prescribed sleeping medication but the drug gave him more nightmares. (R. at 91.) As of the date of

the trial, nearly a year after the event, A1C Booth was still experiencing nightmares and difficulty sleeping. (R. at 91.)

A1C Gasper described feeling anger and tremendous guilt about the shooting. (R. at 63-4). He blames himself for not being quick enough to recognize what was happening in the seconds before Appellant shot A1C Ware and for not doing something to prevent the senseless loss of A1C Ware's life. (R. at 64.) The opportunity for A1C Gasper to escort A1C Ware's body back home was, for him, a small way to make amends for not having done something to stop the shooting. (R. at 65.) At the funeral service for A1C Ware, attended by an estimated 300 to 350 people (R. at 93), A1C Gasper was impacted by the presence of the patriot guard riders who protect the mourners from protesters and by the eulogies to A1C Ware. (R. at 65.) A1C Gasper and his wife are now the godparents of A1C Ware's two daughters. (R. at 66.)

A1C Ware's Flight Chief at Hickam AFB, Master Sergeant Scott Chaplin, described A1C Ware as one of the best security forces members he had ever seen - "an excellent troop." (R. at 104.) He expressed sadness at the loss of A1C Ware and anger over the way it happened, describing the way weapons safety, including AFI 31-207, is briefed every day at guard mount and "drilled into [their] brains." (R. at 109.) He also described a standing room only memorial service at Hickam AFB attended by

an estimated 300 people. (R. at 106). He testified also about other honors bestowed on A1C Ware by the Hickam AFB community, including a posthumous promotion to Senior Airman and the new K9 facility at Hickman AFB, which is to be named after A1C Ware, with a picture of A1C Ware, the flag flown at A1C Ware's funeral service, and plaque in his memory. (R. at 108.)

A1C Ware's parents, Rosalie and Carl Ware, also testified during the sentencing portion of the trial. (R. at 113.) A1C Ware's mother briefly described his childhood (making reference to a number of photographs entered as prosecution exhibits); his close relationship with his sister, Annie; and her immense grief at the loss of her son. (R. at 113-8.) A1C Ware's father also recalled the things he will remember most about his son, he stated he felt he had lost part of himself because he and A1C Ware were so much alike, and he described his feeling of sadness for his son's lost future. (R. at 119-21.) Last, he paid special tribute to A1C Beverly for staying with his son and not leaving his son to die alone. (R. at 122.)

In addition to A1C Ware's parents, A1C Ware's wife also testified at the trial. Kristine Ware met her husband in high school when they were both 15 years old and had been together ever since. (R. at 123). She testified about her profound sadness and the anger she feels over the situation that led to the loss of her husband. (R. at 133.) Since A1C Ware's death,

Mrs. Ware has been diagnosed with anxiety and depression and has been put on medications. (R. at 133.) At the time of A1C Ware's death, they had one little girl, Kaitlin, who was approximately 1 year old, and his wife was pregnant with their second child. (R. at 125-9). Their second daughter, Carly, was born 6 months after A1C Ware's death. (R. at 131.)

The day before the funeral, when Mrs. Ware first got to see A1C Ware's body, she took their daughter, Kaitlin, with her. (R. at 131.) Like the day she learned that A1C Ware had been killed (R. at 130), Mrs. Ware collapsed, crying and sobbing, when she saw A1C Ware in his coffin. (R. at 130.) She had to be held up by a friend so she could talk to A1C Ware as he lay in his coffin. (R. at 130.) Mrs. Ware then described what happened when their daughter saw her father, "[Kaitlin] was waiving at him, trying to get him to pick her up and she wanted to lay with him and she gave him a kiss and she started to cry when she realized he wasn't picking her up." (R. at 131.)

ARGUMENT

The United States does not ask this Court to reconsider its entire decision. Particularly, the government does not contest this Court's decision to set aside the finding of guilt on the charge of violating an Air Force Instruction, its decision to affirm the lesser included offense of willful dereliction of duty, its decision to reassess the sentence, and its decision

that all evidence before the court at trial would have still been before the court had no error occurred. *See* United States v. Dalton, ACM 37057 (A.F. Ct. Crim. App. 25 November 2008). Unquestionably, the United States believes this court had the ability to reassess the sentence without ordering a new sentencing hearing. In fact, the United States would strongly oppose a sentence rehearing. Reassessment is the only proper course of action, especially considering that the victims of this horrendous crime have already suffered enough at the cold hands of this convicted killer and his unconscionable actions. However, the government respectfully requests that this Court reconsider *en banc* the panel's decision to reduce Appellant's confinement by 18 months - the difference between the maximum confinement sentences for violating a lawful general regulation (2 years) and willful dereliction of duty (6 months).

In its decision, the panel found the guilty plea of violating the Air Force Instruction was improvident. The Court then affirmed the lesser included offense of willful dereliction of duty, and rejected Appellant's claim that his sentence was inappropriately severe. However, the panel held that it could not be confident that a sentence of confinement greater than eight years and six months would have been imposed based on this lesser included offense. The panel ruled as follows:

> In this case, our action reduces the maximum permissible sentence that the appellant faced from 12 years of confinement to 10 years and six months. All other aspects of the maximum permissible sentence remain the same. We also note that the dismissal of the greater charge does not impact the admissibility of any of the evidence or aggravation surrounding the offenses, save AFI 31-207 itself. As such, we are satisfied that all of the facts surrounding the earlier incident of weapon pointing would have been admissible as evidence of the willful dereliction of duty. Therefore, the only change in the sentencing landscape is the small reduction in the maximum permissible sentence. Considering this change, we are confident that the military judge would have imposed a sentence of at least eight years and six months. We reassess the sentence accordingly.

Dalton, unpub. op. at *5.

The government believes this Court correctly decided that it had the ability to reassess the sentence in Appellant's case. However, the government also believes this Court misapplied the law when determining what exactly that reassessed sentence should be. As this Court stated in its decision, "this Court must be confident 'that, absent any error, the sentence adjudged would have been of at least a certain severity.'" Id. at *5 (*quoting* United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)). This Court further noted "a sentence can be reassessed only if we 'confidently can discern the extent of the error's effect on the sentencing authority's decision.'" Dalton, unpub.

op. at *5 (*quoting* United States v. Reed, 33 M.J. 98, 99 (C.M.A. 1991).

In Appellant's case, this Court misapplied the law in that it did not base its reassessment on the "confident" standard described in the cases above. Instead, this Court used a much higher standard of what for all intents and purposes amounted to a "beyond all doubt" standard. The panel did not analyze what impact the military judge may have given to the fact that Appellant's repeated and blatant conduct violated an Air Force Instruction. This panel did not analyze the change in the overall maximum permissible confinement caused by the lesser included offense and award some proportional reduction caused by the "small reduction in the maximum permissible sentence." The panel did not discuss why *any* reduction in confinement would have been warranted, when, by the panel's own admission, "all of the facts surrounding the earlier incident of weapon pointing would have been admissible as evidence of the willful dereliction of duty." Instead, the panel merely subtracted the difference between the old and new maximum punishments (18 months) to reassess Appellant's sentence from ten years of confinement to eight years and six months. The panel's use of this simple mathematical equation misapplies the law, as this Court is not required to justify a sentence reassessment to a

mathematical certainty by basing its reassessment only on the difference between the old and new maximum punishments.

At his court-martial, Appellant faced a maximum confinement sentence of twelve years based on his guilty pleas to a charge of involuntary manslaughter under Article 119, Uniform Code of Military Justice (UCMJ), a ten-year maximum, and a charge of disobeying a general regulation under Article 92, UCMJ, a two-year maximum. Based on Appellant's guilty pleas, the military judge adjudged a sentence of ten years confinement. (R. at 247.) This Court, in affirming the lesser-included Article 92 offense of willful dereliction of duty, a six-month maximum, reduced the maximum confinement sentence by eighteen months, the same reduction given by this Court in its sentence reassessment.

By reducing Appellant's sentence by the exact difference in maximum punishments of the Article 92 offenses, this Court conceded to Appellant's flawed line of logic.[1] According to Appellant's logic (adopted by the panel), the military judge sentenced Appellant to the maximum of two years for the Article 92 charge but then sentenced Appellant to only eight out of a possible ten years for the involuntary manslaughter charge. In other words, this Court effectively believed the military judge sentenced Appellant to 100 percent of the allowed confinement

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[1] *See* "Appellant's Second Supplemental Assignment of Errors (In Response to Specified Issue)" at 5.

for violating a general regulation but only 80 percent of the allowed confinement for committing an involuntary manslaughter. Such a determination flies in the face of the clear evidence presented at trial and contradicts the panel's own statements in its opinion.

This Court noted at length the numerous aggravating factors in this case, most notably citing how "the devastating impact of the appellant's crime on this family was profound and will be profound for many, many years." Id. The quintessential and most egregious offense committed by Appellant was the killing of A1C Ware. The family did not experience devastating impact because Appellant's earlier conduct amounted to an AFI violation. The family experienced devastating impact because Appellant negligently killed a young husband and father in the flower of his youth. Yet, the panel surmised that Appellant was sentenced to just 80 percent of the maximum confinement possible for the unmitigated killing A1C Ware but the maximum possible confinement for violating an AFI, misconduct that would have been introduced at trial no matter how the government charged his actions.

In reassessing a sentence, this Court is not charged with determining the least severe possible punishment an appellant would have received. If that were the case, the panel's simple mathematical reassessment would be correct, as the panel simply

subtracted the difference in the maximum confinement sentences of the two Article 92 charges from the adjudged sentence. However, the law states this Court must be certain the adjudged sentence would be of at least a certain severity. *See* Sales, 22 M.J. 308. As a Judge from our Superior Court has explained, this requires Courts of Criminal Appeals to exercise judgment based on their experience, not simply subtract maximum possible sentences:

> In *Sales* and its antecedents, we adopted a further presumption of law that a Court of Criminal Appeal could, in certain contexts, "determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity . . . ." *Sales*, 22 M.J. at 308. Of course, as Appellant points out, there is a **certain** leap of logical faith involved in such an assumption. Absent clairvoyance, we cannot actually know how a military judge or a panel of members would have sentenced an appellant following a change in factual circumstances. This is especially true within a sentencing construct not based on guidelines or bands, but on discretionary sentence maximums and individualized adjudication. However, this Court nonetheless concluded in *Sales* that the lower court may reassess an appropriate sentence for an offense so long as the reassessed sentence "is no greater than that which would have been imposed if the prejudicial error had not been committed." *Id.* Our holding in *Sales* was based on an understanding that given the substantial experience of the lower court, it could act in accordance with the above-noted presumption and accurately reassess an appropriate sentence. *See United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F.1999).

United States v. Moffeit, 63 M.J. 40, 42 (C.A.A.F. 2006) (Baker, J., concurring). Our Superior Court has expressed "great confidence" in the ability of Courts of Criminal Appeals to reassess sentences. United States v. Peoples, 29 M.J. 426, 429 (C.M.A. 1990). Our Superior Court has emphasized that reassessing sentences is a two-fold responsibility: "[W]e have emphasized that our task must be to ensure that the sentence is both appropriate to the affirmed findings of guilty and no greater than that which would have been imposed by the court-martial if the prejudicial error had not been committed." United States v. Boone, 49 M.J. 187, 195 (C.A.A.F. 1998).

Surely, the exercise of discretion vested in this Honorable Court calls for more than a simple mathematical subtraction, especially in a tragic case such as this. The panel misapplied the law in reassessing the sentence based only on maximum confinement sentences rather than reassessing based on the entire record. Had the panel reassessed the sentence based on what impact the AFI violation actually would have had on the military judge, the government is confident this Court would have reassessed the adjudged sentence and determined the sentence of ten years of confinement is what would have been imposed at the original trial absent the error. *See* United States v. Taylor, 47 M.J. 322, 325 (C.A.A.F. 1997) (In reassessing a sentence, "[t]he standard . . . is not what would

be imposed at a rehearing but what would have been imposed at the original trial absent the error.")

CONCLUSION

Wherefore, the United States respectfully asks this Court to reconsider *en banc* its 25 November 2008 decision and determine the reassessed sentence should consist of a period of 10 years confinement, forfeiture of all pay and allowances, reduction to E-1, and a Dishonorable Discharge.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Colonel Nikki A. Hall, Chief, Appellate Defense Division, on DEC 24 2008.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Senior Airman (E-4) KYLE J. DALTON, USAF, Appellant	APPELLANT'S MOTION IN REPLY TO GOVERNMENT'S MOTION FOR *EN BANC* RECONSIDERATION Before Panel No. 3 Case No. ACM 37057

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

In accordance with Rules 17 and 19 of this Court's Rules of Practice and Procedure (hereinafter referred to as "Rules"), Appellant opposes the Government's 24 December 2008 motion for *en banc* reconsideration of this Honorable Court's opinion. On 25 November 2008, this Honorable Court affirmed the finding for involuntary manslaughter, set aside Appellant's conviction for violating Air Force Instruction (hereinafter referred to as "AFI") 31-207, *Arming and Use of Air Force Personnel,* ¶ 2.12 (1 Sept 1999), but affirmed the lesser offense of willful dereliction of duty. *United States v. Dalton,* ACM 37057 (A.F. Ct. Crim. App. 25 Nov 2008) (unpub. op.). In reassessing the sentence, this Honorable Court affirmed only so much of the sentence that includes a dishonorable discharge, confinement for eight years and six months, forfeiture of all pay and allowances, and reduction to E-1.

In making this determination, this Honorable Court did not misapply a material legal or factual matter, a general prerequisite for *en banc* reconsideration under Rule 19.1(b)(1), but properly followed it. The Superior Court has stated that "if the 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. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). This Honorable Court observed this standard when it ruled "we are confident that the military judge would have imposed a sentence of at least eight years and six months." *Dalton,* ACM 37057, unpub. op. at 5; *United States v. Reed,* 33 M.J. 98 (C.M.A. 1991).

Since this Honorable Court applied the appropriate standard in reassessing the sentence in light of the prejudicial error and the Government has failed to show that this Honorable Court misapplied a material legal or factual matter, the Government's request for *en banc* reconsideration should be denied.

WHEREFORE, Appellant requests that this Honorable Court deny the Government's motion for *en banc* reconsideration.

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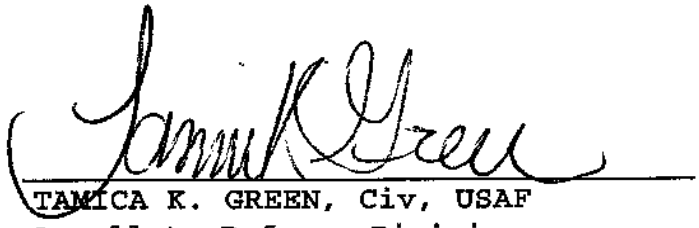
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were delivered to the Court and that a copy was delivered to Colonel Gerald R. Bruce, Chief, Government Trial and Appellate Counsel Division, on 30 December 2008



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