**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant BRETT Q. ANDRE**
**United States Air Force**

**ACM 35846**

**18 November 2005**

Sentence adjudged 11 December 2003 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, a fine of $10,000.00, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, Major James M. Winner, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Jesse Coleman (legal intern).

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have considered the record of trial, the assignment of error, and the government's answer thereto. A military judge sitting alone convicted the appellant, in accordance with his plea, of one specification of assault with a means likely to produce death or grievous bodily harm, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The judge sentenced the appellant to a bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, reduction to E-1, and a $10,000 fine, with an additional 6 months of confinement to be served should the fine not be paid. The convening authority did not approve the contingent confinement but otherwise approved the sentence as adjudged.

The appellant has submitted one assignment of error: that the bad-conduct discharge and the fine are inappropriately severe. "[S]entence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

We have considered all matters properly before the court. We have paid particular attention to the facts and circumstances surrounding the commission of the offense as set forth in the *Care*[1] inquiry and in the stipulation of fact, the evidence presented as to the nature and extent of the victim's injuries, and the degree of medical care required to treat those injuries which was provided in an Air Force hospital.[2]

We have paid particular attention, as well, to the high quality of the appellant's duty performance as set forth in his performance reports, his otherwise clean disciplinary record, and the witnesses and documents that attest to his good character. We have also considered the fact that this case presents no issue of unjust enrichment to the appellant. *See* Rule for Courts-Martial 1003(b)(3), Discussion. Furthermore, we have considered the appellant's statement of his financial condition contained in his clemency submission. *See United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988). Applying the *Snelling* criteria, recently reaffirmed by our superior court in *United States v. Baier*, 60 M.J. 382, 383 (C.A.A.F. 2005), we hold that an appropriate sentence in this case consists of a bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

The approved findings and sentence, as modified, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

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[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[2] The parties stipulated that the comparable cost of such treatment in a U.S. civilian hospital was approximately $13,367.14. Although the military judge did not say so in the record, it is reasonable to conclude that he imposed the fine as reimbursement to the government of the costs associated with the victim's medical care. While it is permissible to impose a fine to reimburse the government for losses occasioned by an accused's misconduct (*see United States v. McElroy*, 14 C.M.R. 24, 31 (C.M.A. 1954)), we also note that there exists a separate mechanism for compensating the government for medical expenses resulting from the willful misconduct or gross negligence of service members. Air Force Instruction 51-502, *Personnel and Government Recovery Claims*, ¶5.3.4.3., (1 Mar 1997).