6 November 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant*	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED
v.	)	
	)	USCA Dkt. No. 16-0054/AF
Airman Basic (E-1) GAVIN B. ATCHAK, USAF, *Appellee.*	)	Crim. App. No. 38526

APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN SETTING ASIDE AND DISMISSING THE SPECIFICATIONS OF AGGRAVATED ASSAULT WITHOUT AUTHORIZING THE CONVENING AUTHORITY TO ORDER A REHEARING FOR THE LESSER INCLUDED OFFENSES OF ASSAULT CONSUMMATED BY A BATTERY.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Honorable Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

On 29 October 2013, Appellee was convicted, pursuant to his pleas, at a general court-martial composed of military judge alone of one specification of dereliction of duty, in violation of Article 92, UCMJ, for providing alcohol to a minor; two specifications of failure to obey a lawful order, in violation

of Article 92, UCMJ, for failing to inform two individuals that he was HIV-positive and engaging in unprotected sex with them; and three specifications of aggravated assault, in violation of Article 128, UCMJ, for having unprotected sex with two individuals while HIV-positive. (J.A. at 39.) The remaining specifications, including one specification of dereliction of duty and one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one specification of abusive sexual contact, in violation of Article 120, UCMJ; and one specification of aggravated assault, in violation of Article 128, UCMJ, were dismissed with prejudice, in accordance with a pretrial agreement. (J.A. at 111.) Appellee was sentenced to forfeit all pay and allowances, to be confined for 36 months, and to be discharged from the service with a bad conduct discharge. (J.A. at 103.) The convening authority approved the sentence as adjudged. (J.A. at 41.)

On 10 August 2015, AFCCA issued an unpublished decision in which, after correctly applying this Court's holding in United States v. Gutierrez, 74 M.J. 61 (C.A.A.F. 2015), it set aside the findings of guilty for the three aggravated assault specifications. (J.A. at 8.) Upon review of the record, AFCCA could not uphold a conviction for the lesser included offense of

assault consummated by a battery, as this Court had done in Gutierrez, because the issue of consent "was not adequately explored with the appellant during the plea inquiry." (Id.) Instead of authorizing a findings rehearing on the lesser included offenses and remanding the case back to the convening authority, AFCCA dismissed the aggravated assault specifications and reassessed the sentence to confinement for eight months and a bad conduct discharge. (J.A. at 18.)

The Judge Advocate General, United States Air Force, certified the following issue under Article 67(a)(2), UCMJ:

> **WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN SETTING ASIDE AND DISMISSING THE SPECIFICATIONS OF AGGRAVATED ASSAULT WITHOUT AUTHORIZING THE CONVENING AUTHORITY TO ORDER A REHEARING FOR THE LESSER INCLUDED OFFENSES OF ASSAULT CONSUMMATED BY A BATTERY.**

STATEMENT OF FACTS

The facts necessary to the disposition of the issue are set forth in the argument below.

SUMMARY OF ARGUMENT

AFCCA erred in its decision to arbitrarily dismiss three aggravated assault specifications without authorizing a rehearing on the lesser included offense of assault consummated by a battery. Articles 66(d) and 67(d), UCMJ, empower military appellate courts to authorize rehearings for both findings and sentencing. This Court has already held that the normal remedy

after a guilty plea has been found to be improvident is to authorize a rehearing. United States v. Negron, 60 M.J. 136, 143-44 (C.A.A.F. 2004). As such, the United States requests that this Court order AFCCA to authorize a rehearing in this case as to the lesser included offense. Furthermore, In United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013), this Court held, regarding the decision to either reassess the sentence or order a sentencing-only rehearing when the sentence has been set aside, that greater deference would be given to a court of criminal appeals when it conducted a thorough analysis of its decision. This Court then listed four illustrative factors to help in that detailed analysis. Id. at 15. While Winckelmann has provided much-needed guidance to courts when a sentence has been set aside, there is no equivalent test when findings of guilt have been set aside and appellate courts have the option to either authorize a rehearing or simply dismiss affected specifications. Accordingly, the United States requests that a framework similar to Winckelmann be established for findings, where this Court will give greater deference to courts that conduct a detailed analysis of multiple factors when making the important decision of whether or not to authorize a findings rehearing.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN SETTING ASIDE AND DISMISSING THE SPECIFICATIONS OF AGGRAVATED ASSAULT WITHOUT AUTHORIZING THE CONVENING AUTHORITY TO ORDER A REHEARING FOR THE LESSER INCLUDED OFFENSES OF ASSAULT CONSUMMATED BY A BATTERY.

Standard of Review

Upon careful review of prior jurisprudence, the United States was unable to find any cases where the opinion of a court of criminal appeals (CCA) has been reviewed for the decision of whether or not to authorize a findings rehearing. As this appears to be a case of first impression, we could not find an applicable standard of review; however, this case can be most closely analogized to the decision of whether or not to reassess a sentence or order a sentencing rehearing. In such cases, this Court may only reverse the lower court for an abuse of discretion. Winckelmann, 73 M.J. at 15.

Law and Analysis

A. Article 66(d) and Article 67(d) form the basis for appellate courts' authority to order findings and sentencing rehearings.

Articles 66(d) and 67(d), UCMJ, authorize military appellate courts to order rehearings for findings or sentencing. Article 66 pertains to the CCAs' power, and Article 67 applies to this Court's power. Both provisions are essentially identical. Article 66(d) reads as follows:

> If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

Article 66(d), UCMJ. Based upon this provision, our courts of review are authorized to order a rehearing where the findings or sentence have been set aside, except when findings have been set aside due to lack of legal or factual sufficiency.

This Court has consistently affirmed this interpretation beginning with United States v. Miller, 27 C.M.R. 370 (C.M.A. 1959). In Miller, this Court was presented with the question of whether Article 66(d), UCMJ, permitted appellate courts to order a rehearing on sentence only. Id. at 372. This Court stated that it was unreasonable to literally read Article 66(d) that a rehearing may be ordered only if both the findings and sentence were set aside. Id. at 373. This Court further explained that this result could be avoided by substituting "or" for "and" in the first sentence so that Article 66(d) is construed to read that a rehearing may be ordered for findings "or" sentencing. Id. The holding in Miller was recently reaffirmed in United States v. Quick, No. 15-0347 (C.A.A.F. 11 August 2015).

The result of Article 66(d), as interpreted by these cases, is that if the sentence alone is set aside, the appellate court

will decide whether to reassess the sentence itself or to remand for a sentencing-only rehearing. However, where some part of the findings are set aside, there are two separate decisions that must be made. First, the court must decide whether to authorize a rehearing on findings or to just dismiss the affected charges. Article 66(d), UCMJ. If the court authorizes a rehearing, the case will be returned to the convening authority, who will either order a rehearing on findings or will dismiss charges and reassess the sentence accordingly. Article 66(e), UCMJ. R.C.M. 1107(e)(B)(iii-iv). If the court does not believe that a rehearing on findings is appropriate, it will dismiss the charges. Article 66(d), UCMJ. Second, if any charges remain after the affected charges are dismissed, the court must then decide whether to reassess the sentence itself or order a sentencing-only rehearing. Quick, slip op. at 18. If the court orders a sentencing-only rehearing, the convening authority may then either order the rehearing or, where a rehearing on sentence would be impractical, approve a sentence of no punishment. R.C.M. 1107(e)(C)(iii).

B. This Court has held that granting rehearings in similar cases is standard practice

The Negron case was a guilty plea case where this Court held that the military judge had given an erroneous definition of the word "obscene" during the providence inquiry. Negron, 60

M.J. at 141. This Court set aside the affected specification and authorized a rehearing after explaining why a rehearing is especially important when a guilty plea is set aside:

> Finally, the normal remedy for finding a plea improvident is to set aside the finding based upon the improvident plea of guilty and to authorize a rehearing at which the accused is permitted to plead anew. This remedy restores the appellant to his position before proferring the guilty plea and permits the Government the opportunity to prove the charged offense or any lesser included offense.

Negron 60 M.J. at 143-44 (internal citations omitted).

In another case, United States v. Riley, 72 M.J. 115, 122 (C.A.A.F. 2013), a guilty plea was held as improvident and set aside because the military judge had not inquired whether the accused had been advised by trial defense counsel regarding sex offender registration consequences. This Court then stated, "[t]he remedy for finding a plea improvident is to set aside the finding based on the improvident plea and authorize a rehearing." Id. In fact, this Court has often authorized rehearings in the guilty plea context. *See* United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005), United States v. Outhier, 45 M.J. 326 (C.A.A.F. 1996), United States v. Williams, 53 M.J. 293 (C.A.A.F. 2000), *and* United States v. Marsh, 15 M.J. 252 (C.M.A. 1983). Based upon the clear precedent established by this Court, we request that this Court authorize a findings

rehearing in this case. This remedy will permit the United States the opportunity to prove the lesser included offense.

C. Winckelmann provides guidance for appellate courts to decide whether to hold a sentencing-only rehearing or to reassess the sentence.

In Winckelmann, this Court addressed how much deference to afford the CCAs in deciding whether to reassess the sentence or order a rehearing on sentencing and if there were factors that CCAs should consider when making that decision. Winckelmann was the culmination of a line of cases including, most notably, Jackson v. Taylor, 353 U.S. 569 (1957); United States v. Miller, 27 C.M.R. 370 (C.M.A. 1959); United States v. Sales, 22 M.J. 305 (C.M.A. 1986); and United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006) (Baker, J., concurring in the result). Jackson established that a CCA may reassess a sentence on its own. 353 U.S. at 576. Miller, as discussed above, held that CCAs may order sentencing-only rehearings. 27 C.M.R. at 373. Sales gave the CCAs broad discretion in deciding whether to reassess sentence or order a rehearing. 22 M.J. at 308. Finally, Moffeit reaffirmed Sales, but most importantly, the concurrence "argued for a more transparent and predictable process by identifying illustrative factors this Court should consider in determining whether a court of criminal appeals has abused its discretion." Winckelmann, 73 M.J. at 15 (citing Moffeit, 63 M.J. at 42).

In Winckelmann, this Court adopted the view from the concurrence in Moffeit. In its decision, this Court continued to give "broad discretion" to the CCAs when reassessing sentences and stated it would "only disturb the [lower court's] reassessment in order to prevent obvious miscarriages of justice or abuses of discretion." Winckelmann, 73 M.J. at 15 (quoting United States v. Harris, 53 M.J. 86, 88 (C.A.A.F. 2000)). However, this Court further held that, although the CCAs were not obligated to detail the analysis of their decisions on reassessing sentence, "where the Court of Criminal Appeals conducts a reasoned and thorough analysis of the totality of the circumstances presented, greater deference is warranted on review before this Court." Id. at 12 and 16. Finally, this Court presented a list of four illustrative factors it "would expect the lower appellate courts to consider" in their decision of whether to reassess sentence or order a rehearing. Id. at 15.

D. Establishment of Winckelmann-like factors would assist appellate courts in making the decision to either dismiss charges or authorize a findings rehearing.

Although this Court has often addressed the CCA's decision when a sentence has been set aside, there is a lack of guidance regarding the CCAs' decision when findings have been set aside and a rehearing could be authorized. As Article 66(d) and 67(d), UCMJ, provide, a CCA may, in its discretion, order a

rehearing or dismiss the affected charges as long as the charges have not been set aside for lack of legal or factual sufficiency. Unfortunately, the same "transparent and predictable" process that has developed for the CCAs' decision about sentencing does not exist for findings. This leaves the CCAs with the ability to make arbitrary or inconsistent decisions without explanation, even though their decision may result in an "obvious miscarriage of justice".

As, according to Miller, the ability of appellate courts to order sentencing rehearings is on par with their ability to order findings rehearings under Article 66(d) and Article 67(d), UCMJ, it naturally follows that this Court should also give greater deference to CCAs that provide a reasoned analysis, including illustrative factors, of their decision to either authorize a findings rehearing or dismiss charges. As such, the United States expressly requests this Court to create a Winckelmann-like test for findings that gives greater deference to appellate courts applying illustrative factors in a well-reasoned and articulated analysis.

E. AFCCA should have authorized a rehearing in Atchak based upon applicable illustrative factors.

In the present case case, AFCCA provided absolutely no reasoning for setting aside and dismissing the aggravated assault specifications instead of authorizing a rehearing on the

lesser included offense. Several illustrative factors can be reviewed to support the assertion that a rehearing should have been granted.

1. Litigated trial or guilty plea

The first applicable factor concerns whether the finding of guilt arose from a guilty plea or from a litigated trial. Because Gutierrez was a litigated case, evidence had been presented that the accused had not informed his sexual partners of his HIV-positive status. Gutierrez at 63. Therefore, this Court was able to rely upon the record to substitute a finding of guilty for assault consummated by a battery as a lesser included offense. Id. at 68. Often, however, when a conviction was based on a guilty plea, or for other reasons, the record of trial may naturally not contain enough evidence to sustain a conviction for the lesser included offenses. In United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002), this Court noted that the nature of a guilty plea case will result in a record without fully developed facts. This Court stated:

> Those facts that are part of the military judge's providence inquiry are not subject to the test of adversarial process. We are similarly mindful that a decision to plead guilty may include a conscious choice by an accused to limit the nature of the information that would otherwise be disclosed in an adversarial contest.

In Jordan, this Court set aside a guilty plea and authorized a rehearing. Id. at 240.

As Atchak was a guilty plea case, the record of trial was understandably unclear regarding the issue of consent. Pertaining to the charged conduct with A1C W, AFCCA stated, "the record is not clear about whether the appellant engaged in sexual contact with A1C W while he was asleep and thus incapable of consenting." (J.A. at 6.) Again, pertaining to the 17 July 2012 conduct with A1C L the Court said, "[t]he record then becomes unclear about the consent issue because the parties were not considering the 'informed consent' concept." (J.A. at 7.)

For this very reason, this Court in Negron held that authorizing a rehearing in guilty plea cases is the standard. Negron 60 M.J. at 143-44. This remedy makes perfect sense in a guilty plea context. If CCAs denied the opportunity to hold a rehearing for lesser included offenses, it would lead to the unworkable result where the United States would have to ask the military judge to conduct a providence inquiry, not only on the charged offenses, but also on every possible lesser included offense.

2. Appellate court or convening authority

The second applicable factor is whether the convening authority or the appellate court is in a better position to decide whether to order a rehearing or dismiss the charges. As

the record from Appellee's guilty plea is naturally unclear regarding what evidence could be presented at a rehearing, the convening authority, who would have access to his or her legal staff and to the trial counsel, would be in a much better position to judge whether the evidence would support a rehearing on the lesser included offenses or whether the charges should be dismissed. From an understandably incomplete and cold guilty plea record, an appellate court will not have access to this information. Just as in any normal referral process, the convening authority, through his or her legal staff, will have direct and full access to the evidence and witnesses and will be best postured to make a decision on rehearing.

3. Pretrial agreement

The third applicable factor is that this conviction arose from a valid pretrial agreement. (J.A. at 111.) As part of his pretrial agreement, Appellee agreed to plead guilty to the aggravated assault specifications in exchange for a sentencing limitation and a promise to dismiss six specifications, including specifications alleging drug use and sexual assault. (Id.) While Appellee received the benefit of the pretrial agreement in that he both received peace of mind and certainty that his sentence would not exceed a certain amount and in that several serious specifications were withdrawn and dismissed with prejudice, the United States has not received its full agreed-

upon benefit. (Id.) Through no fault of the United States, the aggravated assault specifications were set aside and the hard-fought sentence was reduced on appeal. As Gutierrez had not been decided at the time of Appellee's trial, the United States correctly charged the case, and the military judge applied the law correctly as it existed at the time. The military judge had no obligation or reason to explore the issue of "informed consent" as it was not an element or defense to aggravated assault. Consent was simply not relevant to the charges at trial, but clearly will be at rehearing. As this trial included a pretrial agreement, it would be unjust for the Appellee to receive his benefit while the United States did not.

4. Gravamen of the offense

The fourth applicable factor is that the aggravated assault specifications constituted the gravamen of the offense. While disobeying the lawful order was serious, the gravamen of the offense was the unlawful touching. It was the actual touching without meaningful informed consent that forms the basis for the crime. As such, the United States deserves the opportunity to prove the elements of assault consummated by a battery.

5. Prejudice to Appellee

Finally, a fifth potential factor could evaluate prejudice to Appellee if a rehearing is granted. In this case, Appellee has not articulated any actual prejudice that he would suffer if

a rehearing was ordered; therefore, this factor does not apply to this case. Moreover, given that Appellee confessed under oath that he was guilty of the greater offense of aggravated assault, he cannot articulate any prejudice if the convening authority decides to order a rehearing on the lesser included offense of assault consummated by a battery.

Applying and balancing these illustrative factors and looking at the totality of the circumstances show that AFCCA's decision to arbitrarily dismiss the aggravated assault specifications constituted an abuse of discretion or an "obvious miscarriage of justice." As such, AFCCA should have authorized the convening authority to order a rehearing on the lesser included offenses.

F. AFCCA's decisions to grant rehearings are inconsistent.

AFCCA has conflated the separate decisions that must be made about whether to hold a rehearing on findings or dismiss charges and whether to hold a rehearing on sentencing or reassess the sentence. Just two days after AFCCA released its opinion in Atchak, it released another opinion, United States v. Perez, ACM 38559 (A.F. Ct. Crim. App. 12 August 2015) (unpub. op.), (J.A. at 117), where it authorized the convening authority to order a rehearing on three specifications of child endangerment it had set aside for lack of corroboration in light of United States v. Adams, 74 M.J. 137 (C.A.A.F. 2015). In

doing so, the Court failed to cite any reason why the outcomes of Perez and Atchak should have been different, yet in Perez, the rehearing was authorized, and in Atchak, it inexplicably was not.

Then, less than one month later, AFCCA released an opinion, United States v. Jensen, ACM 38669 (A.F. Ct. Crim. App. 3 September 2015) (unpub. op.), (J.A. at 124), where a guilty plea was held to be improvident, in light of United States v. Schell, 72 M.J. 339 (C.A.A.F. 2013), for attempting to persuade a minor to engage in sexual activity of a criminal nature. In AFCCA's opinion, the two-judge majority, without any explanation, authorized a findings rehearing for the charge that had been set aside. (J.A. at 128.) However, the concurring opinion stated that *instead* of authorizing a rehearing, the better course of action would have been to reassess the sentence. (Id.) The concurring opinion then went through the Winckelmann factors and explained why it would be appropriate for AFCCA to reassess the sentence. (J.A. at 129.) This erroneous analysis was similar to that done by AFCCA in Atchak.

Reading Jensen along with Perez and Atchak, it appears that AFCCA has conflated the decision regarding findings rehearings with the decision on sentencing rehearings. The lower Court combined what should be two separate decisions into one decision. It also does not appear to rely on any clear

framework, principles, or factors when deciding whether to dismiss charges that have been set aside or to authorize rehearings.

As AFCCA's action in dismissing the aggravated assault specifications in this case was contrary to this Court's clear guidance in Negron and constituted a "miscarriage of justice," we request that the Court reverse AFCCA's decision and authorize the convening authority to order a rehearing. Moreover, in order to promote greater transparency and predictability when findings are set aside, we request that this Court apply Winckelmann-like factors to the analysis of whether to authorize a findings rehearing.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court reverse the decision of the Air Force Court of Criminal Appeals and authorize the convening authority to order a rehearing on the lesser included offense.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Appellate Defense Division on 6 November 2015.

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