14 November 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Lieutenant Colonel (O-5) EDZEL D. MANGAHAS, USAF, *Appellant.*	)	USCA Dkt. No. 17-0434/AF Misc. Dkt. No. 2016-10

FINAL BRIEF ON SPECIFIED ISSUE ON BEHALF OF THE UNITED STATES

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

ISSUE SPECIFIED

IN LIGHT OF COKER V. GEORGIA, 433 U.S. 584, 598 (1977), AND UNITED STATES V. HICKSON, 22 M.J. 146, 154 n. 10 (C.M.A. 1986), WAS THE OFFENSE OF RAPE OF AN ADULT WOMAN, A VIOLATION OF ARTICLE 120, UCMJ, 10 U.S.C. §920 (SUPP. II 1997), A CRIME PUNISHABLE BY DEATH WITHIN THE MEANING OF ARTICLE 43, UCMJ, 10 U.S.C. §843 (1994)?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On 28 October 2015, a single charge and specification were preferred against Appellant which read as follows:

Charge I: Violation of the UCMJ, Article 120

> Specification: In that LIEUTENANT COLONEL EDZEL D. MANGAHAS, United States Air Force, 388th Operations Group, Hill Air Force Base, Utah, did, at or near the United States Coast Guard Academy, Connecticut, between on or about 1 February 1997 and on or about 28 February 1997, rape [DB], then known as [DS].

(R. at 11.1.)

A preliminary hearing pursuant to Article 32, UCMJ, was conducted on 19 April 2016. On 27 April 2016, the Preliminary Hearing Officer (PHO), a sitting military judge and Air Force judge advocate, issued his report and determined probable cause did not exist for the charge. (App. Ex. X at 15.) On 2 June 2016, the convening authority referred the case to a General Court-Martial. (R. at 11.1.) Appellant was properly arraigned on 14 June 2016. (Id. at 12.)

On 10 July 2016, Appellant, through his civilian trial defense counsel, filed a Motion to Dismiss the charge and specification based on an alleged violation of his right to a speedy trial. (App. Ex. X.) On the same day, Appellant also filed a Motion to Dismiss based on a violation of the statute of limitations. (App. Ex. VI.) The government filed its responses to both motions on 17 July 2016. (App. Exs. VII, XI.)

On 29 July 2016, the parties held an Article 39(a) session to address the motions. (R. at 14.) On 2 August 2016, the military judge denied Appellant's

Motion to Dismiss based on the statute of limitations, ruling that the charge of rape had no statute of limitations. (App. Ex. XIV.) However, on the same day, the military judge granted Appellant's Motion to Dismiss based on speedy trial, ruling that "the accused's Fifth Amendment Due Process right to a speedy trial has been violated. The accused's constitutional right to a speedy trial having been violated, R.C.M. 707(d)(1) mandates dismissal with prejudice." (App. Ex. XV.)

On 5 August 2016, the government provided its Notice of Appeal pursuant to Article 62, UCMJ and R.C.M. 908(b). The case was docketed with AFCCA on 25 August 2016. On 4 April 2017, AFCCA vacated the military judge's order, stating, "We conclude the military judge abused his discretion in finding actual prejudice and thus grant the Government's appeal." United States v. Mangahas, Misc. Dkt. No. 2016-10 (A.F. Ct. Crim. App. 4 April 2017).

SUMMARY OF ARGUMENT

The Supreme Court's holding in Coker, as well as this Court's footnote in Hickson, does not impact this Court's well-established jurisprudence that, for purposes of Article 43, UCMJ, an Article 120, UCMJ, rape offense of an adult woman committed in 1997 is an offense "punishable by death" and thus has no statute of limitations. As such, this Court should deny Appellant's claim and affirm his convictions and sentence.

ARGUMENT

AN ARTICLE 120, UCMJ, OFFENSE OF RAPE OF AN ADULT WOMAN COMMITTED IN 1997 WAS PUNISHABLE BY DEATH WITHIN THE MEANING OF ARTICLE 43, UCMJ.

Standard of Review

Questions concerning statutes of limitations are questions of law subject to de novo review. United States v. McElhaney, 54 M.J. 120, 125 (C.A.A.F. 2000) (citation omitted).

Law and Analysis

A. Maximum Authorized Punishment of Article 120, UCMJ

At trial, Appellant acknowledged that the version of Article 120, UCMJ, in place at the time of the rape charge in this case ("between on or about 1 February 1997 and on or about 28 February 1997") "authorized a maximum punishment of 'Death or such punishment as a court-martial may direct.'" (*See* App. Ex. VI.) In his ruling, the military judge agreed, stating, "The 1996 version of Article 120, UCMJ, authorized a maximum punishment of 'Death or such punishment as a court-martial may direct.'" (*See* App. Ex. XIV.)

B. Article 43. UCMJ

When enacted as part of the Uniform Code of Military Justice in 1950, Article 43(a) did not refer to "offenses punishable by death," but instead contained a list of specific offenses exempt from the statute of limitations. Rape was not

included in that list. *See* Willenbring v. Neurauter, 48 M.J. 152, 178 (C.A.A.F. 1998).[1] In 1986, however, Congress modified Article 43 so that "no statute of limitations would exist in prosecution of offenses for which the death penalty is a punishment prescribed by or pursuant to the UCMJ." Id. at 179.

Thus, Article 43(a), UCMJ, now provided that "[a] person charged with . . . any offense punishable by death, may be tried and punished at any time without limitation." *See* 10 U.S.C. §843(a) (1986). Otherwise, Article 43(b)(1), UCMJ, imposed a five-year statute of limitations, preventing trial by court-martial for an offense committed "more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command."

In his motion to dismiss as trial, Appellant noted, "In 1997, the 1995 version of the Manual for Courts-Martial applied, and that version of Article 43, UCMJ stated: . . . (1) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." (*See* App. Ex. VI.) Such language was unchanged from the 1986 version of Article 43(a).

[1] Notably, in 2006, Congress modified Article 43(a) to expressly include rape as an offense for which no statute of limitations applied. However, such a change did not apply retroactively to Appellant's offense.

C. Death Penalty, Statute of Limitations, and Article 43 Jurisprudence Regarding Rape

i. The Supreme Court

In 1977, the United States Supreme Court held that "with respect to rape of an adult woman," "We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." Coker v. Georgia, 433 U.S. 584, 592 (1977). Notably, however, in its survey of state and federal law, the Coker Court made no mention of the military death penalty. *See* Id. at 593, 595-96, n. 6 of plurality opinion.

In 2008, the Supreme Court, drawing off of its Coker decision, held that a Louisiana statute authorizing capital punishment for child rape was unconstitutional. Kennedy v. Louisiana, 554 U.S. 407 (2008). The original opinion in this case did not reference the Uniform Code of Military Justice. Later, in a separate opinion squarely addressing the military penalty for rape, the Court stated:

> The military death penalty for rape has been the rule for more than a century. As respondent acknowledges in its petition for rehearing, military law has included the death penalty for rape of a child or adult victim since at least 1863. *See* § 30, 12 Stat. 736. Since 1950, that punishment has applied to peacetime offenses by members of the military. *See* Art. 120, 64 Stat. 140.
>
> . . .

> [A]uthorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context. The military death penalty for rape was in effect before the decisions in Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) *(per curiam),* and Coker v. Georgia, 433 U. S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); and when the Court surveyed state and federal law in Coker, it made no mention of the military penalty, see *id.*, at 595-596, 593, and n. 6 (plurality opinion) (not including the military as a "jurisdiction in the United States" that authorized the death penalty for rape, and naming the Federal Government among jurisdictions that recognized the death penalty for rape prior to Furman but citing only the nonmilitary provision). The same is true of more recent Eighth Amendment cases in the civilian context. *See* Enmund v. Florida, 458 U. S. 782, 789-793, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); Tison v. Arizona, 481 U. S. 137, 152-154, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). This case, too, involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision). *Cf.* Loving v. United States, 517 U. S. 748, 755, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).

Kennedy v. Louisiana, 554 U.S. 945, 947-948 (2008).

ii. The Court of Appeals for the Armed Forces

This Court first addressed Coker in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). There, the Court stated as follows:

> Congress obviously intended that in cases where an accused servicemember is convicted of premeditated murder, certain types of felony murder, or rape, the court-martial members should have the option to adjudge a death

> sentence. *See* Articles 118 and 120. Probably this intent cannot be constitutionally effectuated in a case where the rape of an adult female is involved, Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) -- at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense.

Id. at 380. In that case, this Court held that in light of Coker and Article 55, the death penalty could be imposed under the Code only if procedures were established to "ensure that the death penalty is not meted out arbitrarily and capriciously." Id. at 377.

The following year, in 1984, "the President issued detailed capital sentencing procedures, *see* RCM 1004, which included a requirement that the court members unanimously find the presence of at least one of the aggravating factors designated in RCM 1004(c) for the death penalty to be adjudged, *see* RCM 1004(b)(7)." *See* Willenbring, 48 M.J. at 179. As this Court would later note in Willenbring, "Under the new procedures, a rape conviction could not result in a death sentence unless the victim was under the age of 12 or the accused maimed or attempted to kill the victim." Id.

In 1986, this Court, in Hickson, dealt with the issue of "whether there was a congressional intent that an accused not only can be tried by court-martial for rape and adultery arising out a single act but also can be convicted of both offenses." Hickson, 22 M.J. at 154. In a footnote to this issue, this Court, citing to Article

120, UCMJ, and Coker, stated, "The Uniform Code and many state penal codes authorize death sentences for rape; but in the absence of aggravating circumstances, such punishment cannot be constitutionally inflicted." Id. at n 10.

Nine years later, in 1995, this Court faced an issue questioning whether, in light of Coker, a case involving the rape of an adult woman could be referred as a capital case. United States v. Straight, 42 M.J. 244, 246 (C.A.A.F. 1995). This Court found no error. First, in noting the Coker opinion, this Court also referenced that "RCM 1004(c)(9)(B), Manual for Courts-Martial, United States, 1984, authorizes a death sentence for rape if the 'accused maimed or attempted to kill the victim.' RCM 1004(c)(9)(B) was drafted in an effort to accommodate Coker v. Georgia, *supra*." Id. at 247 (citation omitted.) While noting that the finding of guilty to rape was not unanimous and, thus, "the death sentence was not authorized or considered by the court-martial," this Court still held, "Assuming *arguendo* that RCM 1004(c)(9) is unconstitutional, the Eighth Amendment would be violated only if the death penalty had been imposed." Id. at 247. The Court also stated, "To the extent that the referral as capital may have violated the Eighth Amendment, the error was waived by failure to raise the constitutional issue." Id.

Four years later, in 1998, this Court, in Willenbring, would squarely address the issue of Article 120's statute of limitations, and its intersection with Article 43(a) and Coker . There, an appellant faced a rape charge against an adult victim

that occurred in the 1987-1988 timeframe but was not preferred until February 1997. Id. at 155. On appeal, the appellant argued that "the particular offense could not be punished by death, citing RCM 1004(c) . . ., Article 55 . . ., and the Supreme Court's decision in Coker." Id. at 178.

This Court first analyzed the background of Article 43(a), the Court's holding in Matthews, and the resulting implementation of RCM 1004(c)'s aggravating factors. Id. at 179. The Court then dealt with the appellant's argument that "the phrase 'punishable by death,' which is set forth in Article 43's list of offenses exempt from the statute of limitations, necessarily refers only to cases in which RCM 1004(c)'s regulatory aggravating factors are present." Id.

This Court did not agree. First this Court noted that such an interpretation would result in the offense of murder also having a five-year statute of limitations unless the government could prove the existence of an RCM 1004(c) aggravating factor. Id. This Court continued:

> The clear purpose of the 1986 amendments to Article 43, as reflected in the legislative history and the text of the amendments, was to expand the circumstances in which a servicemember would be subject to trial by court-martial in light of parallel developments in the civilian sector. There is no indication in the legislative history that Congress, by using the phrase "punishable by death," intended to change the statute of limitations for murder from complete exemption to a mere 5 years. Likewise, there is no indication that Congress intended to exempt in all cases absence without leave and missing movement in time of war from the statute of limitations without regard

> to the presence of aggravating factors, on the one hand, but to exempt murder and other serious offenses only upon proof of the existence of regulatory aggravating factors, on the other hand.

Id.

This Court then stated, "The exemption from Article 43 for offenses "punishable by death" was meant to apply to the most serious offenses without listing each one in the statute, no more, no less," before citing to United States v. Manning, 56 F.3d 1188, 1195 (9th Cir. 1995), a Ninth Circuit case where that court "held that the crime of murder by mail bomb was "punishable by death" and therefore exempt from the statute of limitations, even though the death-penalty provisions of the statute under which the defendant was convicted were later held unconstitutional." Willenbring, 48 M.J. at 180. This Court specifically stated that it "agree[d] with the Ninth Circuit's explanation that 'the statute of limitations provisions . . . are inextricably tied to the nature of the offense. Congress has made the judgment that some crimes are so serious that an offender should always be punished if caught.'" Id. (*citing* Manning, 56 F.3d at 1196).

This Court then further cited to an Eighth Circuit case, Coon v. United States, 411 F.2d 422, 424 (8th Cir. 1969), for their holding that an "offense was a 'capital offense' even though 'the government did not request' or 'the jury did not access' the death penalty," as well as a Fourth Circuit case, United States v. Watson, 496 F.2d 1125, 1127-28 (4th Cir. 1973), which held that an "offense of

first-degree murder was 'still a 'capital crime'' for purposes of appointing counsel notwithstanding the Supreme Court's invalidation of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972))." Willenbring, 48 M.J. at 180.

Additionally, while referencing the military judge's ruling that "the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statutes of limitations," this Court stated, "We agree." Id. at 178. Ultimately, this Court stated, "We hold that rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations of Article 43(b)(1). Therefore, the charges against appellant are not time-barred." Id. at 180.

During this same timeframe in which this Court was reviewing Willenbring, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) had released in a published opinion United States v. Gonzalez, 46 M.J. 667 (N.M. Ct Crim. App. 1997). There, the NMCCA held that the appellant's Article 120 rape offense that occurred in 1987 had no statute of limitations, concluding as follows:

> If a charge is preferred that is "punishable by death," and that charge is ultimately referred to a court-martial, there is no statute of limitations bar to trial. This is true even if the charge is referred with an instruction that it be tried as a noncapital case or to a special court-martial. *See* United States v. Moore, 32 M.J. 170, 171 n.1 (C.M.A. 1991).

Id. at 669. A few months later, in July 1997, this Court granted review of the case for the following issue: "Whether the military judge erred when he denied defense counsel's motion to dismiss the remaining charge of rape because the five-year statute of limitations under Article 43 of the UCMJ had run." *See* United States v. Gonzales, 48 M.J. 20 (C.A.A.F. 1997). Then, in January 1999, after the release of Willenbring, this Court affirmed the NMCCA's decision by citing to Willenbring and Articles 43 and 120, in holding that, "On further consideration of the granted issue, . . . in light of Willenbring v. Neurauter, 48 M.J. 152, 180 (C.A.A.F. 1998), we hold that appellant's prosecution was not barred by the statute of limitations." United States v. Gonzales, 51 M.J. 306 (C.A.A.F. 1999).

Five years later, in 2004, this Court, citing to Article 43, UCMJ, and Willenbring, stated, "At the time of Appellant's trial, the offense of rape could be tried at any time without limitation, while the offense of indecent acts was subject to a five-year statute of limitations." United States v. Thompson, 59 M.J. 432, 433 (C.A.A.F. 2004).

The following year, in 2005, this Court dealt with the issue of whether life without parole was an authorized punishment for rape after November 18, 1997. United States v. Stebbins, 61 M.J. 366 (C.A.A.F. 2005). There, the appellant, relying on Coker, argued "that confinement for life rather than death is the maximum authorized punishment for rape and that, because LWOP is not a lesser

punishment than life, it cannot be considered as the maximum punishment in this case." Id. at 369.

This Court did not agree. First, the Court stated as follows:

> Appellant's argument is inapposite to the issue in this case. In this case, we need not decide the scope and extent of the plurality opinion in Coker. The issue in this case is not whether Appellant can be executed for the offense of rape. Rather, the issue is whether Congress authorized LWOP for Appellant's offense of rape and whether the President has subsequently imposed any limitations on the imposition of LWOP as punishment for the rape of minor.

Id.

This Court, citing to Willenbring, then clearly stated that "we have explicitly held that 'rape is an offense punishable by death for purposes of exempting it from the 5-year statute of limitations in Article 43(b)(1).'" Id. This Court continued, "In doing so, we stated that 'the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue.'" Id.

This Court then noted that it "need not answer the question of whether Appellant may actually be sentenced to death for raping his daughter," instead noting that "the question in this case focuses on whether the President established a maximum sentence less than LWOP for rapes that occurred in 1998 and 1999." Id. This Court concluded that "because the President authorized death for Appellant's offenses, the 1998 MCM did not preclude a sentence of LWOP for rape." Id.

Accordingly, this Court held that LWOP was "an authorized punishment for Appellant's offense of rape of his daughter, which occurred after November 18, 1997." Id.

Five years later, in 2010, this Court concluded that indecent acts with another, a violation of Article 134, UCMJ, was not a purely military offense. United States v. Contreras, 69 M.J. 120, 124 (C.A.A.F. 2010). In doing so, this Court, in a footnote stated that "Whether something is a "purely military offense" depends on whether the UCMJ limits prosecution for the offense to servicemembers or contemplates the prosecution of a non-servicemember, not on whether a non-servicemember may in fact be prosecuted in a particular case." Id. at 124, n. 7. In making this statement, this Court provided the following citation:

> *See*, e.g., United States v. Stebbins, 61 M.J. 366, 369 (C.A.A.F. 2005) (holding that in determining whether death was the maximum authorized punishment for rape a court "need not answer the question of whether [the accused] may actually be sentenced to death"); Willenbring v. Neurauter, 48 M.J. 152, 180 (C.A.A.F. 1998) (holding that rape was a capital crime for statute of limitation purposes regardless of whether the necessary factors were present to sentence the accused to death in that case); United States v. Ealy, 363 F.3d 292, 296-97 (4th Cir. 2004) (holding that the statutory question of whether to apply the limitation period for capital or for non-capital offenses did not depend on whether the death penalty could be constitutionally imposed for the offense in question); United States v. Manning, 56 F.3d 1188, 1195-96 (9th Cir. 1995) (same).

Id.

iii. The Service Courts

On five occasions, the Air Force Court of Criminal Appeals (AFCCA) has cited to this Court's Willenbring opinion for the notion that rape under Article 120 has no statute of limitations. For example, in 2009, AFCCA dealt with a case questioning whether a child rape that occurred in October 2000 was barred by the statute of limitations. United States v. Vogler, ACM 37231 (A.F. Ct. Crim. App. 3 September 2009) (*rev. denied*, United States v. Vogler, 69 M.J. 179 (C.A.A.F. 2010)). There, citing to the 2000 edition of the Manual for Courts-Martial and Article 43, AFCCA held, "At the time of the earliest alleged child rape, 21 October 2000, there was no statute of limitations because rape was punishable by death, and there was no statute of limitations for offenses punishable by death." Id., unpub. op. at 8-9. In doing so, AFCCA stated the following in a footnote:

> The fact that the rape charge was not referred capital is of little consequence for statute of limitations purposes because the rape charge, whether referred capital or not, is still an offense which subjects the accused to death. *See* United States v. Stebbins, 61 M.J. 366, 369 (C.A.A.F. 2005) (*citing* Willenbring v. Neurauter, 48 M.J. 152, 179-80 (C.A.A.F. 1998)).

Id., unpub. op. at n. 5. AFCCA ultimately affirmed that appellant's convictions and sentence. Id., unpub. op. at 17. This Court denied review of the case. *See* Vogler, 69 M.J. at 179.[2]

In 2008, the Army Court of Criminal Appeals (ACCA) addressed this issue in United States v. Toussant, Army Misc 20080962 (A. Ct. Crim. App. 30 December 2008). There, a military judge dismissed two rape specifications arising from incidents between 1997 and 2003 that involved two child victims as being

[2] The other four cases include United States v. McElhaney, 50 M.J. 819 (A.F. Ct. Crim. App. 1999) (*citing* Willenbring, AFCCA stated, "The Court of Appeals for the Armed Forces has determined that a prosecution for rape, even when referred as non-capital, is not barred by Article 43, UCMJ, because it is an offense punishable by death;" while this court ultimately reversed the AFCCA decision on other grounds, it did not address this citation. *See* McElhaney, 54 M.J. 120); United States v. Knudtson, ACM 33871 (A.F. Ct. Crim App. 21 March 2001) (*rev. denied*, United States v. Knudtson, 55 M.J. 371 (C.A.A.F. 2001) (*quoting* Willenbring, AFCCA stated, "Rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations.'"); United States v. Sims, ACM 34079 (A.F. Ct. Crim. App. 19 December 2001) (*rev. denied*, United States v. Sims, 57 M.J. 436 (C.A.A.F. 2002) (*citing* Willenbring, AFCCA dismissed specifications involving sodomy, indecent acts, and indecent liberties before stating, "Rape, on the other hand, is an offense punishable by death and, thus, exempt from the 5-year statute of limitations."); and United States v. Dillon, ACM 36843 (A.F. Ct. Crim. App. 23 April 2009) (*rev. denied*, United States v. Dillon, 67 M.J. 369 (C.A.A.F. 2009) (*citing* Willenbring in a footnote, AFCCA stated, "We need not determine precisely when the rapes occurred as there is no statute of limitations for the offense of rape under Article 120, UCMJ.") The government acknowledges each of these cases involved child victims; however, the age of the victims in those cases had no bearing on AFCCA's repeated citations to this Court's Willenbring ruling or its ultimate holding that rape under Article 120 had no statute of limitations.

barred by the Eighth Amendment. Id., unpub. op. at 3-6. ACCA disagreed, holding as follows:

> [T]he Court of Criminal Appeals for the Armed Forces has made clear that "rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations of Article 43(b)(1).'" Willenbring v. Neurauter, 48 M.J. 152, 180 (C.A.A.F. 1998). The court in Willenbring also found that "the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue." Id. Our superior court reinforced this principle seven years later in United States v. Stebbins, 61 M.J. 366 (C.A.A.F. 2005).

Id., unpub. op., at 10. Additionally, ACCA disagreed with the appellant's argument that Kennedy prohibited death as an authorized punishment for raping a child, citing the Supreme Court's language that the decision was limited to the civilian context and that the Court "need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our consideration)." Id. (*quoting* Kennedy, 554 U.S. at 947.) This Court denied review of the case. *See* United States v. Toussant, 67 M.J. 269 (C.A.A.F. 2009).

Finally, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) has twice addressed this issue in reference to Willenbring. The first, United States v. Cozart, NMCM 97 01396 (N.M. Ct. Crim. App. 12 May 1999), occurred within a

year after Willenbring and involved an adult victim. There, the NMCCA stated the following:

> Our superior court recently decided the case of Willenbring v. Neurauter, 48 M.J. 152 (1998). Therein, the court undertook a thorough analysis of the very issue in this case and held that if an offense is one "punishable by death" it is exempt from the 5-year statute of limitations regardless of whether it is referred capital or non-capital. Willenbring, 48 M.J. at 180. This court had earlier reached a similar conclusion in United States v. Gonzales, 46 M.J. 667 (N.M. Ct. Crim. App. 1997), *aff'd*, No. 97-0755 (C.A.A.F. Jan. 15, 1999)[3]. Accordingly, we find no merit in this assignment of error.

Id., unpub. op. at 3-4. This Court then granted that appellant's issue asking "whether the military judge correctly denied appellant's motion to dismiss the additional charge of raping [BW] because the five-year statute of limitations under Article 43 had run," before summarily holding that "the military judge did not err" and affirming the NMCCA's decision. *See* United States v. Cozart, 53 M.J. 57 (C.A.A.F. 2000).

The second NMCCA case occurred earlier this year in United States v. Best, No. 201600134 (N.M. Ct. Crim. App. 25 May 2017). There, an appellant convicted of two specifications of raping his stepdaughter in the timeframes between 5 December 1999 and 4 December 2003 (one specification) and from 5 December 2003 and 30 September 2007 (the other specification) challenged whether the

[3] Notably, this is the same case, Gonzalez, referenced in the CAAF section above.

specifications were "barred by the statute of limitations because the Supreme Court has held that the death penalty for rape is unconstitutional." Id., unpub. op. at 1-3. Citing to Coker and Kennedy, the appellant argued that the specifications were subject to Article 43(b)'s five-year statute of limitations. Id., unpub. op. at 9.

The NMCCA did not agree, stating:

> The Court of Appeals for the Armed Forces (CAAF) conclusively ruled that "rape is an offense punishable by death for purposes of exempting it from the 5-year statute of limitations of Article 43(b)(1)," UCMJ. Willenbring v. Neurauter, 48 M.J. 152, 180 (C.A.A.F. 1998) (internal quotation marks omitted). In Willenbring, the appellant sought an extraordinary writ, contending that, given the Supreme Court's holding in Coker, death was not a possible punishment for the three specifications of rape with which he was charged. Since his offenses were alleged to have occurred approximately nine years before the charges were received by the officer exercising summary court-martial jurisdiction, Willenbring argued the charges were barred by the five-year statute of limitations imposed by Article 43(b)(1), UCMJ. The CAAF found that "the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue." Id. at 178.
>
> Consistent with Willenbring, our sister court vacated a military judge's order dismissing two specifications of rape, following a government interlocutory appeal pursuant to Article 62(b), UCMJ. United States v. Toussant, No. 20080962, 2008 CCA LEXIS 564 (A. Ct. Crim. App. 30 Dec 2008) (mem. op.). Like the appellant here, Toussant argued that the Supreme Court's holding in Kennedy barred his prosecution for rape since the crimes occurred more than five years ago. The Army Court of Criminal Appeals disagreed, reasoning that the Supreme

> Court clarified that its decision in Kennedy was limited to the civilian context, and that Willenbring "made clear" that Article 43(b)(1)'s five-year statute of limitations did not apply to the crimes of rape and rape of a child. Id. at *10.
>
> We see no reason to deviate from the CAAF's clear pronouncement of the law in Willenbring, nor from the Army court's application of that law—to facts strikingly similar to those presented here—in Toussant. Consequently, we conclude that Specifications 1 and 2 under Charge I are not barred by the statute of limitations.

Id., unpub. op. at 9-11. The NMCCA affirmed the findings and sentence. Just over two months ago, on 5 September 2017, this Court denied review of the case. *See* United States v. Best, 2017 CAAF Lexis 869 (C.A.A.F. 5 September 2017).

D. Based on congressional intent and this Court's holdings and actions over the last 25 years and in light of Coker and Hickson, the 1997 offense of rape of an adult woman in violation of Article 120 is a crime punishable by death within the meaning of Article 43, UCMJ.

In its specified issue, this Court asks, in light of Coker and Hickson, whether the offense of rape of an adult woman in violation of Article 120, UCMJ, is a crime punishable by death within the meaning of Article 43, the UCMJ statute which deals directly with the statute of limitations within the UCMJ. Based on congressional intent and this Court's rulings and actions since the Supreme Court's 1977 holding in Coker and this Court's 1986 footnote within its Hickson opinion, that answer is a clear and definitive yes.

First, the congressional intent as to the statute of limitations for rape under Article 120 is clear. In 1997, Article 120, UCMJ, explicitly authorized a maximum

punishment of "Death or such other punishment as a court-martial may direct," while Article 43(a) explicitly stated that "A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." Such remained that case until Congress, in 2006, modified Article 43(a) to expressly include rape as an offense for which no statute of limitations applied. While that 2006 modification is not at play in Appellant's case, it clearly shows the intent of Congress has remained clear and steadfast since at least the 1986 modification of Article 43; rape under Article 120 has no statute of limitations.

Moreover, since first squarely addressing the interplay of Coker with Article 43 in Willenbring, this Court has consistently held that, for the purposes of Article 43 and the statute of limitations, the rape of an adult woman is a crime punishable by death and, thus, has no statute of limitations. Notably, since Coker, this Court has recognized the focus of Coker was on whether a death sentence could constitutionally be imposed on an offender if they were actually sentenced to death, not on the interplay between the maximum imposable punishment of a statute and the statute of limitations. In other words, the ability to actually impose a death sentence had no impact on an offense's statute of limitations.

This focus began in Matthews, this Court's first opinion addressing Coker. There, this Court, while noting that "Congress obviously intended that in cases

where an accused servicemember is convicted of premediated murder, certain types of felony murder, or rape, the court-martial members should have the option to adjudge a death sentence," further stated this intent "[p]robably . . . cannot be constitutionally effectuated." Matthews, 16 M.J. at 380. Thus, this Court made it clear regarding the applicability of Coker to these cases – the question was whether a death sentence could actually be imposed as a result of Coker, not whether or not rape was "punishable by death" for statute of limitations purposes.

Such a focus was again evident in this Court's footnote in Hickson when, in noting the UCMJ and other states authorized death sentences for rape, this Court stated that "such punishment cannot be constitutionally inflicted . . . in the absence of aggravating circumstances." Hickson, 22 M.J. at 154, n. 10. Again, the Court's Coker analysis related to actually inflicting a death sentence.

Next, in Straight, this Court again focused on the actual imposition of the death penalty as punishment when it, in assuming *arguendo* that R.C.M. 1004(c)(9) was unconstitutional, stated that "the Eighth Amendment would be violated only if the death penalty had been imposed." Straight, 42 M.J. at 247. Again, the focus of analyzing Coker was on the actual imposition of a death sentence, not on whether or not rape was "punishable by death" for statute of limitations purposes.

Then, in 1998, when looking squarely at the intersection between Coker, Article 43, and Article 120, this Court definitively agreed that the "question of whether the death penalty may be imposed . . . does not control the statutes of limitations." Willenbring, 48 M.J. at 178. While this was the first time this Court addressed the issue in relation to Article 43, this Court directly refuted the appellant's argument then (and Appellant's argument now) that Coker invalidated Article 120's "punishable by death" exemption to the Article 43 statute of limitations. Instead, the Willenbring opinion was directly in line with its previous opinions that Coker dealt with whether a death sentence could actually be imposed. Such a view is also consistent with cases from multiple federal jurisdictions, including the Ninth (Manning) and Fourth (Ealy) Circuits.

The next year in Gonzales and again in 2004 in Thompson, this Court stated that Article 120 prosecutions of rape were not barred by the statute of limitations. *See* Gonzales, 51 M.J. 306; Thompson, 59 M.J. at 433.

Then, in 2005, this Court again noted the focus of Coker was whether an offender could actually be executed for the offense of rape. Stebbins, 61 M.J. at 369 ("In this case, we need not decide the scope and extent of the plurality opinion in Coker. The issue in this case is not whether Appellant can be executed for the offense of rape.") Moreover, this Court further solidified its clear holding in Willenbring, stating that "we have explicitly held that 'rape is an offense

punishable by death for purposes of exempting it from the 5-year statute of limitations in Article 43(b)(1)," before reaffirming as well that "'the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue." Id.

Finally, in 2010, this Court again recognized that whether or not a death sentence could be constitutionally imposed had no impact on an offense's statute of limitations by citing to Stebbins, Willenbring, and federal cases from the 4th and 9th Circuits. *See* Contreras, 69 M.J. at 124, n. 7. In the meantime, beginning in 1999 and up until just a few months ago, the Service courts have consistently followed this Court's holdings in Willenbring and Stebbins in ultimately holding that the offense of rape, whether to an adult or a child, had no statute of limitations.

All told, considering Congress' intent to have no statute of limitations for an Article 120 offense of rape as well as this Court's holdings with regards to both Coker and its impact on Article 43(a) and an Article 120 rape offense, this Court should remain certain, as it has since at least 1998, that the 1997 offense of rape of an adult woman in this case is a crime punishable by death within the meaning of Article 43.

Still, Appellant at trial argued that both Willenbring and Stebbins were wrongly decided. (*See* App. Ex. VI.)[4] Yet in doing so, Appellant's arguments mirror those in Willenbring and other cases, namely that "there could be no 'facts and circumstances of any particular case' that would authorize imposition of the death penalty in a rape case not involving death or attempted death." (Id.) Here, Appellant falls into the same trap as previous appellants making such a claim.

Notably, Appellant acknowledges that there are "facts and circumstances" of a rape case that would authorize the actual imposition of the death penalty – Appellant mentions "death or attempted death."[5] (*See* App. Ex. VI.) Hence, Appellant acknowledges there are instances where rape could result in the death penalty given the presence of certain aggravating factors. Yet, Appellant then essentially argues that the lack of aggravating factors in a particular case or the ability to actually impose a death sentence is what drives whether an overall offense, by statute, is "punishable by death" for statute of limitations purposes.

Yet, such is an argument this Court, and multiple federal jurisdictions, has previously, and repeatedly, rejected. This Court's footnote in Contreras most

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[4] As this Court has ordered simultaneously briefs on this issue, the government presumes Appellant will make similar arguments in its brief on the Court's specified issue.

[5] In Willenbring, this Court mentioned other such circumstances. *See* Willenbring, 48 M.J. at 179 (citation omitted) ("Under the new procedures, a rape convictions could not result in a death sentence unless the victim was under the age of 12 or the accused maimed or attempted to kill the victim.")

amply defeats Appellant's claim. *See* Contreras, 69 M.J. at 124, n. 7. There, this Court cited to both Stebbins and Willenbring for the proposition that "death was the maximum authorized punishment for rape" and that rape was a "capital crime for statute of limitations purposes" regardless of whether a death sentence could actually be imposed or if a particular case actually had aggravating factors present to either refer a case as capital or to actually sentence an accused to death. Id.

Moreover, this footnote cited to a Fourth Circuit case, Ealy, and a Ninth Circuit case, Manning, both of which held that the statutory question of whether to apply the limitation period did not depend on whether the death penalty could be constitutionally imposed. Id. Notably, this Court in Willenbring cited to Manning for the same premise. Willenbring, 48 M.J. at 180. Finally, the Willenbring court also cited to an Eighth Circuit case, Coon, for its holding that "an offense was st ill considered a 'capital offense' even though the government did not request the death penalty."[6] Id.

[6] Additionally, in Willenbring, this Court drew out that appellant's argument, which is the same as Appellant's argument here, to the crime of murder. If one were to use Appellant's argument in that sense and substitute rape for murder, then Appellant would essentially argue that murder only qualifies for an exemption from the statute of limitations if it has aggravating factors present that could result in a death sentence being imposed. Whether it be rape or murder, such a proposition clearly goes against the intent of Congress and case law from this Court and from multiple other federal jurisdictions.

In short, Appellant's arguments are unpersuasive to reverse the litany of jurisprudence both by this Court and every service court since the Supreme Court's holding in Coker and this Court's opinion in Hickson, particularly in light of the principle of *stare decisis*. The doctrine of *stare decisis* is "the preferred course because it promotes the even handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003) (*citing* Payne v. Tennessee, 501 U.S. 808, 827 (1991)). "The doctrine is 'most compelling' where courts undertake statutory construction." Id. (*citing* Hilton v. South Carolina Public Ry. Comm'n, 502 U.S. 197, 205 (1991); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

Here, the cases cited in this Court's specified issue, Coker and Hickson, occurred prior to both this Court's and every service court's holdings that Article 120 rape offenses do not have a statute of limitations under Article 43 and are "punishable by death" for purposes of Article 43. Since both Coker and Hickson, this Court has repeatedly either struck down similar arguments made by Appellant or denied review of cases where every service court has rejected similar arguments.

The law, particularly with respect to the Supreme Court, has not changed in Appellant's favor. In fact, if anything, the Supreme Court's holding in Kennedy works against Appellant's claim as the Supreme Court in Kennedy, as in Coker,

did not definitely hold that either case even applies to military law when it had the clear opportunity to do so. In fact, as Appellant acknowledged in his motion at trial, "the Supreme Court has not spoken on this issue;"[7] in other words, the question still remains as to whether Coker and Kennedy even apply at all to military law.

Yet, in resolving the instant specified issue, this Court need not make such a determination.[8] Here, even if this Court were to assume *arguendo* that Coker does apply to military law, this Court's jurisprudence over the course of the last 30 years shows Coker would only impact whether or not the death penalty could actually be imposed *if adjudged*, not on the statutory language of both Articles 43 and 120 or the resulting lack of a statute of limitations.

All told, even in the face of Coker and Hickson, this Court has routinely held, and permitted its inferior service courts to hold, that the statute of limitations question within the meaning of Article 43 has no bearing on and is not "controlled" by the key issue of Coker, namely whether a death sentence could actually be imposed for a rape conviction. As such, in light of Coker and Hickson, the 1997

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[7] *See* App. Ex. VI.

[8] Much like this Court reasoned in Stebbins and Straight, the government contends such a determination would not need to be made until an appellant was actually sentenced to death and such a sentence was set to be actually imposed. *See* Stebbins, 61 M.J. at 369; Straight, 42 M.J. at 247.

offense of rape of an adult woman in this case was in 1997 and remains today a crime punishable by death within the meaning of Article 43, UCMJ.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny Appellant's claims and affirm AFCCA's decision.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian counsel, and the Air Force Appellate Defense Division on 14 November 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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/s/
G. MATT OSBORN, Lt Col, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 14 November 2017

APPENDIX

A

United States v. Cozart

United States Navy-marine Corps Court of Criminal Appeals

May 12, 1999, Decided

NMCM 97 01396

Reporter
1999 CCA LEXIS 140 *; 1999 WL 350787

UNITED STATES v. Frederick L. ***COZART***, 288-56-4723 Chief Personnelman (Aviation Warfare) (E-7), U.S. Naval Reserve (TAR)

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 14 November 1996. Military Judge: D.J. D'Alesio, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Jacksonville, Naval Air Station, Jacksonville, FL.

Disposition: Affirmed.

Core Terms

military, sentence, COURT-MARTIAL, assigned error, specification, rape, mental capacity, forfeiture, convening, recused

Case Summary

Procedural Posture

Appellant sought review from a general court-martial, which found appellant guilty of six specifications of sexual harassment, two specifications of violating lawful orders, providing alcohol to a minor, two specifications of rape, breaking restriction, incest, forcible sodomy, and adultery in violation of arts. 92, 120, 125 and 134, Unif. Code Mil. Justice, *10 U.S.C.S. §§ 892*, *920*, *925* and *934*.

Overview

The court affirmed all convictions. The military judge did not err in refusing to dismiss the additional charge of rape. Rape, because it was a crime punishable by death, was exempt from the five-year statute of limitations set forth in art. 43, Unif. Code Mil. Justice, whether it was classified as capital or non-capital. Appellant's ineffective assistance of counsel claim was without merit. The court found appellant's unconditional guilty plea to the charge that he raped his daughter was provident and found that defense counsel's performance was not deficient. The military judge was within his discretion in allowing appellant's daughter to provide impact testimony remotely over a speaker telephone during sentencing. There was no error in placing appellant on suspension for the length of his confinement because such measure was reasonable as a control and motivating measure. There was no basis for questioning the military judge's impartiality, and therefore the military judge was not required to recuse himself. Appellant's self-serving affidavit was not enough to support appellant's claim for unlawful command influence.

Outcome

The court affirmed the general court-martial decision to convict appellant as charged and the sentence imposed. The additional rape charge was exempt from the five-year statute of limitations because it was classified as a crime punishable by death. The military judge was within his discretion in allowing appellant's daughter to testify remotely over a telephone speaker during sentencing.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > Military Justice > Statute of Limitations

HN1 **Judicial Review, Courts of Criminal Appeals**

If an offense is one punishable by death, it is exempt from the five-year statute of limitations set forth in art. 43, Unif. Code Mil. Justice, regardless of whether it is referred as capital or non-capital.

Criminal Law & Procedure > ... > Sexual Assault > Rape > Penalties

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN2 **Rape, Penalties**

The crime of rape, in violation of art. 120, Unif. Code Mil. Justice, is punishable by death or such other punishment as a court-martial may direct.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN3 **Effective Assistance of Counsel, Trials**

The competence of an accused's counsel is presumed. To rebut the presumption, an accused must satisfy a two-prong test by showing that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced his defense.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Criminal Law & Procedure > Sentencing > Presentence Reports

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN4 **Imposition of Sentence, Evidence**

R. C. M. 1001(e)(1), Manual for Courts-Martial, specifically states that during the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN5 **Sentencing Alternatives, Probation**

Placing appellant on probation for the entire period of his confinement is reasonable as a control and motivating measure and is not violative of public policy or of R. C. M. 1108(d), Manual for Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN6 **Courts Martial, Judges**

R. C. M. 902, Manual for Courts-Martial, sets forth the grounds for disqualification of a military judge. A military judge need only have recused himself if his impartiality might have been reasonably questioned, or if he had a personal bias or prejudice.

Military & Veterans Law > Military Justice > General Overview

HN7 **Military & Veterans Law, Military Justice**

In order to prevail on a claim of unlawful command influence, appellant must (1) allege sufficient facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness. No prejudice is presumed unless the defense presents evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial. Although the threshold for raising the issue of unlawful command influence at trial is low, the evidence required must be more than mere allegation or speculation. The evidentiary standard for raising the issue has been determined to be the same as that required to raise an issue of fact, i.e., some evidence.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Role of Court

Criminal Law & Procedure > Defenses > Diminished Capacity

HN8[] **Entry of Pleas, Guilty Pleas**

R. C. M. 706, Manual for Courts-Martial, sets forth the guidelines for inquiring into the accused's mental capacity or mental responsibility.

Counsel: LT DALE O. HARRIS, JAGC, USNR, Appellate Defense Counsel.

LT J.K. O'GRADY, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE K.T. SEFTON, JOHN W. ROLPH, DAVID W. PAULSON. Chief Judge SEFTON and Judge ROLPH concur.

Opinion by: DAVID W. PAULSON

Opinion

PAULSON, Judge:

Pursuant to his pleas, the appellant was found guilty at a general court-martial, military judge alone, of 6 specifications of sexual harassment, 2 specifications of violating lawful orders, providing alcohol to a minor, 2 specifications of rape, forcible sodomy, adultery, breaking restriction, and incest, in violation of Articles 92, 120, 125, and 134, Uniform Code of Military Justice, *10 U.S. C. §§ 892*, *920*, *925*, and *934 (1994)*. He was sentenced to 32 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. In his initial action dated 19 June 1997, the **[*2]** convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Pursuant to a pretrial agreement, the convening authority suspended for a period of 17 years from the date of his action that portion of the sentence adjudging confinement in excess of 17 years. In a supplemental action dated 11 January 1999, the convening authority also suspended for 6 months from the date of his supplemental order that portion of the sentence adjudging forfeitures of $ 500 pay per month. He then waived the automatic forfeiture of $ 500 pay per month for 6 months, pursuant to Article 58b, UCMJ, contingent upon payment of all such monies to the appellant's dependent spouse.

We have carefully reviewed the record of trial, the appellant's assignments of error, [1] and the

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[1] I. THE MILITARY JUDGE ERRED WHEN HE DENIED DEFENSE COUNSEL'S MOTION TO DISMISS THE ADDITIONAL CHARGE OF RAPING BW BECAUSE THE FIVE-YEAR STATUTE OF LIMITATIONS UNDER ARTICLE 43, UCMJ, HAD RUN.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL FAILED TO REQUEST THE SUPPORTING DOCUMENTS FROM DNA TESTING PERFORMED ON CRUCIAL EVIDENCE IN THIS CASE.

III. THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ALLOWING A WITNESS TO TESTIFY VIA TELEPHONE DURING APPELLANT'S SENTENCING HEARING.

IV. THE CHANGES TO ARTICLE 57, UCMJ, AND THE ADDITION OF ARTICLE 58b, UCMJ, VIOLATE THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION WITH RESPECT TO THE APPELLANT.

V. APPELLANT WAS DENIED DUE PROCESS OF LAW, WHERE THE DEFENSE FINANCE AND ACCOUNTING SERVICE REFUSED TO EXECUTE CLEMENCY GRANTED BY THE SECRETARY OF THE NAVY IN THE NATURE OF WAIVING FORFEITURES OF $ 500 PER MONTH.

Government's response. While we have carefully considered each assigned error, we discuss only those which require specific comment or clarification.

VI. A 17-YEAR PERIOD OF SUSPENSION IS UNREASONABLY LONG AND THEREFORE AGAINST PUBLIC POLICY.

VII. THE MILITARY JUDGE SHOULD HAVE RECUSED HIMSELF FROM PARTICIPATION AS THE SENTENCING AUTHORITY IN APPELLANT'S CASE, WHERE THE MILITARY JUDGE WAS THE FORMER COMMANDING OFFICER OF NAVAL LEGAL SERVICE OFFICE SOUTHEAST, AND WHERE THE MILITARY JUDGE RECEIVED EXTENSIVE EVIDENCE ABOUT APPELLANT'S ALLEGED OFFENSES DURING THE PRETRIAL MOTION STAGE.

VIII. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE APPELLANT'S COMMANDING OFFICER (REDCOM 8) HAD AUTHORITY TO CONVENE A GENERAL COURT-MARTIAL FOR ANY CHARGES AGAINST APPELLANT, BUT INSTEAD TRANSFERRED THE CASE TO COMMANDER, NAVAL BASE JACKSONVILLE, WITHOUT GOOD CAUSE.

IX. APPELLANT'S COURT-MARTIAL WAS TAINTED BY UNLAWFUL COMMAND INFLUENCE, AS EVIDENCED BY: 1) THE ARBITRARY TRANSFER OF THE CHARGES FROM REDCOM 8 TO COMMANDER, NAVAL BASE JACKSONVILLE; 2) APPELLANT'S REMOVAL FROM HIS HOME AND FAMILY PENDING TRIAL WITHOUT REGARD TO HIS WIFE'S SERIOUS MEDICAL CONDITION; 3) APPELLANT'S DENIAL OF ACCESS TO WITNESSES WHICH COULD HAVE HELPED IN HIS DEFENSE; 4) THE FACT THAT SEVERAL WITNESSES DECLINED TO ASSIST APPELLANT AFTER BEING INTERVIEWED BY INVESTIGATORS, BECAUSE OF THEIR FEAR OF CAREER REPERCUSSIONS IF THEY TESTIFIED ON APPELLANT'S BEHALF.

X. APPELLANT HAS BEEN SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF HIS ***EIGHTH AMENDMENT*** RIGHTS, WHERE THE UNITED STATES DISCIPLINARY BARRACKS WILLFULLY DISREGARDED ITS OWN PROCEDURAL RULES AND ENGAGED IN DELIBERATE DILATORY TACTICS BY REFUSING APPELLANT'S REQUEST FOR EMERGENCY LEAVE AND/OR EMERGENCY PAROLE IN ORDER TO ASSIST HIS WIFE FOLLOWING CANCER SURGERY.

XI. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE AND STAFF JUDGE ADVOCATE WERE NOT PROPERLY CERTIFIED; SPECIFICALLY, NEITHER WAS AN ACTIVE MEMBER OF HIS RESPECTIVE STATE BAR AT THE TIME OF TRIAL.

XII. AN INQUIRY INTO APPELLANT'S MENTAL CAPACITY AND MENTAL RESPONSIBILITY SHOULD HAVE BEEN ORDERED, DUE TO APPELLANT'S EXTREME DURESS BEFORE AND DURING TRIAL.

[*3] We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Statute of Limitations

The appellant's first assignment of error relates to the Additional Charge and the sole specification thereunder which alleges a violation of Article 120, UCMJ, the rape of Aviation Electronics Technician Second Class W on or about 19 April 1990. The appellant's contention is that since this offense was alleged to have occurred more than 5 years prior to the preferral of the charge on 28 August 1996, and since the offense was referred non-capital, that prosecution is barred under the 5-year statute of limitations set forth in Article 43, UCMJ. We disagree.

Our superior court recently decided the case of *Willenbring v. Neurauter, 48 M.J. 152 (1998)*. Therein, the court undertook a thorough analysis of the very issue in this case and held that ***HN1***[↑] if an offense is one "punishable by death" it is exempt from the 5-year statute of limitations regardless of whether it is referred capital or non-capital. [2] *Willenbring, 48 M.J. at 180*. This court had earlier **[*4]** reached a similar conclusion in *United States v. Gonzales, 46 M.J. 667 (N.M.Ct.Crim.App. 1997)*, *aff'd*, No. 97-0755 (C.A.A.F. Jan. 15, 1999). Accordingly, we find no merit in this assignment of error.

Ineffective Assistance of Counsel

In his second assignment of error, the appellant contends that he was denied effective assistance counsel when his trial defense counsel failed to request supporting documents for the DNA testing with reference to Additional Charge I and its sole specification which alleges a violation of Article 120, UCMJ, the rape of the appellant's daughter, CG. This assignment of error is without merit.

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[2] ***HN2***[↑] The crime of rape, in violation of Art. 120, UCMJ, is punishable by "death or such other punishment as a court-martial may direct." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, P 45e(1).

The standard of review for a claim of ineffective assistance of counsel, as applied to courts-martial, is found in *United States v. Scott, 24 M.J. 186 (C.M.A. 1987)*(citing **[*5]** *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*). ***HN3***[⬆] The competence of an accused's counsel is presumed. *Scott, 24 M.J. at 188*. To rebut this presumption, an accused must satisfy a two-prong test by showing that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced his defense. *Id.*

The appellant has failed to satisfy either prong of this test. Pursuant to the terms of a pretrial agreement, the appellant entered into a stipulation of fact wherein he admitted the rape of CG and then entered an unconditional plea of guilty to the charge and specification. Prosecution Exhibit 1 at 9-11; Record at 132-134, 136-139. We concur with the military judge's finding that the plea was provident, and we will not now engage in speculation regarding tactical decisions made by the appellant and his trial defense counsel. We find that trial defense counsel were not deficient in their performance. Likewise, we find no prejudice to the appellant's substantial rights or any plausible reason for requiring the production of the requested documents where the appellant stipulated to his guilt and pled providently to the offense in the court below.

Telephonic Testimony [*6] During Sentencing

The appellant next asserts that it was plain error for the military judge to permit CG to testify remotely over a speaker telephone during sentencing. We find no merit in this argument. ***HN4***[⬆] RULE FOR COURTS-MARTIAL 1001(e)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) specifically states that "during the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." Thus, it was clearly "a matter within the discretion of the military judge," to permit this victim to provide impact testimony either in person or by other means. *Id*. Furthermore, the appellant affirmatively consented to the taking of the testimony of CG by telephone. Record at 189. Therefore, the appellant forfeited this issue in the absence of plain error.

See United States v. Powell, 49 M.J. 460 (1998). We conclude that there was no prejudice to the appellant's substantial rights, and he, therefore, is entitled to no relief. Art. 59(a), UCMJ.

***Ex Post Facto* Violation**

The appellant's contention that the changes to Articles 57 and 58b, UCMJ, violate **[*7]** the *ex post facto* clause of the Constitution is without merit. *See United States v. Carter, 50 M.J. 233, 1998 CAAF LEXIS 1727 (C.A.A.F. Order 1998)*.

Due Process

The appellant's fifth assignment of error is moot. Any possible prejudice was overcome upon the issuance of the convening authority's Supplemental Court-Martial Order No. 1-99, dated 11 January 1999, wherein adjudged and automatic forfeitures of $ 500 pay per month were, respectively, suspended and waived for a period of six months.

Unreasonably Long Period of Suspension

We find no merit in the appellant's next assignment of error. As we stated in *United States v. Ratliff, 42 M.J. 797, 802 (N.M.Ct.Crim.App. 1995)*, ***HN5***[⬆] "Placing an appellant on probation for the entire period of his confinement is reasonable as a control and motivating measure and is not violative of public policy or of R.C.M. 1108(d)."

Recusal of Military Judge

The appellant contends in his seventh assignment of error that the military judge should have recused himself since he had previously served as commanding officer of Naval Legal Service Office Southeast and had, in such capacity, received evidence about the appellant's **[*8]** offenses. ***HN6***[⬆] R.C.M. 902 sets forth the grounds for disqualification of a military judge. In the context of this case, the military judge need only have recused himself if his impartiality might have been reasonably questioned, R.C.M. 902(a), or if he had a personal bias or prejudice. R.C.M. 902(b)(1)(emphasis added). No evidence was adduced at trial, nor is any presented on appeal, to demonstrate a personal interest in the appellant's case or a basis for reasonably questioning the military judge's impartiality.

We further find that even if there were some remotely possible basis for disqualification, the military judge's failure to recuse himself was not plain error. We find no prejudice to the appellant's substantial rights in the record before us. Art. 59(a), UCMJ.

Unlawful Command Influence

HN7[] In order to prevail on a claim of unlawful command influence, the appellant must "(1) 'allege[] sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness." *United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)* (quoting **[*9]** *United States v. Levite, 25 M.J. 334, 341 (C.M.A. 1987)*(Cox, J., concurring)).

Our superior Court has defined what it means, in an appellate context, to "show" that the proceedings were unfair because of unlawful command influence. *United States v. Reynolds, 40 M.J. 198, 202 (C.M.A. 1994)*. The Court also noted that no prejudice is presumed unless the defense presents evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial. *Reynolds, 40 M.J. at 202*.

Although the threshold for raising the issue of unlawful command influence at trial is low, the evidence required must be more than mere allegation or speculation. *United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994)*. The evidentiary standard for raising the issue has been determined to be the same as that required to raise an issue of fact, i.e., "some evidence." *United States v. Ayala, 43 M.J. 296, 300 (1995)*.

Here, we are presented with absolutely nothing more than the appellant's self-serving affidavit. Nonetheless, based on our careful review of the entire record, we find no support for the appellant's claim. His allegations of unlawful **[*10]** command influence are without merit.

Mental Capacity and/or Mental Responsibility

In his final assignment of error, the appellant alleges, for the first time, that he suffered duress during the pendency of the court-martial proceedings. He further asserts that, due to the negative impact of such duress, an inquiry should have been ordered into his mental capacity and/or mental responsibility.

HN8[] R.C.M. 706 sets forth the guidelines for inquiring into the accused's mental capacity or mental responsibility. At no time during the entire proceeding did the evidence suggest that the appellant suffered from either a lack of mental capacity or mental responsibility. On the contrary, the appellant entered pleas of guilty and engaged in a lengthy providence inquiry with the military judge who subsequently determined those pleas to be freely and voluntarily made. Record at 187. Even if we were to find some evidence of his present claim, which we most assuredly do not, these matters were waived by his unconditional guilty pleas. R.C.M. 905(e); R.C.M. 910(j); *United States v. Boasmond, 48 M.J. 912, 916 (N.M.Ct.Crim.App. 1998)*(citing *United States v. Lewis, 34 M.J. 745, 750 (N.M.C.M.R. **[*11]** 1991))*. The appellant's claim is without merit.

Conclusion

Accordingly, we affirm the findings of guilty and the sentence, as approved below.

ABSENT FOR SIGNATURE DAVID W. PAULSON

Chief Judge SEFTON and Judge ROLPH concur.

CONCURS/ABSENT FOR SIGNATURE K.T. SEFTON

JOHN W. ROLPH

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APPENDIX

B

United States v. Knudtson

United States Air Force Court of Criminal Appeals

March 21, 2001

ACM 33871

Reporter
2001 CCA LEXIS 96 *; 2001 WL 322146

UNITED STATES v. Master Sergeant LOUIS J. ***KNUDTSON***, United States Air Force

Notice: [*1] NOT FOR PUBLICATION

Prior History: Sentence adjudged 2 September 1999 by GCM convened at Edwards Air Force Base, California. Military Judge: Howard P. Sweeney (sitting alone). Approved sentence: Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.

Disposition: AFFIRMED.

Core Terms

rape, specification, sentence, statute of limitations, court-martial, occasions, reassess, military, offenses

Case Summary

Procedural Posture
Appellant master sergeant pled guilty to raping two stepdaughters and his natural daughter and obstruction of justice before a general court-martial convened at Edwards Air Force base, California. Pursuant to a pretrial agreement, the convening authority reduced the period of confinement. Appellant challenged the conviction and sentence.

Overview
Appellant claimed that three of the four specifications alleging rape should have been set aside because he was prosecuted after the statute of limitations expired. He also asserted that his sentence was inappropriately severe. The appellate court concluded that three of the specifications were to be set aside and dismissed because they occurred before the applicable date of the legislation that eliminated the statute of limitations for rape. Since the specifications were not received within the former statute of limitations, they were barred. The appellate court determined that had the trial court correctly applied the statute of limitations, it would have imposed the sentence approved by the convening authority pursuant to the pretrial agreement, especially in light of the evidence of the rapes that had been set aside.

Outcome
The court set aside three of the specifications of rape and affirmed the sentence as reassessed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > Military Justice > Statute of Limitations

HN1[] **Judicial Review, Courts of Criminal Appeals**

The applicable statute of limitations for offenses tried under the Uniform Code of Military Justice is contained in art. 43, Unif. Code Mil. Justice, *10 U.S.C.S. § 843*.

Criminal Law & Procedure > ... > Sexual Assault > Rape > Penalties

Military & Veterans Law > Military Justice > Statute

of Limitations

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Rape > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Summary Courts-Martial

Military & Veterans Law > Military Justice > Jurisdiction > In Personam Jurisdiction

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN2[] Rape, Penalties

In 1986, Congress changed the statute of limitations for rape. Where formerly the statute of limitations was three years, the new statute provides that, effective November 14, 1986, a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command. Pub. L. No. 99-661, § 805(a) (1986). However, that amendment also provides that a person charged with any offense punishable by death, may be tried at any time without limitation. Art. 43(a), Unif. Code Mil. Justice, *10 U.S.C.S. § 843(a)*. Rape is an offense punishable by death for purposes of exempting it from the five-year statute of limitations.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Military & Veterans Law > Military Justice > General Overview

HN3[] Entry of Pleas, Guilty Pleas

A guilty plea in a court-martial proceeding may be improvident because of an accused's substantial misunderstanding of the maximum sentence to which he is subject.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Rehearings

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN4[] Imposition of Sentence, Evidence

The United States Air Force Court of Criminal Appeals may reassess a sentence instead of ordering a sentence rehearing, if it confidently can discern the extent of the error's effect on the sentencing authority's decision. Thus, the court must first determine what sentence the court-martial would probably have adjudged if the error had not been committed at trial. The court does that by considering only the evidence that was before the sentencing authority at trial. If the court reassesses the sentence, the court may properly consider the entire record and the allied papers in performing its statutory duty to determine whether the sentence is appropriate.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Military & Veterans Law > Military Justice > Statute of Limitations

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Military & Veterans Law > Military Justice > General Overview

HN5[] Entry of Pleas, Guilty Pleas

In the context a court-martial proceeding, uncharged sexual misconduct with his children evidences a continuous course of conduct involving the same or

similar crimes, the same victims, and a similar situs within the military community, i.e., the service member's home, and is admissible to demonstrate not only the depth of appellant's sexual problems, but also the true impact of the charged offenses on the members of his family.

Military & Veterans Law > Military Justice > General Overview

HN6[] **Military & Veterans Law, Military Justice**

In the context of a court-martial proceeding, the appellate court reviews the severity of an appellant's sentence by giving individualized consideration to the nature and seriousness of the appellant's offenses as well as the appellant's character and military service.

Counsel: For Appellant: Colonel Jeanne M. Rueth, Colonel James R. Wise, and Major Jeffrey A. Vires.

For the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rogers, Lieutenant Colonel David N. Cooper, and Major Harold M. Vaught.

Judges: Before YOUNG, BURD, and PECINOVSKY, Appellate Military Judges.

Opinion by: YOUNG

Opinion

OPINION OF THE COURT

YOUNG, Chief Judge:

The appellant pled guilty to raping two stepdaughters and his natural daughter, and obstruction of justice. Articles 120, 134, UCMJ, *10 U.S.C. §§ 920*, *934*. The military judge sentenced him to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to the pretrial agreement, the convening authority reduced the period of confinement to 20 years. The appellant claims three of the four specifications alleging **[*2]** rape should be set aside because he was prosecuted after the statute of limitations expired. He also asserts that his sentence is inappropriately severe. We set aside three of the four rape specifications and reassess the sentence.

I. The Statute of Limitations

Although no mention of the statute of limitations appears in the record of trial, it appears the parties were operating under this Court's ruling that the statute of limitations contained in the Victims of Child Abuse Act, *18 U.S.C. § 3283*, applied. *United States v. McElhaney, 50 M.J. 819 (A.F. Ct. Crim. App. 1999)*, *rev'd*, *54 M.J. 120 (2000)*. *HN1*[] The applicable statute of limitations for offenses tried under the Uniform Code of Military Justice is contained in Article 43, UCMJ, *10 U.S.C. § 843*. *McElhaney*, 54 M.J. at 126.

HN2[] In 1986, Congress changed the statute of limitations for rape. Where formerly the statute of limitations was 3 years, the new statute provided that, effective 14 November 1986, "a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years **[*3]** before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." Pub. L. No. 99-661, § 805(a) (1986). *See* Article 43(b)(1), UCMJ. However, that amendment also provided that a person charged with "any offense punishable by death, may be tried at any time without limitation." *Id*. *See* Article 43(a), UCMJ. "Rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations." *Willenbring v. Neurauter, 48 M.J. 152, 180 (1998)*.

Any specification alleging a rape occurring prior to 14 November 1986 would have to be received by the summary court-martial officer within 3 years. As the summary court-martial officer received the charges in this case on 11 February 1999, any rape the appellant committed prior to 14 November 1986 is barred by the statute of limitations. Because there is no statute of limitations for rapes occurring on or after 14 November 1986, the appellant may be held criminally liable for such offenses.

In order to analyze this issue, a summary of the rape offenses as alleged in the specifications and the evidence adduced during the plea **[*4]** inquiry is necessary.

Specification 1: Rape CAN, a person under the age of 12 on divers occasions in Las Vegas, Nevada, from 1 January 1981-15 October 1984. As the specification alleges the rapes occurred prior to 14 November 1986, prosecution on this specification is barred by the statute of limitations. Therefore, the appellant's conviction on this specification must be set aside and dismissed.

Specification 2: On divers occasions, in Aurora, Colorado, from 16 October 1984-15 October 1988, rape CAN, a person under the age of 16. During the plea inquiry, the appellant admitted having sexual intercourse with CAN once or twice a month during the alleged time period. Those rapes alleged in the specification as occurring before 14 November 1986 are barred by the statute of limitations. The appellant's admissions establish the providence of his plea to raping CAN on divers occasions from 14 November 1986 until 15 October 1988, which are within the statute of limitations. The specification shall be amended to reflect that the appellant raped CAN on divers occasions from 14 November 1986 to 15 October 1988.

Specification 3: Between 1 January 1985 and 5 July 1986, in Aurora, Colorado, **[*5]** rape KST, a person under the age of 12. As the specification alleges the rapes occurred prior to 14 November 1986, prosecution on this specification is barred by the statute of limitations. The appellant's conviction of this specification must be set aside and dismissed.

Specification 4: Between 1 January 1985 and 31 December 1987, in Aurora, Colorado, rape HK, a person under the age of 16. During the providence inquiry, the appellant admitted raping HK late in 1986 when there was snow on the ground. We are not convinced that this is sufficient to establish that the rape occurred on or after 14 November. Therefore, the appellant's conviction on this specification must be set aside and dismissed.

II. Providence of the Plea and Sentence Severity

HN3[↑] A guilty plea may be improvident because of an accused's "substantial misunderstanding" of the maximum sentence to which he is subject. *United States v. Mincey, 42 M.J. 376, 378 (1995)*. In this case, even after setting aside three of the rape specifications, the maximum punishment to which the appellant was subject remains the same--a dishonorable discharge, confinement for life, and reduction to E-1. Thus, **[*6]** the appellant could not have misunderstood the maximum punishment.

Having set aside and dismissed three of the four specifications of rape, we must decide whether we can reassess the sentence or must return the case to the convening authority for a rehearing. ***HN4***[↑] This Court may reassess a sentence instead of ordering a sentence rehearing, if we "confidently can discern the extent of the error's effect *on the sentencing authority's decision*." *United States v. Reed, 33 M.J. 98, 99 (C.M.A. 1991)* (emphasis added). Thus, we must "first determine what sentence the court-martial would probably have adjudged if the error had not been committed at trial." *United States v. Peoples, 29 M.J. 426, 427 (C.M.A. 1990)* (citation omitted). We do that by considering only the evidence that was before the sentencing authority at trial. If we reassess the sentence, we may properly consider the entire record and the allied papers in performing our statutory duty to determine whether the sentence is appropriate. *Id. at 428*.

Although we set aside the appellant's provident pleas of guilty to three specifications because his conduct fell outside the statute **[*7]** of limitations, we are not prohibited from considering the evidence of those rapes as aggravation in sentencing. *See United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990)* ***HN5***[↑] (holding uncharged sexual misconduct with his children "evidenced a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community, *i.e.*, the servicemember's home," was admissible to demonstrate "not only the depth of appellant's sexual problems, but also the true impact of the charged offenses on the members of his family"); *United States v. Martin, 20 M.J. 227 (C.M.A. 1985)*. We are convinced that had the court below correctly applied the statute of limitations, the military judge would have imposed a sentence that provided for at least a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1--the sentence approved by the convening authority pursuant to the pretrial agreement.

HN6[↑] We review the severity of an appellant's sentence by giving individualized consideration to the nature and seriousness of the appellant's offenses as well as the appellant's **[*8]** character and military service. *United States v. Snelling, 14 M.J. 267 (C.M.A. 1982)*. The reassessed sentence is appropriate.

III. Conclusion

The findings of guilty to Specifications 1, 3, and 4 of Charge I are set aside and dismissed. Specification 2 will be amended to reflect that the appellant raped CAN on divers occasions between 14 November 1986 and 15 October 1988. The current court-martial order also incorrectly reflects the appellant was arraigned in Specifications 3 and 4 of Charge I, on charges of rape on divers occasions. The findings as modified and the sentence as reassessed are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

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APPENDIX

C

United States v. Sims

United States Air Force Court of Criminal Appeals

December 19, 2001, Decided

ACM 34079

Reporter
2001 CCA LEXIS 357 *; 2002 WL 13231

UNITED STATES v. Airman First Class JOHN G. ***SIMS***, United States Air Force

Notice: [*1] NOT FOR PUBLICATION

Prior History: Sentence adjudged 14 March 2000 by GCM convened at Eglin Air Force Base, Florida. Military Judge: James L. Flanary (sitting alone). Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-1.

Disposition: Affirmed in part.

Core Terms

military, sentence, confession, sexual intercourse, molested, indecent, court-martial, corroborate, hearsay, rape, statute of limitations, interviewed, guarantees, punishable, occasions, residual, sworn

Case Summary

Procedural Posture
Military appellant was sentenced to dishonorable discharge, confinement for 12 years, and reduction to E-1. The appellant pled guilty to committing indecent acts with, and indecent liberties upon, his stepdaughter, who was under 12 years of age at the time. Contrary to his pleas, the military judge also convicted him of the rape and forcible sodomy of his stepdaughter while she was under the age of 12. Appellant sought review.

Overview
Appellant claimed that his convictions for sodomy, indecent acts, and indecent liberties were barred by the statute of limitations. The United States agreed. Therefore, the court dismissed the sodomy, indecent acts, and indecent liberties specifications. Under the circumstances of the case, the court could not say that the military judge abused his discretion in admitting the victim's statement. The court found that even if it had found the military judge abused his discretion in admitting the victim's statement, the court still would not reverse appellant's conviction for rape. The court was convinced that appellant's confession, coupled with the victim's testimony that he molested her, was more than enough to convince the military judge beyond a reasonable doubt of appellant's guilt. Having set aside and dismissed the guilty findings to forcible sodomy, indecent acts, and indecent liberties, the court reassessed the sentence. In doing so, the court determined that it could still consider the evidence from the dismissed charges.

Outcome
The court set aside all of appellant's convictions, except his conviction for rape. The court affirmed his conviction for rape and the sentence as approved by the convening authority. The modified findings of guilty and sentence were affirmed. The court affirmed the approved sentence of a dishonorable discharge, confinement for 12 years, and reduction to E-1.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Statute of Limitations

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Summary Courts-Martial

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN1 **Military Justice, Statute of Limitations**

A military member charged with any offense punishable by death, may be tried and punished at any time without limitation. Art. 43(a), Unif. Code Mil. Justice, *10 U.S.C.S. § 843(a)*. Otherwise, the military member is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command. Art. 43(b)(1), Unif. Code Mil. Justice.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > Military Justice > General Overview

HN2 **Admissibility of Evidence, Admissions & Confessions**

The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the corpus delicti of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Admissions by Party Opponents

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > General Overview

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Available to Testify

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

HN3 **Hearsay Rule & Exceptions, Admissions by Party Opponents**

A statement must meet five requirements before it can be admitted under the residual exception to the hearsay rule: (1) The statement must be offered as evidence of a material fact; (2) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; (3) Admission of the statement is not covered by Mil. R. Evid. 803 or 804, but has "equivalent guarantees of trustworthiness;" (4) The general purposes of the Military Rules of Evidence and the interests of justice will best be served by admission of the statement; (5) The proponent of the evidence provides adequate notice to the adverse party. Mil. R. Evid. 807. This rule was adopted verbatim from *Fed. R. Evid. 807* and combined the two residual hearsay exceptions formerly found in Mil. R. Evid. 803(24) and 804(b)(5), Manual for Courts-Martial.

HN4 Whether evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts is a difficult issue. It has often been lost in the debate over whether the evidence has the necessary circumstantial guarantees of trustworthiness to be admitted. Many courts have interpreted the "more probative" requirement as a "general necessity requirement." The necessity prong essentially creates a "best-evidence" requirement.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Noncustodial Confessions & Statements

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN5 **Interrogation, Noncustodial Confessions & Statements**

A deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.

Military & Veterans Law > Military Justice > General

Overview

HN6[] **Military & Veterans Law, Military Justice**

A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence.

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Criminal Law & Procedure > Appeals > Remand & Remittitur

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Rehearings

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN7[] **Sentencing, Appeals**

There is no authority in the Uniform Code of Military Justice to remand a case to a court-martial for a rehearing on sentence alone. The function of reassessing the sentence in such cases is left to the unfettered discretion of the service boards of review (now courts of criminal appeals). The United States Court of Appeals for the Armed Forces, however, has ruled that the United States Air Force Court of Criminal Appeals must remand the case back to a court-martial unless the court is convinced that the sentence, as reassessed, is not greater than the sentence that the original court-martial would have imposed absent the error.

Counsel: For Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, Major Stephen P. Kelly, and Captain Kyle R. Jacobson.

For the United States: Colonel Anthony P. Dattilo, Major Lance B. Sigmon, Major Linette I. Romer, and Captain Suzanne Sumner.

Judges: Before YOUNG, BRESLIN, and HEAD, Appellate Military Judges.

Opinion by: YOUNG

Opinion

OPINION OF THE COURT

YOUNG, Chief Judge:

The appellant pled guilty to committing indecent acts with, and indecent liberties upon, his stepdaughter, C, who was under 12 years of age at the time. Article 134, UCMJ, *10 U.S.C. § 934*. Contrary to his pleas, the military judge also convicted him of the rape and forcible sodomy of C while she was under the age of 12. Articles 120, 125, UCMJ, *10 U.S.C. §§ 920*, *925*. The military judge sentenced the appellant to a dishonorable discharge, confinement for 18 years, and reduction to E-1. The convening authority **[*2]** reduced the period of confinement to 12 years, but otherwise approved the findings and sentence. The appellant assigns eight errors. We set aside and dismiss all of his convictions, except his conviction for rape. We affirm his conviction for rape and the sentence as approved by the convening authority.

I. The Statute of Limitations

The appellant claims his convictions for sodomy, indecent acts, and indecent liberties are barred by the statute of limitations. Article 43(b)(1), UCMJ, *10 U.S.C. § 843(b)(1)*. The United States agrees.

HN1[] A military member charged with "any offense punishable by death, may be tried and punished at any time without limitation." Article 43(a), UCMJ, *10 U.S.C. § 843(a)*. Otherwise, the military member is "not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." Article 43(b)(1), UCMJ.

In *United States v. McElhaney, 50 M.J. 819 (A.F. Ct. Crim. App. 1999)*, *rev'd*, *54 M.J. 120 (2000)*, this Court held that the statute **[*3]** of limitations contained in the Victims of Child Abuse Act (VCAA), *18 U.S.C. § 3283*, applies to courts-martial. The VCAA extends the statute of limitations in cases involving victims of child abuse

who are under age 18 until the victim reaches age 25. The appellant was tried after our decision in *McElhaney*, but before that of the United States Court of Appeals for the Armed Forces (CAAF) overturning our decision.

The sworn charges and specifications were received by an officer exercising summary court-martial jurisdiction over the command on 22 December 1999. Thus, any offense not punishable by death that occurred prior to 22 December 1994 is outside the statute of limitations. All of the incidents for which the appellant was convicted occurred in 1990. Violations of Articles 125 and 134 are not punishable by death. Although the appellant never raised the issue at trial, it appears that does not preclude him from raising it on appeal. *See* Rule for Courts-Martial (R.C.M.) 907(b)(2)(B). Therefore, we must dismiss the sodomy, indecent acts, and indecent liberties specifications. Rape, on the other hand, is an offense punishable by death and, thus, exempt **[*4]** from the 5-year statute of limitations. *Willenbring v. Neurauter, 48 M.J. 152, 180 (1998)*.

II. Hearsay and Corroboration

In 1998, the appellant's marriage began to fall apart. His wife was carrying on an affair with a man with whom she worked, and it caused considerable disruption in the family. The appellant decided to get divorced. C, the appellant's 16-year-old stepdaughter wanted to live with him, rather than her mother. During this period, C became argumentative and violent. She broke her sister's arm and beat up a neighbor. C started cutting herself and tried to commit suicide by setting herself on fire.

On 27 June 1999, base law enforcement officials responded to the appellant's on-base residence where a domestic dispute was in progress. When the law enforcement agents arrived, they found the appellant's wife pinning C to the floor. C was yelling, "He molested me." In July, C hit the appellant in the head with a pot as he was trying to defend his wife from the children's wrath over the wife's affair and the likelihood that a divorce would ensue.

The appellant was eventually interviewed by agents of the Air Force Office of Special Investigations (AFOSI) **[*5]** on at least three occasions. On 20 July, the appellant admitted, in a signed, sworn statement, that he had molested C. He claimed that he entered C's bedroom one night after returning home intoxicated. He got into bed with C and pressed up against her before he realized that it was his stepdaughter, not his wife, and departed. Approximately five to six other times over that summer of 1990, when C was 7, he entered C's room for sexual gratification. This consisted of fondling her vaginal area while he masturbated.

On 3 August, agents of the AFOSI interviewed C. C's mother was initially reluctant to permit the agent's to interview C alone. However, she acquiesced after the agents explained that it was better if she was not in the room at the time. The agents took C into an interview room where they advised her they were investigating her father for molesting her. They told C that it was important for her to tell the truth. C told the agents that, on several occasions when she was 7, the appellant entered her room, licked her vaginal area, masturbated himself, and had sexual intercourse with her. She declined to make a written statement.

On 4 October, AFOSI agents reinterviewed the **[*6]** appellant. In another signed, sworn statement he admitted that he licked C's vagina and accidentally penetrated her vagina with his finger. After waffling on whether he had sexual intercourse with C, the appellant admitted that he must have guided "his erect penis to C's vagina."

On 7 October, in another signed, sworn statement to AFOSI agents, the appellant admitted having sexual intercourse once with C. He insisted that he thought he was having sex with his wife and, when he realized it was C, he stopped.

At trial, C testified that, although her father had molested her, he never had sexual intercourse with her. Over the objection of the defense, the military judge admitted, under Mil. R. Evid. 807, C's oral statement to the AFOSI that the appellant had sexual intercourse with her on several occasions. The military judge also admitted, under Mil. R. Evid. 803(2), over defense objection, the statement C yelled to law enforcement officials on 27 June while she was pinned to the floor by her mother -- that he (the appellant) had molested her. The appellant claims the military judge erred by admitting these statements. He further asserts that, without C's statement to the AFOSI, his **[*7]** confession to sexual intercourse is uncorroborated and, thus, inadmissible.

HN2[↑] "The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. Rather, the corroborating evidence must raise only an

inference of truth as to the essential facts admitted." *United States v. Cottrill, 45 M.J. 485, 489 (1997)* (citations omitted). The appellant appears to have waived this issue by failing to raise it at trial. *United States v. Melvin, 26 M.J. 145, 147 (C.M.A. 1988)* (dictum). Regardless, C's testimony at trial that the appellant molested her is sufficient to corroborate the appellant's confession to having sexual intercourse with her. *See United States v. Baldwin*, 54 M.J. 464, 465-66 (2001).

As the confession was adequately corroborated by C's testimony, we see no need to decide whether the statement C made while she was pinned to the floor was admissible. Even if it was not, its admission was harmless error. C testified that the appellant had molested her, making her prior statement cumulative at **[*8]** best. In addition, the military judge admitted, without defense objection, a stipulation of expected testimony of a clinical social worker to whom C had reported that the appellant had molested her.

Admission of the statement C made to the AFOSI agents, that the appellant had sexual intercourse with her on five or six occasions, is more problematic. If the military judge erred in admitting the document, the only evidence of sexual intercourse would be the appellant's confession to one "mistaken" encounter.

HN3[⬆] A statement must meet five requirements before it can be admitted under the residual exception to the hearsay rule:

(1) The statement must be offered as evidence of a material fact;

(2) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts;

(3) Admission of the statement is not covered by Mil. R. Evid. 803 or 804, but has "equivalent guarantees of trustworthiness";

(4) The general purposes of the Military Rules of Evidence and the interests of justice will best be served by admission of the statement;

(5) The proponent of the evidence provides adequate notice to the adverse party.

[*9] Mil. R. Evid. 807. This rule was adopted verbatim from *Fed. R. Evid. 807* and combined the two residual hearsay exceptions formerly found in Mil. R. Evid. 803(24) and 804(b)(5). "This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended." *Fed. R. Evid. 807* advisory committee's note (1997). "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." S. Rep. No. 1277, 93d Cong., 2d Sess. 20, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7065-66.

As C's statement to the AFOSI agents goes directly to whether the appellant committed the charged offense of rape, the statement is material. The prosecution's notice of the statement to the defense was adequate to enable the defense to object to its admission. Thus, we must concentrate on requirements (2)-(4).

HN4[⬆] Whether evidence "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts" is a difficult issue. It has often been lost in the debate over whether the evidence has the necessary circumstantial guarantees of trustworthiness to be admitted. Many courts have interpreted **[*10]** the "more probative" requirement as a "general necessity requirement." 2 John W. Strong et al., *McCormick on Evidence* § 324 (5th ed. 1999) (citing *United States v. Mathis, 559 F.2d 294, 298-99 (5th Cir. 1977)* (holding "live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than the bare statements transcribed by the ATF agents")). "The necessity prong 'essentially creates a best-evidence requirement.'" *United States v. Kelley, 45 M.J. 275, 280 (1996)* (citing *Larez v. City of Los Angeles, 946 F.2d 630, 644 (9th Cir. 1991))*.

This "best-evidence" approach suggests that when the alleged victim testifies in court, is subject to cross-examination, and is capable of remembering what happened, Mil. R. Evid. 807 evidence is not admissible. But, federal courts have not taken such a restrictive view of the rule in child abuse cases. *See* *Kelley, 45 M.J. at 280* (citing *United States v. Shaw, 824 F.2d 601, 609 (8th Cir. 1987))*.

In *Shaw*, the **[*11]** child-victim testified that she had sexual intercourse with the defendant on several occasions. Nevertheless, the judge admitted, as residual hearsay, evidence that the child-victim made out of court statements that were consistent with her testimony. On appeal, the defendant claimed hearsay evidence met the necessity requirement only when the

child-victim was "too frightened and uncommunicative to testify meaningfully." *Shaw, 824 F.2d at 610*. The 8th Circuit rejected this approach. "Even though the evidence may be somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement can not be interpreted with cast iron rigidity." *Id.* (quoting 4 J. Weinstein & M. Berger, *Weinstein's Evidence* P 803(24)[01], at 803-379 (1985). The United States Court of Appeals for the Armed Forces (CAAF) seems to have adopted this approach. *Kelley, 45 M.J. at 280*.

Chief Judge Crawford has explained the need for special application of Mil. R. Evid. 807 in child abuse cases.

> When young children, more than other victims, complain of abuse, there is a greater need for evidence that either **[*12]** corroborates or negates the victim's version of the abuse. Child victims are easily attacked and often easily confused with peripheral details. Evidence which shows state of mind is important.

United States v. Pablo, 53 M.J. 356, 362 (2000) (Crawford, C.J., dissenting). Chief Judge Crawford noted four factors in that case that established the need for the residual hearsay evidence: (1) the victim was under 10 years of age; (2) the lack of physical evidence of sexual activity; (3) the lapse of time in reporting the activity to an adult; and (4) the reluctance of appellant's family to testify. *Id.*

In this case, C was about 7 years old when the abuse occurred, 16 when she was interviewed by the AFOSI agents, and 17 when she was called to testify. There was no physical evidence available to establish that C had been raped. Shortly after the appellant sexually molested C, she was sent away to live, and did not return until she was approximately 13 years old. She told the AFOSI agents that she respected her mother, but was afraid of her mother and would not do anything that would harm her. If her parents divorced, C wanted to remain with the appellant. Under **[*13]** these circumstances, we believe her out of court statement to the AFOSI agents was more probative than her testimony.

The appellant claims C's statement to the AFOSI agents lacked the guarantees of trustworthiness necessary for admission under Mil. R. Evid. 807. The appellant's case was tried by military judge alone. C testified for the defense in support of a motion in limine in which the defense asked the military judge to suppress C's statement to the AFOSI agents. Once confrontation was satisfied, the military judge was able to consider evidence beyond the circumstances of the declaration itself in determining whether the statement had the requisite guarantees of truthfulness. *Kelley, 45 M.J. at 281*.

We find the following circumstantial guarantees of trustworthiness in C's statement to the AFOSI agents:

(1) C was not hostile to the appellant. In fact, she wanted to live with him rather than her mother;

(2) The AFOSI agents explained to C the importance of telling the truth;

(3) C gave the statement outside the presence of her mother;

(4) The appellant's confessions corroborate C's statement;

(5) Although the statement was made to law enforcement officials, **[*14]** it was not the result of leading questions suggesting particular answers; [6) The military judge's finding that C's testimony at trial was not credible.

On the other hand, there are factors that might suggest the contrary:

(1) C declined to put the statement in writing;

(2) C was mentally disturbed to the extent that she was cutting herself, tried to commit suicide, and was involved in several physical confrontations with members of her family and with others;

(3) C was taking medications at the time -- although no evidence was presented that these medications would cause a person to be unable to remember and explain details from the past.

This is a close call. But, that is what exercising discretion is all about. *United States v. Barrow, 42 M.J. 655, 661 (A.F. Ct. Crim. App. 1995)*. Under the circumstances, we cannot say that the military judge abused his discretion in admitting C's statement to the AFOSI agents.

Even if we had found the military judge abused his discretion in admitting C's statement, we still would not reverse the appellant's conviction for rape. We are convinced that the appellant's confession to the AFOSI coupled with C's testimony that **[*15]** he molested her,

was more than enough to convince the military judge beyond a reasonable doubt of the appellant's guilt. HN5[] "[A] deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession." Hopt v. Utah, 110 U.S. 574, 584, 28 L. Ed. 262, 4 S. Ct. 202 (1884) (citations omitted). *See* Arizona v. Fulminante, 499 U.S. 279, 292, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) (stating a confession is probably the most probative and damaging evidence that can be admitted against an accused).

III. Remaining Issues

During direct examination, the trial counsel purposely prodded an AFOSI agent to testify that the appellant took a polygraph exam. This was error, but the military judge resolved the issue by sustaining the appellant's objection and stating that he would totally disregard such evidence. HN6[] "A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence." United States v. Robbins, 52 M.J. 455, 457 (2000). **[*16]**

Pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), the appellant asserts the defense counsel were ineffective because they failed to get his confession suppressed. He argues that his counsel were deficient for failing to request an expert consultant in sleep deprivation and failing to move to suppress his statements as the involuntary product of a sleep-deprived mind. Of course, there is no evidence the appellant ever told his counsel that he had been unable to sleep. The appellant failed to establish that his counsel's performance was defective or that there was any likelihood that the motion would have been meritorious. United States v. Flack, 47 M.J. 415, 417 (1998) (citing Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (requiring reasonable probability that verdict would have been different absent excludable evidence, when ineffectiveness claim is based on counsel's failure to litigate *Fourth Amendment* objection to evidence)). This issue is without merit.

The appellant also asserts that application to him of accelerated and automatic forfeitures under the provisions of Articles 57(a) and 58b, UCMJ, 10 U.S.C. §§ 857 **[*17]** (a), 858b, violates the Ex Post Facto Clause of the Constitution of the United States. We agree. *See* United States v. Gorski, 47 M.J. 370 (1997). All rights and privileges of which the appellant has been deprived as a result of the misapplication of Articles 57(a) and 58b shall be restored.

The appellant's assertion that his counsel were ineffective in cross-examining an AFOSI agent is without merit.

IV. Sentence Reassessment

Having set aside and dismissed the guilty findings to forcible sodomy, indecent acts, and indecent liberties, we must reassess the sentence. In doing so, we may still consider the evidence from the dismissed charges. *See* United States v. Nourse, 55 M.J. 229, 232 (2001); United States v. George, 52 M.J. 259, 261 (2000); United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990).

In Jackson v. Taylor, 353 U.S. 569, 579, 1 L. Ed. 2d 1045, 77 S. Ct. 1027 (1957), the Supreme Court found HN7[] no authority in the Uniform Code of Military Justice to remand a case to a court-martial for a rehearing on sentence alone. The function of reassessing the sentence in such cases was left to the unfettered discretion of the service **[*18]** boards of review (now courts of criminal appeals). The United States Court of Appeals for the Armed Forces (CAAF), however, has ruled that we must remand the case back to a court-martial unless we are convinced that the sentence, as reassessed, is not greater than the sentence that the original court-martial would have imposed absent the error. United States v. Sales, 22 M.J. 305 (C.M.A. 1986).

Whether we employ the standard of Article 66(c), UCMJ, and *Jackson*, or that mandated by the CAAF in *Sales*, we reach the same result. We affirm the approved sentence of a dishonorable discharge, confinement for 12 years, and reduction to E-1. This sentence is appropriate regardless of the admissibility of C's statement to the AFOSI agents.

The findings of guilty, as modified, and the sentence are correct in law and fact. Article 66(c), UCMJ, *10 U.S.C. § 866(c)*; United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). The modified findings of guilty and sentence are

AFFIRMED.

End of Document

APPENDIX

D

United States v. Toussant

United States Army Court of Criminal Appeals

December 30, 2008, Decided

ARMY MISC 20080962

Reporter
2008 CCA LEXIS 564 *; 2008 WL 8087964

UNITED STATES, Appellant v. Master Sergeant ROBERT T. ***TOUSSANT***, United States ***Army***, Appellee

Subsequent History: Review denied by *United States v. **Toussant**, 67 M.J. 269, 2009 CAAF LEXIS 111 (C.A.A.F., 2009)*

Prior History: [*1] III Corps and Fort Hood, Texas. Charles Walters, Military Judge, Colonel John W. Miller II, Staff Judge Advocate.

Core Terms

Specifications, military, statute of limitations, rape, court-martial, punishable, Appeals, death penalty, alleged rape, charges

Case Summary

Procedural Posture
Appellant, the United States, challenged an order of a military judge that dismissed military judge dismissed two specifications of rape of a person under the age of sixteen years committed up to, and after December 31, 2001. The dismissal was based on the limitations period the military court found applicable under Unif. Code Mil. Justice art. 43, *10 U.S.C.S. § 843*, if rape was not deemed a capital offense under Kennedy v. Louisiana.

Overview
The government conceded a defense motion asserting that specifications of forcible sodomy and indecent acts were barred by the statute of limitations. The applicable statute of limitations for those offenses at the time of the alleged criminal acts was five years under Unif. Code Mil. Justice art. 43(b)(1), *10 U.S.C.S. § 843(b)(1)*. The charges had not been preferred within that prescribed limitations period. There was no limitations period for a capital offense, which rape was under military law, and the government argued that the rape charges were therefore not barred by the limitations period. The military judge determined that the rape charges must be dismissed, because the recent decision in Kennedy v. Louisiana prohibited death as an authorized punishment for the rape of a child in a civilian criminal setting. On appeal, the court noted that subsequent U.S. Supreme Court case law distinguished the military setting from the *Eighth Amendment* issue raised in Kennedy. The government's appeal under Unif. Code Mil. Justice art. 62, *10 U.S.C.S. § 862*, was granted. There was a long standing use of the death penalty for rape in the military, including rape of a child.

Outcome
The government's appeal was granted. The military judge's decision to dismiss the rape specifications was vacated. The court-martial could proceed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > General Overview

Military & Veterans Law > Military Justice > Judicial Review > General Overview

HN1[] **Courts Martial, Pretrial Proceedings**

R.C.M. 908(b)(4), Manual Courts-Martial, states that upon written notice to a military judge, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by a court of criminal appeals of the appeal.

Military & Veterans Law > Military Justice > Judicial Review > General Overview

HN2[] **Military Justice, Judicial Review**

When ruling on the government's interlocutory appeal pursuant to Unif. Code Mil. Justice art. 62, *10 U.S.C.S. § 862*, a reviewing court may act only with respect to matters of law. It may not make additional findings of fact; rather, on questions of fact, the court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record. If the findings are incomplete or ambiguous, the appropriate remedy is a remand for clarification or additional findings. The court may not find its own facts or substitute its own interpretation of the facts. However, it reviews questions of law de novo.

Military & Veterans Law > Military Justice > Statute of Limitations

HN3[] **Military Justice, Statute of Limitations**

See former Unif. Code Mil. Justice art. 43, *10 U.S.C.S. § 843*.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

HN4[] **Sentences, Capital Punishment**

Subsequent to its decision in Kennedy v. Louisiana, the United States Supreme Court clarified the holdings of that decision are limited to the civilian context.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

HN5[] **Sentences, Capital Punishment**

There is a long standing existence of the death penalty for rape in the military, including rape of a child. The United States Supreme Court has left open whether certain considerations might justify differences in the application of the *Cruel and Unusual Punishments Clause* to military cases.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > Military Justice > Statute of Limitations

HN6[] **Sentences, Capital Punishment**

The United States Court of Criminal Appeals for the Armed Forces has made clear that rape is an offense punishable by death for purposes of exempting it from the five year statute of limitations of Unif. Code Mil. Justice art. 43, *10 U.S.C.S. § 843*.

Counsel: For Appellant: Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Lieutenant Colonel Steven P. Haight, JA; Captain Adam S. Kazin, JA (on brief).

For Appellee: Lieutenant Colonel Mark Tellitocci, JA; Lieutenant Colonel Matthew M. Miller, JA; Major Bradley Voorhees, JA; Captain W. Jeremy Stephens, JA (on brief).

Judges: Before COOK, CONN and BAIME, Appellate Military Judges. Judge CONN and Judge BAIME concur.

Opinion by: COOK

Opinion

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

COOK, Judge:

The government's appeal under Article 62, Uniform Code of Military Justice [hereinafter UCMJ], *10 U.S.C. § 862* is granted. The military judge's decision to dismiss Specifications 1 and 2 of Charge I is vacated.

FACTS AND PROCEDURAL BACKGROUND

The simple facts and procedural history necessary to resolve this appeal are not in dispute. On 28 February 2008, the government preferred charges against the accused of rape (three specifications), forcible sodomy (three specifications), and indecent acts (four specifications) in violation **[*2]** of Articles 120, 125, and

134, UCMJ, *10 U.S.C. §§ 920*, *925*, and *934*. The summary court-martial convening authority received the charges this same date. On 31 July 2008, a military judge arraigned the accused on these charges.

At a later motions hearing on 6 October 2008, conducted pursuant to *Article 39(a), UCMJ*, the government conceded, in part, to a defense motion asserting that Specifications 1 and 2 of Charge II (forcible sodomy), and Specifications 1, 2 and 3 of Charge III (indecent acts) were all barred by the statute of limitations as interpreted under our superior court's ruling in *United States v. Lopez de Victoria, 66 M.J. 67, 71-74 (C.A.A.F. 2008)*. [1] The military judge agreed and dismissed these specifications with prejudice.

The government did not concede the remainder of the defense motion to dismiss Specifications 1 and 2 of Charge I (rape) as barred by the statute of limitations. Specification 1 alleges the accused, on divers occasions between 1 October 1997 and 31 December 2000, raped Ms. T.M.T., a person under the age of 16 years. Specification 2 alleges the same offense, but with the acts occurring between the period of 1 January 2001 and 31 December 2003.

During the period of the alleged rapes, the maximum possible punishment for rape of a person under 16 years of age, as stated under Article 120, UCMJ, included death; neither forcible sodomy nor indecent acts included death as a possible punishment. Also during the period of the alleged rapes, *Article 43(a), UCMJ*, provided that "[a] person charged . . . with any offense punishable by death, may be tried and punished at any time without limitation." Therefore, unlike the dismissed forcible sodomy and indecent acts specifications, which all had a statute of limitations of five years, the alleged rape offenses had no statute of limitations.

After hearing argument from both sides **[*4]** as to whether Specifications 1 and 2 of Charge I were barred by the statute of limitations, the military judge dismissed these specifications, ruling as follows.

> Back in 1992, as the defense counsel in a capital murder case, I raised the specific issue that was later decided by the US Supreme Court in *Crawford v. Washington.* I raised the issue based upon an appellate decision that I had found out of the 5th Circuit. If I remember correctly, *Crawford v. Washington* comes out of the 9th Circuit. Well, my case, had it been tried in the Supreme Court, would have been from the 9th Circuit and, in fact, as ironic as it may have been, I believe that my case involved a crime that occurred in the same civilian jurisdiction where *Crawford v. Washington* occurred. But the trial court denied my motion. DAD failed to preserve that motion and that issue. DAD failed to raise it to The ***Army*** Court of Appeals so, therefore, it never reached the Court of Appeals for the Armed Forces. Therefore, it could have never reached the US Supreme Court. Ten years later, they did decide *Crawford v. Washington,* and then a latter court decision decided that, even though *Crawford v. Washington* was of constitutional dimensions, **[*5]** it wasn't such a watershed issue as could be applied retroactively. So, I had a client who was clearly prejudiced by an improper ruling that had been made 15 years prior to the Supreme Court addressing the issue, and still couldn't receive relief because it was determined that it wasn't of watershed proportions.
>
> Now, I don't know why the Supreme Court deferred to rule as to whether or not this *8th Amendment* issue would be addressed the same for soldiers as it was for civilians, and I'm talking as to the specific issue of whether or not rape of a child without a death occurring could justify the imposition of the death penalty. So I'm very concerned that my ruling today might prejudice this accused because, by the time that he is granted the relief, if the court were to find that the *8th Amendment* barred prosecution of Specifications 1 and 2 of Charge I because the death penalty was not allowed and, therefore, the Statute of Limitations governing those Specifications would be limited to five years, that, by the time that all of that was decided, this accused would have suffered prejudice and is not likely to be given any meaningful relief at that point if he's been convicted and serving **[*6]** a lengthy sentence, and the court again determines that it's not such a watershed issue as to apply it retroactively.
> So, in the interest of justice and to force the court to

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[1] The alleged acts for these specifications occurred between the dates of 1 October 1997 and 31 January 2003. The summary court-martial convening authority did not receive the sworn charges until 28 February 2008. The applicable statute of limitations at the time of these alleged acts was five years as provided in ***Article 43(b)(1), UCMJ***. Because the summary court-martial convening authority did not receive the sworn charges within the prescribed limitations **[*3]** period, the accused was not liable to be tried by court-martial for them.

> address that issue at this time, before this accused has suffered prejudice, I am going to dismiss Specifications 1 and 2 of Charge I, with prejudice, as being barred by the Statute of Limitations; and that the Statute of Limitations that was in force at that time would only allow proceeding because the death penalty was applicable and because, I believe, the Supreme Court would have ruled, currently, that that it is unconstitutional under the limitations of the *8th Amendment*, as it applies specifically to this offense, and that there would not be military-specific exigencies or circumstances to justify otherwise proceeding.

The government filed a motion for reconsideration on 8 October 2008. Prior to the military judge acting on that motion, the government filed, on 9 October 2008, a timely notice of appeal pursuant to Rule for Court-Martial [hereafter R.C.M.] 908. On 10 October 2008, the military judge held another Article 39a hearing. [2] At that hearing, he advised the parties that the government's R.C.M. 908 **[*7]** appeal stayed any further proceedings on the government's request for reconsideration. [3] Gratuitously, the military judge also commented that his ruling to dismiss Specifications 1 and 2 of Charge I was "incorrect."

LAW

Standard of Review

HN2[] When ruling on government interlocutory appeals pursuant to Article 62(b), UCMJ, our court "may act only with respect to matters of law." We may not make additional **[*8]** findings of fact; rather, "[o]n questions of fact, [our] court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record. If the findings are incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings." *United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995)* (quoting *United States v. Kosek, 41 M.J. 60, 64 (C.M.A. 1994)*). This court may not "find its own facts or substitute its own interpretation of the facts." *United States v. Cossio, 64 M.J. 254, 256 (C.A.A.F. 2007)* (citing *United States v. Mizgala, 61 M.J. 122, 127 (C.A.A.F. 2005)*). However, we review questions of law de novo. *Kosek, 41 M.J. at 63*; *United States v. Rittenhouse, 62 M.J. 509, 511 (**Army** Ct. Crim. App. 2005)*.

Statute of Limitations

During the time of appellant's alleged misconduct in Specifications 1 and 2 of Charge I, the *Manual for Courts-Martial, United States* [hereinafter *MCM*] provided that ***HN3***[] "[a] person charged with absence without leave or missing movement in time of war, ***or with any offense punishable by death,*** may be tried at any time without limitation." *Article 43, UCMJ* (1995) (emphasis added). At the time **[*9]** of the alleged rapes, the crime of rape under Article 120 (a), UCMJ, was punishable by death. [4]

DISCUSSION

The appellant argues that the *Eighth Amendment to the United States Constitution*, as recently interpreted by the Supreme Court in the case of *Kennedy v. Louisiana,* prohibits death as an authorized punishment for the rape of a child under Article 120, UCMJ. *128 S. Ct. 2641, 2650-51, 171 L. Ed. 2d 525, 540 (2008)*. Appellant further argues that since death is not an authorized punishment, that the statute of limitations to be applied in appellant's case for the alleged rapes in Specifications 1 and 2 of Charge I is five years, under *Article 43(b)(1)* as it existed at the time of the alleged offenses.

We disagree with appellant's argument. First, in

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[2] The defense attempted to prevent, via a petition for extraordinary relief to the ***Army*** Court of Criminal Appeals, the 10 October 2008 Article 39a hearing by the military judge concerning the government's request for reconsideration. The petition for extraordinary relief became moot following the military judge holding the Article 39a hearing, but ruling he had no authority to act on the request for reconsideration due to the government's subsequent notice of appeal pursuant to R.C.M. 908 (*see* fn. 3 following).

[3] See ***HN1***[] R.C.M. 908(b)(4), stating that "upon written notice to the military judge . . . the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal . . . ."

[4] *MCM,* Part. IV, para. 45e(1) (1995). Note, the punishment of death for the crime of rape has been authorized under the *MCM* since 1951 through the present. *See also MCM,* Part IV, para. 15(2) 126 (1951); *MCM,* Part. IV, para. 45e(1) (2005); *MCM,* Part IV, para. 45f(1) (2008).

subsequent proceedings in ***HN4***[⬆] *Kennedy v. Louisiana,* the Supreme Court clarified its decision was limited to the civilian context. *128 S. Ct. 2641, 2650-51, 171 L. Ed. 2d 525*; *128 S. Ct. 2641, 171 L. Ed. 2d 525, 540 (2008)*, **[*10]** modified, *129 S. Ct. 1, 3-4, 171 L. Ed. 2d 932, 933-934 (2008)*. Furthermore, ***HN5***[⬆] while recognizing the long standing existence of the death penalty for rape in the military, including rape of a child under the current *MCM,* the Court stated that it "need not decide whether certain considerations might justify differences in the application of the *Cruel and Unusual Punishments Clause* to military cases (a matter not presented here for our consideration)." *Id.*

Second, ***HN6***[⬆] the Court of Criminal Appeals for the Armed Forces has made clear that "rape is an 'offense punishable by death' for purposes of exempting it from the 5-year statute of limitations of *Article 43(b)(1)*." *Willenbring v. Neurauter, 48 M.J. 152, 180 (C.A.A.F. 1998)*. The court in *Willenbring* also found that "the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue." *Id.* Our superior court reinforced this principle seven years later in *United States v. Stebbins, 61 M.J. 366 (C.A.A.F. 2005)*.

CONCLUSION

Based upon our review of the record, we hold the military judge erred in applying the law. Accordingly, the military judge's ruling **[*11]** dismissing Specifications 1 and 2 of Charge I is vacated. The court-martial of Master Sergeant Robert T. ***Toussant*** may proceed in accordance with R.C.M. 908(c)(3).

Judge CONN and Judge BAIME concur.

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APPENDIX

E

United States v. Dillon

United States Air Force Court of Criminal Appeals

April 23, 2009, Decided

ACM 36843

Reporter
2009 CCA LEXIS 132 *; 2009 WL 1508224

UNITED STATES v. Staff Sergeant KENNETH W. ***DILLON***, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion denied by *United States v. **Dillon**, 2009 CAAF LEXIS 1346 (C.A.A.F., Dec. 1, 2009)*

Review denied by *United States v. **Dillon**, 2009 CAAF LEXIS 1321 (C.A.A.F., Dec. 2, 2009)*

Prior History: **[*1]** Sentence adjudged 09 August 2006 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Ronald A. Gregory (sitting alone). Approved sentence: Dishonorable discharge, confinement for 21 years, and reduction to E-1.

Core Terms

sentence, confinement, military, sexual abuse, mental health professional, trial defense counsel, reassess, older brother, occasions, offenses, amnesia, sodomy, rapes, indecent act, ineffective, court-martial, post-trial, deficient, complain, daughter, statute of limitations, counsel's performance, violation of article, presentencing, subjected

Case Summary

Procedural Posture

A military judge, sitting as a general court-martial, convicted appellant servicemember of rape of a child under the age of 16 years on divers occasions, sodomy of a child under the age of 12 years on divers occasions, and indecent acts upon the body of a child under the age of 16 years on divers occasions, in violation of Unif. Code Mil. Justice (UCMJ) arts. 120, 125, and 134, *10 U.S.C.S. §§ 920*, *925*, and *934*. The servicemember appealed.

Overview

The servicemember pled guilty to charges alleging that he raped, sodomized, and committed indecent acts on his stepdaughter on divers occasions, and he was convicted of those offenses and sentenced to a dishonorable discharge, confinement for 21 years, and reduction to E-1. The court of criminal appeals rejected the servicemember's argument that he was entitled to relief because he was subjected, posttrial, to cruel and unusual punishment, in violation of the *Eighth Amendment to the U.S. Constitution* and UCMJ art. 55, *10 U.S.C.S. § 855*, because, inter alia, he failed to exhaust his administrative remedies before he made that complaint to the court. The court also found that there was no merit to the servicemember's claim that he was denied effective assistance of counsel and that his sentence to 21 years' confinement was inappropriately severe. However, the court found that the military judge erred when he considered allegations that the servicemember committed sodomy and indecent acts on his stepdaughter before April 10, 2001, because those charges were barred by the statute of limitations, and it set aside those findings and amended the servicemember's sentence.

Outcome

The court of criminal appeals modified the specifications under Charge III and Charge IV, reassessed the sentence by reducing the period of confinement to 19 years, and affirmed the findings and the sentence as modified.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

HN1 **Sentences, Confinement**

In order to prevail through the judicial process on allegations of abuse while in posttrial confinement, a prisoner must seek administrative relief prior to invoking judicial intervention. In this regard, a servicemember must show a military court of criminal appeals, absent some unusual or egregious circumstance, that he has exhausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, *10 U.S.C.S. § 938*. This requirement promotes resolution of grievances at the lowest possible level and ensures that an adequate record has been developed to aid appellate review.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

HN2 **Fundamental Rights, Cruel & Unusual Punishment**

A servicemember must establish two factors required for an *Eighth Amendment* or Unif. Code Mil. Justice art. 55, *10 U.S.C.S. § 855*, violation regarding conditions of confinement. In order to succeed on these theories, the servicemember must (1) show that the act or omission resulted in the denial of necessities and is objectively, sufficiently serious, and (2) prove a deliberate indifference on the part of his jailors to his health or safety.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Criminal Process, Assistance of Counsel**

Claims of ineffective assistance of counsel are reviewed de novo. To prevail on a claim of ineffective assistance of counsel, a servicemember must show (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. The servicemember must identify specific acts or omissions that rendered the trial defense counsel's performance outside the wide range of professionally competent assistance that could have been provided in any given case, and the United States Air Force Court of Criminal Appeals will not second guess a trial defense counsel's strategic or tactical decisions. The prejudice prong requires that the servicemember show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Even if a defense counsel's performance was deficient, a servicemember is not entitled to relief unless he was prejudiced by that deficiency.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault of a Child

Military & Veterans Law > Military Justice > Statute of Limitations

HN4 **Military Offenses, Rape & Sexual Assault of a Child**

The United States Court of Appeals for the Armed Forces, in United States v. Lopez de Victoria, determined that the 2003 amendment to Unif. Code Mil. Justice art. 43(c), *10 U.S.C.S. § 843(b)*, extending the application of the statute of limitations for child abuse cases from five years to the victim's twenty-fifth birthday, was not retroactive.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Statute of Limitations

HN5 **Military Offenses, Rape & Sexual Assault**

There is no statute of limitations for the offense of rape under Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN6 **Judicial Review, Courts of Criminal Appeals**

If a military court of criminal appeals cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred, it must order a rehearing on sentence. However, if the United States Air Force Court of Criminal Appeals is convinced that even if no error had occurred at trial, the accused's sentence would have been at least of a certain magnitude, the court need not order a rehearing on sentence, but instead may itself reassess the sentence.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7 **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals must be convinced not only that a servicemember's sentence, as adjudged, is appropriate in relation to the affirmed findings of guilty, but also that the sentence is no greater than that which would have been imposed if prejudicial error had not been committed.

Counsel: For the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Michael A. Burnat, and Captain John S. Fredland.

For the United States: Colonel Gerald R. Bruce, Colonel George F. May, Major Jeremy S. Weber, Major Donna S. Rueppell, and Major Amy E. Hutchens.

Judges: Before WISE, BRAND, and HELGET, Appellate Military Judges. Judge HELGET did not participate.

Opinion by: WISE

Opinion

OPINION OF THE COURT

WISE, Chief Judge:

The appellant was tried at Luke Air Force Base, Arizona, by a general court-martial composed of a military judge. Pursuant to his pleas, the appellant was found guilty of rape of a child under the age of 16 years on divers occasions, in violation of Article 120, UCMJ, *10 U.S.C. § 920*; sodomy of a child under the age of 12 years on divers occasions, in violation of Article 125, UCMJ, *10 U.S.C. § 925*; and indecent acts upon the body of a child under the age of 16 years on divers occasions, in violation of Article 134, UCMJ, *10 U.S.C. § 934*. The military **[*2]** judge sentenced the appellant to a dishonorable discharge, confinement for 21 years, and reduction to E-1. The convening authority, after making a provision for monetary payments for the benefit of the appellant's wife and children, approved the sentence as adjudged.

On appeal, the appellant raises three issues. The appellant asserts: (1) he was subjected to post-trial cruel and unusual punishment, in violation of the *Eighth Amendment to the Constitution of the United States* [1] and Article 55, UCMJ, *10 U.S.C. § 855*; (2) his trial defense counsel were ineffective in failing to call a defense expert mental health witness for presentencing proceedings; [2] and (3) his sentence to 21 years confinement was inappropriately severe. Additionally, this Court specified an issue involving the application of *United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008)*, in which our superior court determined that the 2003 amendment to Article 43(b), UCMJ, *10 U.S.C. § 843(b) (2000)*, extending the application of the statute of

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[1] ***U.S. CONST. amend. VIII***.

[2] Issues 1 and 2 are raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

limitations for child sex abuse cases from five years to the victim's twenty-fifth birthday, was not retroactive. In response to the specified issue, the appellant requests that **[*3]** this Court amend the time frames for which the appellant was found guilty of the sodomy and indecent acts offenses and order a rehearing on the sentence. We have examined the record of trial, the assignment of errors, the appellant's response to the specified issue, and the government's responses. We amend the findings as indicated in our decretal paragraph and reassess the sentence.

Background

The appellant married RD on 19 October 1996. RD had a daughter from a previous marriage, SP, who was born on 27 October 1990. RD and SP moved into the appellant's residence on 19 October 1996. The appellant repeatedly sexually abused SP between the ages of six and eleven. SP turned six years old on 27 October 1996 and eleven years old on 27 October 2001. All of the crimes committed by the appellant against SP occurred prior to the November 2003 Congressional amendment of Article 43(b), UCMJ, extending the statute of limitations in child sex abuse cases from five years to the victim's twenty-fifth birthday. The Summary Court-Martial Convening Authority receipted for the court-martial **[*4]** charges on 10 April 2006. All sodomies and indecent assaults committed by the appellant against SP prior to 10 April 2001 are barred by the five-year statute of limitations in effect at the time the crimes were committed. *United States v. Tunnell, 23 M.J. 110 (C.M.A. 1986)*.

Cruel and Unusual Post-Trial Punishment

The appellant complains for the first time in an affidavit submitted to this Court that he was subjected to post-trial cruel and unusual punishment. The appellant states that: (1) he was denied his right to physical exercise; (2) no one from his chain of command came to visit him while in post-trial confinement; (3) his meals while in post-trial confinement consisted of whatever Security Forces or other inmates provided him; (4) unlike other inmates, he was handcuffed and fitted with leg restraints when leaving the confinement facility for appointments; and (5) he was placed in restraints when he had visitors while other inmates were able to have free movement.

HN1[↑] In order to prevail through the judicial process on allegations of abuse while in post-trial confinement, "[A] prisoner must seek administrative relief prior to invoking judicial intervention. In this regard, [the] appellant **[*5]** must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, *10 [U.S.C.] § 938*." *United States v. White, 54 M.J. 469, 472 (C.A.A.F. 2001)* (quoting *United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997)* (quoting *United States v. Coffey, 38 M.J. 290, 291 (C.M.A. 1993)))*. This requirement "promot[es] resolution of grievances at the lowest possible level [and ensures] . . . that an adequate record has been developed" to aid appellate review. *Miller, 46 M.J. at 250*.

The appellant has failed to show that he attempted to obtain relief pursuant to the prisoner-grievance system at the Luke Air Force Base confinement facility or by filing an Article 138, UCMJ, complaint. Further, the appellant has failed to identify "some unusual or egregious circumstance" that prohibited him from exhausting those remedies.

Beyond the appellant's failure to establish that he attempted to obtain administrative relief for his complaints, he has failed to articulate a valid claim for the relief he seeks. ***HN2***[↑] The appellant must establish two factors required for an *Eighth Amendment* or Article 55, **[*6]** UCMJ, violation regarding conditions of confinement. In order to succeed on these theories, the appellant must: (1) show that the act or omission resulted in the denial of necessities and is "objectively, 'sufficiently serious'" and (2) prove a "deliberate indifference" on the part of his jailors to the appellant's health or safety. *White, 54 M.J. at 474* (quoting *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (quoting *Wilson v. Seiter, 501 U.S. 294, 298, 302-03, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)))*. The appellant's complaints meet neither the "objectively, 'sufficiently serious'" or the subjective "deliberate indifference" factors required to establish an *Eighth Amendment* or Article 55, UCMJ, violation.

Effective Assistance of Counsel

The appellant was sexually abused by his older brother from approximately age seven until age nine or ten. The appellant's trial defense counsel did not call a mental health professional to testify during presentencing procedures. The appellant insinuates that had his trial defense counsel called a mental health professional, the witness could have detailed, as a mitigating factor, how

the abuse suffered by the appellant "might have lead [sic] to the crimes [the appellant] committed against **[*7]** [his] victim." The appellant concludes, "I was denied any expert witness at my trial though my counsel informed me that they would get expert witness [sic] on my behalf." The appellant has not proffered to this Court, by way of affidavit or otherwise, what information such a witness could have provided in this military judge alone trial.

The appellant's wife, RD, was called as a government witness. Trial defense counsel (TDC) had the following exchange with the witness on cross-examination:

> [TDC:] During your relationship, at the beginning of the relationship with Sergeant ***Dillon***, he confided in you that he had been sexually abused as a child?
> [RD:] Yes.
> . . . .
> [TDC:] When you talked to him about this, he was upset. He talked to you on more than one occasion about it, is that right?
> [RD:] Yes.
> [TDC:] And his demeanor was sad and crying and etcetera?
> [RD:] Yes.
> [TDC:] And there was a time you accompanied him back to his home for a family reunion, is that correct?
> [RD:] Yes.
> [TDC:] And he told you that he was sexually abused by his older brother and basically physically forced to engage in oral sex with his older brother?
> [RD:] Yes.
>
> [TDC:] And when you went back to the family reunion, you witnessed **[*8]** Sergeant ***Dillon*** tell his older brother that I forgive you for hurting me, is that right?
> [RD:] Yes.
> [TDC:] And he was crying, is that right?
> [RD:] Yes, both of them were.
> [TDC:] Both of them were crying?
> [RD:] Yes.

The appellant elaborated on this abuse during his oral and written unsworn statements:

> My older brother [M], who was six years older than me, abused me from when I was a young boy. First it was physical to where he would beat up on me pretty badly, but starting when I was about 7, he would force me to perform oral sex on him. He would beat me up if I didn't. This lasted two or three years until I told him I wouldn't do it any more. I didn't know how to deal with this and I just sort of carried it with me everywhere. Sometimes I would think about it, but mostly I would try to pretend it never happened. But it did happen and I've never been the same.
> My parents did not know this was going on, and I never told them about it until recently. I only wish I had told them about it when it happened so that they could get me help and make it stop. I was always too embarrassed and ashamed.
>
> I have talked with several psychologists about what happened to me as a boy with my older brother. I only **[*9]** wish I had gone to them sooner and gotten help and not tried to deal with this alone. I know now from talking to them that people who are abused are more likely to grow up to abuse others.

The appellant also entered into a stipulation of expected testimony from Dr. BE, a clinical and forensic psychologist, who said, in part:

> The likelihood of an adult who was sexually abused as a child to sexually abuse another child is also greater. This is more likely the case when the victim has not been treated for the abuse. Additionally, this is more likely to occur with males than females.

The testimony of RD concerning the appellant's statements to her about the sexual abuse he suffered at the hands of his older brother, RD's observations of the appellant's confrontation of his older brother and the brothers' respective reactions, the appellant's unsworn statements, and Dr. BE's testimony regarding the elevated potential for abuse by an untreated victim of child sexual abuse were unrebutted by the government.

In response to the appellant's allegations of ineffective assistance of counsel, the appellant's trial defense counsel, Captain HL and Captain SC, have submitted an unrebutted joint affidavit **[*10]** explaining in detail why they did not call a mental heath professional in their case-in-chief during presentencing proceedings. They state that the appellant, just hours after having received an Air Force Office of Special Investigations arranged pretext phone call from SP, claimed to have fallen and hit his head, resulting in a state of amnesia that prevented him from remembering anything after the approximate age of seven. A complete battery of medical tests, including a CT-scan and MRI, showed no organic basis for his condition. A medical professional from Wilford Hall Medical Center found "perceived amnesia not consistent with known psychiatric or

neurological causes of amnesia." A Sanity Board, ordered pursuant to Rule for Courts-Martial (R.C.M.) 706, determined that the appellant did not suffer from a severe mental disease or defect at the time of the alleged criminal misconduct and was not suffering from a mental disease or defect rendering him unable to intelligently assist in his own defense.

This exceedingly rare medical condition complained of by the appellant lasted from 17 October 2005 until approximately one week before the 9 August 2006 trial date. The appellant claimed **[*11]** he began recovering his memory through "dreams and other flashes of memory" resulting in his complete memory recovery the day before trial, enabling him to enter into a pretrial agreement. The pretrial agreement required the government to withdraw a malingering charge with two specifications (dealing with his professed amnesiac condition) and capped confinement at 25 years in return for the appellant's pleas to the charges and specifications for which he was convicted.

The trial defense counsel admit that they did not call a mental health professional to testify on the appellant's behalf during presentencing proceedings. They state that Colonel (Col) RC, a board-certified psychiatrist, was appointed as a defense expert consultant. The trial defense counsel explain that Col RC, after interviewing the appellant several times, interviewing SP, and reviewing the evidence:

> became concerned that [the appellant] had at minimum begun what Col [RC] called "grooming" of his [then] 5 year old [natural] daughter and had very likely already sexually abused her as well. This other daughter was the same age [SP] had been when [the appellant] began sexually abusing her. Col [RC] saw the same pattern **[*12]** in his relationship with his other daughter that [the appellant] had used in grooming [SP] to get to the point that [SP] would submit to his sexual advances in return for privileges, such as playing outside or going to a friend's house.

The trial defense counsel continue:

> Contrary to [the appellant's] declaration, Col [RC] was present at his court-martial. [3] However, the defense elected not to call him for tactical reasons. First, Col [RC] was strongly of the opinion that [the appellant] had either already sexually abused his other daughter or was grooming her for imminent abuse. Such a revelation would have been disastrous as the single victim would suddenly have become two in the eyes of the military judge. [The appellant's] rehabilitation potential would have looked particularly grim as this abuse [of SP] could no longer be couched as an isolated [victimization]. We wished to keep these conclusions away from the government so we chose to keep Col [RC's] consultations with [the appellant] privileged by not calling him as a witness. In addition, the defense wished to the extent possible to keep out the alleged amnesia. Col [RC] was intimately aware of the amnesia as [the appellant] **[*13]** had professed no recollection of anything subsequent to the age of seven when he first met with Col [RC]. While it may have been possible to put some sort of spin on the amnesia as an acknowledgement of wrongfulness and therefore a sign of favorable rehabilitation potential, the more obvious interpretation was what it appeared to be; a poorly-conceived and absurdly-timed attempt to avoid punishment through apparent lack of understanding of the allegations against him.
>
> . . . .
>
> Similarly, the defense agreed the wisest course of action was not to call Capt [M] [4] or any witness involved in [the appellant's] mental health treatment leading up to court. As described above, [the appellant] had tried to maintain his story of complete amnesia with these folks (albeit not well). For these reasons, calling any of them would open the door for the government to explore the amnesia issue, which would have allowed them to paint [the appellant] as an unrepentant child molester willing to feign a lack of competency simply to avoid punishment.

HN3[↑] Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley, 47 M.J. 158, 159 (C.A.A.F. 1997)*. To prevail on a claim of ineffective assistance of counsel, the appellant must show: (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. The appellant must

[3] We read the appellant's affidavit to complain not that a mental health professional was not present at his court-martial but that a mental health professional did **[*14]** not testify on his behalf during presentencing proceedings.

[4] Captain M was another mental health professional mentioned by the appellant in his affidavit complaining of ineffective assistance of counsel.

identify specific acts or omissions that rendered the trial defense counsel's performance "outside the wide range of professionally competent assistance" that could have been provided in any given case. *Id. at 690*. We will not second guess the trial defense counsel's strategic or tactical decisions. *United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993)* (quoting *United States v. Rivas, 3 M.J. 282, 289 (C.M.A. 1977))*. The prejudice prong requires that the appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **[*15]** *Strickland, 466 U.S. at 694*. Even if the defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick, 59 M.J. 383, 385 (C.A.A.F. 2004)* (quoting *Strickland, 466 U.S. at 687*).

The appellant has identified the specific omission committed by his trial defense counsel that he claims was ineffective. The appellant does not complain, and cannot complain, that the sentencing body, in this case the military judge, did not receive evidence from a mental health professional that an untreated adult who was himself subjected to child sexual abuse is more likely to commit child sexual abuse as an adult. The appellant complains only that a mental health professional was not called to testify in person on his behalf to provide this evidence to the military judge. The trial defense counsel's choice to present this evidence through a background witness, the appellant's unsworn oral and written statements, and a stipulation of expected testimony from an eminently qualified mental health professional was not deficient, particularly when all of the evidence went unrebutted by the government. Further, the trial defense **[*16]** counsel have provided compelling tactical reasons for not calling such a witness and thereby opening the door on cross-examination to potentially devastating evidence to the appellant. Contrary to the appellant's claim, the trial defense counsel's performance was not deficient but was remarkably proficient. Having determined that counsel's performance was: (1) not deficient and (2) guided by sound tactical analysis, there is no legal purpose in determining whether the appellant would have received a better result had a mental health professional testified, as the appellant now desires, during the defense sentencing case-in-chief. However, all indications are that such an approach would have been disastrous for the appellant. The appellant was not subjected to ineffective assistance of counsel.

Statute of Limitations

The appellant was charged with committing sodomy with SP, a child under the age of 12, from on or about 1 January 1996 to on or about 26 October 2002, in violation of Article 125, UCMJ, and performing indecent acts upon SP, a child under the age of 16, from on or about 1 January 1996 until on or about 31 December 2003, in violation of Article 134, UCMJ. The Summary Court-Martial **[*17]** Convening Authority receipted for charges in the appellant's case on 10 April 2006. The trial was convened on 9 August 2006. ***HN4***[⬆] Our superior court in *Lopez de Victoria* determined that the 2003 amendment to Article 43(b), UCMJ, extending the application of the statute of limitations for child abuse cases from five years to the victim's twenty-fifth birthday, was not retroactive. *Lopez de Victoria, 66 M.J. at 74*. Therefore, only those sodomy and indecent act offenses committed by the appellant against SP after 10 April 2001 are actionable. [5] We will order appropriate corrections in our decretal paragraph.

Sentence Reassessment

The military judge improperly considered those **[*18]** sodomies and indecent acts that occurred prior to 10 April 2001 as charged misconduct for findings and sentencing purposes. The trial counsel, during his sentencing argument, focused, in part, on the number of sexual offences the appellant subjected his daughter to prior to the running of the statute of limitations and improperly asked the military judge to punish the appellant for those offenses. This evidence would have been admissible as uncharged misconduct pursuant to R.C.M. 1001(b)(4) as evidence in aggravation "directly relating to . . . the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4); *see United States v. Tanner, 63 M.J. 445, 448-49 (C.A.A.F. 2006)*; *United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990)*. However, it was plain error for the military judge to punish the appellant for those offenses that occurred prior to 10 April 2001. *United States v. Denney, 28 M.J. 521 (A.C.M.R. 1989)*; Department of the Army Pamphlet

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[5] The appellant, during the *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)*, inquiry said the rapes occurred sometime between 2000 and 2001 although the stipulation of fact entered into by the appellant said the rapes occurred when SP was 11 years old, which would have placed the rapes closer to 27 October 2001. We need not determine precisely when the rapes occurred as ***HN5***[⬆] there is no statute of limitations for the offense of rape under Article 120, UCMJ, ***10 U.S.C. § 920***. *Willenbring v. Neurauter, 48 M.J. 152 (C.A.A.F. 1998)*.

27-9, *Military Judges' Benchbook*, P 8-3-20 (15 Sep 2002).

HN6[] If a military court of criminal appeals "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred" it must order a rehearing **[*19]** on sentence. United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986). However, if this Court is convinced "that even if no error had occurred at trial, the accused's sentence would have been at least of a certain magnitude" then we "need not order a rehearing on sentence, but instead may [ourselves] reassess the sentence." *Id*. We conclude that we can properly reassess the sentence.

The appellant raped SP on at least two occasions when she was approximately 11 years old. The appellant routinely and repeatedly committed sodomy with and perpetrated indecent acts upon SP subsequent to 10 April 2001. The appellant coerced SP to engage in these activities through use of his parental control. As a result of limiting criminal liability for the sodomies and indecent acts committed by the appellant to those that occurred after 10 April 2001, there is no change in the "penalty landscape." United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003). The maximum period of confinement that could have been imposed remains life imprisonment without parole. [6] After taking into account all the facts and circumstances surrounding the offenses for which the appellant was found guilty, we find the appellant's **[*20]** sentence to a dishonorable discharge, reduction to E-1, and 21 years confinement appropriate for the crimes for which he was convicted. However, that does not end our inquiry.

HN7[] We must be convinced not only that the sentence, as adjudged, "is appropriate in relation to the affirmed findings of guilty" but also "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985). The military judge improperly sentenced the appellant for crimes of sexual abuse committed against SP dating back to 1996. While it is very possible the military judge would have adjudged the sentence he imposed for those crimes committed by the appellant subsequent to 10 April 2001, we cannot ignore the possibility that he punished the appellant for those earlier offenses.

We are convinced beyond a reasonable doubt that had this experienced military judge not received evidence of those sexual offenses committed by the appellant prior to 10 April 2001, he would have adjudged a sentence of at least a dishonorable discharge, reduction to E-1, and 19 **[*21]** years confinement. Therefore, we reassess the sentence to a dishonorable discharge, reduction to E-1, and 19 years confinement. Furthermore, we find the sentence, as reassessed, to be appropriate. *See* United States v. Peoples, 29 M.J. 426, 427-28 (C.M.A. 1990). In view of our decision to reassess the sentence, we need not address the appellant's claim that his sentence to 21 years confinement is inappropriately severe.

Conclusion

The findings are modified as follows: that portion of the Specification of Charge III which states, "on divers occasions, from on or about 1 January 1996 to on or about 26 October 2002" is amended to read "on divers occasions, from on or about 10 April 2001 to on or about 26 October 2002." That portion of the Specification of Charge IV which states, "on divers occasions, from on or about 1 January 1996 to on or about 31 December 2003" is amended to read "on divers occasions, from on or about 10 April 2001 to on or about 31 December 2003."

The approved findings, as modified, and the sentence, as reassessed, 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, **[*22]** the approved findings, as modified, and the sentence, as reassessed are AFFIRMED.

Judge HELGET did not participate.

End of Document

[6] The case was referred non-capital for the rape offense.

APPENDIX

F

United States v. Vogler

United States Air Force Court of Criminal Appeals

September 3, 2009, Decided

ACM 37231

Reporter
2009 CCA LEXIS 331 *; 2009 WL 2996991

UNITED STATES v. Technical Sergeant RICHARD W. ***VOGLER***, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. **Vogler**, 2010 CAAF LEXIS 180 (C.A.A.F., Feb. 22, 2010)*

Review denied by *United States v. **Vogler**, 2010 CAAF LEXIS 483 (C.A.A.F., June 3, 2010)*

Prior History: [*1] Sentence adjudged 13 November 2007 by GCM convened at Eglin Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone). Approved sentence: Dishonorable discharge, confinement for 20 years, and reduction to E-1.

Core Terms

sentence, specification, military, rape, convening, statute of limitations, confinement, guilty plea, forcible sodomy, providency, offenses, indecent act, plain error, improvident, pretrial, sexual, abuse of discretion, alleged error, twenty years, misconduct, questions, charges, severe, waived

Case Summary

Procedural Posture

Pursuant to his pleas, a military judge sitting as a general court-martial found appellant sergeant guilty of divers rape, divers rape of a child, divers forcible sodomy, divers indecent assault, and willfully disobeying a superior commissioned officer, under Unif. Code Mil. Justice, arts. 120, 125, 134, 90, *10 U.S.C.S. §§ 920*, *925*, *934*, *890*. On appeal, appellant challenged his rape conviction and sentence of 20 years confinement.

Overview
After the convening authority (CA) dismissed charges of divers forcible sodomy of a child and divers indecent acts with a child, appellant remained convicted of the bulk of the charges, which carried a maximum of life without parole; the sentencing landscape did not change. A portion of the divers rape of a child specification was not barred by the statute of limitations (S/L). At the time of the earliest alleged child rape in 2000, there was no S/L as it was punishable by death, and while Unif. Code Mil. Justice art. 43, *10 U.S.C.S. § 843*, had since been amended twice, there was never a lapse in the S/L, and in 2007 when the rape specification was received it was not time-barred. Over many years, appellant sexually assaulted, raped, and sodomized his stepdaughter. 20 years of confinement was not inappropriately severe. The CA considered the fact that two of the charges were dismissed yet still thought 20 years of confinement was proper, and that appellant received the generous benefit of a pretrial agreement. Appellant's "yes" and "no" responses to leading questions sufficiently supported his plea. He acknowledged, in no uncertain terms, his understanding of constructive force.

Outcome
The convictions and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Posttrial Procedure, Staff Judge Advocate Recommendations**

Proper completion of post-trial processing is a question of law, which a reviewing military court reviews de novo. Failure to timely comment on matters in the staff judge advocate's recommendation waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6), Manual Courts-Martial. To prevail under a plain error analysis, the appellant bears the burden of showing that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. While the threshold for establishing prejudice is low, the appellant must nevertheless make a colorable showing of possible prejudice.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Statute of Limitations

HN2 **Judicial Review, Standards of Review**

The interpretation of the statute of limitations contained in Unif. Code Mil. Justice art. 43, *10 U.S.C.S. § 843*, is a matter of law; therefore, it is reviewed de novo.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Statute of Limitations

HN3 **Military Offenses, Rape & Sexual Assault**

In 2006, Congress amended Unif. Code Mil. Justice art. 43, *10 U.S.C.S. § 843*, and in so doing allowed prosecution for child rape during the life of the child or within five years after the date on which the offense was committed, whichever provides for a longer period of time.

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Sentences, Credits**

Axiomatically, a government agency must abide by its own regulations where the underlying purpose of such regulations is the protection of personal liberties or interests. However, confinement in violation of Air Force Instruction 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. Under R.C.M. 305(k), Manual Courts-Martial, a service-member may identify abuses of discretion by pretrial confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit. A military judge's decision in response to this request is reviewed, on appeal, for abuse of discretion.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5 **Judicial Review, Clemency & Parole**

A reviewing military court reviews sentence appropriateness de novo. The reviewing court makes such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. Additionally, while the reviewing court has a great deal of discretion in determining whether a particular sentence is appropriate, it is not authorized to engage in exercises of clemency.

Military & Veterans Law > ... > Trial Procedures > Pleas > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Trial Procedures, Pleas**

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN7[] **Pleas, Providence Inquiries**

An accused may not plead guilty unless the plea is consistent with the actual facts of his case. An accused may not simply assert his guilt; the military judge must elicit facts as revealed by the accused himself to support the plea of guilty. Where there is a substantial basis in law and fact for questioning the appellant's plea, the plea cannot be accepted.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN8[] **Pleas, Providence Inquiries**

While leading questions are disfavored, a military judge's use of leading questions does not automatically result in an improvident plea and the sufficiency of a providency inquiry must be determined by examining the totality of the circumstances.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9[] **Judicial Review, Standards of Review**

The issue of accurate characterization of an appellant's service is a question of law, which a reviewing military court reviews de novo. A failure to timely comment on this issue waives any later claim of error in the absence of plain error.

Counsel: For Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Lance J. Wood, and Captain Tiffany M. Wagner.

For United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, Captain G. Matt Osborn, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Judges: Before FRANCIS, JACKSON, and THOMPSON, Appellate Military Judges.

Opinion by: JACKSON

Opinion

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge sitting as a general court-martial found the appellant guilty of one specification of divers rape, one specification of divers rape of a child, one specification of divers forcible sodomy, one specification of divers forcible sodomy of a child, one specification of divers indecent acts with a child, one specification of divers indecent assault, and one specification of willfully disobeying a superior commissioned officer, in violation of Articles 120, 125, 134, and 90, UCMJ, *10 U.S.C. §§ 920*, 925, 934, 890. The military judge sentenced the appellant to **[*2]** a dishonorable discharge, thirty years of confinement, and a reduction to the grade of E-1. The convening authority approved the dishonorable discharge, the reduction to the grade of E-1, and, pursuant to a pretrial agreement, twenty years confinement. [1]

On appeal, the appellant asks the Court to, alternatively: (1) order a sentence rehearing; (2) set aside the findings or a portion of the findings; (3) grant administrative credit toward his sentence of confinement; (4) grant meaningful relief by reducing his sentence of confinement; (5) reassess his sentence; and (6) set aside the sentence.

As the basis for his request, the appellant opines that: (1) the staff **[*3]** judge advocate (SJA) erred when he failed to advise the convening authority of the option to order a sentence rehearing pursuant to Rule for Courts-Martial (R.C.M.) 1107 since the dismissal of the divers forcible sodomy of a child specification and the divers indecent acts with a child specification changed the

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise not to approve confinement in excess of twenty years. In taking action in the appellant's case, the convening authority determined that the divers forcible sodomy of a child specification and the divers indecent acts with a child specification were barred by the statute of limitations; he accordingly dismissed those specifications.

sentencing landscape; (2) a portion of the divers rape of a child specification was barred by the statute of limitations in effect prior to the 2003 amendment of Article 43(b), UCMJ, *10 U.S.C. § 843(b)*, as interpreted in *United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008)*; (3) the military judge, having found knowing violations of Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004), erred in not determining that the violations involved an abuse of discretion warranting credit under R.C.M. 305(k); (4) his approved sentence of twenty years confinement is inappropriately severe because it was based on a pretrial agreement that was reached with an understanding that he would plead and be found guilty of all charges and did not take into account that his convictions for the divers forcible sodomy of a child specification and the divers indecent **[*4]** acts with a child specification were barred from prosecution by the statute of limitations; (5) his guilty pleas to the divers rape, divers rape of a child, divers forcible sodomy, and divers indecent assault are improvident since the military judge failed to establish on the record a factual basis to support the pleas of guilty; (6) the SJA committed post-trial error in failing to provide the convening authority with either an accurate characterization of the appellant's service or accurate information as to what action he was entitled to take on the appellant's sentence; (7) the military judge abused his discretion by relaxing the rules of evidence during the government's sentencing case thereby allowing the prosecution to admit irrelevant evidence; (8) the military judge erred by failing to inform the appellant of his right to assert the statute of limitations; (9) his guilty pleas to divers rape and divers rape of a child are improvident since the military judge failed to provide the appellant with a complete definition of the legal concept of force; (10) the trial counsel committed prosecutorial misconduct by suborning perjury and by allowing Dr. KC to commit professional misconduct; **[*5]** (11) his guilty pleas to the charges and specifications were improvident because the military judge erred when he created and failed to resolve inconsistencies between the stipulation of fact and the providency inquiry; (12) he was denied effective assistance of counsel by the trial defense counsels' errors; and (13) the trial counsel's sentencing argument was improper. [2] Finding the appellant's assignments of error to be meritless and finding no prejudicial error, we affirm.

[2] Issues 4-13 are raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

Background

In early 1996, the appellant began a sexual relationship with SNV, his then eight-year-old stepdaughter. Over the course of several years, he fondled her vagina and breasts and forced her to fondle his penis. [3] When SNV turned twelve years old, she and the appellant began to engage in oral sex. Over the course of several years, the appellant performed cunnilingus on SNV, forced SNV to perform fellatio on him, and on at least two occasions anally sodomized SNV. [4]

When SNV turned thirteen years old, the appellant began coercing her to have sexual intercourse with him. His sexual intercourse with SNV continued until she was nineteen years old. On 20 July 2007, SNV, with the encouragement of her boyfriend, reported the appellant to law enforcement officials. On 22 July 2007, agents with the Air Force Office of Special Investigations (AFOSI) summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, and admitted to having "consensual" oral and sexual intercourse with SNV since she was sixteen years old. On or about 26 July 2007, the appellant's commander, having been informed of the misconduct, issued the appellant a "no contact" order prohibiting him from having any contact with SNV. On or about 31 July 2007, the appellant violated the "no contact" order by sending SNV two text messages.

Lack of SJA Advice on Option for Sentence Rehearing

HN1[] Proper completion of post-trial processing is a question of law, which this Court reviews de **[*7]** novo. *United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)*; *United States v. Bakcsi, 64 M.J. 544, 544 (A.F. Ct. Crim. App. 2006)* (citing *United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004))*. Failure to timely comment on matters in the SJA's Recommendation waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005)*. "To prevail under a plain error

[3] The convening authority determined that a portion of the appellant's misconduct during this time period was barred by the statute of limitations.

[4] The convening **[*6]** authority determined that a portion of the appellant's misconduct during this time period was barred by statutes of limitations.

analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo, 60 M.J. at 436* (quoting *Kho, 54 M.J. at 65*). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id. at 437*.

Since the appellant failed to raise this alleged error in his clemency petition, it is waived absent a showing of plain error. Here, the SJA was not obliged to advise the convening authority of his option for a sentence rehearing. First, the SJA advised the convening authority on all the matters of which he was required under R.C.M. 1106(d). Second, while a sentence rehearing **[*8]** may be appropriate when a significant part of the government's case has been dismissed, such was not the case sub judice. After the convening authority dismissed the divers forcible sodomy of a child specification and the divers indecent acts with a child specification, the appellant remained convicted of the bulk of the charges and specifications. Significantly, the appellant remained convicted of charges that carried a maximum period of confinement of life without the possibility of parole and, contrary to the appellant's assertions, the sentencing landscape did not change. In short, we find no error. Additionally, even assuming error, the error was not plain and the appellant has fallen woefully short of establishing prejudice.

Statute of Limitations on the Divers Rape of a Child Specification

HN2[] The interpretation of the statute of limitations contained in *Article 43, UCMJ*, is a matter of law; therefore, we review de novo. *Lopez de Victoria, 66 M.J. at 73*. Contrary to the appellant's assertions, a portion of the divers rape of a child specification is not barred by the statute of limitations. At the time of the earliest alleged child rape, 21 October 2000, there was no statute of limitations **[*9]** because rape was punishable by death, [5] and there was no statute of limitations for offenses punishable by death. *Manual for Courts-Martial, United States (MCM)*, Part IV, P 45.e.(1) (2000 ed.); *Article 43, UCMJ*.

In 2003, Congress amended *Article 43, UCMJ*, to except certain "child abuse" offenses from the general five-year statute of limitations and this amendment had the unintended effect of establishing a statute of limitations for child rape. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). That statute of limitations barred prosecution after the victim reached twenty-five years of age. *Id*. **HN3**[] In 2006, however, Congress once again amended *Article 43, UCMJ*, and in so doing allowed prosecution for child rape during the life of the child or within five years **[*10]** after the date on which the offense was committed, whichever provides for a longer period of time. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 (2006). Thus, in this case, there was never a lapse in the statute of limitations, [6] and on 22 August 2007, the day the summary court-martial authority received the rape specification, the specification was not barred by any statute of limitations.

Credit for AFI 31-205 Violation

HN4[] Axiomatically, "a government agency must abide by its own regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Adcock, 65 M.J. 18, 23 (C.A.A.F. 2007)* (quoting *United States v. Dillard, 8 M.J. 213, 213 (C.M.A. 1980)*). However, confinement in violation of AFI 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the **[*11]** military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. *Id. at 23-24*. "[U]nder R.C.M. 305(k), a service-member may identify abuses of discretion by pretrial confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit." *Id. at 24*. "A military judge's decision in response to this request is reviewed, on appeal, for abuse of discretion." *Id*.

We now turn to whether the military judge abused his

[5] The fact that the rape charge was not referred capital is of little consequence for statute of limitations purposes because the rape charge, whether referred capital or not, is still an offense which subjects the accused to death. *See United States v. Stebbins, 61 M.J. 366, 369 (C.A.A.F. 2005)* (citing *Willenbring v. Neurauter, 48 M.J. 152, 179-80 (C.A.A.F. 1998)*).

[6] SNV was born on 21 October 1987, and thus will be twenty-five years of age on 21 October 2012. Since she was not older than twenty-five years of age when there was a statute of limitations for child rape, the statute of limitations for the child rape specification never lapsed.

discretion in declining to award the appellant additional sentencing credit for AFI 31-205 violations. The military judge made detailed findings of fact and conclusions of law. While he noted technical non-compliance with AFI 31-205, he also noted that the non-compliance was done to achieve legitimate, non-punitive, governmental objectives. The military judge's findings of fact are not clearly erroneous and his conclusions of law are correct. The award of additional confinement credit was clearly a matter within his sound discretion, and he did not abuse his discretion in refusing to award additional confinement credit.

Inappropriately Severe Sentence

HN5[] We **[*12]** review sentence appropriateness de novo. *United States v. Baier, 60 M.J. 382, 384 (C.A.A.F. 2005)*. We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)*; *United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006)*, *aff'd*, *65 M.J. 35 (C.A.A.F. 2007)*. Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *See United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)*; *United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988)*.

Over the course of many years, the appellant sexually assaulted, raped, and sodomized a child whom he was entrusted to protect. His crimes rank among the most heinous crimes recognized by society and severely compromise his standing as a non-commissioned officer, a military member, and a member of society. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant **[*13]** was found guilty, we do not find the appellant's sentence, one which includes twenty years of confinement, inappropriately severe. [7]

Providency of the Appellant's Pleas

HN6[] A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996)* (citing *United States v. Gallegos, 41 M.J. 446, 446 (C.A.A.F. 1995))*. ***HN7***[] An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977)*; **[*14]** *United States v. Logan, 22 C.M.A. 349, 47 C.M.R. 1, 3 (C.M.A. 1973)*. An accused may not simply assert his guilt; the military judge must elicit facts *as revealed by the accused himself* to support the plea of guilty. *United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)* (emphasis added) (quoting *United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980))*; *United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996)*. Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman, 59 M.J. 389, 391 (C.A.A.F. 2004)* (citing *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991))*.

In the case sub judice, sufficient evidence exists to support the military judge's findings that the appellant committed the offenses of which he was convicted. First, with respect to the appellant's assertions that his "yes" and "no" responses to the military judge's leading questions are insufficient to support his guilty plea, we note that our superior court has recently rejected that notion. *United States v. Nance, 67 M.J. 362, 365 (C.A.A.F. 2009)* (holding that, ***HN8***[] while leading questions are disfavored, a military judge's use of leading questions **[*15]** does not automatically result in an improvident plea and the sufficiency of a providency inquiry must be determined by examining the totality of the circumstances).

Concerning the appellant's claims that his plea is improvident because the military judge failed to provide a complete definition of the legal concept of force, we likewise find this claim meritless. The appellant acknowledged, in no uncertain terms, his understanding of the elements of and the definitions that accompanied the offenses, to include his specific understanding of constructive force. He stated that the elements and definitions taken together accurately and correctly described what he did, and that through his parental

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[7] We likewise reject the appellant's claim that his sentence is inappropriately severe because the convening authority approved the same sentence that would have been approved had the convening authority not dismissed the divers forcible sodomy of a child specification and the divers indecent acts with a child specification. On this point, we note that it is within the sound discretion of the convening authority to approve the sentence he deems most appropriate, that the convening authority considered the fact that he dismissed the aforementioned specifications and thought it appropriate to approve twenty years of confinement, and that the appellant received the generous benefit of his pretrial agreement.

authority over SNV, he constructively forced her to engage in oral and anal sodomy and sexual intercourse. Put simply, there is little doubt that the appellant understood the elements of the offenses and the definitions, including the definition of force, and that he provided sufficient evidence, either through his inquiry with the military judge or the stipulation of fact, to support his guilty plea. [8]

SJA's Alleged Error on Service Characterization

HN9[↑] This issue, as the first issue, is a question of law, which this Court reviews de novo. *Kho, 54 M.J. at 65*. Similarly, failure to timely comment on this issue waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *Scalo, 60 M.J. at 436*. The same three-part "plain error" test that was applicable to the first issue also applies to this issue. The appellant failed to raise this alleged error in his clemency petition, so the alleged error is waived absent a showing of plain error. In the case at hand, the SJA characterized the appellant's record as "average" and his duty performance as "acceptable." This description was appropriate given the fact that the appellant's command had made such a characterization and the appellant's commander, more than anyone, should know the appropriate characterization of the appellant's service. Moreover, even if it were error for the SJA to characterize the appellant's service as "average," the appellant has nonetheless **[*17]** failed to show prejudice. The record makes it abundantly clear that the convening authority considered the appellant's performance reports and personal data prior to taking action and opted to approve the sentence he later approved.

Remaining Alleged Errors

We have considered the additional assertions of error, find them to be without merit, and find them to be without worthiness of further discussion. *United States v. Straight, 42 M.J. 244, 248 n.4 (C.A.A.F. 1995)* (citing *United States v. Clifton, 35 M.J. 79, 81-82 (C.M.A. 1992)*; *United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987))*.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. [9] 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 are

AFFIRMED.

End of Document

[8] Additionally, we find his claim that his pleas are improvident because of unresolved inconsistencies **[*16]** between his providency inquiry and the stipulation of fact to be meritless. Minor inconsistencies in the use of language do not disrupt an otherwise provident inquiry.

[9] We note that the court-martial order (CMO) erroneously lists Colonel Stephen Woody as the military judge whereas Colonel W. Thomas Cumbie was the military judge. Additionally, the CMO lists the Article 90, UCMJ, *10 U.S.C. § 890*, charge as "Additional Charge I" rather than "Additional Charge." Preparation **[*18]** of a corrected CMO, properly reflecting Colonel W. Thomas Cumbie as the military judge and the *Article 90, UCMJ*, charge as the "Additional Charge" is hereby directed.

APPENDIX

G

United States v. Best

United States Navy-marine Corps Court of Criminal Appeals

May 25, 2017, Decided

No. 201600134

Reporter
2017 CCA LEXIS 345 *

UNITED STATES OF AMERICA, Appellee v. SHANON L. ***BEST*** Master Chief Hospital Corpsman (E-9), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Review denied by *United States v. **Best**, 2017 CAAF LEXIS 869 (C.A.A.F., Sept. 5, 2017)*

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary Military Judge: Captain Robert J. Crow, JAGC, USN. Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL Staff Judge Advocate's Recommendation: Commander Nell O. Evans, JAGC, USN.

Core Terms

military, rape, Specification, sex, sexual, instructions, statute of limitations, constructive force, sexual intercourse, stepdaughter, stepfather, sentence, death penalty, court-martial, compulsion, civilian, offenses, reasonable doubt, expert witness, punishable, distorted, contends, grooming, resist, weigh

Case Summary

Overview
HOLDINGS: [1]-There was ***no*** merit to a servicemember's claim that the Government was barred under UCMJ art. 43(b)(1), *10 U.S.C.S. § 843(b)(1)*, from prosecuting charges alleging that he raped his stepdaughter, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, because the U.S. Supreme Court limited the statute of limitations for rape to five years when it decided that the death penalty for rape was unconstitutional; [2]-The military judge did not abuse his discretion when he allowed the Government's expert to testify about a 13-year-old stepdaughter's capacity to consent to sexual intercourse with her stepfather; [3]-There was ***no*** merit to the servicemember's claim that he could not be convicted of raping his stepdaughter after she was 16 years old because parental compulsion evaporated as a matter of law when his stepdaughter reached that age.

Outcome
The court affirmed the findings and sentence but directed publication of a supplemental promulgating order to reflect that the specification under Charge II was withdrawn and dismissed prior to the entry of the servicemember's pleas.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Statute of Limitations

HN1[] **Military Offenses, Rape & Sexual Assault**

The United States Court of Appeals for the Armed Forces conclusively ruled in its 1998 decision in Willenbring v. Neurauter that rape is an offense punishable by death for purposes of exempting it from the five-year statute of limitations of Unif. Code Mil. Justice art. 43(b)(1), *10 U.S.C.S. § 843(b)(1)*. Although the appellant sought an extraordinary writ in Willenbring,

contending that, given the United States Supreme Court's holding in Coker v. Georgia, death was not a possible punishment for the three specifications of rape with which he was charged, the CAAF found that the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue.

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] Evidence, Objections & Offers of Proof

Error may not be predicated upon the admission of testimony in a trial by court-martial unless there is a timely objection on the record. However, as an exception, the United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") may take notice of plain error even though an error is not brought to the attention of the military judge if an appellant demonstrates that there was an error, the error was plain ("clear" or "obvious"), and that the error materially prejudiced the substantial rights of the appellant. Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*; Mil. R. Evid. 103(d), Manual Courts-Martial (2012). On the other hand, where a proper objection is raised at trial, the NMCCA reviews a military judge's rulings on the admissibility of evidence for an abuse of discretion.

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN3[] Witnesses, Expert Testimony

A military judge has broad discretion as a gatekeeper to determine whether an adequate foundation for the introduction of expert testimony has been established. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Mil. R. Evid. 703, Manual Courts-Martial (Supp. 2012). Put simply, an expert's opinion can be formed from personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN4[] Military Offenses, Rape & Sexual Assault

In cases involving allegations of sexual abuse of a child, a qualified expert may inform the fact finder of characteristics commonly found in sexually abused children and describe the characteristics exhibited by an alleged victim.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] Trial Procedures, Instructions

Whether a court-martial panel was properly instructed is a question of law reviewed de novo. Where there was ***no*** objection to an instruction at trial, the United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") reviews for plain error. Absent evidence to the contrary, the NMCCA may presume that members follow a military judge's instructions.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] Judicial Review, Courts of Criminal Appeals

The United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") reviews questions of legal and factual sufficiency de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, any reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In applying that test, the

NMCCA is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that it did not see or hear the witnesses as did the trial court, the NMCCA is convinced of an appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the NMCCA takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN7[] **Military Offenses, Rape & Sexual Assault**

The United States Navy-Marine Corps Court of Criminal Appeals rejects any suggestion that parental compulsion evaporates as a matter of law when a child reaches 16 years of age. Certainly, ***no*** case law supports such a rule.

Counsel: For Appellant: James S. Trieschmann, Jr., Esq.; Lieutenant Jacqueline M. Leonard, JAGC, USN.

For Appellee: Major Kelli A. O'Neil, USMC; Major Cory A. Carver, USMC.

Judges: Before CAMPBELL, FULTON, and HUTCHISON, Appellate Military Judges. Senior Judge CAMPBELL and Judge FULTON concur.

Opinion by: HUTCHISON

Opinion

HUTCHISON, Judge:

A panel of officer members sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of rape and one specification of obstructing justice in violation of *Articles 120* and *134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 920 (2000)* and *10 U.S.C. § 934 (2012)*, respectively. The convening authority (CA) approved the adjudged sentence of 30 years' confinement and a dishonorable discharge.

The appellant asserts three assignments of error (AOEs)[1]: (1) the rape specifications are barred by the statute of limitations because the Supreme Court has held that the death penalty for rape is unconstitutional; (2) the **[*2]** military judge abused his discretion by permitting a government expert witness to testify about a 13-year-old step-daughter's capacity to consent to sexual intercourse with her stepfather[2]; and (3) the evidence is legally and factually insufficient to support Specification 2 of Charge I. Having carefully considered the record of trial and the parties' submissions, we conclude the findings and sentence are correct in law and fact, and find ***no*** error materially prejudicial to the appellant's substantial rights. *Arts. 59(a)* and *66(c), UCMJ*.

I. Background

The appellant was convicted of two specifications of raping his stepdaughter, LN, over **[*3]** the course of several years, beginning when she was a child. Specification 1 alleges rape on divers occasions between 5 December 1999 and 4 December 2003, while Specification 2 alleges rape on divers occasions between 5 December 2003 and 30 September 2007. The sworn charges were received by the officer exercising summary court-martial jurisdiction on 3 April 2015.

LN was born in December 1987 and was five years old when the appellant married her mother, MB. For the first

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[1] We have renumbered the AOEs.

[2] The appellant further alleges that the military judge committed instructional error by issuing contradicting instructions:

> IMMEDIATELY AFTER THE MILITARY JUDGE RULED THAT THE GOVERNMENT EXPERT COULD NOT TESTIFY TO THE ULTIMATE ISSUE OF CONSENT, THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE EXPERT WITNESS TO TESTIFY THAT A 13-YEAR-OLD STEP-DAUGHTER COULD NEVER HAVE THE CAPACITY TO CONSENT TO SEXUAL INTERCOURSE WITH HER 33-YEAR-OLD STEPFATHER. THE MILITARY JUDGE ALSO COMMITTED INSTRUCTIONAL ERROR BY ISSUING CONTRADICTING INSTRUCTIONS "THAT NOT ALL CHILDREN INVARIABLY ACCEDE TO PARENTAL WILL" AND THAT THE MEMBERS SHOULD RELY ON EXPERT TESTIMONY TO DETERMINE CONSENT.

Appellant's Brief of 17 Oct 2016 at 1.

several years of the marriage, LN lived with her biological father and had only sporadic interaction with the appellant. However, she lived with her mother and the appellant as a teenager.

During March 2001, the appellant, MB, LN, and the three children the appellant and MB had together all travelled to Texas, because the appellant's grandfather was ill. LN testified that the appellant entered the room in which she was sleeping and asked her if "he could be somebody that [she] could practice sexual things with, that way when [she] do[es] come into contact with boys [she] would know what [she] was doing[.]"[3] Although LN told him "***no***" because she "couldn't do that to [her] mom," the appellant persisted, and "the next thing [LN] **[*4]** remember[s] [the appellant] was on top of [her]" and "had sex with [her]."[4]

Sexual encounters between the appellant and LN continued over the next several years at the appellant's various duty stations. LN described how the appellant would approach her for sex whenever the two were alone together. Although LN testified that she definitely did not want the appellant to have sex with her, "at the time, [she] fe[lt] like that's all [she] knew" and that sex with her stepfather "was just so normal for [her]."[5] At times she told the appellant they should stop having sex. In response, the appellant would isolate and ignore her and she would not be included in family outings. LN also testified that the appellant told her never to tell anyone about their sexual encounters, that he would kill himself if anyone ever found out, and that "one day [she would] look back and hate [him] and realize what [he had] done."[6]

The appellant was the sole provider and disciplinarian for the family and was very strict with LN, affording her very little privacy. He read her diaries, and she was not permitted to have a boyfriend or to talk with boys on the phone. LN described being constantly grounded for months at a time over very **[*5]** minor issues. The appellant also punished her by removing her bedroom door. LN testified that the appellant got angry whenever she got in trouble and that she was afraid of him. She felt like she had to have sex with him if he wanted to, because it was "what made him happy . . . .[she] felt like if [she] didn't do that it would cause trouble and it would ruin everything."[7]

MB testified that she first found out about the appellant having sex with LN in 2007, after she discovered LN with a male friend in her bedroom. The appellant was out of town, and when he returned a few days later, MB informed him that LN had a boy with her in her bedroom. MB testified that the appellant reacted by "freaking out and throwing up, panicking."[8] At that point, MB was already suspicious that something was going on between the appellant and LN, and she told the appellant to "[j]ust tell [her]."[9] The appellant admitted to MB that he had been having sex with LN since she was "like 12, 13," but downplayed his role, telling MB that LN "was evil, that she was bad, that they were gonna go off and be together, and they were gonna leave [MB] and the kids to go be together."[10] After the appellant's disclosure to MB, the appellant **[*6]** and MB sent LN to live with her biological father in Texas.

LN admitted during cross-examination that, while she lived in Texas, she sent the appellant e-mails telling him she wanted him to "dream about"[11] her and stating, "[w]e can finally be together, because I don't want anyone else. I never have."[12] LN also disclosed that the appellant never physically forced her to have sex with him and never threatened her with physical violence or punishment. LN further conceded that she, at times, approached the appellant for sex, that she wrote him love letters, and that she told the appellant that she loved him. After joining the Navy in 2008, and while at bootcamp, LN sent the appellant letters, referring to him as "baby" or "Shanon."[13] The appellant attended LN's bootcamp graduation, and the two engaged in sexual intercourse in a hotel room that night.

In a controlled call conducted during the subsequent Naval Criminal Investigative Service investigation, LN

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[3] Record at 215.

[4] *Id.*

[5] *Id.* at 226.

[6] *Id.* at 224.

[7] *Id.* at 235.

[8] *Id.* at 282.

[9] *Id.*

[10] *Id.* at 282-83.

[11] *Id.* at 264-65.

[12] *Id.* at 263-64.

[13] *Id.* at 246.

confronted the appellant about being "only 12 years old and more vulnerable than ever and [him being] a 31 year old man," when their sexual relationship began and the "the guilt [he] put on [her] when [she] would approach [him] asking for all **[*7]** this to stop."[14] She told the appellant that he "created a wall between [her] and the whole family for [his] own benefit;" that he "broke [her] down to nothing, making her believe [she] wasn't good enough for anything;" and that the appellant "took more and more control over [her]."[15] In response, the appellant admitted that HN LN was "100 percent right with everything" she said.[16]

At trial, a forensic psychiatrist, Dr. H, testified as an expert witness regarding the importance of the parent-child relationship, especially as the brain develops in adolescence. He explained that the relationship is "critical because the parent provides the framework" or the "lens in which . . . the child sees the world."[17] Dr. H explained that a parent is "tremendously influential in helping the child realize what is appropriate, what is not appropriate, what is normal, what is not normal[.]"[18] When asked by the trial counsel what happens if the trust between a parent and a child becomes distorted, Dr. H testified:

> [A]ny ***number*** of things can happen, but . . . what I see clinically when the primary relationship is distorted or pathological or deviant is that the child makes bad decisions. They have a distorted sense **[*8]** of what is right and wrong. They have a distorted sense of what they should do or what they shouldn't do. They have a distorted sense of whether and when it is not appropriate to act on impulses.[19]

Dr. H then gave a lengthy explanation on "grooming," describing such behavior as the deliberate and thoughtful set of behaviors designed to "leverage and exploit the vulnerable nature of the victim and to perpetuate the deviant feelings of the predator."[20] Dr. H explained that the goal of grooming was psychological, vice physical, coercion and referred to such conduct as manipulation. Finally, after listening to her testimony, Dr. H noted that LN "spoke of control, isolation[,] and secrecy," all of which are "central components of grooming" and indicative of a coercive environment.[21]

II. Discussion

A. Statute of limitations

During these offenses, *Article 43(a), UCMJ*,[22] provided that "[a] person charged with . . . any offense punishable by death, may be tried and punished at any time without limitation." Otherwise, *Article 43(b)(1), UCMJ*, then as now, imposes a five-year statute of limitations, preventing trial by court-martial for an offense committed "more than five years before the receipt of **[*9]** sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." The statutory maximum punishment for rape at the time of the charged offenses was "death or such other punishment as a court-martial may direct." *Article 120(a)(1), UCMJ*.[23] The appellant contends, however, that the death penalty for rape under *Article 120, UCMJ*, is unconstitutional given the Supreme Court's holdings in *Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008)* (concluding the *Eighth Amendment* barred imposition of the death penalty for rape of a child) and *Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)* (holding a sentence of death was grossly disproportionate and excessive punishment for the crime of rape). Consequently, the appellant argues, Charge I is subject to the five-year statute of limitations in *Article 43(b)(1), UCMJ*. We disagree.

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[14] Prosecution Exhibit 3 at 3-4.

[15] *Id.*

[16] *Id.* at 5.

[17] Record at 307.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 308.

[21] *Id.* at 329.

[22] ***10 U.S.C. § 843(a) (1986)***. The 2006 amendment adding "rape" to the enumerate offenses having ***no*** statute of limitations under ***Article 43(a)*** and extending the statute of limitations for child abuse offenses to "the life of the child or within five years after the date on which the offense was committed, whichever provides a longer period," applied only to offenses committed on or after 1 October 2007—the first day after the appellant's charged period. ***109 P.L 163 Sec. 553(a)-(b)***.

[23] ***10 U.S.C. § 920(a)(1) (2000)***.

HN1[] The Court of Appeals for the Armed Forces (CAAF) conclusively ruled that "rape is an offense punishable by death for purposes of exempting it from the 5-year statute of limitations of *Article 43(b)(1)*," UCMJ. *Willenbring v. Neurauter, 48 M.J. 152, 180 (C.A.A.F. 1998)* (internal quotation marks omitted). In *Willenbring*, the appellant sought an extraordinary writ, contending that, given the Supreme Court's holding in *Coker*, death was not a possible punishment for the three specifications **[*10]** of rape with which he was charged. Since his offenses were alleged to have occurred approximately nine years before the charges were received by the officer exercising summary court-martial jurisdiction, Willenbring argued the charges were barred by the five-year statute of limitations imposed by *Article 43(b)(1), UCMJ*. The CAAF found that "the question of whether the death penalty may be imposed, given the facts and circumstances of any particular case, does not control the statute of limitations issue." *Id. at 178*.

Consistent with *Willenbring*, our sister court vacated a military judge's order dismissing two specifications of rape, following a government interlocutory appeal pursuant to *Article 62(b), UCMJ*. *United States v. Toussant, **No**. 20080962, 2008 CCA LEXIS 564 (A. Ct. Crim. App. 30 Dec 2008)* (mem. op.). Like the appellant here, Toussant argued that the Supreme Court's holding in *Kennedy* barred his prosecution for rape since the crimes occurred more than five years ago. The Army Court of Criminal Appeals disagreed, reasoning that the Supreme Court clarified that its decision in *Kennedy* was limited to the civilian context,[24] and that *Willenbring* "made clear" that *Article 43(b)(1)*'s five-year statute of limitations did not apply to the crimes of rape and rape of a child. *Id. at *10*.

We see **[*11]** ***no*** reason to deviate from the CAAF's clear pronouncement of the law in *Willenbring*, nor from the Army court's application of that law—to facts strikingly similar to those presented here—in *Toussant*. Consequently, we conclude that Specifications 1 and 2 under Charge I are not barred by the statute of limitations.

B. Expert witness testimony

The appellant next contends that the military judge erred "when he allowed the government's expert to testify that a thirteen-year-old does not have the capacity to consent to sexual intercourse."[25]

HN2[] "[E]rror may not be predicated upon the admission of testimony unless there is a timely objection on the record." *United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000)* (citation omitted). However, "[a]s an exception, [we] may take notice of plain error even though not brought to the attention of the military judge if the appellant demonstrates that there was an error, that the error was plain ('clear' or 'obvious'), and that the error materially prejudiced the substantial rights of the appellant." *Id.* (citing *United States v. Powell, 49 M.J. 460, 463-65 (C.A.A.F. 1998))*; *Art. 59(a), UCMJ*; and MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.)).

On the other hand, where a proper objection is raised at trial, we review a military judge's **[*12]** rulings on the admissibility of evidence for an abuse of discretion. *United States v. Griffin, 50 M.J. 278, 284 (C.A.A.F. 1999)*. Therefore, we must first determine whether the defense objected to this evidence at trial, in order to determine the proper standard by which we evaluate this alleged error.

Following a cross-examination in which Dr. H conceded that 13-year-old teenagers make "bad" or "inappropriate" decisions, that they can "flirt with an older adult," and that they "can have sexual contact with an adult,"[26] the government counsel began redirect with the following question:

> Dr. H[], you just testified after the defense question that teenagers may make bad decisions. In your opinion can a 13 year old girl make a consensual decision to have sex with a 31 year old stepfather?[27]

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[24] *Toussant, 2008 CCA LEXIS 564, at *9* (quoting ***Kennedy v. Louisiana, 554 U.S. 945, 947-48, 129 S. Ct. 1, 171 L. Ed. 2d 932 (2008)*** (denying petition for rehearing, and explaining that the Court "need not decide whether certain considerations might justify differences in the application of the ***Cruel and Unusual Punishments Clause*** to military cases (a matter not presented . . . for [the Court's] consideration) and, that whether or not "the Manual for Courts-Martial retains the death penalty for rape of a child or an adult when committed by a member of the military does not draw into question [the Court's] conclusions that there is a consensus against the death penalty for the crime in the civilian context[.]").

[25] Appellant's Brief at 9.

[26] Record at 321-22.

[27] *Id.* at 323.

The civilian defense counsel objected. The military judge sustained the objection and instructed the members to disregard the question. The trial counsel then continued:

> Q. Based on your knowledge and expertise, Dr. H[], is a 13 year old able to appreciate and weigh the ramifications of sexual activity accurately?
>
> A. I'm of the opinion, to a reasonable degree of medical and psychiatric certainty, ***no***, unequivocally ***no*** and that's why they have parents, because they don't **[*13]** have that *capacity* and their parents are there to help them make better decisions.[28]

The civilian defense counsel did not object to this specific question and answer. The appellant now contends that following the trial defense counsel's prior objection, "the government continued to elicit improper testimony" from Dr. H and "the [m]ilitary [j]udge failed to perform his role to prevent it."[29] We disagree and find the civilian defense counsel's failure to object forfeited the issue. Therefore, we review admission of this testimony for plain error and find none.

As a threshold matter, we disagree with the appellant's underlying premise that Dr. H testified that a 13-year old girl was *incapable of consenting* to sex with her stepfather. Indeed, after trial defense counsel's objection, the military judge prevented Dr. H from answering that specific question—whether or not a 13-year-old could "make a consensual decision to have sex" with a stepfather.[30] Instead, Dr. H testified regarding whether a 13-year-old had the *capacity* to "appreciate and weigh the ramifications of sexual activity accurately[.]"[31] The appellant points to ***no*** law—and we have found none—that supports the contention that being "unable to appreciate **[*14]** and weigh the ramifications of sexual activity accurately" is the same thing as being incapable of consenting. Consequently, absent objection from defense counsel, there was ***no*** "clear" or "obvious" error in admitting the testimony. *Powell, 49 M.J. at 463-65*.

We also find ***no*** merit in the appellant's argument that Dr. H's testimony—which "characterize[d] a 33 year old stepfather having sex with his 13 year old stepdaughter" as "deviant" and "pathological"—lacked a proper foundation.[32]

HN3[] The "military judge has broad discretion as the gatekeeper to determine whether . . . an adequate foundation" has been established. *United States v. Green, 55 M.J. 76, 80 (C.A.A.F. 2001)* (citations and internal quotation marks omitted). "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." MIL. R. EVID. 703, SUPPLEMENT TO MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Put simply, an expert's opinion can be formed from "personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial." *United States v. Houser, 36 M.J. 392, 399 (C.M.A. 1993)*.

In *United States v. Raya*, the CAAF held that the military judge did not abuse his discretion by admitting testimony of a social worker who testified that a rape victim suffered from post-traumatic stress disorder, **[*15]** despite never having interviewed or treated the victim. *45 M.J. 251, 253 (C.A.A.F. 1996)*. The fact that the social worker formed her opinion from listening to the trial testimony, reading the reports of others, and "assuming facts as alleged by the victim were true," went to the weight of the evidence and not its admissibility. *Id.* The same is true here. The trial counsel laid a proper foundation for Dr. H's testimony by establishing (1) Dr. H had assessed and treated victims and perpetrators involved in step-parent/stepchild relationships and, (2) Dr. H had reviewed the relevant facts in the case and observed LN's testimony.

Moreover, unlike the social worker in *Raya*, Dr. H did not testify about a specific condition or make a medical diagnosis concerning LN; rather he testified about the psychological conditions that are associated with victims of childhood sexual assault. ***HN4***[] "In cases involving allegations of sexual abuse of a child, a qualified expert may inform the fact finder of characteristics commonly found in sexually abused children and describe the characteristics exhibited by the alleged victim." *United States v. Rodriguez-Lopez, **No**. 33548, 2001 CCA LEXIS 223, at *33*, unpublished op., (A.F. Ct. Crim. App. 26 Jul 2001) (citing *United States v. Birdsall, 47 M.J. 404, 409 (C.A.A.F. 1998))* (additional citations omitted),

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[28] *Id.* at 327 (emphasis added).

[29] Appellant's Brief at 10.

[30] Record at 323.

[31] *Id.* at 327.

[32] *Id.* at 315. During an effective cross-examination of Dr. H, the civilian defense counsel made clear to the members that the terms "deviant" and "pathological" were medical terms and carried ***no*** legal effect. *Id.* at 320-21.

aff'd, *58 M.J. 19 (C.A.A.F. 2002)*. Therefore, **[*16]** given the military judge's broad discretion as gatekeeper, we find ***no*** error in the admission of Dr. H's testimony.

Finally, the appellant avers that the military judge erred "[b]y referencing Dr. H[]'s testimony on consent in his instructions," thereby injecting "inadmissible evidence into the definition of 'consent,'" and "instructing the members that they could use Dr. H[]'s opinion to determine the element of consent."[33]

HN5[] "Whether a panel was properly instructed is a question of law reviewed *de novo*." *United States v. McClour, 76 M.J. 23, 25 (C.A.A.F. 2017)* (citations and internal quotation marks omitted). Where there is ***no*** objection to an instruction at trial, this court reviews for plain error. *United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)*. Having found that the military judge did not err in admitting Dr. H's testimony, we reject the appellant's assertion that "inadmissible evidence" was injected into the definition of consent.[34] Regardless, the members were properly instructed on the elements of rape, the standard of proof, and the government's requirement to prove beyond a reasonable doubt that the sexual intercourse was achieved by force and without consent. "Absent evidence to the contrary, [we] may presume that members follow a military judge's instructions." *United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000)* (citing *United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994))* (additional **[*17]** citation omitted). The military judge also instructed the members on constructive force, explaining:

> In deciding whether the victim did not resist or ceased resistance because of constructive force in the form of parental duress or compulsion, you must consider all of the facts and circumstances including, but not limited to, the age of the child when the alleged abuse started, the child's ability to fully comprehend the nature of the acts involved, the child's knowledge of the accused's parental power, any implicit or explicit threats of punishment or physical harm if the child does not obey . . . the parent's commands, the accused harming himself, the family being ruined and the child's dependency upon the parents. If [LN] did not resist or ceased resistance due to compulsion or duress of parental command, constructive force has been established and the act of sexual intercourse was done by force and without consent.[35]

The military judge further instructed, "In deciding whether [LN] had at the time of the sexual intercourse the requisite knowledge and mental development, capacity and ability to consent, you should consider *all of the evidence in the case*, including, but not limited **[*18]** to, her age, education and the testimony of Dr. H[]."[36] Finally, specifically with regards to Dr. H's expert testimony, the military judge instructed the members "you are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness."[37]

Taken as a whole, we conclude that the military judge's reference to Dr. H's testimony, along with all the other evidence in the case, was not clearly or obviously erroneous and was, in any event, properly bounded by the military judge's admonition that members were free to disregard the testimony or give it ***no*** more weight than that of any other witness. Therefore, we find ***no*** plain error in the military judge's instructions.[38]

C. Legal and factual sufficiency

In his final assignment of error, the appellant contends that the evidence is legally and factually insufficient to support a conviction for Specification 2 under Charge I, because throughout the charged period, LN was not a "child of tender years" and the "government's theory of the case . . . was rape by constructive force, that LN did not consent because of her young age, and that Appellant had power over her as a parent."[39]

HN6[] We review questions **[*19]** of legal and factual sufficiency *de novo*. *Art. 66(c), UCMJ*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test

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[33] Appellant's Brief at 12-13.

[34] *Id.*

[35] Record at 411-12.

[36] *Id.* at 413 (emphasis added).

[37] *Id.* at 421.

[38] Although we find ***no*** error in either the military judge's admission of Dr. H's testimony or the military judge's instructions, we conclude that even if the military judge erred, there was ***no*** material prejudice to a substantial right of the appellant. Art. 59(a), UCMJ. *See United States v. Berry, 61 M.J. 91, 98 (C.A.A.F. 2005)* (evaluating the strength of the government case, the strength of the defense case, and the materiality and quality of the evidence in question, in determining whether any error substantially influenced the members' decision).

[39] Appellant's Brief at 22.

for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day, 66 M.J. 172, 173-74 (C.A.A.F. 2008)* (citing *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987))*. In applying this test, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Rankin, 63 M.J. 552, 557* (N-M. Ct. Crim. App. 2006) (citing *Turner, 25 M.J. at 325* and *Art. 66(c), UCMJ)*, *aff'd on other grounds*, *64 M.J. 348 (C.A.A.F. 2007)*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

The appellant argues that, in addition to LN being 16 to 19 years old during the period charged in Specification **[*20]** 2, she "never said '***no***,' resisted, or attempted to flee her situation with the [a]ppellant."[40] Rather, she sent him love letters and emails and wanted him to divorce her mother so she could marry him. Indeed, while LN testified she felt controlled, manipulated, and brainwashed, she also testified the appellant never forced her or threatened her with violence or punishment to affect that control over her.

The appellant relies on *United States v. Rhea, 33 M.J. 413 (C.M.A. 1991)*, where the Court of Military Appeals (CMA) set aside Rhea's convictions for raping and committing indecent acts with his stepdaughter by using "constructive force" when she was between the ages of 16 and 19. The appellant's reliance on *Rhea* is misplaced. The CMA remanded the case so that "the court below [could] undertake a further review of the sufficiency of the evidence and the instructions" with a "focus on whether the subtle and psychological effects of Rhea's relationship to [his stepdaughter]—to the extent that relationship still existed—were *still* sufficient to constitute constructive force" in light of his stepdaughter's age. *Id. at 425* (emphasis in original) (internal quotation marks omitted). On remand, the Air Force Court of Military Review concluded that "parental duress **[*21]** did still provide the coerciveness that constitutes 'constructive force' even when [the victim] was 20 years old" and that Rhea's stepdaughter "did not willingly consent to . . . sexual intercourse[.]" *United States v. Rhea, **No**. 27563, 1992 CMR LEXIS 470, at *11* (A. F. C. M. R. 11 May 1992).

In *United States v. Young, 50 M.J. 717 (A. Ct. Crim. App. 1999)*, the Army court affirmed Staff Sergeant Young's conviction for raping his stepdaughter when she was between the ages of 16 and 20, holding that the government's theory that the victim was "groomed" and "conditioned" to comply with Young's demands from an early age was fully supported by the evidence, including the testimony of two child sexual abuse expert witnesses. *Id. at 726*.

HN7[↑] We reject—as did the Army court in *Young*—any suggestion that parental compulsion evaporates as a matter of law when a child reaches 16. Certainly, ***no*** case law supports such a rule. Therefore, in order for the appellant to prevail, we must find that the evidence produced at trial was legally insufficient to establish constructive force, *i.e.*, parental compulsion.

As in *Rhea* and *Young*, sexual activity between the appellant and LN began well before LN turned 16. LN testified that the appellant first raped her when she was 13. In addition, LN had little privacy; the appellant read her diaries **[*22]** and, as a punishment for minor transgressions, removed the door from her bedroom. Even after LN graduated from high school, the appellant did not let her date. LN further testified that she got to the point where sex with the appellant felt "normal" to her, and she wanted to keep him happy.[41] Like the victims in *Rhea* and *Young*, LN viewed the appellant as the authority figure and main provider for the family and continued to live in his house during much of the charged period.

Finally, testimony from Dr. H expounded on the concept of parental compulsion. He testified that grooming a child to have sex involves behaviors like isolation and taking advantage of the inherent authority a parent has over a child; it was possible for a child to be coerced through that psychological manipulation to give in to an authority figure's wishes. Importantly, Dr. H also testified

[40] *Id.* at 23.

[41] Record at 226.

that he heard testimony in this case indicating LN was in a coercive environment when she lived with the appellant.

After carefully reviewing the record of trial and considering all of the evidence in a light most favorable to the prosecution, we are convinced that a rational factfinder could have found the appellant's sexual intercourse **[*23]** with LN was by force and without her consent, despite the fact that she was older than 16, given the government's theory of constructive force through parental compulsion. Furthermore, weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt.[42]

III. Conclusion

The findings and sentence, as approved by the CA, are affirmed. The supplemental promulgating order will reflect that the specification under Charge II was withdrawn and dismissed prior to the entry of pleas. *United States v. Crumpley, 49 M.J. 538, 539* (N-M. Ct. Crim. App. 1998).

Senior Judge CAMPBELL and Judge FULTON concur.

For the Court

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[42] Although we find Specification 2 both factually and legally sufficient, we note that the military judge merged both Charge I specifications for sentencing purposes. *Id.* at 606. Consequently, even were we to set aside Specification 2 and reassess the sentence in accordance with *United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013)*, we would still affirm the sentence as approved by the CA.

APPENDIX

H

United States v. Best

United States Court of Appeals for the Armed Forces

September 5, 2017, Decided

No. 17-0523/NA.

Reporter
2017 CAAF LEXIS 869 *

U.S. v. Shanon L. ***Best***.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: CCA 201600134 **[*1]** .

*United States v. **Best**, 2017 CCA LEXIS 345 (N-M.C.C.A., May 25, 2017)*

Opinion

Petition for Grant of Review Denied.

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