IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private (E-1) **ADRIAN GONZALEZ** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 20160363 USCA Dkt. No. 19-0297/AR

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Assigned Issue

WHETHER THE ARMY COURT ABUSED ITS DISCRETION BY REASSESSING THE SENTENCE AFTER DISMISSING THE MOST EGREGIOUS SPECIFICATION, AND OFFERING THE CONVENING AUTHORITY THE OPTION TO APPROVE AN EXCESSIVE SENTENCE FOR THE REMAINING SPECIFICATION IN LIEU OF A REHEARING.

Specified Issue

WHETHER APPELLANT WAIVED OR FORFEITED HIS OBJECTION TO THE ARMY COURT'S INSTRUCTION TO THE CONVENING AUTHORITY.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military

Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On May 10-11, 2016, at Fort Leavenworth, Kansas, a military judge sitting as a general court-martial convicted Private (PVT) Adrian Gonzalez, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012) [hereinafter UCMJ]. The military judge also convicted him, pursuant to his pleas, of one specification of violating a lawful general order, two specifications of violating a lawful general regulation, and two specifications of abusive sexual contact in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892 and 920 (2012). The military judge found PVT Gonzalez not guilty of one specification of sexual assault.

The military judge sentenced PVT Gonzalez to be confined for ten years and to be dishonorably discharged from the service. (JA 194). The convening authority approved the sentence. (JA 192).

On July 3, 2018, the Army Court issued a memorandum opinion in appellant's case, setting aside the finding of guilty for sexual assault in Specification 2 of Charge III and the sentence. The remaining findings of guilty were affirmed. *United States v. Gonzalez,* 2018 CCA LEXIS 327, *13-14 (A. Ct.

Crim. App. 2018). (App'x A). The Army Court set aside the sentence and authorized the convening authority to order a rehearing or dismiss Specification 2 of Charge III and reassess the sentence, affirming no more than a dishonorable discharge and confinement for 6 years.[1] (App'x A). The matter was returned to the convening authority for further action. On October 2, 2018, appellant, through his trial defense counsel, submitted new Rule for Courts-Martial (R.C.M.) 1105 matters that explained why the maximum sentence authorized by the Army Court was disproportional and, therefore, requested appellant's sentence be reassessed with no more than two years of confinement. (JA 184).

In light of the Army Court's opinion, the convening authority chose not to order a rehearing on Specification 2 of Charge III and the sentence or on the sentence alone, stating both those options were "not practical." (JA 194). Rather, on October 19, 2018, the convening authority took action to reassess the sentence, approving only so much of the sentence as provides for a dishonorable discharge

[1] The court's decretal paragraph stated: "Upon consideration of the entire record, the finding of guilty to Specification 2 of Charge III is set aside. The remaining findings of guilty are AFFIRMED. The sentence is set aside. The same or a different convening authority may: 1) order a rehearing on Specification 2 of Charge III and the sentence; 2) dismiss Specification 2 of Charge III and order a rehearing on the sentence only; 3) dismiss Specification 2 of Charge III and reassess the sentence, affirming no more than a dishonorable discharge and confinement for six years." *United States v. Gonzalez*, 2018 CCA LEXIS 327, *13-14 (A. Ct. Crim. App. 2018).

and confinement for six years before returning the record of trial to the Army Court for review pursuant to Article 66, UCMJ.

On January 31, 2019, appellant filed a brief with the Army Court raising as error that the convening authority improperly reassessed appellant's sentence resulting in an inappropriately severe sentence of confinement.

On March 13, 2019, the Army Court of Criminal Appeals affirmed the findings and the sentence. (App'x B). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, petitioned this honorable Court on May 10, 2019. On July 2, 2019, appellant filed his Supplement to his petition. This Court granted appellant's petition for review on September 19, 2019 on the assigned issue, and specified an additional issue.

STATEMENT OF FACTS[2]

The appellant was charged with sexual assault of three women. Appellant's charges included several offenses that qualify as a "sexual offense" under Military Rules of Evidence (Mil. R. Evid.) 413. (JA 1). In a pretrial motion, the government sought to introduce evidence of appellant's prior sexual assault convictions, as well as the charged Article 120 offenses as propensity evidence to

[2] Additional pertinent facts are contained in the assignment of error below.

prove the charged Article 120 offenses. (JA 119). The alleged victims in the charged Article 120 offenses were Mrs. VB, PFC TO, and SPC AC. The defense opposed this use of "contemporaneously charged misconduct that is all being used to prove one another." (JA 9).

On April 19, 2016, the military judge granted the government's M.R.E. 413 motion allowing the government to use prior convictions and the charged offenses as propensity evidence of the charged offenses.[3] (JA 173). On May 4, 2016, the defense submitted an offer to plead guilty to Specifications 3 and 4 of Charge II as well as Charge I and its specifications in exchange for a fifteen-year cap on confinement, which the convening authority accepted. (JA 174).

The military judge convicted appellant, contrary to his pleas, of one specification of rape of SPC AC. The military judge also convicted him, pursuant to his pleas, of three specifications of violating a lawful general order or regulation and two specifications of abusive sexual contact of Mrs. VB. The military judge also found appellant not guilty of one specification of sexual assault of PVT TO. (JA 181).

[3] The Mil. R. Evid. 413 evidence, which the military judge ruled was admissible on April 19, 2016 and thereafter was used against appellant on merits and in sentencing, was later ruled inadmissible for such purposes by *Hills* and its progeny. *See United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016); *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017); *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018).

During the government's sentencing case, only three witnesses – SPC AC, SPC AC's husband, Mrs. VB's husband – testified, while Mrs. VB instead chose to have her Special Victim Counsel (SVC) read her unsworn testimony. (JA 20-64). Trial counsel relied heavily on propensity to argue the severity of Appellant's offenses and to advocate for a twenty-five year term of confinement. (JA 65-72). Throughout government's argument, trial counsel rarely differentiated between the two victims and consistently referred to SPC AC and Mrs. VB as "them" or "both of them." (JA 65-72).

The military judge sentenced PV1 Gonzalez to be confined for ten years and to be dishonorably discharged from the service. (JA 181). The convening authority approved the adjudged findings and sentence. (JA 181).

The Army Court set aside the finding of guilty for sexual assault of SPC AC, affirming only the offenses to which appellant plead guilty. (App'x A). The Army Court set aside the sentence and provided the convening authority three options, one of which was to reassess the sentence but affirm no more than a dishonorable discharge and confinement for 6 years. (App'x A). The Army Court explained their reassessed sentence was appropriate. (App'x A).[4]

[4] The Court stated "In reassessing the sentence we are satisfied that the sentence adjudged, absent Specification 2 of Charge III, would have been at least a dishonorable discharge and confinement for six years. *See United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). The reassessment being both appropriate and purging the

The matter was returned to the convening authority for further action. In light of the Army Court's opinion, the convening authority chose not to order a rehearing on Specification 2 of Charge III involving SPC AC and the sentence or on the sentence alone, stating simply that both those options were "not practical." (JA 193). Rather, the convening authority took action to reassess the sentence, approving only so much of the sentence as provides for a dishonorable discharge and confinement for six years before returning the record of trial to the Army Court for review pursuant to Article 66, UCMJ. (JA 193).

On January 31, 2019, appellant filed a brief with the Army Court raising as error that the convening authority improperly reassessed appellant's sentence resulting in an inappropriately severe sentence of confinement. The Army Court of Criminal Appeals affirmed the findings and the sentence on March 13, 2019. (App'x B).

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record as it stands of error does not otherwise limit the sentence that may be adjudged at a rehearing. *See* UCMJ, art. 63." (App'x A.)

Assigned Issue

WHETHER THE ARMY COURT ABUSED ITS DISCRETION BY REASSESSING THE SENTENCE AFTER DISMISSING THE MOST EGREGIOUS SPECIFICATION, AND OFFERING THE CONVENING AUTHORITY THE OPTION TO APPROVE AN EXCESSIVE SENTENCE FOR THE REMAINING SPECIFICATION IN LIEU OF A REHEARING.

SUMMARY OF ARGUMENT

After setting aside appellant's sentence, the Army Court erred by conducting a de facto sentence reassessment and providing a "preapproved" reassessed sentence for the convening authority to adopt rather than allowing the convening authority to conduct an independent reassessment as permitted by R.C.M. 1107. Such a remand tainted both the convening authority's action and subsequent Article 66 review. This Court should find that the Army Court's erroneous view of the law rendered the advisory opinion to the convening authority on sentence appropriateness an abuse of discretion.

STANDARD OF REVIEW

This Court reviews a service court's sentence reassessment for abuse of discretion or to prevent obvious miscarriages of justice. *United States v. Winckelmann*, 73 M.J. at 15 (citing *United States v. Harris*, 53 M.J. 86, 88

(C.A.A.F. 2000)). Thus, sentence reassessment is a reviewable question of law "when exercised in an arbitrary manner." *United States v. Humphries*, 71 M.J. 209, 218 (C.A.A.F. 2012) (Baker, J., dissenting). "An abuse of discretion occurs when the . . . court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451 (C.AA.F. 2008).

LAW

This Court's decisions in *Sales* and *Winckelmann* provide guidance to the military service courts in determining whether to reassess a sentence or to order a rehearing. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013). In making this important decision, the service court considers the totality of the circumstances, including: (1) dramatic changes in the penalty landscape and exposure; (2) the forum; (3) whether the offenses remaining after correction of the errors capture the gravamen of the criminal conduct included within the original offenses and whether significant or aggravating circumstances remain admissible and relevant; and (4) whether the remaining offenses are the type with which appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority. *Winckelmann*, 73 M.J. at 15-16 (internal citations omitted).

A convening authority may:

> Reassess the sentence based on the approved findings of guilty and dismiss the remaining charges. Reassessment is appropriate only where the convening authority determines that the accused's sentence would have been at least of a certain magnitude had the prejudicial error not been committed and the reassessed sentence is appropriate in relation to the affirmed findings of guilty.

R.C.M. 1107(e)(2)(B)(iii).

When findings of guilt have been disapproved, the Staff Judge Advocate (SJA) must provide clear advice on the convening authority's options to cure any effect that error may have had on the sentence as well as the convening authority's responsibility to make a determination of sentence appropriateness under R.C.M. 1107(d)(2). *United States v. Reed*, 33 M.J. 98, 100 (C.M.A. 1991).

The purpose of the reassessment is to place an accused "in the position he would have occupied if an error had not occurred." *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988). The reassessed sentence must be "purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307. If the error at trial was one of constitutional magnitude, then the court must be satisfied "beyond a reasonable doubt that its reassessment has rendered harmless any error affecting the sentence adjudged at trial." *Id.* (citations omitted).

ARGUMENT

A. The Army Court abused its discretion in conducting a de facto sentence reassessment.

In giving the convening authority the Army Court's valuation of the case as meriting up to 6 years of confinement, the Army Court conducted a sentence reassessment. However, given the significant changes in both the penalty landscape and the gravamen of appellant's convictions, the Army Court clearly abused its discretion by finding it could even reliably reassess the sentence. *See Sales*, 22 M.J. at 308.

Additionally, given the magnitude of the constitutional error, the reduction in appellant's penalty exposure, and the nature of the presentencing evidence tainted by the error, the lower court's decision to merely reduce appellant's confinement from 10 years to 6 years in order to purge the record of error was an abuse of discretion.

1. The first, third, and fourth Winckelmann factors did not support a sentence reassessment by the service court.

In a footnote, the Army Court reassessed the sentence and concluded that absent Specification 2 of Charge III, the sentence would "at least" be a dishonorable discharge and confinement for six years. The Army Court did not provide any analysis for its de facto reassessment. Considering the change in penalty landscape and exposure and the offenses remaining differing from the

criminal conduct included with the original offenses, the Army Court abused its discretion in issuing an advisory opinion on sentence reassessment.

The dismissed specification – the single sexual assault conviction on the charge sheet – was the most serious offense of which appellant was initially convicted. This specification alone carried a maximum period of confinement of 20 years, whereas the remaining five specifications only carried a maximum combined punishment of 13 years. When an allegation generating 20 of the original 33 years of penal exposure was dismissed by the convening authority, only 40 percent of appellant's penal exposure remained at reassessment. Despite this significant alteration of the penalty landscape, the Army Court, and the convening authority, nevertheless chose to approve 60 percent of appellant's original sentence.

This is more startling when the Army Court's reassessed sentence, as a percentage of the maximum sentence is juxtaposed with the military judge's sentence, as a percentage of the maximum sentence. At trial, the appellant was originally exposed to a maximum of 33 years confinement. Yet, the military judge, who heard the entirety of the original sentencing case, only chose to adjudge appellant 10 years of confinement. That adjudged sentence amounted to only about 30 percent of his original maximum exposure. In contrast, the Army Court chose a reassessed confinement sentence of 6 years, which amounts to 46 percent

of the new 13 years of exposure, despite the dismissal of the most serious offense. Contrasting the military judge's 30 percent assessment with the Army Court's elevated 46 percent reassessment, raises the question of how both the Army Court and the convening authority reached this identical decision. All the more so, if the sentencing evidence before the Army Court and the convening authority really excluded all matters related to the dismissed specification, and if the convening authority considered the additional matters submitted to him that were not available to the Army Court when it prematurely considered the appropriateness of the convening authority's decision.

In light of the convening authority's decision to dismiss the most egregious specification, the reassessed sentence could have only been based upon the three specifications for disobeying orders and regulations and a single abusive sexual contact offense – as the two sexual contact specifications were merged for sentencing because they resulted from a single course of conduct, from one single night, and involved one woman. Appellant pleaded guilty to all of the offenses of which he currently stands convicted, making the entirety of the government's sentencing argument, which characterized appellant as a predator with a pattern of sexual abuse and no rehabilitative potential, moot. The Army Court and convening authority's reassessed sentence should have reflected appellant's acceptance of responsibility for his conduct, but did not.

Additionally, the government's use of "both," "them," and "their" throughout the court-martial, made the impacts to SPC AC and Mrs. VB indistinguishable from one another. When the convening authority dismissed the specification pertaining to SPC AC, this action rendered a large portion of the government's aggravation evidence and testimony from presentencing witnesses irrelevant.

In sum, the significant change in admissible sentencing evidence should have seriously undermined the Army Court's confidence in its ability to reliably reassess the sentence. The interests of justice are only served by permitting a thorough review of the evidence, untainted by the inadmissible error that was of a constitutional magnitude.

2. The Mil. R. Evid. 413 error also permeated the sentencing portion of appellant's court-martial, making reassessment inappropriate.

The Army Court correctly found the Mil. R. Evid. 413 error was of constitutional magnitude for findings. (App'x A at 7). Although the Army Court did not state it was persuaded that the constitutional error was harmless beyond a reasonable doubt with the reassessment of appellant's sentence, nevertheless, the Court provided that the convening authority could reassess appellant's sentence up to a certain amount. (App'x A at 8). The Army Court simply concluded the reassessment was both "appropriate and purg[ed] the record as it stands of error."

(App'x A at n.3). As a result, the Army Court did not appropriately analyze the impact of the error in its reassessment. This is significant for two reasons.

First, R.C.M. 1001(f)(2) provides that evidence properly admitted during merits can be considered during sentencing. In appellant's case, this rule served as a gateway for the improper propensity evidence, previously admitted during merits, to be considered in adjudging the appellant's sentence.

Second, the government's use of propensity evidence made the impacts to SPC AC and Mrs. VB dynamically intertwined. The prosecutor used Mil. R. Evid. 413 during merits to both overcome deficiencies in the government's case and liken appellant's behavior to that of a serial predator. Specifically, the government's use of vague references to "both," "them," and "their" throughout the court-martial muddled the record on sentencing, making the impacts to SPC AC and Mrs. VB inextricably entwined. Likewise, when the convening authority dismissed the specification pertaining to SPC AC, making her no longer a victim in this case, SPC AC's testimony in aggravation was no longer relevant, and the government's overarching sentencing theme that appellant did this "not once, but twice" was no longer accurate.

Given the dismissal of the specification pertaining to SPC AC, this Court must evaluate whether the Army Court abused its discretion in evaluating whether its sentence reassessment could render the constitutional error in appellant's case

harmless beyond a reasonable doubt. *Sales*, 22 M.J. at 307 (citations omitted). Here, where the government's use of propensity evidence made the impact to the victims dynamically intertwined, the Army Court failed to analyze the impact that propensity evidence had on sentencing in order to properly discern, with confidence, the extent of the error's effect on the sentencing authority's decision. It also failed to find its reassessment rendered harmless any error affecting the sentence adjudged at trial beyond a reasonable doubt. This was an abuse of discretion.

B. The Army Court's de facto sentence reassessment circumvented the convening authority's independent review.

The convening authority's post-trial duties are akin to that of a legal officer. *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987) (citing *United States v. Boatner*, 20 U.S.C.M.A. 376 (1971)). Indeed, this Court has said that "[a]s a matter of right, each accused is entitled to an individualized, legally appropriate, and careful review of his sentence by the convening authority." *Id.* (citing *United States v. Scott*, 6 U.S.C.M.A. 650 (1956); *United States v. Wise*, 6 U.S.C.M.A. 472 (1955)).

This Court's precedents comport with R.C.M. 1107(e). Rule for Courts-martial 1107(e)(2)(B)(iii) provides that "[r]eassessment is appropriate *only where the convening authority determines* that the accused's sentence would have been at

least of a certain magnitude had the prejudicial error not been committed and the reassessed sentence is appropriate in relation to the affirmed findings of guilty." Together, military case law and the Rules for Courts-Martial contemplate that when a sentence is set aside and remanded, the *convening authority* has the duty and discretion to determine whether reassessment is possible, and if so, what sentence is appropriate. This is true despite any changes to the convening authority's clemency powers, for those are distinct from the convening authority's powers to reassess pursuant to a remand in R.C.M. 1107.

If the convening authority were merely a conduit for the service court, subordinating its discretion to that of the service court, there would be no reason why this military jurisprudence requires the convening authority to conduct its own, independent *Sales* analysis in conducting a reassessment. *See* R.C.M. 1107, App. 21, A21-90. Such an interpretation would render this Court's precedent and R.C.M. 1107(e) meaningless because reassessment by the convening authority would no longer be an "option" at all. In other words, the Army Court short circuited the remand and review process by instructing the convening authority that he could reassess the sentence under the specific circumstances, and further, by advising that six years was an appropriate sentence that purged the record of error. This was at best an advisory opinion to the convening authority, in contravention of this Court's jurisprudence prohibiting advisory opinions. *See, e.g., United*

States v. Hamilton, 78 M.J. 335, 342 (C.A.A.F. 2019); *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)).

Just as the quantum portions of pre-trial agreements are not reviewed prior to the trial judge independently arriving at a sentence,[5] an appellate court's assessment as to an appropriate sentence should be kept from tainting the convening authority conducting the reassessment. While the sentence reassessed by the convening authority could have included a sentence to confinement less than six years to avoid the Army Court finding an inappropriately severe sentence on appellate review, the convening authority had more freedom to arrive at a higher sentence knowing that anything six years or less will survive appellate review – and, not surprisingly, the convening authority did arrive at the exact sentencing cap pre-approved by the Army Court.

Ensuring the convening authority was not inappropriately influenced by the Army Court was especially important in this case, as the convening authority maintained broader clemency powers over appellant's case. Here, the offenses at issue – both the conviction affirmed by the Army Court as well as the specification that was potentially subject to a rehearing – were alleged to be committed before

[5] "Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge." *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976); *see also* Military Judges' Benchbook, para. 8-2-5, DA PAM 27-9, September 1, 2014.

June 24, 2014. Accordingly, the convening authority's action was not limited by the changes to the UCMJ enacted by Congress in the National Defense Authorization Act for Fiscal Year 2014 (NDAA FY14), or by the associated changes to Rule for Courts-Martial 1107. Stated plainly, the convening authority's clemency power was not restricted in appellant's case and instead was governed by the broader power available under the 2012 version of Article 60 and Rule for Courts-Martial 1107. The applicable version of Article 60 states, in part, that "the convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend[6] the sentence[7] in whole or in part." Art. 60(c)(2).

Thus, in appellant's case, the convening authority had broad discretion on clemency for these pre-June 2014 offenses under the former Article 60. Additionally, this Court has said that "[a]s a matter of right, each accused is entitled to an individualized, legally appropriate, and careful review of his sentence by the convening authority." *Fernandez*, 24 M.J. at 78. (citing *Scott*, 6 U.S.C.M.A. 650; *Wise*, 6 U.S.C.M.A. 472). As such, the convening authority's knowledge of

[6] Article 60 provides just four options for the Convening Authority to choose: "approve, disapprove, commute, or suspend." Reassessment is distinct from those enumerated options and is not included in the options available to the Convening Authority.

[7] Article 60 states the Convening Authority's action is on "the sentence." As the Army Court set aside appellant's sentence, there is currently no longer an adjudicated sentence for the Convening Authority to act upon.

the appellate court's pre-approved sentence was similar to the scenario discussed above of a military judge knowing of the quantum. The convening authority's knowledge of the pre-approved sentence undoubtedly impacted his action, as the sentence amount cannot be unseen and certainly influenced his decision.

Upon receiving this record of trial, the convening authority learned that three appellate judges (the "superior authority" under R.C.M. 1107) determined that reassessment was appropriate,[8] despite the tremendous change in the findings with regard to one of two alleged victims and the pervasiveness of the propensity error in the case, and that these judges considered the entire record and predetermined that a six year sentence would purge the record of error. This influence at least tainted — if it did not entirely usurped — the convening authority's discretion to determine whether sentence reassessment is possible, and if so, what sentence is an appropriate reassessment.

In concrete terms, the Army Court's pronouncement that a reassessment of six years is appropriate enticed the convening authority to abdicate his proper role in the process. First, the convening authority no longer faced the intellectual hurdle of determining whether a reassessment was appropriate in light of the fact that a "significant part of the government's case has been dismissed." *See* Discussion to R.C.M. 1107(e)(2). Second, reassessment was the path of least

[8] JA 187-190; JA 191.

resistance: with a mere pen stroke, the convening authority avoided the significant cost, labor, and time associated with a rehearing in a case as complex as this. The practical effect of the preapproved sentence reassessment is a complete disruption of the convening authority's ordinary calculus on remand.

C. The convening authority failed to conduct an independent sentence reassessment because of the Army Court's de facto reassessment.

In the present case, the Army Court authorized a rehearing as to sentence *or* a sentence reassessment subject to a limit based on the Army Court's own purported *Sales* and *Winckelmann* analysis. In doing so, the Army Court corrupted the independence of the convening authority's action upon remand. After all, the convening authority is acting as a subordinate to the CCA, for the CCA delegated the ability to reassess the sentence to the convening authority. *United States v. Carter*, 76 M.J. 293, 296 (C.A.A.F. 2017). And this Court has held that "in no instance . . . may an appellate authority substitute its own judgment as to the appropriateness of the sentence, notwithstanding the error and its effect on the sentencing authority in arriving at that sentence." *Reed*, 33 M.J. at 100 (citing *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985)); *see also Humphries*, 71 M.J. at 218 (C.A.A.F. 2012) (Baker, J. dissenting)("The Court of Criminal Appeals cannot direct the manner in which the convening authority exercises his or her independent clemency power under the guise of sentence appropriateness.")

On remand, in addition to taking the path of least resistance, the convening authority failed to restrict his reassessment to only matters properly before him. The need to ensure sentencing evidence involving SPC AC was not considered by the convening authority could have been addressed with prudent advice to the convening authority. However, nothing in the record suggests the convening authority received such instructions. Rather, the instructions actually seemed to be to the contrary. First, the record does not reflect the convening authority received or considered a new result of trial. Conversely, the DD Form 2707 reflecting the dismissed Article 120 conviction was included with the SJA's post-trial advice. Thus, the SJA advised the convening authority to consider a document inaccurately reflecting appellant's actual convictions. (JA 187).

Then, the SJA's Addendum to the Post-Trial Advice actually advised the convening authority that the matters he "*must* consider" included "the result of trial" without any specific instructions that the portions involving SPC AC should be disregarded. (JA 190)(emphasis added). Moreover, the addendum states "[the SJA] attached the record of trial for [the convening authority's] review," without any mention of what portions should or should not be considered. (JA 190).

The record also lacks an indication the convening authority properly considered only the portions of the record that remained relevant following the decision to dismiss the specification involving SPC AC. On the contrary, the

memorandum accompanying the convening authority's action plainly states that he considered the record of trial, implying he considered the entirety of the original record sent to him for his review by the SJA. Thus, the evidence now before this Court suggests that the convening authority's reassessment failed to exclude SPC AC's testimony or argument by the government as to the aggravating nature of this case involving two victims. Thus, with mounting evidence that the reassessment did not reflect the massive change in admissible sentencing evidence, serious doubts are cast as to how the convening authority could have appropriately reassessed appellant's confinement time without improperly considering sentencing matters involving SPC AC.

With the most egregious conviction dismissed, the appellant's penalty landscape significantly changed, the gravamen of his convictions drastically reduced, and the presentencing evidence against him was dramatically altered. Appellant further asserts, for the same reasons discussed herein, that the decretal paragraph of the Army Court's original memorandum opinion, which held that a sentence of confinement for six years and a dishonorable discharge would be appropriate, misapplies the factors outlined in *Winckelmann* and is similarly inappropriately severe. However, with a footnote assurance from the Army Court that six years would be appropriate, the convening authority chose the exact amount of confinement time listed in the footnote reassessment. In light of the

remaining offenses and relevant sentencing evidence, a sentence of six years confinement and a dishonorable discharge is inappropriately severe.

D. The Army Court's preapproved sentence dissolved appellant's appellate review after remand.

"If a Court of Criminal Appeals authorizes sentence reassessment by a convening authority upon remand, the Court of Criminal Appeals must make its own determination as to whether the reassessed sentence comports with *Sales* and *Jones*." *United States v. Williams*, 2000 CAAF LEXIS 1359 (C.A.A.F. 2000) (citing *Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994)). Upon review, then, the service court reviews the convening authority's reassessment for an abuse of discretion. *United States v. Johnson*, 27 M.J. 553 (A.C.M.R. 1988) (affirming that "*Sales* provides the proper guidelines by which to measure the actions of the convening authority in a case such as this, but we do not agree that the convening authority in this case abused his discretion").

Here, the taint of the Army Court's advisory opinion did not stop with the convening authority. Having biased the convening authority, a quasi-judicial actor, below, the Army Court then reviewed its own decision, bringing into question the validity of this secondary appellate review. Being assigned to the same panel, the appellate court was left to evaluate its predetermined assessment that it approved merely months prior.

The appellate court's assessment of the sentence should have been reserved for either when the appellate court conducted the reassessment itself or for when the appellate court addressed an assignment of error as to sentence appropriateness. An appellate court's advisory opinion on sentence appropriateness should not exist in an opinion in which the appellate court remands the case back to the convening authority for further action, as the remand is not the time for the appellate court to insert itself into a sentence appropriateness determination.

Moreover, by preemptively conducting an appellate review of its own proposed sentence, the Army Court essentially denied appellant any meaningful appellate review of the actual subsequent sentence after an appropriate process, including appellant's subsequent submissions. Here, as the convening authority non-coincidentally reassessed appellant's sentence on remand to the exact amount of confinement that was pre-approved by the Army Court, appellant was denied a fresh appellate review of the appropriateness of his sentence. Instead, the Army Court's actions awkwardly forced appellant to ask the Army Court to reconsider their previously issued opinion. Therefore, the Army Court's taint of the remanded action harmed appellant by denying him due process.

CONCLUSION

The aforementioned effects from the Army Court's pronouncement highlight the error, and demonstrate that in practice, such a course of action conflicts with

R.C.M. 1107 and military case law. WHEREFORE, the appellant respectfully requests this Honorable Court order a sentence rehearing.

Specified Issue

WHETHER APPELLANT WAIVED OR FORFEITED HIS OBJECTION TO THE ARMY COURT'S INSTRUCTION TO THE CONVENING AUTHORITY.

SUMMARY OF ARGUMENT

Appellant neither waived nor forfeited his objection to the Army Court's advisory opinion. No legal authority exists requiring an appellant raise errors of a CCA's decision to this Court prior to the case being remanded to the convening authority or else forfeit raising those errors on a subsequent Article 66 or 67 review. Likewise, no legal authority requires appellant to raise issues before the CCA prior to having an issue considered in this court.

STANDARD OF REVIEW

Determining whether an issue is waived is a question of law reviewed under a de novo standard of review. *See United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002). If waiver occurred, there is "'no error for us to correct on appeal;'" if forfeiture occurred, a plain error review is conducted. *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)).

LAW

Forfeiture is the passive abandonment of a right by neglecting to preserve an objection, whereas waiver is the affirmative, "'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725 (1993)).

Stated differently, "[a] forfeiture is basically an *oversight*; a waiver is a *deliberate decision* not to present a ground for relief that might be available in the law." *Campos*, 67 M.J. at 332 (citation omitted)(emphasis added). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

ARGUMENT

A. Article 67 mandates an independent review by this Court, which is not limited to issues raised at or reviewed by the CCA.

The plain text of Article 67 requires that this Court conduct an independent review of a case after review by the respective service's CCA. The language of Article 67 is "not contradictory, redundant, vague, or ambiguous. It is plain." *Randolph v. HV*, 76 M.J. 27, 32 (C.A.A.F. 2017)(Ryan, J., dissenting).

Relevant to the case here, Article 67(a)(3) provides that this Court "shall review the record" in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted review." In describing how this Court conducts the review, Article 67 states "action need be taken only with respect to issues specified in the grant of the review" and that this Court "shall take action only with respect to matters of law." Article 67(c), UCMJ.

Plainly, Article 67 requires this Court to conduct its own independent review of cases for which this Court has granted such review under Article 67(a)(3). As this Court granted review in appellant's case, Article 67(c) states this Court must, at a minimum, address the issues specified in the grant of review as to matters of law. Absent from the language of Article 67 is any mention of issue preclusion where an issue has not been previously raised at or previously reviewed by the CCA. Therefore, the issue granted by this Court from the appellant's petition is an issue properly before this Court and not precluded for not having been raised in an assignment of error before the CCA.

B. No legal authority exists that requires an issue be raised at the CCA to prevent issue preclusion in an Article 67 review.

This Court has differentiated between failure to raise an issue at the trial level from failure to raise an issue at the appellate level stating, "while it is the

general rule that failure to make a timely motion at trial *may* estop one from raising the issue on appeal, failure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief." *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988). Thus, even when an issue is raised before this Court for this first time, this Court "may properly refuse to apply the doctrine of waiver in the exercise of [this Court's] statutory authority." *United States v. Evans*, 28 M.J. 74, 76 (C.M.A. 1989)(citing *Britton,* 26 M.J. 24).

This Court has continued to hold that "[i]t is solely within this Court's discretion under Article 67 to determine whether an issue is properly raised." *Johnson*, 42 M.J. at 446. As it is in the Court's discretion and, as this Court has "not addressed the question of waiver of an issue raised for the first time before this Court[,]" *Id.* at 447(Crawford, J., concurring)(citing *United States v. Smith*, 41 M.J. 385 (C.A.A.F. 1995)), no outright rule of waiver or issue preclusion exists.

This Court has "not adopted a strict appellate waiver approach when an appellant fails to challenge an adverse Court of Criminal Appeals holding in this Court,"[9] no legal authority currently exists that requires an issue be raised at the CCA to prevent issue preclusion in an Article 67 review. Thus, appellant should

[9] *United States v. Hall*, 56 M.J. 432, 437-38 (C.A.A.F. 2002) (Sullivan, J., concurring) (citing Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces*, 34-37 (9th ed. 2000)).

not have his issue precluded where this Court has routinely not precluded issues raised for the first time to this Court.

C. No legal authority exists that generally requires appellants to seek reconsideration before advancing to the next highest court.

As a general matter, requests for reconsideration are not required in all cases. When a military judge makes a ruling at the trial level, counsel are not required to request reconsideration to preserve that issue for later appellate review. *See* Mil. R. Evid. 103(b)("Once the military judge rules definitively on the record admitting or excluding evidence, either before or at trial, a party need now renew an objection or offer proof to preserve a claim of error for appeal.") While the Army Court's rules allow for appellant to file for a motion for reconsideration,[10] nothing exists statutorily requiring a motion for reconsideration to first be exhausted before the Army Court's decision is final and ready for petition for Article 67 review. Article 67, UCMJ. Therefore, no legal authority exists requiring appellants first request reconsideration from a CCA before being able to raise that issue granted in Article 67 review.

[10] Rule19.2 "Motion to Reconsider Decisions or Order Terminating Cases," Rules of Practice and Procedure, United States Army Court of Criminal Appeals, June 1, 2018.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court order a rehearing consistent with the Army Court setting aside appellant's sentence.

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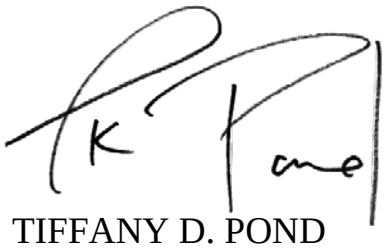

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 7,117 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Gonzalez*, Army Dkt. No. 20160363, USCA Dkt. No. 19-0297/AR, was electronically filed brief with the Court and Government Appellate Division on November 4, 2019. The Joint Appendix will be delivered via courier service.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON, HAGLER, and SCHASBERGER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 ADRIAN GONZALEZ
United States Army, Appellant

ARMY 20160363

Headquarters, U.S. Army Combined Armed Center & Fort Leavenworth
Charles L. Pritchard, Jr., Military Judge (arraignment)
Marc D. Cipriano, Military Judge (trial)
Colonel Craig E. Merutka, Staff Judge Advocate

For Appellant: Lieutenant Colonel Christopher D. Carrier, JA; Major Brendan Cronin, JA; Major Joseph T. Marcee, JA (on brief).

For Appellee: Colonel Tania M. Martin, JA; Captain Austin J. Fenwick, JA; Captain Joshua B. Bannister, JA (on brief).

3 July 2018

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SCHASBERGER, Judge:

In the instant case, Private (PVT) Adrian Gonzalez was charged with sexual assault of three women: Specialist (SPC) AC, PVT TO[1] and Mrs. VB. At issue is whether the use of the charged assaults for propensity purposes was prejudicial error. We find that appellant's plea of guilty to the charges of abusive sexual contact of VB waived any objection to the military judge's ruling with respect to those charges. With respect to the charge of rape of SPC AC, we are unable to conclude that the use of propensity evidence was harmless beyond a reasonable doubt, and take corrective action in our decretal paragraph.

[1] The military judge acquitted appellant of Specification 1 of Charge III, alleging the rape of PVT TO.

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of three specifications of violating a general order or regulation and two specifications of abusive sexual contact, and contrary to his pleas, of one specification of rape, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920 (2012) [UCMJ]. The military judge sentenced appellant to a dishonorable discharge and confinement for ten years, a sentence later approved by the convening authority.

BACKGROUND

A. Assault of Specialist AC (Specification 2 of Charge III)

In June 2013, while waiting to be court-martialed for other charges,[2] appellant was transferred to Tripler Army Medical Center and assigned as the senior cook on the grill at the dining facility. Specialist (SPC) AC reported to Hawaii in July 2013 and was assigned to work at the grill under appellant's supervision. At the time appellant was a sergeant. Over the following several months appellant and SPC AC became friends.

On 19 January 2014, appellant texted SPC AC and asked if she wanted to accompany him and another friend, LH, to a movie. After consulting her husband, SPC AC agreed. The original plan consisted of appellant and LH picking up SPC AC and going to the movie. Appellant arrived at SPC AC's house, later than expected and alone. The two of them went and picked up LH. To SPC AC's surprise, the three then went to Moose McGillycuddy's, a bar and dance club, so LH could pick up some marijuana.

Once at McGillycuddy's, SPC AC drank several strong drinks.[3] She danced with LH and appellant. When they left the bar at 0300 the next morning, SPC AC was drunk; she could not walk without holding handrails and she needed assistance to climb into appellant's truck.

On the drive back, SPC AC immediately fell into a deep sleep. She slept through the twenty-five minute drive to McDonald's, the stop at the drive thru, and the ten minute drive back to appellant's house. At the house, LH and appellant tried to awaken SPC AC. They spoke to her, shook her and slapped her face. SPC AC did

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[2] These charges are relevant only in that they form part of the basis of the government's Military Rule of Evidence [Mil. R. Evid.] 413 motion. On 28 May 2014, appellant pleaded guilty to one specification of maltreatment of a subordinate, one specification of rape, and three specifications of abusive sexual contact. The victims of these offenses, SPC JF and SPC MM, were, respectively, a member of appellant's unit and a subordinate. Appellant did not tell anyone he was pending charges; his supervisors, coworkers and friends were unaware of the charges.

[3] The drink was referred to as AMF, which stood for "Adios Mother Fucker," and, as described by one witness, contained several types of liquor, Sprite, and a sweetener.

not respond, so they left her in the truck and went inside. After using the bathroom, LH asked that appellant drive her home. Appellant drove LH home and told LH that he would "make sure that [SPC AC] got home safe."

Specialist AC woke up the next morning in a parking lot. Her pants and underwear were around her ankles and she felt a semen-like fluid between her legs and coming out of her vagina. She saw appellant sleeping in the driver's seat, with his pants down to his knees. Specialist AC screamed. Appellant woke up, said "fuck, fuck, fuck," pulled up his pants and drove to SPC AC's house. During the ten minute drive, neither appellant nor SPC AC said anything.

When SPC AC got home she went in her house, laid down on the couch and curled up in the fetal position. Her husband yelled at her, went upstairs and started to pack. Specialist AC followed her husband upstairs. Before she could tell him anything he had a seizure. SPC AC had to call for an ambulance to take her husband to the hospital.

Specialist AC did not reveal the assault to her husband until months later. She reported the incident to authorities a year after the incident.

At trial, the government's evidence concerning the assault of SPC AC consisted of her testimony, LH's testimony corroborating SPC AC's level of intoxication, and SPC AC's husband's testimony as to her demeanor when she returned the morning before his seizure. The government offered no physical evidence corroborating the assault.

Contrary to appellant's plea, the military judge found appellant guilty of this offense.

B. Assault of Mrs. VB (Specifications 3 and 4 of Charge III)

In February 2014, in anticipation of his court-martial for other sexual misconduct, appellant moved his family back to the continental United States. He told his friends that there was a problem with his orders so he could not immediately join his family. Appellant's friend, SPC NB, invited him to stay at his house. SPC NB's wife, Mrs. VB also resided at the house. Neither SPC NB nor Mrs. VB knew appellant was pending court-martial charges.

On 4 May 2014, after drinking and watching a movie in their living room, SPC NB and Mrs. VB fell asleep on the living room floor. At around 0400, after a night out drinking appellant returned and could not get into the residence. Mrs. VB heard loud banging and attempted to wake her husband. After waking him, Mrs. VB went back to sleep on the floor. Specialist NB let appellant in the house, rejoined his wife, and went back to sleep.

Later that morning, Mrs. VB woke up because someone was touching her buttocks. She opened her eyes and realized it was not her husband. She heard appellant say "come here, come here, let's go to the room." Mrs. VB told appellant

to stop. He did not stop, but instead attempted to convince Mrs. VB to have sex with him. Appellant touched her breasts, buttocks, inner thighs and mons pubis. Unable to wake her husband, Mrs. VB got up and left the house.

Appellant pleaded guilty to touching Mrs. VB's buttocks (Specification 3 of Charge III) and guilty, by exceptions and substitutions, to touching Mrs. VB's mons pubis (Specification 4 of Charge III).

C. Trial

The government charged appellant with sexual assault of SPC AC, two specifications of abusive sexual contact of Mrs. VB, sexual assault of PVT TO, as well as violating a general order by providing alcohol to PVT TO, a person under the age of twenty-one, and fraternizing with PVT TO. In a pretrial motion, the government sought to introduce evidence of appellant's prior sexual assault convictions and use that evidence, as well as the charged Article 120, UCMJ, offenses to establish that appellant had a propensity to commit the sexual misconduct.

The government motion specifically requested the pre-admission of the stipulation of fact from appellant's prior court-martial, the transcript of appellant's providence inquiry at that trial, and the result of trial (RROT). The government also asked for a ruling on the admissibility of:

> a. Evidence of the Accused's prior conviction for sexually assaulting two prior victims (if RROT not pre-admitted);
> b. Evidence of the accused's assault of [Mrs. VB] for its bearing on the charged assault of [PVT TO] and [SPC AC];
> c. Evidence of the accused's assault of [PVT TO] for its bearing on the charged assault of [Mrs. VB] and [SPC AC]; and
> d. Evidence of the accused's assault of [SPC AC] for its bearing on the charged assault of [Mrs. VB] and [PVT TO].

The defense did not file a motion opposing the government's motion but, at a pretrial motions hearing on 18 April 2016, opposed the motion, citing Military Rule of Evidence [Mil. R. Evid] 403. The next day, the military judge issued a written ruling with findings of fact, and found the evidence was admissible but not admitted.

On 4 May 2016, appellant submitted an offer to plead guilty (OPG) to Charge I and its specifications (the violations of a general regulation or order) and Specifications 3 and 4 of Charge III (the abusive sexual contact of Mrs. VB). After a counter offer, the convening authority accepted the OPG. Within the OPG,

appellant reserved the right to raise a motion regarding unreasonable multiplication of charges for sentencing; no other motions were reserved.

On 10 May 2016, pursuant to his agreement with the convening authority, appellant pleaded guilty to abusive sexual contact with Mrs. VB. Before asking for appellant's plea, the military judge went over the outstanding motions and asked defense if there were any other motions. Defense indicated there were no other motions. Appellant then pleaded guilty to the specifications of Charge I, and Specifications 3 and 4 of Charge III.[4]

After the providence inquiry, the government began their case as to Specifications 1 and 2 of Charge III. When trial counsel attempted to address propensity in his opening statement the military judge stopped him and told him that he could not mention propensity unless it became relevant and the evidence was admitted.

In closing, the government set the tone of the argument early in stating "[T]his court has before it powerful propensity evidence" before listing the various victims of appellant's sexual assaults as his subordinates, his friends, and those who trusted him. After arguing propensity, the trial counsel laid out the evidence supporting the assault of SPC AC, and the evidence supporting the assault of PVT TO. Trial counsel closed his argument the way he started–arguing propensity.

LAW AND DISCUSSION

A. Military Judge's Ruling on Military Rule of Evidence 413

The decision to admit evidence is reviewed for an abuse of discretion. *United States v. Hukill*, 76 M.J. 219, 221 (C.A.A.F. 2017). "The meaning and scope of M.R.E. 413 is a question of law that is reviewed de novo." *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016) (citation omitted). In *Hills*, the Court of Appeals for the Armed Forces (CAAF) found that using Mil. R. Evid. 413 evidence of charged misconduct as propensity evidence to prove other charged misconduct "violated Appellant's presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in constitutional error." *Hills* 75 MJ at 356. Though *Hills* was a case involving instructions to a panel, the CAAF made it clear in *Hukill* that this issue extends to military judge alone cases as well. 76 M.J. at 222 ("Whether considered by members or a military judge, evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense.").

[4] The trial counsel dismissed Charge II after arraignment but before appellant entered his plea.

The government's motion to admit evidence under Mil. R. Evid. 413 contained both uncharged and charged misconduct. There was nothing erroneous in the military judge's ruling with regard to the uncharged misconduct. Of the charged misconduct, the military judge allowed the government to use the evidence of assaults on each of the named victims, (Mrs. VB, SPC AC, and PVT TO) to prove the assault of the other named victims. It is clear from the decision by CAAF in *Hukill* that this was error.[5]

We must therefore examine the impact of the error on the plea of guilty and on the contested portion of the trial.

B. Pleas and Waiver of Unpreserved Motions

Appellant argues that he relied on the military judge's ruling on the government's use of Mil. R. Evid. 413 when he decided to plead guilty to some offenses and, as that ruling was erroneous, we should set aside his plea of guilty to abusive sexual contact of Mrs. VB. We disagree. We find the appellant's plea of guilty was provident even if he based his decision on an erroneous evidentiary ruling by the military judge.

Unless conditioned under Rule for Courts-Martial [R.C.M.] 910(a)(2), a plea of guilty that results in a finding of guilty, "waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Lee*, 73 M.J. 166, 167 (C.A.A.F. 2014) (quoting *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010). An erroneous ruling on Mil R. Evid. 413 is not jurisdictional. This is an evidentiary ruling akin to motions to suppress a confession or on the admissibility of evidence seized without a warrant. Just as the Supreme Court has found that a valid guilty plea with the advice of counsel waives an erroneous ruling on the admissibility of a pretrial confession (*See McMann v. Richardson*, 397 U.S. 759, 771 (1970)), and the CAAF has found that an unconditional guilty plea waives all suppression motions (*See United States v. Tarleton*, 47 M.J. 170, 172-173 (C.A.A.F. 1997)), we find that unless specifically conditioned, a guilty plea waives any objection to a military judge's ruling under Mil. R. Evid. 413.

Appellant chose to enter into a pretrial agreement (PTA) with the Convening Authority. In that PTA, appellant agreed to plead guilty to some of the specifications in exchange for a limitation on his sentence. While appellant preserved his motion in regard to an unreasonable multiplication of charges, the PTA otherwise was silent as to his objection to the military judge's Mil. R. Evid. 413

[5] The record indicates that the plea of guilty to the specifications regarding Mrs. VB was anticipated, as at the motions hearing, trial counsel stated "pending the accused's plea of guilty to Specifications 3 and 4 of Charge III we'd like that plea, . . . when and if it becomes relevant, to be as 413 propensity evidence for purposes of abuse against [SPC AC and PVT TO]." At the time of the military judge's ruling, however, appellant had not entered into an agreement to plead guilty to the assault of Mrs. VB, and the propensity issue was still one of charged misconduct.

ruling. Prior to entry of pleas, the military judge went over the status of the pretrial motions and the results and then twice asked the defense counsel if there were any other motions. The defense counsel indicated there were no other motions and entered a plea of guilty to the violations of a general order or regulation (Charge I and its specifications), and the abusive sexual contact of Mrs. VB (Specifications 3 and 4 of Charge III). This waived any evidentiary issues, such as the military judge's Mil. R. Evid. 413 ruling, as to those charges.

C. Use of Propensity Evidence in the Contested Portion of Trial

It is constitutional error to admit evidence of charged conduct as propensity evidence in proving other charged conduct. Therefore we must determine whether the military judge's ruling and consideration of improper propensity evidence was harmless beyond a reasonable doubt.[6] *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). An error is not harmless beyond a reasonable doubt when there is a reasonable possibility the error complained of might have contributed to the conviction. *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007); *United States v. Chandler*, 74 M.J. 674, 685 (Army Ct. Crim. App. 2015).

As our superior court has noted, "[t]here are circumstances where the evidence is overwhelming, so we can rest assured that an erroneous propensity instruction did not contribute to the verdict by 'tipp[ing] the balance in the members' ultimate determination.'" *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017) (quoting *Hills*, 75 M.J. at 358). At first glance, this would appear to be such a case. Specialist AC presented as a very credible witness. The circumstantial evidence – the amount SPC AC had to drink, the inability to wake her at McDonald's or at appellant's house, and her actions upon arriving home – supports the conclusion that SPC AC was assaulted by appellant.

However, we must view this evidence in light of the government's focus on propensity evidence in obtaining a guilty finding.

The clear theme of the prosecution's closing argument was propensity. While much of this was permissible, as it revolved around appellant's prior conviction and the parallels between those crimes and the charged misconduct, government counsel repeatedly made references to improper evidence. The trial counsel used the plea of guilty to the specifications regarding Mrs. VB to show propensity evidence to commit similar acts. Although not an improper use of propensity this was improper argument.[7] Most critically trial counsel grouped the assaults on SPC AC and PVT TO, pointing out the similarities between these incidents and the other assaults.

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[6] Appellant objected to the government's motion, thereby preserving the error.

[7] The military judge initially stopped trial counsel from arguing propensity based on

(continued . . .)

Though we conclude the evidence against appellant was strong, we cannot conclude beyond a reasonable doubt that improper propensity evidence played no role in appellant's conviction of Specification 2 of Charge III.

CONCLUSION

Upon consideration of the entire record, the finding of guilty to Specification 2 of Charge III is set aside. The remaining findings of guilty are AFFIRMED. The sentence is set aside. The same or a different convening authority may: 1) order a rehearing on Specification 2 of Charge III and the sentence; 2) dismiss Specification 2 of Charge III and order a rehearing on the sentence only; 3) dismiss Specification 2 of Charge III and reassess the sentence, affirming no more than a dishonorable discharge and confinement for six years.[8]

Senior Judge BURTON and Judge HAGLER concur.

FOR THE COURT:

JOHN P. TAITT
Acting Clerk of Court

(. . . continued)
the assaults of Mrs. VB, as he had not issued a finding of guilt, even though he had accepted appellant's pleas to these offenses. The trial counsel pointed to the prior ruling on Mil. R. Evid 413 and the military judge allowed trial counsel to continue. Under the facts in this case this constituted error, as the government introduced no evidence of the crimes against Mrs. VB and instead relied on appellant's testimony during the providence inquiry and the stipulation of fact. This was an improper use of appellant's providence inquiry and outside of the scope of permissible use of the stipulation of fact, which by its terms, could only be considered for purposes of appellant's guilty pleas and sentencing. The government could have asked the judge to make his findings on the guilty plea as contemplated by R.C.M. 910(g) and then called Mrs. VB to testify as to what happened to her if they wanted to argue propensity based on the guilty plea.

[8] In reassessing the sentence we are satisfied that the sentence adjudged, absent Specification 2 of Charge III, would have been at least a dishonorable discharge and confinement for six years. *See United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). The reassessment being both appropriate and purging the record as it stands of error does not otherwise limit the sentence that may be adjudged at a rehearing. *See* UCMJ, art. 63.

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON, HAGLER, and SCHASBERGER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 ADRIAN GONZALEZ
United States Army, Appellant

ARMY 20160363

Headquarters, U.S. Army Combined Arms Center and Fort Leavenworth
Charles L. Pritchard, Jr. and Marc Cipriano, Military Judges
Colonel Craig E. Merutka, Staff Judge Advocate

For Appellant: Major Todd W. Simpson, JA; Captain Rachele A. Adkins, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA, Lieutenant Colonel Wayne H. Williams, JA; Captain Lauryn D. Carr, JA (on brief).

13 March 2019

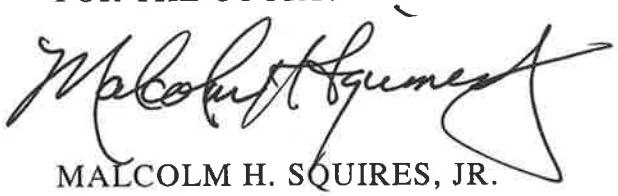
DECISION ON FURTHER REVIEW

Per Curiam:

On 3 July 2018, this court set aside the finding of guilty of Specification 2, Charge III, affirmed the remaining findings of guilty, and set aside the sentence. *United States v. Gonzalez*, ARMY 20160363, 2018 CCA LEXIS 327 (Army Ct. Crim. App. 3 July 2018) (mem. op.). This court authorized the same or different convening authority to: 1) order a rehearing on Specification 2 of Charge III and the sentence; 2) dismiss Specification 2 of Charge III and order a rehearing on the sentence only; or 3) dismiss Specification 2 of Charge III and reassess the sentence, affirming no more than a dishonorable discharge and confinement for six years. The convening authority determined that a rehearing on finding of Specification 2 of Charge III was not practicable and that specification was dismissed without prejudice to the government. A rehearing on the sentence only was also not practicable. The convening authority approved a sentence of dishonorable discharge and confinement for six years. The record is now before is for further review.

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court