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 APPELLEE)))) Crim. App. Dkt. No. 20160363)) USCA Dkt. No. 19-0297/AR))

LAURYN D. CARR
Captain, Judge Advocate
Appellate Counsel, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0779
Lauryn.d.carr.mil@mail.mil
U.S.C.A.A.F. Bar No. 37132

DUSTIN B. MYRIE
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37122

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 31651

Issues Presented

I. 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.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Issues Presented

I. 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.

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

Table of Contents

Table of Authorities

Cases

Statutes

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016) [UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ.

Statement of the Case

On May 10-11, 2016, a military judge sitting as a general court-martial convicted Private (PV1) Adrian Gonzalez, contrary to his plea, of one specification of sexual assault, in violation of Article 120, UCMJ. The military judge also convicted appellant, pursuant to his pleas, of two specifications of abusive sexual contact, one specification of violating a lawful general order, and two specifications of violating a lawful general regulation, in violation of Articles 120 and 92, UCMJ. The military judge found appellant not guilty of one specification of sexual assault, Article 120, UCMJ. The military judge sentenced appellant to be confined for ten years and to be dishonorably discharged from the service. The convening authority (CA) approved the sentence on December 2, 2016. (JA 182).

On July 3, 2018, the Army Court issued a memorandum opinion in appellant's case and set aside the finding of guilty for sexual assault in Specification 2 of Charge III and the sentence. The remaining findings of guilty were affirmed. The Army Court set aside the sentence and authorized the CA 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. (JA 203). The matter was returned to the CA for further action. He determined that a rehearing was impracticable and dismissed Specification 2 of Charge III. The CA subsequently approved appellant's sentence of confinement for six years and a dishonorable discharge on October 19, 2018. (JA 192).

On January 31, 2019, appellant filed a brief with the Army Court raising as error that the CA improperly reassessed appellant's sentence which resulted in an inappropriately severe sentence of confinement. On March 13, 2019, the Army Court affirmed the findings and the sentence. (JA 205). In accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellant petitioned this Honorable Court for review on May 10, 2019, claiming that the Army Court abused its discretion by giving the CA the option to reassess the sentence up to a dishonorable discharge and confinement for six years, and filed his supplement to the petition on July 2, 2019. This Court granted appellant's petition on September 19, 2019 and specified an additional issue: Whether appellant waived or forfeited his objection to the Army Court's instructions to the CA.

Statement of Facts[1]

Appellant was charged with several offenses to include sexually assaulting PVT TO and SPC AC and sexually abusing VB, a civilian. (JA 1-3). In a pretrial motion, the government sought to introduce evidence of appellant's prior sexual assault and sexual abuse convictions, as well as the charged Article 120 offenses, as propensity evidence to prove the charged Article 120 offenses under Military Rule of Evidence (Mil. R. Evid) 413. (JA 119). The military judge granted the government's Mil. R. Evid. 413 motion to use the prior convictions as well as the charged offenses as propensity evidence of other charged offenses. (JA 173).

Ultimately, the accused pleaded guilty to Specifications 3 and 4 of Charge II (abusive sexual contact of VB) as well as Charge I and its specifications in exchange for a fifteen-year cap on confinement. (JA 174-79). The military judge found appellant guilty of Specification 2 of Charge III (sexual assault of SPC AC), but the Army Court set aside that finding in light of *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016). (JA 200-03). The Army Court also set aside the military judge's sentence of confinement for ten years and a dishonorable discharge. (JA 203).

The Army Court then authorized the CA to choose between ordering a rehearing or reassessing appellant's sentence to "no more than a dishonorable

[1] Additional relevant facts will be presented throughout this brief.

discharge and confinement for six years." (JA 203). The Army Court found the limitation on sentence to be "both appropriate and purg[e] the record as it stands of error." (JA 203). The CA, after receiving his staff judge advocate's (SJA) post-trial advice, independently decided to reassess the sentence in lieu of ordering a rehearing. (JA 187,88, 192).

Although the record considered by the CA upon remand was not redacted to remove the evidence and argument related to Specification 2 of Charge III, the SJA's post-trial advice to the CA stated that: (1) the Army Court "set aside the finding of guilty to Specification 2 of Charge III"; (2) the Army Court authorized the CA to either order a rehearing or reassess the sentence; and (3) the CA only had authority to "reassess the accused's sentence based on the approved findings of guilty." (JA 187-88). The memorandum further stated that "[i]n reassessing a sentence, [the CA] must determine that the accused's sentence would have been at least of a certain magnitude had the prejudicial error not been committed and [determine] the reassessed sentence is appropriate in relation to the affirmed findings of guilty." (JA 188).

Absent the evidence and argument related to Specification 2 of Charge III, the record contained substantial evidence with which to determine the appropriateness of a new sentence including evidence of appellant's character. Evidence of appellant's character included two stipulations of fact which detailed

his recent history of sexual assault and sexual abuse involving two junior enlisted soldiers and VB, whom appellant admittedly had a pattern of mistreating. (JA 76-86).

More specifically, the stipulations revealed that appellant, in June 2013, licked and kissed one junior enlisted soldier while she was sleeping and after she awoke and pushed him away, he shoved his hand into her shorts and rubbed her hip and pelvis before she rebuffed him again and fled. (JA 77). Appellant then found another junior enlisted soldier in the vicinity and, while she was incapacitated due to alcohol, sexually assaulted her with his penis, tongue, and fingers. (JA 77). While he was awaiting trial for these offenses, appellant continued fraternizing with junior enlisted soldiers and harassed VB, a fellow soldier's wife, while he was drunk. (JA 81). This misconduct culminated in appellant, in May 2014, coming up behind VB while she was asleep, "holding her and spooning her" against her will, and forcibly touching her mons pubis, breasts, buttocks, and inner thigh as she struggled to get away. (JA 80). Appellant was sentenced and confined for his 2013 crimes shortly following this incident, (JA 81), but VB remained deeply scarred. (JA 180).

After considering the aforementioned evidence of record, the CA approved a dishonorable discharge and confinement of six years. (JA 192).

I. 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

The Army Court did not abuse its discretion when it: (1) determined that reassessment could be appropriate in this case; (2) allowed the CA to conduct that reassessment without a rehearing; and (3) limited the amount of confinement upon any reassessed sentence. The Army Court's disposition and afforded options were in accordance with the prevailing legal standards and under its broad discretion to determine whether a sentence should be approved. Appellant's claim of error is based on an incorrect account of the procedure used in this case and an impermissibly narrow view of the facts on the record. Accordingly, this Court should deny appellant's request for a rehearing.

Standard of Review

This Court "will only disturb [a sentence] reassessment in order to prevent obvious miscarriages of justice or abuses of discretion." *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013) (quoting *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000)).

Law

A. Service Court Options after Setting Aside a Sentence

When a service court sets aside a sentence, it "may" authorize a rehearing. Article 66(d), UCMJ; *United States v. Carter*, 76 M.J. 293, 295 (C.A.A.F. 2017) ("the text of Article 66(d), UCMJ, does not obligate a [service court] to authorize a rehearing"). A rehearing on sentence is an appropriate choice when the service court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred." *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). A sentence reassessment without rehearing is appropriate when the service court is "convinced that . . . the accused's sentence would have been at least of a certain magnitude" absent the error. *Id*.

The service court has the ability to delegate this authority to CAs. *See United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989). Congress explicitly directs CAs via The Judge Advocate General (TJAG) "to take action in accordance with the decision of the Court of Criminal Appeals." Article 66(e), UCMJ; *cf*. Article 60(c), UCMJ (granting CAs the authority to "approve, disapprove, commute, or suspend the sentence in whole or in part" when taking initial action on the sentence of a court-martial). This means that when a service court remands a case to the CA for further action, the CA can "take [any] action that conforms to the limitations and conditions prescribed by the remand." *Montesinos*, 28 M.J. at

44. In these instances, the CA is in fact "acting by delegation" as a "subordinate . . . in the military justice system" and not under his own limited "independent statutory authority." *Id*. Indeed, if remanded, the CA may only take action that conforms to the limits and conditions of the remand. *Id*. at 42 ("[I]n a case subject to review under Article 66 of the Code, 10 USC § 866, the [CA] loses jurisdiction of the case once he has published his action or has officially notified the accused thereof; and from that point on, jurisdiction is in the Court of Military Review. The only further contact that the [CA] has with the case occurs in the event of a remand.").

B. Service Court Authority to Address the Validity of a Sentence

A service court's jurisdiction to review sentences extends to cases in which the sentence, as approved, includes a dishonorable discharge or confinement for one year or more. Article 66(b)(1), UCMJ. Not only is the court imbued "with the power to determine whether a sentence is correct in law and fact, but also with the highly discretionary power to determine whether a sentence should be approved." *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999) (citing Article 66(c), UCMJ). This broad discretion extends to sentence reassessments. *Winckelmann*, 73 M.J. 11, 15 ("[I]n light of the experience, training, and independence of military judges, courts of criminal appeals act with broad discretion when reassessing sentences"). However, reassessed sentences must still be "appropriate in relation

to the affirmed findings of guilty" and "no greater than that which would have been imposed if the prejudicial error had not been committed." *Sales*, 22 M.J. at 308.

C. The Effect of Timing on Sentence Appropriateness Review

Evaluating sentence appropriateness is not an abuse of discretion when it helps resolve "a justiciable case or controversy between adverse parties." *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003). Moreover, "[b]y answering the certified questions," a court of appeals "neither rule[s] on a moot question nor render[s] an advisory opinion." *United States v. Katso*, 77 M.J. 247, 251 n. 4 (C.A.A.F. 2018).

Argument

A. The Army Court did not abuse its discretion by authorizing the CA to conduct a sentence reassessment.

The Army Court did not conduct a sentence reassessment as appellant erroneously claims. Instead, the court exercised its discretion in accordance with Article 66(e), UCMJ, to authorize the CA to conduct a sentence reassessment on remand. (JA 203) ("The same or a different [CA] may . . . reassess the sentence."). Reassessment is appropriate when the service court is "convinced" that absent the error at trial, "the accused's sentence would have been at least of a certain magnitude." *Sales*, 22 M.J. at 307. The Army Court was "satisfied" that this case met that threshold standard in light of the totality of the circumstances and the

Winckelmann factors. (JA 203) (citing *Sales*, 22 M.J. at 308, and *Winckelmann*, 73 M.J. at 15 -16).

Appellant's position that the *Winckelmann* factors do not support sentence reassessment is based on an overly narrow view of the facts of this case and therefore should be disregarded by this Court. *See* (Appellant's Br. 12 – 15) (arguing the Army Court abused its discretion by concluding appellant's sentence could be reliably reassessed). Although the penalty landscape was narrowed from thirty-three years of confinement to thirteen years of confinement after the Army Court set aside Specification 2 of Charge III, appellant's penalty exposure remained well above the original adjudged sentence of ten years. *See Winckelmann*, 73 M.J. at 16 ("[W]e conclude that the court below did not abuse its discretion, nor do we discern any obvious miscarriage of justice. Among other things, Appellant remained exposed to fifty-one years of confinement, which was otherwise limited by the thirty-one years adjudged at the original court-martial."). Furthermore, although appellant places emphasis on the "single abusive sexual contact offense" he remains convicted of in this case, (Appellant's Br. 14), appellant's misconduct warranted the sentence he ultimately received. The government draws this Court's attention to the "significant [and] aggravating circumstances addressed at the court-martial [which] remain admissible and relevant" to that offense: (1) the devastating effect appellant's sexual abuse had on

VB and her family; and (2) appellant's convictions for sexual assault and abusive sexual contact of *other* sleeping or incapacitated women within twelve months of the charged offense. *See Winckelmann*, 73 M.J. at 16 (instructing courts to analyze "whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses").

In light of the totality of the circumstances, as well as the deference this Court gives the service courts when they apply the correct framework, the government respectfully submits that the Army Court did not abuse its discretion when it authorized the CA to conduct a sentence reassessment in this case.

B. The Army Court did not abuse its discretion by capping the CA's sentence reassessment authority.

The Army Court operated within its authority to limit the CA's sentence reassessment to one which would meet the legal standard of appropriateness. *See United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) ("Article 66(c) requires that the members of the [court] independently determine, in every case within [their] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [they] affirm."); s*ee also Sales*, 22 M.J. at 308 (the sentence must be "appropriate in relation to the affirmed findings of guilty" and "no greater than that which would have been imposed if the prejudicial error had not been committed"). After authorizing the CA to conduct a limited sentence reassessment, the Army

Court cited to *Sales*[2] and *Winckelmann*[3] to support its conclusion that a reassessment of "no more than a dishonorable discharge and confinement for six years" would be "appropriate and purg[e] the record" as it stood of prejudicial error. (JA 203). Contrary to appellant's repeated claims that this guidance to the CA was erroneous and constituted an advisory opinion, the Army Court's limit on the CA's authority on remand addressed the concern raised by appellant in the specified issue: whether the CA improperly reassessed appellant's sentence and approved an inappropriate sentence of confinement in the first instance. As such, the court's instructions were directly related to the "controversy between [the] parties" and did not constitute an advisory opinion. *Chisholm*, 59 M.J. at 152; *Katso*, 77 M.J. at 251 n. 4. The instructions were in fact an exercise of the court's "highly discretionary power to determine whether a sentence should be approved." *Lacy*, 50 M.J. 286, 287.

Appellant's claims that the CA was "merely a conduit for the service court" and that the Army Court's limitation on the CA's reassessment "certainly influenced his decision" are without merit. (Appellant's Br. 21). Unequivocally, the Army Court did not order the CA to conduct a sentence reassessment. Nor did the Army Court mandate six years of confinement upon any reassessment. Instead,

---

[2] *See United States v. Sales,* 22 M.J. 305, 308 (C.M.A. 1986).
[3] *See United States v. Winckelmann,* 73 M.J. 11, 15-16 (C.A.A.F. 2013).

the court authorized the CA to independently select from a range of legally viable options. *Cf.* (Appellant's Br. 18) ("If the [CA] were merely a conduit for the service court . . . reassessment by the [CA] would no longer be an 'option' at all."). By selecting sentence reassessment, the CA was bound by the Army Court's limitation of *no more than* six years of confinement for the stated legal purpose of purging the record as it stands of error. (JA 203) (emphasis added). Appellant misinterprets the intent of the Army Court's guidance and therefore erroneously cites to *United States v. Reed* for the proposition that appellate authorities may not substitute their own judgment as it relates to the appropriateness of a sentence. 33 M.J. 98, 100 (C.M.A. 1991). In fact, the Army Court did not substitute its own judgment for that of the CA and conclude that six years of confinement was *the* appropriate sentence in this case. On the contrary, it determined that any sentence of confinement *greater than* six years would be inappropriate in relation to the affirmed findings of guilty.[4] Because the Army Court authorized the CA to

[4] The government recognizes the Army Court stated its reassessment was also "appropriate," however we draw this Court's attention to the CA's option to reassess appellant's sentence to "no more than . . . confinement for six years" as proof that the Army Court considered any reassessment within the zero to six years range to be "appropriate" based on the record as it stood before the remand. (JA 203). There remained an opportunity for the court's calculus to change after remand if the record were expanded. *See* Article 66(c), UCMJ ("[The service court] may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of *the entire record*, should be approved.") (emphasis added).

conduct a sentence reassessment on remand, it was required to make such a determination before affirming any sentence. *Sales*, 22 M.J. 305 at 308. Accordingly, the timing of the court's sentence appropriateness analysis was not an abuse of its "highly discretionary power to determine whether a sentence should be approved." *Lacy*, 50 M.J. 286, 287.

Furthermore, the Army Court's guidance did not cause the CA to "abdicate his proper role" on remand by improperly influencing his reassessment. (Appellant's Br. 21). The President sets a maximum punishment for all offenses listed under the UCMJ and leaves to the proper authorities the discretion to select appropriate sentences within those guidelines. In the same way, it was not an improper infringement on the CA's discretion for the Army Court to cap a sentence of confinement which may have arisen from reassessment. Accordingly, the CA performed an independent reassessment. The CA's memorandum for record accompanying the action states that he considered the Army Court's opinion, his SJA's reasoned legal advice, and appellant's Rule for Courts-Martial (R.C.M.) 1105 submission, which included a three-page memorandum and twenty-one enclosures, before he took action. (JA 191). There is no evidence that appellant received anything but "an individualized, legally appropriate, and careful review of

his sentence by the [CA]."[5] *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987). Appellant's concern that the CA viewed an unredacted record is of no moment in light of the clear guidance from the Army Court and the SJA that reassessment must solely consider the affirmed findings of guilty and presumably the CA discharged his duties "correctly, lawfully, and in good faith." *Frizelle v. Slater*, 324 U.S. App. D.C. 130, 111 F.3d 172, 177 (1997) (citing *Collins v. United States*, 24 Cl. Ct. 32, 38 (1991), *aff'd*, 975 F.2d 869 (Fed. Cir. 1992)).

In sum, the Army Court did not abuse its discretion by authorizing the CA to reassess appellant's sentence to one no greater than that which would have been imposed if the prejudicial error had not been committed.

C. Appellant was not prejudiced by the CA's sentence reassessment or the Army Court's affirmance.

Appellant's contention that the CA's reassessment was a miscarriage of justice is without legal or factual support. It is well established that "accused persons are not robots to be sentenced by fixed formulae but rather, they are

[5] The CA was under no obligation to reassess appellant's sentence to one which would have treated favorably "appellant's acceptance of responsibility for his conduct." (Appellant's Br. 14). The CA was within his discretion to consider appellant's character as relevant to the determination of an appropriate sentence and weigh appellant's guilty pleas against his underlying sexually predatory behavior. *See Baier*, 60 M.J. 382, 383 (A review of sentence appropriateness requires consideration of not only the nature and seriousness of the offenses, but also appellant's character); *see also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

offenders who should be given individualized consideration on punishment." *United States v. Ellis*, 68 M.J. 341, 347-38 (C.A.A.F. 2010) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106 (1959)). Appellant, however, argues the exact opposite of the law and derides the Army Court (and the CA by extension) for not applying an arbitrary "percentage of the maximum sentence" metric to the sentence reassessment. (Appellant's Br. 13 - 14). Instead, the CA followed the Army Court's guidance and his SJA's advice regarding reassessment to conduct an individualized review of appellant's case based only on the affirmed findings of guilty.[6] (JA 187-90, 203). In rendering his decision, the CA reviewed the admissible evidence of record, to include appellant's admitted pattern of sexual crimes against sleeping and incapacitated women, (JA 76-86), and appellant's R.C.M. 1105 matters. (JA 191). In sum, the CA took action in accordance with the law and therefore did not abuse his discretion.

Appellant's claim that he was denied meaningful appellate review after sentence reassessment is also without support. Appellant was not entitled to a "fresh appellate review of the appropriateness of his sentence" when the CA reassessed his sentence to one which the Army Court already determined was

[6] The Army Court's establishment of a ceiling on confinement above which the CA could not venture only served to advantage the appellant. Accordingly, any argument of prejudicial error based upon the Army Court's guidance as to a sentence cap upon reassessment is vitiated.

appropriate in relation to the affirmed findings of guilty and would purge the record as it stands of error. (Appellant's Br. 26). If instead the CA ordered a rehearing or appellant presented new relevant matters in his R.C.M. 1105 submission, the Army Court would have been compelled to conduct its sentence appropriateness review anew based on an expanded record potentially affecting the legality of the sentence. Article 63, UCMJ; R.C.M. 1105(b)(2). However, neither of those situations occurred. The CA chose to reassess the sentence and appellant's R.C.M. 1105 submission only included matters in mitigation and a recitation of legal issues already disposed of by the Army Court. (JA 184-86). Accordingly, appellant was not denied due process simply because the Army Court exercised its power to determine what range of sentences could be approved as appropriate in relation to the affirmed findings of guilty prior to remand.

Wherefore, the United States respectfully requests that this Honorable Court deny appellant's request to order a rehearing.

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

Standard of Review

Whether an accused has waived an issue is a question of law reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). Claims of

forfeiture are reviewed for plain error. *Id.* (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)).

Law

"[W]aiver is the intentional relinquishment or abandonment of a known right," whereas forfeiture is the failure to timely assert a right. *Ahern*, 76 M.J. at 197 (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). "Whether a particular right is waivable . . . depend[s] on the right at stake." *Ahern*, 76 M.J. at 197 (quoting *Olano*, 507 U.S. at 733). In *Olano*, the United States Supreme Court explained that a harmless error was waived in accordance with Fed. R. Crim. P. 52, a rule which defined a category of forfeited-but-reversible error. 507 U.S. at 733. If, however, the error was "plain and affect[ed] substantial rights, the court of appeals ha[d] authority to order correction, but [was] not required to do so." *Id*. at 735. Similarly, this Court, in accordance with Article 67, UCMJ, has the discretion "to determine whether an issue is properly raised." *United States v. Johnson*, 42 M.J. 443, 446 (C.A.A.F. 1995); *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019) ("We consider the issue of waiver as a question of law.").

Summary of Argument

Appellant, through his R.C.M. 1105 submission requesting reassessment, affirmatively waived his right to object to the Army Court's instructions to the CA. Alternatively, appellant forfeited his right to object to the Army Court's

instructions because his R.C.M. 1105 submission was devoid of any challenge to or disagreement with the instructions and the instructions were not clearly erroneous. The Army Court followed the law and appellant has not met his burden to demonstrate that either the court's or the CA's actions materially prejudiced his substantial rights.

Argument

A. Appellant waived his objection to the Army Court's instructions.

Appellant waived his right to object to the Army Court's delegation of authority in his R.C.M. 1105 submission. After the Army Court's ruling, appellant *requested* that the CA "reassess the sentence" without rehearing. (JA 184) (emphasis added). Then, appellant argued that "the maximum sentence authorized by [the Army Court was] disproportional to the misconduct." (JA 186). Taken together, these statements indicate appellant believed that: (1) the CA was within his authority to reassess the sentence; and (2) the Army Court was within its discretion to set a "maximum sentence authorized" for the reassessment.[7] Indeed, appellant's request that the CA complete the reassessment was an even more undeniable example of waiver than an affirmative statement of "no objection" to the Army Court's instructions. *See United States v. Swift*, 76 M.J. 210, 217

[7] Appellant's matters did not allege the Army Court's instructions on remand were outside the scope of their authority or otherwise deficient. (JA 184-86).

(C.A.A.F. 2017) ("First, as a general proposition of law, 'no objection' constitutes affirmative waiver of the right or admission at issue. [Additionally,] appellant was fully aware of the content of the statement, and he had numerous opportunities to contest its admission and use."). It is clear from his R.C.M. 1105 submission that appellant's counsel was fully aware of the content of the Army Court's opinion and had the opportunity to make a claim that the CA's reassessment was unlawful, but merely argued that reassessing the sentence to six years of confinement would be "disproportional to the misconduct." (JA 186). This was a clear relinquishment of any claim that the limited reassessment power delegated to the CA was unauthorized. Because the objection is waived, there is no error for this court to correct. *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009).

B. Alternatively, appellant forfeited his objection to the Army Court's instructions.

Should this Court find waiver does not apply in this case, appellant's objection to the Army Court's instructions was, at least, forfeited. The CA's SJA submitted his initial post-trial advice on August 29, 2018, and laid out the CA's options on remand in accordance with the Army Court's opinion. (JA 187). In response, appellant's October 2, 2018 R.C.M. 1105 submission "respectfully request[ed] on behalf of [appellant] that [the CA] reassess the sentence and affirm no more than a dishonorable discharge and confinement for two years." (JA 184). The SJA's October 19, 2018 addendum to his initial post-trial advice notified the

CA that appellant had submitted matters in accordance with R.C.M. 1105 and instructed the CA that he "must consider all written defense submissions prior to taking action in this case." (JA 189). Subsequently, the CA reviewed the submitted matters, (JA 191), and reassessed appellant's sentence. (JA 192).

Prior to petitioning this Court for review, appellant failed to timely assert his right to challenge the guidance the Army Court provided to the CA. *Gladue*, 67 M.J. 311, 313 ("If an appellant has forfeited a right by failing to raise it at trial, we review for plain error."). Appellant had the opportunity to object to the Army Court's instructions in his R.C.M. 1105 submission, but instead only took issue with how the court decided an evidentiary matter and a claim of unreasonable multiplication of charges. *See* Article 66(c), UCMJ ("[The service court] may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of *the entire record*, should be approved.") (emphasis added). In cases involving forfeiture, this Court reviews for plain error. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018). The plain error standard is met when appellant demonstrates: (1) an error was committed; (2) the error was clear or obvious; and (3) the error resulted in material prejudice to a substantial right. *Id.*

In the instant case, the Army Court did not err. If this Court determines the contrary, such error was not clear or obvious. In determining whether an error is

obvious, we look to the law at the time of the appeal. *United States v. Knapp*, 73 M.J. 33, 37 (C.A.A.F. 2014). In this case, the Army Court authorized a sentence reassessment because it was convinced that, based on the prevailing standards of *Sales* and the *Winckelmann* factors, "the accused's sentence would have been at least of a certain magnitude" absent the error at the trial level.[8] *Sales*, 22 M.J. 305, 307. The court then instructed the CA to take action and limited his authority in accordance with its ultimate responsibility to ensure that appellant's sentence was "appropriate in relation to the affirmed findings of guilty" and "no greater than that which would have been imposed if the prejudicial error had not been committed." *Id*. at 308; *see also* Article 66(e), UCMJ ("[TJAG] shall . . . instruct the [CA] to take action in accordance with the decision of the Court of Criminal Appeals."). Appellant has failed to meet his burden and demonstrate that this course of action was anything but appropriate under the current law.[9]

Moreover, appellant has failed to make a valid claim that the Army Court's actions materially prejudiced his substantial rights. *See Armstrong*, 77 MJ at 469 ("Under [the plain error] standard, even if there was an error, no relief is warranted

[8] This was not a clearly erroneous finding given the record still contained victim impact evidence and ample evidence of appellant's sexually predatory nature absent the irrelevant evidence related to the dismissed charge.

[9] The fact that neither appellant's first appellate defense counsel nor appellant's defense counsel upon remand noted the alleged error made by the Army Court also suggests that, were there error, it was not clear or obvious.

unless the appellant can show the second and third requirements" are met.). Appellant claims that he was denied due process because he was "awkwardly forced" to ask the Army Court to "reconsider" its previously issued opinion, (Appellant's Br. 26), yet appellant never actually petitioned the court for reconsideration. Instead, appellant put himself in an awkward position by asking the CA to reassess his sentence and waiting for his case to return to the Army Court. Only when the CA chose to reassess appellant's sentence to six years of confinement – higher than appellant's R.C.M. 1105 request of no more than two years of confinement (JA 184) – did appellant petition this Court alleging the Army Court erred. *But see, e.g. United States v. Holt*, 52 M.J. 173, 185 (C.A.A.F. 1999) (finding R.C.M. 1105 matters which did not allege error, but acknowledged the underlying facts upon which allegations of error were later based, "underscore[d] the lack of prejudice" to appellant). In the absence of error, appellant is not entitled to relief. Alternatively, if this Court finds error, appellant is not entitled to relief because he has not shown: (1) that such error was clear or obvious or (2) that his substantial rights were materially prejudiced by such error.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court deny appellant's request to order a rehearing and affirm the sentence in this case.

LAURYN D. CARR
Captain, Judge Advocate
Appellate Counsel, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0779
Lauryn.d.carr.mil@mail.mil
U.S.C.A.A.F. Bar No. 37132

DUSTIN E. MYRIE
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37122

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 31651

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 5,469 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

LAURYN D. CARR
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0779
Lauryn.d.carr.mil@mail.mil
U.S.C.A.A.F. Bar No. 37132

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on appellate defense counsel, on December 3, 2019

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0822