

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	BRIEF ON BEHALF OF
Appellee)	APPELLEE
)	
v.)	
)	
Specialist (E-4))	Crim. App. Dkt. No. 20160235
COREY N. WALL)	
United States Army,)	USCA Dkt. No. 19-0143/AR
Appellant)	

CHRISTOPHER T. LEIGHTON
Captain, Judge Advocate
Appellate Government
Counsel
U.S.C.A.A.F. Bar No. 37226

HANNAH E. KAUFMAN
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37059

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

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

Specified Issue

WHETHER THE GRANTED ISSUE IS RIPE FOR REVIEW AT THIS TIME.

Statements of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault and one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). *See United*

States v. Wall, 2018 CCA LEXIS 479 at *1 (Army Ct. Crim. App. 2018). The military judge sentenced appellant to forfeiture of all pay and allowances, reduction to E-1, a dishonorable discharge, and 15 years of confinement. *Id.* at *1–2. Appellant was credited with 60 days against confinement and the convening authority approved the adjudged sentence. *Id.* at *2.

The Army Court found the military judge erred in admitting evidence of the charged offenses as propensity evidence, set aside the sexual assault conviction, affirmed the rape conviction, set aside the sentence, and remanded the case to the convening authority with three options. *Id.* at *14–16. The convening authority was authorized to: 1) order a rehearing on the sexual assault specification and the sentence; 2) dismiss the sexual assault specification and order a rehearing on the rape specification only; or 3) dismiss the sexual assault specification and reassess the sentence, affirming no more than total forfeitures, reduction to E-1, a dishonorable discharge, and 10 years of confinement. *Id.*

Appellant filed a Petition for Grant of Review and a Supplement to the Petition on January 14, 2019 and February 4, 2019, respectively, challenging the legality of the third option provided to the convening authority on remand. On April 29, 2019, this Court granted appellant’s petition for review. On September 18, 2019, this Court ordered supplemental briefing from the parties as to whether the granted issue was ripe for review at the present time.

Summary of Argument

The granted issue is not ripe as there is currently no sentence on which this Court may act. The convening authority has not selected from the provided options on remand, two of which include a rehearing. Furthermore, there is currently no approved sentence before this Court. Consequently, appellant's petition necessarily lacks a cognizable claim of prejudice and is premature for review.

Standard of Review

The Court of Appeals for the Armed Forces (CAAF) may act “only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.” Article 67(c), UCMJ, 10 U.S.C. § 867(c). This Court reviews sentence reassessments for an abuse of discretion. *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013). “[T]he abuse of discretion standard of review recognizes that [lower courts have] a range of choices and will not be reversed so long as the decision remains within that range.” *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

Law and Analysis

Congress gives service courts broad discretion in granting sentence relief, including the authority to remand cases subject to reasonable limitations. *See*

Article 66, UCMJ, 10 U.S.C. § 866. “The triggering mechanism permitting an appeal to the [CAAF] is the fact that a case has been ‘reviewed’ ... ‘Congress intended this Court to review a decision by a [lower court] only if it has finally acted on both the findings and the sentence.’” *United States v. Boudreaux*, 35 M.J. 291, 294 (C.M.A. 1992) (citations omitted).

The Army Court provided the convening authority with three ways to reach a sentence in this case, two of which involve a rehearing. *See Wall*, at *15–16. Until final action by a convening authority, there is no reviewable sentence in this or any other case. Accordingly, appellant cannot seek review on the granted issue, by this Court, at this time. The mere pendency of a sentence is insufficient to invoke this Court’s jurisdiction given Congress’s determination that a sentence “may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” Article 59(a), UCMJ, 10 U.S.C. § 859(a). In the sentencing context, prejudice occurs when “the error substantially influenced the adjudged sentence.” *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009). In other words, Congress did not intend for this Court to act under these circumstances. *See Boudreaux*, 35 M.J. at 294.

In this case, the convening authority has yet to take action, let alone reassess appellant’s sentence in a manner presenting a colorable claim of prejudice. Moreover, addressing the petition prematurely overlooks two other important

considerations. First, it runs the risk of negating the possibility that even if appellant's disfavored option is selected, his concerns could be ameliorated nonetheless by a favorable reassessment. Second, given the punitive discharge statutorily attached to appellant's intact rape conviction, his case will be forwarded for automatic review under Article 66 regardless of the path ultimately taken. *See Manual for Courts-Martial, United States* (2016 ed.) pt. IV, ¶ 45.e(1).

If appellant believes himself aggrieved by either the sentence approved by the convening authority or a subsequent Army Court decision, he can then properly petition this Court for review under Article 67. Until such time, appellant will be unable to establish any prejudice from the Army Court's decision beyond pure speculation, his claim will be premature, and this Court should deny his petition in keeping with its recent order in *United States v. Steele*, 2019 LEXIS 717 (24 Sep. 2019).

Conclusion

The United States respectfully requests that this Honorable Court dismiss appellant's petition for review and permit this case to proceed in the normal course of appellate review.



CHRISTOPHER T. LEIGHTON
Captain, Judge Advocate
Appellate Government
Counsel
U.S.C.A.A.F. Bar No. 37226



HANNAH E. KAUFMAN
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Colonel, Judge Advocate
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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 974 words.
2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.



CHRISTOPHER T. LEIGHTON
Captain, Judge Advocate
Attorney for Appellee
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 3rd October 2019 and electronically filed to Defense Appellate on October 3, 2019.

Angela Riddick

ANGELA R. RIDDICK
Paralegal Specialist
Office of The Judge Advocate
General, United States Army
Appellate Government Counsel
9275 Gunston Road, Room 1209
Fort Belvoir, VA 22060
703-693-0823