IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

WHETHER, AFTER SETTING ASIDE THE SENTENCE AND ORDERING A REMAND, A SERVICE COURT OF CRIMINAL APPEALS IS AUTHORIZED TO REASSESS THE SENTENCE AND LIMIT THE LAWFUL SENTENCE THE CONVENING AUTHORITY MAY APPROVE.

STATEMENT 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 [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 April 5-8, 2016, at Fort Carson, Colorado, a military judge sitting as a general court-martial convicted Specialist (SPC) Corey N. Wall, contrary to his pleas, of one specification of sexual assault and one specification of rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §920 (2012). The military judge sentenced appellant to reduction to the grade of E-1, confinement for fifteen years, and a dishonorable discharge. (R. at 667).

The military judge credited appellant with 60 days against his sentence of confinement due to illegal punishment under Article 13, UCMJ. (R. at 666-67). The convening authority approved the sentence as adjudged and credited appellant with 60 days against the sentence to confinement. (Action).

On October 5, 2018, the Army Court found that the military judge erred in admitting the evidence of the charged offenses as propensity evidence. *United States v. Wall*, slip. op., at 7. The Army Court found prejudice as to Specification 1 of The Charge and set it aside but affirmed the finding of guilt as to Specification 2. The Army Court set aside the sentence and authorized a rehearing on findings and sentence, a rehearing on sentence only, or dismissal of Specification 1 of The Charge and reassessment of the sentence, affirming no more than a dishonorable discharge, confinement for ten years, total forfeiture of all pay and allowances, and reduction to the grade of E-1. *Id*. at 8.

Specialist Wall filed a Motion for Reconsideration of the Army Court's opinion to address two issues that were presented in appellant's Supplement to this Court. On November 16, 2018, the Army Court granted appellant's motion and corrected a typographical error but affirmed the remainder of its original opinion.

Specialist Wall was notified of the Army Court's decision, and its Order denying reconsideration and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, petitioned this honorable Court on January 14, 2019. On February 4, 2019, appellant filed his Supplement to his petition. This Court granted appellant's petition for review on April 29, 2019, and specified an issue. The court approved appellant's request for one extension of time until June 12, 2019.

STATEMENT OF FACTS

On October 5, 2018, the Army Court found that the military judge inappropriately used the evidence of the charged offenses as propensity evidence and concluded it was error. *United States v. Wall*, slip. op., at 7. The Army Court found prejudice as to Specification 1 and set it aside but affirmed the finding of guilt as to Specification 2. The Army Court set aside the sentence. *Id*. at 8. The Army Court stated that the same or different convening authority may:

> (1) order a rehearing on Specification 1 of The Charge and the sentence;

> (2) dismiss Specification 1 of The Charge and order a rehearing on the sentence only; or
>
> (3) dismiss Specification 1 of The Charge and reassess the sentence, affirming no more than a dishonorable discharge, confinement for ten years, total forfeiture of all pay and allowances, and reduction to E-4.

Id. at 8.

> **WHETHER, AFTER SETTING ASIDE THE SENTENCE AND ORDERING A REMAND, A SERVICE COURT OF CRIMINAL APPEALS IS AUTHORIZED TO REASSESS THE SENTENCE AND LIMIT THE LAWFUL SENTENCE THE CONVENING AUTHORITY MAY APPROVE.**

1. Summary of Argument

After setting aside appellant's sentence, the Army Court conducted a de facto sentence reassessment, and "preapproved" a reassessed sentence for the convening authority to adopt in the guise of conducting an independent reassessment. Such a remand renders the convening authority, and subsequent Article 66 review, meaningless. This Court should find that such an erroneous view of the law renders the Army Court's decision an abuse of discretion.

2. Standard of Review

This Court reviews a CCA's sentence reassessment for abuse of discretion or to prevent obvious miscarriages of justice. *United States v. Winckelmann*, 73 M.J.

11, 15 (C.A.A.F. 2013) (*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).

3. Law and Argument

a. The CCA has authority to remand, but not on these terms.

This Court has consistently held that "[w]hen an error occurs at trial that impacts on the accused's sentence, the accused is entitled to be made whole on appeal." *United States v. Reed*, 33 M.J. 98 (C.A.A.F. 1991). Through this Court's decisions in *Sales* and *Winckelmann*, the CAAF provided guidance on when the court should authorize a rehearing.[1] In the present case, the CCA authorized a rehearing as to sentence *or* a sentence reassessment subject to a limit based on the CCA's own *Sales* and *Winckelmann* analysis.

The Army Court's decision here both improperly limited and also corrupted the independence of the convening authority's action upon remand. "The Court of

[1] *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).

Criminal Appeals cannot direct the manner in which the convening authority exercises his or her independent clemency power under the guise of sentence appropriateness." *Humphries*, 71 M.J. at 218 (C.A.A.F. 2012) (Baker, J. dissenting). 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)).

In sum, 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 Rule for Courts-Martial (R.C.M.) 1107(e)(iii). R.C.M. 1107(e)(1)(B)(iv) 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 CCA, subordinating its discretion to that of the CCA, 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)(iii) 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 ten years was an appropriate sentence that purged the record of error. This is 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)).

b. Allowing the Army Court to send the case to the convening authority for a consideration of a preapproved sentence impedes his right to an impartial review of his case on 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 *United States v. 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 CCA 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").

Instead, the Army Court tainted the reassessment option that was left in the sole discretion of the convening authority. Upon receiving this record of trial, the convening authority would learn that three appellate judges (the "superior authority" under R.C.M. 1107) determined that reassessment was appropriate, despite the tremendous change in the finding 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 ten year sentence would purge the record of error. This influence at least taints—if it does not entirely usurp—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 ten years is appropriate entices the convening authority to abdicate his proper role in the process. First, the convening authority no longer faces the intellectual hurdle of determining whether a reassessment is 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)(1)(B)(iii). Second, reassessment is the path of least resistance: with a mere pen stroke, the convening authority can avoid 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.

Moreover, the taint would not stop with the convening authority. Having biased the convening authority, a quasi-judicial actor, below, the Army Court would then review its own decision, in a travesty of appellate review. Indeed, even if the case is assigned to another panel, the appellate court is left to evaluate its predetermined assessment that it approved merely months prior. 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.

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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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 2,702 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. Wall*, Army Dkt. No. 20160235, USCA Dkt. No. 18-0143/AR, was electronically filed brief with the Court and Government Appellate Division on June 12, 2019. The Joint Appendix will be delivered via courier service.

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