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	SUPPLEMENTAL 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
FOR THE ARMED FORCES:

SPECFIED ISSUE

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

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*, ARMY 20160235, slip. op., at 7 (A. Ct. Crim. App. Oct. 5, 2018). 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, on which both parties filed briefs in response. On September 18, 2019, this Court ordered supplemental briefs from both parties on an additional issue.

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*, ARMY 20160235, slip. op., at 7 (A. Ct. Crim. App. Oct. 5, 2018). 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 THE GRANTED ISSUE IS RIPE FOR REVIEW BY THIS COURT AT THIS TIME.

1. Summary of Argument

The Army Court conducted a de facto sentence reassessment and provided a "preapproved" sentence for the convening authority to adopt in the guise of conducting the convening authority's own independent reassessment. Such a remand renders the convening authority, and subsequent Article 66 review, tainted, if not meaningless. Accordingly, the issue of whether the Army Court disrupted Appellant's due process rights on remand is ripe for adjudication.

2. Standard of Review

This Court reviews a military court of criminal appeal'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

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 Army Court authorized a rehearing as to sentence *or* a sentence reassessment by the convening authority subject to a limit based on the Army Court's own *Sales* and *Winckelmann* analysis. The Army Court's pre-approved sentence is an advisory opinion.

In other words, the Army Court short circuited the remand and review process by instructing the convening authority that he or she 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,

[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).

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

In this case, the Army Court's advisory opinion as to sentence appropriateness tainted every available course of action on remand. "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." *Humphries*, 71 M.J. at 218 (C.A.A.F. 2012) (Baker, C.J. dissenting). The error in the Army Court's opinion remanding appellant is a harm that is not speculative because this erroneous advisory opinion affects appellant's due process on remand and his subsequent appellate review. This error by the Army Court is ripe for review, as judicial economy begs this error be corrected now.

a. Rehearing Options: (1) Order a Rehearing on Specification 1 of The Charge and the sentence, or (2) Dismiss Specification 1 of The Charge and order a rehearing on the sentence only

Both rehearing options involve the convening authority sending appellant's case back to the trial court for a military judge to conduct an independent rehearing on sentence. However, the Army Court's advisory opinion tainted any chance of appellant receiving an impartial rehearing. The military judge would either receive the Army Court's opinion as part of the remand packet or be able to look up the

opinion. This opinion contains what the Army Court believes to be an appropriate sentence for the affirmed conviction.[2]

In either rehearing scenario, the military judge would be influenced by seeing the Army Court's opinion as to what the affirmed conviction is worth, as the Army Court is the higher court of review for the military trial judge. While the sentence adjudged by the trial court may include a sentence to confinement less than ten years to avoid the Army Court finding an inappropriately severe sentence on appellate review, the trial judge now has more freedom to arrive at a higher sentence knowing that anything ten years or less will survive appellate review. Just as the quantum portions of pre-trial agreements are not reviewed prior to the trial judge independently arriving at a sentence,[3] an appellate court's assessment as to sentence appropriateness should be kept from tainting the trial judge conducting the rehearing.

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[2] "In reassessing the sentence we are satisfied that the sentence adjudged, absent Specification 1 of The Charge, would have been at least a dishonorable discharge and confinement for ten years." *Wall*, ARMY 20160235, slip. op., at 8, fn. 4 (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986) and *United States v. Winckleman*, 73 M.J. 11, 15-16 (C.A.A.F. 2013)).

[3] "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.

Similar to this taint on the trial level, appellant disagrees with appellee's assertion that "[the convening authority] will have detached legal advice from his staff judge advocate ('SJA')." (Gov't Brief at 7). First, the SJA receiving the Army Court's opinion is himself tainted by the pre-approved sentence. The SJA has knowledge of what amount of confinement will survive appellate review. When questioned by the convening authority about what sentence is appropriate, the SJA's advice undoubtedly will be tainted by his knowledge of the Army Court's pre-approved amount. Therefore, the convening authority will likely be indirectly tainted by the advisory opinion since the advice received by the SJA will be influenced by the advisory opinion.

Indeed, appellee outright predicts that the SJA would actually explain the Army Court's opinion, including that the sentence can be as high as ten years. (Gov't Brief at 7). Therefore, under appellee's forecast of action on remand, the convening authority will be directly tainted by his knowledge of the Army Court's pre-approved sentence. Only an appellate court opinion without such a pre-approved sentence could ensure that the SJA, and thus the convening authority, are not tainted.

Ensuring the convening authority is not inappropriately influenced by the Army Court is especially important in this case, as the convening authority maintains 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 potentially subject to a rehearing – were alleged to be committed before June 24, 2014. Accordingly, the convening authority's action is 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 is not restricted in appellant's case and instead is 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[4] the sentence[5] in whole or in part." Art. 60(c)(2).

Therefore, in appellant's case, the convening authority has 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." *Id.* (citing *United States v. Scott*, 6 U.S.C.M.A. 650

[4] 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.

[5] 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.

(1956); *United States v. Wise*, 6 U.S.C.M.A. 472 (1955). As such, the convening authority's knowledge of the appellate court's pre-approved sentence is similar to the scenario discussed above of a military judge knowing of the quantum. The convening authority's knowledge of the pre-approved sentence impacts his granting of clemency, as the sentence amount cannot be unseen and will undoubtedly influence his decision. As such, the issue of whether the Army Court erred when including this pre-approved amount is ripe for appellate review.

b. <u>Reassessment Option</u>: 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

Of the three options, reassessment is the path of least resistance. First, the convening authority would no longer face 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* R.C.M. 1107(e)(1)(B)(iii) Discussion. Second, this option is accompanied by a promise from the Army Court that a clearly articulated amount of confinement will be approved. The Army Court's actions improperly entice the convening authority away from considering whether a rehearing is appropriate. In selecting the third option proposed by the Army Court, the convening authority – with a mere pen stroke – 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.

Here, the convening authority is acting as a subordinate to the Army Court, for the Army Court 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). Although the Army Court authorized a sentence reassessment, this reassessment is subject to a limit based on the Army Court's own *Sales* and *Winckelmann* analysis. Therefore, appellant's sentence could never be an actual reassessment conducted by the convening authority, as the Army Court inserted itself and essentially conducted the reassessment itself. 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)).

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 Army Court, subordinating its discretion to that of the Army 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)(iii) meaningless because reassessment by the convening authority would no longer be an "option" at all.

"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 Court of Criminal Appeals 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, 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 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 or her proper role in the process. Therefore, the Army Court's erroneous advisory opinion is ripe for appellate review.

c. Appellate Review of Convening Authority's action on Remand: The Army Court's advisory opinion dissolves Appellant's due process to appellate review after either the rehearing or reassessment options.

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 appellate court's assessment of the sentence should be reserved for either when the appellate court conducts the reassessment or for when the appellate court addresses an appellant's assignment of error as to sentence appropriateness. An appellate court's advisory opinion on sentence appropriateness should not exist in 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 the ability to appellate review of the actual subsequent sentence after an appropriate process, including appellant's subsequent submissions. Here, if the convening authority ironically just happened to reassess appellant's sentence on remand to the exact amount of confinement that was pre-approved by the Army Court, appellant would be denied a fresh appellate review of the appropriateness of his sentence. Instead, appellant would be awkwardly forced 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 and their opinion is ripe for this Court's review.

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. The Army Court's error of an advisory opinion of a pre-approved sentence amount is ripe for appellate review.

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

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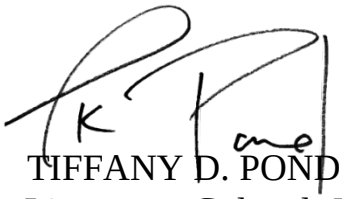

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Wall, Crim App. Dkt. No. 20160235, USCA Dkt. No. 19-0143/AR was electronically filed brief with the Court and Government Appellate Division on October 3, 2019.

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