IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **GENE N. WILLIAMS** Sergeant (E-5) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20130582 USCA Dkt. No. 23-0006/AR

Sean Patrick Flynn
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar No. 37529

Bryan A. Osterhage
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar Number 36871

Jonathan F. Potter, Esq.
Senior Appellate Counsel
Defense Appellate Division
USCAAF Bar Number 26450

Dale McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37645

Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33185

Table of Contents

Table of Authorities

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES/COURT OF MILITARY APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE ARTICLES

FEDERAL STATUTES

EXECUTIVE ORERS

PUNITIVE ARTICLES

RULES FOR COURTS-MARTIAL

SECONDARY SOURCES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF APPELLANT
v.	
GENE N. WILLIAMS Sergeant (E-5) United States Army, Appellant	Crim. App. Dkt. No. ARMY 20130582 USCA Dkt. No. 23-0006/AR

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

Issue Presented

WHETHER THE ARMY COURT ABUSED ITS DISCRETION IN REASSESSING APPELLANT'S SENTENCE?

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 [UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case[1]

On June 21, 2013, a panel of officer and enlisted members, sitting as a general court-martial, convicted Appellant, Sergeant Gene N. Williams, contrary to his pleas, of one specification of rape on divers occasions, four specifications of sodomy (three on divers occasions), and five specifications of assault (three on divers occasions), in violation of Articles 120, 125, and 128, UCMJ. (JA 028–031). The panel sentenced Appellant to a dishonorable discharge, confinement for twenty years, total forfeiture of pay and allowances, and reduction to the grade of E-1. (JA 30, 112). On April 17, 2014, the convening authority approved the reduction, forfeiture, and confinement portion of the adjudged sentence, but approved only a bad-conduct discharge. (JA 030).

The Army Court affirmed the findings and sentence. (JA 003). This Court then remanded the case for reconsideration in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). (JA 003). On remand, the Army Court again affirmed the findings and sentence. (JA 003). This Court then set aside the rape specification, three specifications of forcible sodomy, and the sentence. (JA 004). However, this Court affirmed one specification of forcible sodomy by exceptions

[1] A diagram of the complex procedural history of Appellant's case is available in the appendix.

and affirmed the five specifications of assault consummated by battery. (JA 004, 033)

On November 14, 2018, the convening authority re-referred the set-aside specifications to a combined rehearing with two additional charges: aggravated sexual contact of a child and sodomy of a child, in violation of Articles 120 and 125, UCMJ. (JA 004, 021–27). On November 6, 2019, a military judge sitting as a general court-martial found appellant guilty, contrary to his pleas, of the set-aside specifications (excepting divers occasions from Specification 2 of Charge III) and Additional Charge II. (JA 159–60). The military judge sentenced appellant to a dishonorable discharge, confinement for thirty-five years, total forfeitures, and reduction to the grade of E-1. (JA 212). The convening authority approved the adjudged sentence, and he credited Appellant with 2,444 days of credit against the sentence to confinement.[2] (JA 035).

On June 10, 2022, the Army Court set aside and dismissed Additional Charge II. (JA 010). The Army Court affirmed only so much of the sentence as provided for a dishonorable discharge, confinement for 19 years, total forfeitures, and reduction to the grade of E-1. (JA 010).

[2] The credit consisted of 1,925 days for the period of confinement served following the first trial, 459 days of pre-trial confinement credit, and 60 days of Article 13 credit. (JA 035; JA 2600).

Statement of Facts

A. Appellant's First Court-Martial

Appellant's first wife testified that she felt she had no way to make Appellant stop raping her. (JA 064). The rapes occurred from the end of 2000 until January 2003 anywhere from 3–5 to 8–10 times per week, (JA 065–66), and she had between 800 and 1000 nonconsensual sexual encounters with Appellant. (JA 067). Moreover, Appellant's first wife had cervical cancer which required surgery to remove parts of her cervix, and she was in pain afterwards. (JA 061–62). Even though her doctors told her to wait for four to six weeks before again having intercourse, Appellant raped her the day of her surgery. (JA 062–63).

His second wife testified that during vaginal intercourse Appellant "start[ed to] put his penis inside of [her] butt," and ignored her protests. (JA 058–59). These forcible sodomies appear to play out in a way similar to the crimes against his first wife, and his second wife also testified to several assaults by Appellant. (JA 044–60).

During its closing argument, the Government highlighted that Appellant had sex with his first wife "when he wanted it, how often he wanted it." (JA 068). The Government argued Appellant's rapes of his first wife were "relentless" and "countless," and could go on for "up to an hour" and that Appellant would rape his

first wife "over and over again." (JA 071–73). The Government noted the rapes were "almost fantastical in the amount." (JA 084).

The Government argued the forcible sodomy of his second wife was "spread throughout multiple occasions" and "painful." (JA 073). During sentencing, the Government requested that Appellant receive the maximum punishment, which the military judge informed the panel was confinement for life without the possibility for parole. (JA 105, 111).

B. Appellant's Second Court-Martial

At Appellant's second court-martial, his stepdaughter testified that, when she was seven or eight years old and living in Germany, Appellant drove her to a secluded part of the woods and put his penis in her butt. (JA 113–16). He then told her he would buy her a toy if she did not tell her mom. (JA 116–17).

Appellant's second wife again testified that Appellant forcibly sodomized her in Trabitz, Germany, (JA 132–34), Oerlenbach, Germany, (JA 129–32), and twice in Sanford, North Carolina. (JA 123, 128).

The Government argued at closing that the crimes against the step daughter broke his second wife more severely than her own forcible sodomies, and the crimes against the child were "perhaps the most egregious." (JA 152, 155). At sentencing, the Government focused its witnesses on the effects of the sodomy of the child. (JA 161–89).

During its sentencing argument, the Government continued focusing on the child sodomy, beginning and ending with it and referring to the child sodomy throughout its sentencing argument. (JA 207–11). The Government devoted scant attention to the crimes against Appellant's second wife. The Government requested a sentence likewise focused on the child sodomy offense, arguing Appellant should be confined for thirty years for his crime against the child and twenty-five years for his convictions involving his second wife. (JA 210–11).

Law

A. Rule for Court-Martial 810(d)

At a rehearing, if it does not involve findings of guilty for new charges, the new approved sentence may not be more severe than the sentence originally approved by the convening, or higher, authority. Rule for Court-Martial [R.C.M.] 810(d)(1).[3] Even if new charges result in a finding of guilty, the original sentence limitation still applies to the original charges, but the sentence may be increased

[3] All references to the R.C.M are to the 2016 version. The Army Court did not identify which rules applied to Appellant's court-martial, but erroneously quoted language from the 2019 rules. (*Compare* JA 008 *with* JA 015). But because Appellant's charges were referred in November of 2018, the 2016 rules control. (JA 022, 027); Exec. Order No. 13,825, 83 Fed. Reg. 9,890 (Mar. 1, 2018) ("Except as otherwise provided in this order, the Amendments in Annex 2 shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019.").

from the original sentence to the extent of the maximum punishment of the new charges. R.C.M. 810(d)(1).

B. *United States v. Winckelmann*

In *United States v. Winckelmann*, to assist in a "totality of the circumstances" analysis, this Court enunciated four factors (the *Winckelmann* factors) for service courts to consider in determining whether they should reassess a sentence or order a rehearing. 73 M.J. 11, 15–16 (C.A.A.F. 2013). Those factors are:

> (1) Dramatic changes in the penalty landscape and exposure; (2) whether an appellant chose sentencing by members or a military judge . . .; (3) whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses . . .; and (4) whether the remaining offenses are of the type that judges at the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 15–16 (citations omitted). Previously, some judges of this Court expressed disagreement with the notion that service courts could authorize a rehearing for just a sentence. *Id.* at 16 (Stucky, J., concurring) (citing *Jackson v. Taylor*, 353 U.S. 569 (1957); *Id.* at 17 (Ryan, J., concurring) (same); *United States v. Quick*, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky J., joined by Ohlson, J., dissenting) (same). However, Congress has since specifically authorized service courts to set aside a sentence and "order a rehearing." Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 5330 [MJA, 2016].

C. *United States v. Mitchell*

In *United States v. Mitchell*, this Court emphasized that "punitive separations are 'qualitatively different' from confinement and 'other punishments' such as forfeitures." 58 M.J. 446, 448 (C.A.A.F. 2003) (quoting *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000) and *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003)). Mitchell was originally convicted of numerous offenses and sentenced to confinement for 10 years, total forfeitures, reduction to E-1, and a bad-conduct discharge. *Mitchell*, 58 M.J. at 447. At his rehearing, following the setting aside of several specifications, a panel sentenced Mitchell to confinement for six years, reduction to E-1, and a dishonorable discharge. *Id.* The Army Court affirmed Mitchell's sentence, despite the increased severity of the discharge. *Id.* The Army Court stated the "increased stigma [of a dishonorable discharge] did not *objectively* outweigh the severity of the additional four years of confinement" and affirmed the sentence. *Id.*

This Court rejected the Army Court's rationale, reasoning it was not possible "to make a meaningful comparison, objectively or otherwise, between the increased severity of Appellant's discharge and the decreased severity of his confinement and forfeitures." *Id.* at 448. This Court concluded that although the difference in a bad-conduct and dishonorable discharge may be subjective, for purposes of reviewing a rehearing "a dishonorable discharge is more severe than a

bad-conduct discharge." *Id.* at 449. This Court remanded Mitchell's case to the Army Court with an order to approve only six years of confinement and a bad-conduct discharge. *Id.* at 449.

Argument

Despite the tortured procedural history of this case, the issue presented is simple: as affirmed by the Army Court, Appellant stands convicted of fewer severe crimes than he was, yet he has a more severe sentence than he did. He is no longer convicted of offenses the government claimed were "countless" rapes and at least two instances of forcible sodomy (because of the divers language dropping off of two specifications). (*Compare* JA 028–031 *with* JA 032–036). The sentence limitation from his original trial involved those convictions, and no new charges remain. Despite the vastly fewer criminal offenses, the Army Court's reassessed sentence is worse. Even if the Army Court could reliably reassess Appellant's sentence (which it could not), its reassessed sentence was arbitrary and should be set aside.

A. The Army Court erred in determining it could reassess Appellant's sentence.

The *Winckelmann* factors inform whether a service court can properly reassess a sentence. A review of Appellant's case must consider his initial court-martial because of *Winckelmann*'s emphasis on the "totality of the circumstances" and a service court's statutory obligation to only affirm a sentence that "it

determines, on the basis of the *entire* record, should be approved." 73 M.J. at 15; Article 66, UCMJ (emphasis added). Three of the four *Winckelmann* factors weigh against reassessment, and the Army Court erred in reassessing Appellant's sentence.

1. Appellant's former crimes constituted a gravamen of his offenses.

Gravamen is defined as, "[t]he substantial point or essence of a claim, grievance, or complaint." *Black's Law Dictionary* (9th ed. 2009). The gravamen analysis must consider the nature of the evidence presented. Appellant was originally convicted on testimony that he raped his first wife *hundreds* of times, a claim the Government emphasized throughout its argument. Some of these rapes were alleged to have been particularly aggravated, even occurring the same day she had cancerous tissue removed from her cervix. (JA 061–63). Currently, Appellant stands convicted of four instances of forcible sodomy—serious crimes without question—but not the gravamen of his misconduct when compared to rapes that are "fantastical" in quantity. (JA 084). This factor weighs against reassessment.

Additionally, the President believed that, at the time of Appellant's crimes, rape was a more serious crime than forcible sodomy and purported to authorize death for rape. *Manual for Court-Martial*, *United States*, (1998 ed.), pt, IV, ¶ 45.d(1). While a capital sentence could not be executed per *Coker v. Georgia*, 433 U.S. 584 (1977) and *Kennedy v. Louisiana*, 554 U.S. 407 (2008), that the President

believed execution was warranted for rape is an appropriate consideration when determining the gravamen of the offenses. Congress too took a more serious view of rape, and in 2006 purported to authorize death for rape under the UCMJ "[u]ntil the President otherwise provide[d]." National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3263. *See also United States v. Briggs*, 141 S. Ct. 467, 472 (2020).

Even if the service court's analysis is limited to only the second court-martial, the gravamen of the offenses analysis still weighs against reassessment. The Government evaluated Appellant to be more culpable for his crime against the child than those against his second wife, requesting an additional five years of confinement for the child offense. (JA 210–11). And the Army Court's own reassessment, albeit flawed, demonstrated its own perception of the weight of the child offense on Appellant's sentence, finding it to be worth confinement for sixteen years, or over 45% of the total confinement. (JA 009–010).

It is challenging to square an offense not being a gravamen when the setting aside of that offense resulted in a sixteen-year reduction in sentence. It likewise strains credulity to believe that the anal sodomy of a seven-year-old would not be considered a gravamen offense (especially as there is no requirement there be just one gravamen offense).

2. Appellant's Sentencing Forum

The Army Court believed that because Appellant was sentenced by a military judge at his second court-martial that this factor weighs in favor of reassessment. (JA 009). Not so. The real sentence to be evaluated is the one adjudged at Appellant's first court-martial—done by members. That sentence imposes the limitation under R.C.M. 810(d), and that is the sentencing authority the Army Court was bound to analyze. The Army Court recognized this when it appropriately began its analysis considering the gravamen of Appellant's offenses in the first trial. (JA 009). But then the Army Court flipped to Appellant's second trial in considering the sentencing authority. (JA 009). This inconsistency was error. The first sentence is now what matters, and at the first trial a panel sentenced Appellant.

3. The Army Court is unfamiliar with the offense of sodomy.

Finally, the Army Court cannot be familiar with the remaining offense of forcible sodomy because it has not been an offense under the UCMJ since 2016. MJA, 2016, 130 Stat. 5428. While the elements of forcible sodomy from 2007 may align with the elements of rape in the more recent UCMJ, during the time of Appellant's actions Congress designated rape and sodomy as distinct offenses with different elements and the President proscribed different punishments. The Army

Court did not give this consideration any deference and instead only referenced the crime of rape for which appellant no longer stands convicted. (JA 009).

On balance, the *Winckelmann* factors weigh against the Army Court reassessing Appellant's sentence, and it abused its discretion in attempting to do so.

B. The Army Court's reassessed sentence is arbitrary.

Even if the Army Court could reassess Appellant's sentence, it approved a discharge more severe than that approved by the convening authority at Appellant's original trial. This was in violation of *Mitchell* and, standing alone, is sufficient to require the Army Court to again amend Appellant's sentence. 58 M.J. at 448.

Moreover, as the Army Court correctly recognized, it is bound by the sentence imposed at Appellant's first court-martial. (JA 009). Nonetheless, when it conducted its reassessment, it functionally determined that "countless" rapes, occurring over the course more than two years, and at least two other forcible sodomies, equated to a mere one year of Appellant's original sentence. That cannot be.

The Army Court ignored not only the number of offenses but it also ignored the aggravated nature of those offenses. According to Appellant's first wife, Appellant raped her immediately after she had surgery on her cervix, and he raped

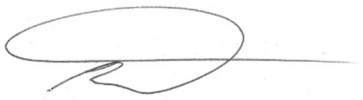
her countless times, over and over. Countless rapes—and at least two forcible sodomies (those necessarily included in now gone divers language)—should result in a more severe sentence than five forcible sodomies.

Finally, even if the Army Court needed to reassess the sentence from the second court-martial, Appellant's sentence is not proportionally correct. The Government requested confinement for fifty-five years, twenty-five for all Appellant's crimes against his second wife (including those previously affirmed) and thirty for those against the child. (JA 210–11). Proportionally, of the adjudged thirty-five-year sentence, this represents fewer than sixteen years. And this does not account for the real and distinct possibility that the factfinder attached more weight to the child sodomy offense than the Government requested. *See e.g.*, Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 Wm. & Mary Bill of Rts. J. 91, 123 (2013) (noting that punishments for sex crimes against children have become noticeably more severe over the recent decades). Appellant's reassessed sentence is arbitrary and should be set aside.

WHEREFORE, Appellant respectfully requests this Court remand this case to the Army Court to order a rehearing on the sentence.

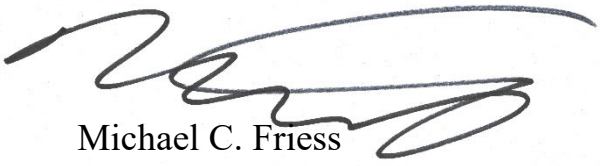
Sean Patrick Flynn
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar No. 37529

Bryan A. Osterhage
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar Number 36871



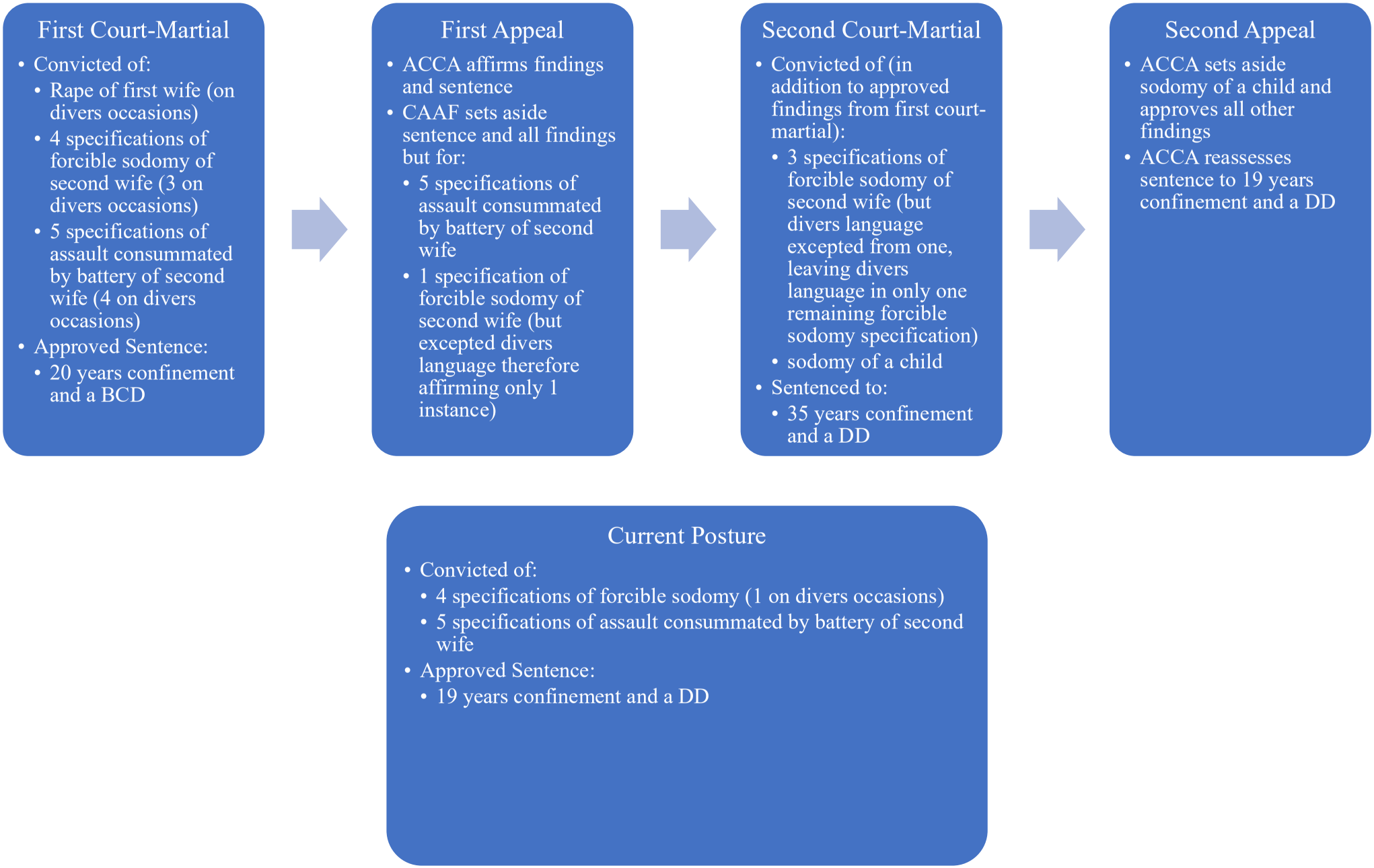
Jonathan F. Potter, Esq.
Senior Appellate Counsel
Defense Appellate Division
USCAAF Bar Number 26450

Dale McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37645



Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33185

Appendix


First Court-Martial
• Convicted of:
• Rape of first wife (on divers occasions)
• 4 specifications of forcible sodomy of second wife (3 on divers occasions)
• 5 specifications of assault consummated by battery of second wife (4 on divers occasions)
• Approved Sentence:
• 20 years confinement and a BCD
First Appeal
• ACCA affirms findings and sentence
• CAAF sets aside sentence and all findings but for:
• 5 specifications of assault consummated by battery of second wife
• 1 specification of forcible sodomy of second wife (but excepted divers language therefore affirming only 1 instance)
Second Court-Martial
• Convicted of (in addition to approved findings from first court-martial):
• 3 specifications of forcible sodomy of second wife (but divers language excepted from one, leaving divers language in only one remaining forcible sodomy specification)
• sodomy of a child
• Sentenced to:
• 35 years confinement and a DD
Second Appeal
• ACCA sets aside sodomy of a child and approves all other findings
• ACCA reassesses sentence to 19 years confinement and a DD
Current Posture
• Convicted of:
• 4 specifications of forcible sodomy (1 on divers occasions)
• 5 specifications of assault consummated by battery of second wife
• Approved Sentence:
• 19 years confinement and a DD

Certificate of Filing and Service

I certify that a copy of the foregoing in the case of United States v. Williams, Crim. App. Dkt. No. ARMY 20130582, USCA Dkt. No. 23-0006/AR was electronically filed with the Court and the Government Appellate Division on March 22, 2023.

SEAN PATRICK FLYNN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar Number 37529