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	REPLY BRIEF ON BEHALF OF 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 the Case

On March 1, 2023, this Court granted Appellant's petition for a grant of review for the above issue. (JA 1). On March 22, 2023, Appellant filed his brief with this Court. The Government responded on April 21, 2023.[1] This is Appellant's reply.

[1] The Government declined to respond substantively to Appellant's request for reconsideration before the Army Court or to Appellant's supplement to his petition requesting review before this Court.

Argument

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

The Government correctly concludes the original trial is relevant in evaluating whether a service court can reassess a sentence. (Appellee's Br. 9 ("Appellant's act of raping [his first wife] was an egregious offense . . . .")). However, with respect to the gravamen of the offense, the Government embraces the same faulty logic as the Army Court in believing the number and location of the charges and specifications matter more than the underlying evidence. (Appellee's Br. 8–9, 10). Countless examples disprove this notion.

Consider a platoon leader who, every day for years, strikes the same private in his formation every morning at the same location—for no reason. He also strikes another private, also for no reason, at four different locations at five different times. The government charges all the strikes of the first private in one specification on divers occasions, and it charges the five strikes of the second soldier in four separate specifications. Under the analysis employed by the Army Court and endorsed by the Government, if the specification involving the first private were dismissed, the gravamen of the criminal conduct would remain. That

result would be absurd. Instead, what must matter is the evidence presented. (Appellant's Br. 10).[2]

Similarly, the Government acknowledges that the sentencing authority from the first court-martial—a panel—is what matters. (Appellee's Br. 11–12). However, it paradoxically believes this factor weighs in its favor, citing an unpublished Army Court opinion. (Appellee's Br. 11–12). But that opinion, indeed even the Government's parenthetical, shows the Army Court there understood that sentencing by a panel weighs against reassessment. *United States v. Sanks*, ARMY 20130085, 2016 CCA LEXIS 182, *16 (A. Ct. Crim. App. Mar. 23, 2016) ("*[A]lthough* appellant was sentenced by a panel . . . .") (emphasis added). The Army Court just believed the totality of the circumstances—in that case—weighed in favor of reassessment. *Id.*

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

The Government claims the minimal weight the Army Court assigned to countless rapes "is of no moment," but does not attempt to—and cannot—explain why it was not an abuse of discretion to assign five percent of Appellant's culpability to a "fantastical" number of rapes (and at least two now-set-aside

[2] The Government chooses not to engage with Appellant's position that a gravamen analysis is not a binary one. (Appellant's Br. 11). The real question of gravamen is not—and should not be—whether over fifty percent of an appellant's culpability remains. The proper analysis is whether the setting aside of certain specifications fundamentally changes an appellant's culpability.

forcible sodomies) and ninety-five percent of his culpability to five forcible sodomies (captured in four specifications) plus five specifications of assault consummated by battery. (Appellee's Br. 14; Appendix to Appellant's Br.; JA 84, 122–29). Both the Army Court and the Government acknowledge the twenty-year universe they must operate in, but then provide—and defend—a sentence reassessed as if from scratch. (JA 9–10; Appellee's Br. 14–15). Here, the sentence originally imposed considered evidence from Appellant's first wife of 800–1000 rapes. (JA 67). Neither the Army Court, nor the Government, attempts to justify why all those rapes were worth only five percent—a mere one year—of Appellant's original twenty-year sentence.

Additionally, the Government suggests that sentencing arguments before a military judge serve no purpose. (Appellee's Br. at 10–11). At trial, the Government argued that Appellant was more culpable for the sodomy of a child. (JA 207–11). The Government must maintain that position now. *Cf. United States v. Swift*, 76 M.J. 210, 216–17 (C.A.A.F 2017)

Finally, while the Government concedes the dishonorable discharge should be disapproved, (Appellee's Br. 6–7), it failed to consider whether the Army Court's error impugns the entire reassessed sentence. It does. The Government asserts, "the Army Court identified the applicable law . . . ." (Appellee's Br. 15). But it did not. The Army Court failed to cite or follow *United States v. Mitchell*,

58 M.J. 446 (C.A.A.F. 2003). Just as a military judge abuses his discretion when he misstates or misunderstands the law, the Army Court's reassessed sentence here is not entitled to the "broad discretion" upon which the Government relies. *See United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) ("A military judge abuses his discretion when . . . the court's decision is influenced by an erroneous view of the law . . . ."); (Appellee's Br. 15). The Army Court abused its discretion. Its reassessed sentence is entitled to no deference. Given its earlier failing, the Army Court cannot be expected to do any more than ratify its initial reassessment and should not be given another chance. An untainted sentencing hearing is necessary.

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

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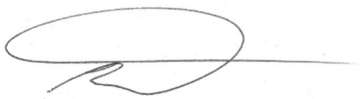

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Certificate of Filing and Service

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 April 27, 2023.

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