IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ.

Statement of the Case

On June 20, 2013, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of rape on divers occasions, four specifications of forcible sodomy, and five specifications of

assault consummated by a battery, in violation of Articles 120, 125, and 128, UCMJ, 10 U.S.C. §§ 920, 925, and 928 (2000, 2006). (JA 028–031). The panel sentenced appellant to forfeiture of all pay and allowances, reduction to E-1, confinement for twenty years, and a dishonorable discharge. (JA 030, 112). The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for twenty years, forfeiture of all pay and allowances, and reduction to the grade of E-1. (JA 030, 112). The Army Court affirmed the findings of guilt and approved the sentence. (JA 030).

This Court granted Appellant's petition for review and subsequently reversed and remanded Appellant's 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 of guilt and the sentence, finding the military judge's propensity instruction was an error, but that such error was harmless beyond a reasonable doubt. (JA 003).

This Court subsequently affirmed in part and reversed in part and set aside the rape specification, three specifications of forcible sodomy, and the sentence. (JA 004, 033). This Court affirmed one specification of forcible sodomy (Specification 1 of Charge III) by excepting "on divers occasions between on or about 21 September 2007 and on or about 7 April 2008" and substituting therefor, "on or about 21 November 2007." (JA 004, 033). This Court authorized a

rehearing on the set-aside specifications and the sentence. (JA 004, 033).

On November 14, 2018, the convening authority referred the set-aside specifications to a combined rehearing, along with two additional charges—aggravated sexual contact of a child and sodomy, in violation of Articles 120 and 125, UCMJ. (JA 004, 21–27). On November 6, 2019, a military judge, sitting alone as a general court-martial, convicted Appellant, contrary to his pleas, of three specifications of forcible sodomy and one specification of sodomy of a child.[1] (JA 159–60). The government dismissed Appellant's rape conviction with prejudice. (JA 004). The military judge sentenced Appellant to confinement for thirty-five years, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge.[2] (JA 212). On April 29, 2019, the convening authority approved the adjudged sentence and credited Appellant with 2,444 days of credit against his sentence. (JA 035).

On June 10, 2022, the Army Court set aside and dismissed Additional Charge II, sodomy of a child under the age of twelve. (JA 010). The Army Court

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[1] At the rehearing, Appellant was found guilty of one specification of forcible sodomy (Specification 2 of Charge III) by excepting "on divers occasions between on or about 8 April 2008 and on or about 21 March 2009" and substituting therefor, "on or about 4 July 2008." Appellant was found not guilty of sexual contact of a child.

[2] Appellant's sentence also included the resentencing for the one forcible sodomy conviction and the five specifications of assault consummated by a battery affirmed by this Court. *Id*. at 464–65.

reassessed the sentence and affirmed only so much of the sentence as provided for a dishonorable discharge, confinement for nineteen years, total forfeitures, and reduction to the grade of E-1.[3] (JA 010).

On October 8, 2022, Appellant filed a Petition for a Grant of Review with this Court. On March 1, 2023, this Court issued an order granting review of the issue below.

Statement of Facts

A. Appellant's crimes included multiple acts of sodomy against SW.

On October 8, 2004, Appellant married SW in South Korea. (JA 118). In November 2007, when Appellant and SW lived in Fort Lewis, Washington, Appellant began sodomizing and assaulting SW. (JA 137,139–40, 143). When Appellant and SW lived in Trabitz and Oerlenbach, Germany, Appellant watched anal sex pornography and continued to sodomize SW. (JA 129–136). Appellant would often hit SW when she told him she did not want to have anal sex, and often pushed her and pulled her hair to control her movement while he sodomized her. (JA 43–44, 46, 49).

In January 2011, Appellant grabbed SW from behind and sodomized her again. (JA 126). Appellant only stopped because SW told him she felt like she

[3] The Government adopts the diagram provided in the appendix of Appellant's Brief.

was going to have a bowel movement. (JA 127). SW went into the bathroom and noticed her anus was bleeding. (JA 128). SW informed Appellant that she was bleeding from her anus; however, he told her, "Come on. Hurry up . . . [y]ou're going to be alright . . . ." (JA 128). After SW returned from the bathroom, Appellant continued to anally penetrate SW until he fell asleep and urinated on the mattress. (JA 128).

SW's testimony about the trauma and abuse she experienced while she was married to Appellant was consistent during both of Appellant's courts-martial. (Compare JA 092–104 to 118–149).

B. Appellant was convicted of raping TW at his first court-martial, and sodomy of a child at his second court-martial.

At Appellant's first court-martial, Appellant was also convicted of raping his first wife, TW, on divers occasions. (JA 086). At Appellant's second court-martial, Appellant's stepdaughter, EW, testified that Appellant sodomized her on one occasion. (JA 113–16). Ultimately, these charges were dismissed and were not amongst the crimes the Army Court considered when they reassessed Appellant's sentence. (JA 003, 005).

Summary of Argument

The Army Court did not abuse its discretion in reassessing Appellant's sentence. The Army Court properly applied the four non-exhaustive *Winckelmann*

factors and was not "arbitrary" when it reassessed Appellant's sentence to nineteen years confinement, reduction to E-1, and total forfeitures. Although Appellant was tried by a panel at his original court-martial, this factor still favors reassessment. (JA 223). The Army Court was familiar with the crimes Appellant remained convicted of and properly determined his appropriate sentence. Even though the Army Court sentenced Appellant to a dishonorable discharge when a bad-conduct discharged was approved at his first trial,[4] this is a separate issue—which this Honorable Court can remedy—and it does not impact the Army Court's authority to reassess appellant's sentence. (JA 010, 028). Therefore, this Honorable Court should affirm only so much of the Army Court's decision that extends to the

[4] Appellant's first court-martial occurred while the 2012 version of the Manual for Courts-Martial [MCM, 2012] was in effect. At that time, Rule for Courts-Martial [R.C.M.] 810(d)(1) provided that an "*approved* sentence" from a rehearing could not be more severe than the sentence "ultimately *approved* by the convening or higher authority following the previous trial or hearing . . . ." (emphasis added). *See also* Article 63, UCMJ ("no sentence in excess of or more severe than the original sentence may be approved"). However, in the 2019 version of the MCM, Article 63, UCMJ, was revised to state that "no sentence in excess of or more severe than the original sentence may be *adjudged*". (emphasis added). Correspondingly, the 2019 version of R.C.M. 810(d)(1) was also revised to state that an "*adjudged* sentence" at a rehearing could not "exceed or be more severe than the original sentence as set forth in the judgment under R.C.M. 1111." (emphasis added). Although all three versions (2012, 2016, and 2019) of R.C.M. 801(d)(1) and Art. 63, UCMJ, create an exception to the sentence limitations for mandatory sentences, a dishonorable discharge was not a mandatory minimum sentence for forcible sodomy until the 2016 MCM was in effect. *Compare* MCM, 2012, MCM, pt. IV, ¶ 51.e.(1) *with* MCM, 2016, pt. IV, ¶ 51.e.(1).

findings and sentence of a bad-conduct discharge, confinement for nineteen years, reduction to E-1, and total forfeitures. *United States v. Mitchell*, 58 M.J. 446, 449 (C.A.A.F 2003).

Issue Presented

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

Standard of Review

This Court reviews sentence reassessments for an abuse of discretion. *United States v. Winckelmann,* 73 M.J. 11, 15 (C.A.A.F. 2013). The "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). This Court "will only disturb the [lower court's] reassessment in order to 'prevent obvious miscarriages of justice or abuses of discretion.'" *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999) (quoting *United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998)).

Law and Argument

A. The Army Court did not err in determining it could reassess Appellant's sentence.

"[C]ourts of criminal appeals act with *broad* discretion when reassessing sentences." *Winckelmann*, 73 M.J. at 15 (emphasis added). If a court of criminal

appeals "can determine to its satisfaction that, absent any error, the sentence adjudged would have been at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). When making this determination, a court "appl[ies] several non-exhaustive factors:

> (1) Dramatic changes in the penalty landscape and exposure. (2) Whether an appellant chose sentencing by members or a military judge alone . . . . (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses. (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Winckelmann, 73 M.J. at 15–16.

1. Appellant's crimes against SW capture the gravamen of criminal conduct included with the original offenses.

The gravamen of Appellant's criminal conduct were his crimes against SW which spanned a period of four years. (JA 019). *See United States v. McPherson,* ARMY 20180214, 2020 CCA LEXIS 350, at * 40 (Army Ct. Crim. App. 28 Sep. 2020) (noting the remaining sexual offenses capture the gravamen of criminal conduct included with the original trial). While addressing this non-exhaustive factor, the Army Court properly concluded that "the gravamen of criminal conduct in the original trial centered around SW and formed the basis of a significant

number of the charges and specifications that spanned a variety of dates and location[s]." (JA 009). Appellant sodomized and assaulted SW on multiple occasions. In fact, Appellant abused SW to the point where her anus bled; however, he proceeded to tell her to "Come on. Hurry up . . . [y]ou're going to be alright . . . ." (JA 128). On another occasion, SW attempted to escape from Appellant's abuse by locking herself into her daughter's bedroom to no avail. (JA 145). SW endured this assault multiple times for nearly four years. (JA 061–067). Thus, Appellant was convicted of four specifications of forcible sodomy (one on divers occasions) and five specifications of assault. (JA 006). While Appellant's act of raping TW was an egregious offense, the Army Court properly determined that the "gravamen of the criminal conduct appellant was charged with remains in the charges and specifications involving SW . . . ." (JA 009).

Appellant argues that—when the crimes occurred—the President and Congress believed rape was a more serious crime that forcible sodomy because death was an authorized punishment for rape convictions. (Appellant's Br. 10–11). *Manual for Court-Martial, United States*, (1998 ed.), pt. IV, ¶ 45.d(1); 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). Appellant's argument attempts to minimize a point they do not contest—regardless of what maximum punishment the President or Congress attempted to authorize for rape

cases in the past, there were no drastic changes to the sentencing landscape for Appellant's offenses. *Id. (*JA 009). Furthermore, when the Army Court reassessed Appellant's sentence, death was no longer an authorized punishment for rape convictions, and Appellant never faced the capital referral of his case. *See Manual for Court-Martial*, *United States* (2019 ed.), App'x. 12, at A12-8. As noted by the Army Court, Appellant's rape conviction at his original trial consisted of one specification involving TW in one location. (JA 009). In stark contrast, Appellant's remaining convictions that all involve SW consisted of four separate sodomy offenses (one on divers occasions) and five separate assault offenses (three on divers occasions) that spanned over four years and two countries: in Fort Lewis, Washington; Trabitz, Germany; Oerlenbach, Germany; Sanford, North Carolina; and Fayetteville, North Carolina. (JA 019–20, 028–35).

Appellant notes that, at the rehearing, the Government requested Appellant receive more confinement time for the child sodomy conviction than what was requested for the offenses involving SW. (Appellant's Br. 11). The Government requested Appellant be sentenced to a total of the fifty-five years confinement—twenty-five years for the crimes committed against SW and thirty years confinement for the crime committed against the minor child. (JA 210–11). The military judge sentenced Appellant to a total of thirty-five years confinement because Appellant's sentence was based upon the evidence before the military

judge and general sentencing principles—not a recommendation from the trial counsel or defense counsel. (JA 212). *See* R.C.M. 1001(g). Appellant's brief does nothing more than guess as to how much time the military judge attributed towards the child sodomy offense and the offenses committed against SW. (Appellant's Br. 11). Simply put, this *Winckelmann* factor weighs in favor of reassessment and the Army Court did not abuse its discretion when it reassessed Appellant's sentence. *See United States v. Short*, 80 M.J. 647, 655 (N-M. Ct. Crim. App. 2020) (despite dismissing one specification of resisting apprehension, the court found that the remaining specification of resisting apprehension against another person "capture[d] the gravamen" of the originally charged criminal conduct: "While not insignificant, the specification alleging resisting apprehension against the civilian PMO forms only a piece of Appellant's overall misconduct on the evening in question. We do not see a dramatic change in the sentencing landscape with the dismissal of this one specification.").

2. Appellant's trial by members.

Although Appellant was sentenced by a panel at his first trial,[5] this *Winckelmann* factor still favors reassessment. While not binding on this court, the

[5] In its *Winckelmann* analysis, the Army Court's opinion refers to Appellant's choice to be sentenced by a military judge at the rehearing when Appellant was initially sentenced by a panel. (JA 009). However, for the reasons listed above, this factor still favors reassessment.

Army Court has addressed this issue. *See United States v. Sanks*, ARMY 20130085, 2016 CCA LEXIS 182, at *16 (Army Ct. Crim. App. 23 Mar. 2016). "([A]lthough appellant was sentenced by a panel of enlisted members, we have experience dealing with cases like this involving violent crime. We are confident we can discern what punishment a panel would adjudge in this case.")

Similarly, in the present case, the Army Court highlighted their "experiences as judges on this court" and their familiarity with rape offenses. (JA 009). This experience allows the Army Court to discern what punishment a panel would have adjudged in this case. As such, this *Winckelmann* factor slightly favors reassessment.

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

Appellant suggests the Army Court cannot be familiar with the remaining offenses of forcible sodomy because it had not been an offense under the UCMJ since 2016. (Appellant's Br. 12). The fact that forcible sodomy is no longer listed as a separate offense in the Manual for Court-Martial does not preclude the Army Court's knowledge about the offense. Furthermore, the Army Court noted its familiarity with the offense of rape and was able to "reliably determine what sentence would have been imposed had Appellant not been convicted." (JA 009). In fact, this court has made a similar determination in other cases. *See generally United States v. Moffeit*, *60* M.J. 40, 41 (C.A.A.F. 2006) ("We note that the lower

court has reviewed the records of a substantial number of courts-martial involving convictions for child pornography activities and offenses involving sexual misconduct with children and has extensive experience with the level of sentences imposed for such offenses under various circumstances."). Similarly, the Army Court noted their "close review of the record of trial and [their] experience, in conjunction with the knowledge that [A]ppellant was sentenced to twenty years confinement at his first trial where he was not convicted of child sodomy . . . allows [them] to reassess and affirm" Appellant's sentence. (JA 009–10). As such, the Army Court possessed the knowledge and experience to reassess Appellant's sentence, and this *Winckelmann* factor weighs in favor of reassessment. *See also United States v. English,* ARMY 20160510, 2019 CCA LEXIS 542, at * 7 (Army Ct. Crim. App. 8 Nov. 2019) ("[W]e are familiar with the remaining offense so that we may reliably determine what sentence would have been imposed at trial based on the remaining specifications.").

B. The Army Court's reassessed sentence is not arbitrary.

Contrary to Appellant's assertion, (Appellant's Br. 13), nothing about the Army Court's reassessed sentence was arbitrary.[6] The Army Court's decision to

[6] Appellant again focuses on the Government's closing argument during the rehearing as proof that the reassessed sentence was arbitrary. (Appellant's Br. 14). However, closing arguments are not evidence, and military judges, including appellate judges, are presumed to "know the law and follow it absent clear

reassess Appellant's sentence to nineteen years confinement, reduction to E-1, and total forfeitures was well within its broad discretion afforded by *Wickelmann*. *Winckelmann*, 73 M.J. at 15. Further, Appellant's argument that the Army Court "functionally determined that 'countless' rapes . . . equated to a mere one year of Appellant's original sentence" is of no moment. (Appellant's Br. 13). This court reviews the lower court's reassessment for an abuse of discretion and will "only disturb [that] reassessment in order to prevent obvious miscarriages of justice or abuses of discretion." *Hawes*, 51 M.J. at 260 (cleaned up). Here, considering Appellant's offenses against SW consisted of four separate sodomy offenses (one on divers occasions) and five separate assault offenses (three on divers occasions) that spanned over four years and two countries, a reassessed sentence of nineteen years confinement does not amount to an "obvious miscarriage[] of justice or abuse[] of discretion." (JA 019–20, 028–35).

As it pertains to the punitive discharge, this Honorable Court should exercise its authority as it did in *United States v. Mitchell* by disapproving the dishonorable discharge and affirming only so much of the decision that extends to the findings

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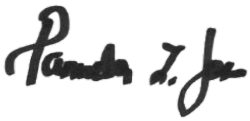
evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.AF. 2007); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) ("Certainly, appellate judges of the Courts of Criminal Appeals are deserving of no less a presumption.").

and sentence of a bad-conduct discharge, confinement for nineteen years, reduction to E-1, and total forfeitures. *Mitchell,* 58 M.J. at 449.

The Army Court was fully capable of reassessing the sentence. The Army Court identified the applicable law, applied the appropriate factors, and reached a sentence that was well within the Army Court's broad discretion in a sentence reassessment. Consequently, reassessment in this case was proper, and the Army Court did not abuse its discretion. *Hawes*, 51 M.J. at 261 (affirming the lower court's reassessment because, "[W]e are not persuaded that there has been an obvious miscarriage or abuse of discretion.")

Conclusion

The United States respectfully requests that this Honorable Court affirm only so much of the Army Court's decision that extends to the findings and sentence of a bad-conduct discharge, confinement for nineteen years, reduction to E-1, and total forfeitures. *Mitchell*, 58 M.J. at 449.



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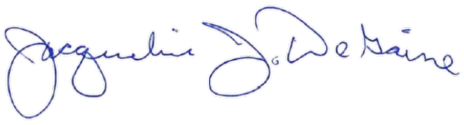

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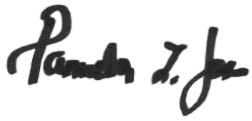

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 21, 2023.

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