UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KRIMBILL,[1] RODRIGUEZ, and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class MICHAEL A. ROBINSON
United States Army, Appellant

ARMY 20190231

Headquarters, Fort Drum
Teresa L. Raymond, Military Judge
Lieutenant Colonel Jennifer A. Neuhauser, Staff Judge Advocate

For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig J. Schapira, JA; Captain Karey B. Marren, JA (on brief).

30 December 2020

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

RODRIGUEZ, Judge:

The military judge in appellant's case erred in allowing the government to make a major change, in violation of Rule for Courts-Martial [R.C.M.] 603, to Specification 1 of Charge I (Renumbered The Specification of Charge IV). In our decretal paragraph, we set aside and dismiss The Specification of Charge IV and reassess the sentence. Additionally, appellant claims his defense counsel were ineffective for failing to elicit an alleged alibi and not calling certain witnesses who

[1] Chief Judge (IMA) Krimbill participated in this case while on active duty.

would testify about appellant's "after-work home life."[2] For the reasons set forth below, we disagree with appellant.[3]

BACKGROUND

Appellant raped and sexually assaulted his biological daughter, BR, on several occasions, across three different duty locations, when she was between the ages of seven and twelve.

The Government's Motion to Amend

Initially, the government charged appellant with rape of a child, in violation of Article 120 UCMJ, in Specification 1 of Charge I, alleging as follows:

> In that [appellant], U.S. Army, did, at or near Fort Hood, Texas, on one or more occasions between on or about 9 May 2011 and on or about 27 June 2012, engage in sexual acts, to wit: penetration of [BR's] *anus with his penis*, with [BR], a child who had not attained the age of [twelve] years.

(emphasis added). At the time the aforementioned offense was charged to have occurred, Article 120, UCMJ, did not criminalize the penetration of the anus with

[2] An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape of a child, one specification of sexual assault of a child, four specifications of sexual abuse of a child, one specification of sodomy, and one specification of obstructing justice, in violation of Articles 120b, 125, 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920b (2006 Ed. & Supp. V 2012; 2012 Ed. & Supp. II 2015; 2012 Ed. & Supp. IV 2017), 925 (2006 Ed. & Supp. IV 2011), 934 (2019 Main Ed.). The panel sentenced appellant to a dishonorable discharge, confinement for thirty years, and reduction to the grade of E-1. The military judge credited appellant with four hundred days of pretrial confinement credit and one hundred twenty days of credit pursuant to Article 13, UCMJ, for illegal pretrial punishment. The convening authority waived automatic forfeitures, directed all funds to be paid to appellant's wife, and approved the adjudged sentence.

[3] We considered appellant's other five assigned errors, as well as the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they merit neither discussion nor relief.

the penis. *See* 10 U.S.C. § 920 (2006 Ed. & Supp. IV 2011).[4] At the time of the offense in Specification 1 of Charge I, Article 125, UCMJ, criminalized "unnatural carnal copulation."[5] *See* 10 U.S.C. § 925 (2006 Ed. & Supp. IV 2011).

After referral, but prior to trial, the government submitted a motion to amend Specification 1 of Charge I to allege the offense of sodomy under Article 125, UCMJ. The government also requested to substitute the words "sexual acts" for the words "unnatural carnal copulation." The government stated in its motion that "[i]t charged the wrong article, but alleged all the elements of the correct article." The defense objected to the proposed amendment and countered that the offense, as charged, failed to state an offense.

On the morning of trial, the military judge granted the government's motion to amend Specification 1 of Charge I to allege a violation of Article 125, UCMJ, but denied the government's request to substitute the words "sexual acts" for the words "unnatural carnal copulation." The military judge stated in her ruling that the government was authorized to "[c]hange the inaccurate UCMJ violation number to the accurate one." The military judge further elaborated that the amendment "[d]oesn't prejudice the defense because the language of the specification gives [the defense] an understanding of what they need to defend against and that changing merely the number of the UCMJ violation itself is a minor change." The military judge then directed the government to renumber Specification 1 of Charge I as The Specification of Charge IV.

Appellant's Alibi and The List of Witnesses

In Specification 1 of Charge II, appellant was convicted of raping BR at or near Fort Hood, Texas, on one or more occasions, between on or about 28 June 2012 and on or about 10 September 2012. At trial, BR testified that all of the rapes that occurred in Texas took place in her house. BR's mother, ER, testified the family lived in three houses while in Texas. ER explained that they moved from the second to the third home in 2011, and then moved to Germany in September 2012. On

[4] The statute defined the term "sexual act" as "[c]ontact between the penis and the vulva . . . ." 10 U.S.C. § 920(t)(1)(A) (2006 Ed. & Supp. IV 2011).

[5] The 2019 *MCM* eliminates the offense of forcible sodomy under Article 125, UCMJ, and criminalizes the non-consensual penetration of the anus under Article 120, UCMJ. *See* 10 U.S.C. § 920(g) (2019 Main Ed.).

appeal, appellant asserts his trial defense counsel were ineffective for failing to elicit evidence of appellant's location in Specification 1 of Charge II.[6]

In support of his claim, appellant submitted an affidavit and handwritten timeline that he provided his trial defense counsel describing his whereabouts from 16 July 2012 through 10 September 2012. Specifically, appellant states he "[a]ttended the Senior Leaders Course (SLC) . . . at Fort Jackson, South Carolina from 16 July 2012 until 24 August 2012." At the time appellant attended SLC, he knew his family would be moving to Germany in September 2012. For that reason, appellant's family moved out of their home at Fort Hood "[a]t the end of May or beginning of June 2012." Appellant and his family then stayed in Killeen, Texas, with his mother-in-law and father-in-law, IK and WK, "[i]n a mobile home until approximately 10 July 2012, when [appellant] left with [his] entire family to drive to South Carolina for SLC." After appellant completed SLC, appellant and his family "[s]tayed in the same mobile home with [IK and WK] from approximately 28 August 2012 until [appellant and his family moved] to Germany on or about 10 September 2012.

Appellant supplements his ineffective assistance of counsel (IAC) claim in the matters he raised personally pursuant to *Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellant claims he "[p]resented between [fifteen] and [eighteen] witnesses for trial defense counsel to interview." Appellant asserts "[t]hese witnesses would have been able to present evidence of appellant's 'after-work home life.'" Appellant states that "[to his] knowledge, none of these witnesses were contacted by trial defense counsel."

This court ordered affidavits from appellant's trial defense counsel to address appellant's claims of IAC.[7] *United States v. Robinson*, ARMY 20190231 (Army Ct. Crim. App. 19 Nov. 2020) (Order). At trial, appellant was represented by Captain (CPT) RD and Major (MAJ) DL. This court's order requested counsel to explain

[6] Appellant also argues his location was relevant to Renumbered Specification 5 of Charge II. We need not address this assertion because appellant was acquitted of that specification.

[7] Appellant's *Grostefon* submission also lists several other deficiencies he claims in his trial defense counsel's performance. We have afforded all of appellant's IAC claims full and fair consideration. Assuming without deciding the truth of appellant's claims, we find no relief is warranted as appellant fails to establish any prejudice. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) (holding the performance and prejudice prongs required for relief for an allegation of IAC can be analyzed independently, and if appellant fails either prong, his IAC claim fails).

whether they were aware of the timeline of appellant's whereabouts from the end of May 2012 through 10 September 2012 and, if so, why they decided not to present that evidence. Additionally, this court requested counsel confirm whether they received the list of fifteen to eighteen witnesses appellant claims he provided them.

Captain RD and MAJ DL confirm in their affidavits that appellant informed them of his alibi and the timeline. Captain RD enclosed the same handwritten timeline that appellant provided the court. In the timeline, appellant wrote, "26 Aug 2012: We started back to Fort Hood, TX to out-process. At this time we stayed with my in-laws again." In response to appellant's assertion that he told his defense counsel the family lived in a mobile home after SLC, Captain RD states:

> The defense is not aware of an assertion prior to trial that following SLC [appellant] and his family lived in a mobile home . . . until their PCS to Germany on 10 September 2012. [Appellant] indicated to his defense counsel that during that time he lived at his in-laws' home in Killeen, Texas, which is near Fort Hood, Texas.

Captain RD discussed appellant's handwritten timeline with him and they determined "[t]here was some period of time, both before and after SLC, that both [appellant] and his family were near Fort Hood, Texas." According to MAJ DL, the conversation with appellant ended with the understanding that "it did not matter whether the family lived on-post at Fort Hood or in a [mobile home] just off-post." The defense team then made a tactical decision not to cross-examine BR on which particular house near Fort Hood, Texas, her family lived in at the time of the rape. Captain RD explains BR was approximately six years old at the time, "[a]nd it was possible that the members would understand and overlook an inaccuracy as to location, if they found the [rape] occurred during the charged timeframe in the home where BR lived with her family."

In regard to appellant's claim he provided fifteen to eighteen witnesses for his defense counsel to interview, CPT RD confirms she received this list and submitted it as an enclosure. The list of potential witnesses does not contain any contact information for any of them, except for appellant's mother-in-law. Captain RD attempted to contact all of the witnesses through Microsoft Outlook or Facebook. She was able to make contact with several of the people, "[b]ut most of them told [CPT RD] . . . that they did not remember [appellant] well enough to provide any detailed information about him or his family." Of the witnesses CPT RD was able to

make contact with, none appeared to provide information helpful for the defense case.[8]

LAW AND DISCUSSION

A. Major Change

We first address appellant's claim the military judge erred in allowing the government to make a major change to Specification 1 of Charge I.[9] "Whether a change made to a specification is minor is a matter of statutory interpretation and is reviewed de novo." *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)). The military is a notice pleading jurisdiction. *United States v. Sell*, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1956). It is the government's responsibility by virtue of its control of the charge sheet to place an accused on notice of the offense against which he must defend. *See United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010).

Rule for Courts-Martial [R.C.M.] 603(a)[10] provides that "[m]inor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in the preferred charge or specification, or

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[8] For example, Command Sergeant Major CP stated appellant has an "integrity issue," and he had no relevant information about appellant's family. Colonel SS described appellant's work performance as "adequate," and he did not have much one-on-one interaction with him. Colonel SS had no relevant information regarding appellant's family.

[9] Alternatively, appellant claims The Specification of Charge IV fails to state an offense. Appellant argues "The Specification of Charge IV alleges a legal impossibility: that appellant violated Article 125, UCMJ, by engaging in a sexual act." Appellant further argues "[b]y combining the term 'sexual act' with descriptive language that does not meet the definition of a sexual act, the government created an uncertain and ambiguous specification that lacked a sufficiently definite legal meaning to have put appellant on notice of the charge against him." As we find the amendment to Specification 1 of Charge I was a major change in violation of R.C.M. 603, we do not reach appellant's claim that The Specification of Charge IV failed to state an offense.

[10] This court's discussion references the version of R.C.M. 603 in the 2016 edition of the *Manual for Courts-Martial, United States* [*MCM*], which the parties relied upon at trial. We note the language of R.C.M. 603 in the 2019 *MCM* differs slightly, but not substantively, from the language in the 2016 *MCM*.

which are likely to mislead the accused as to the offense charged." The R.C.M. 603(a) Discussion clarifies what constitutes a minor change and includes "[t]hose necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors." Rule for Courts-Martial 603(d) provides that, when "changes or amendments to charges or specifications other than minor changes [are] made over the objection of the accused . . . . [t]he charge or specification affected [must be] preferred anew." *See also Reese*, 76 M.J. at 300-02. The plain language of R.C.M. 603(d) does not discuss prejudice, and our Superior Court has overruled any precedent requiring a separate showing of prejudice. *Id.*

In appellant's case, the government argues the amendment to Specification 1 of Charge I "simply corrected a mis-numbered offense." We disagree that the government's amendment was a "simple" correction or scrivener's error designating the wrong article under the UCMJ. Redesignation-type errors contemplate a scenario where the specification as originally drafted stated an offense and the redesignation of the article merely corrects the scrivener's error to allege the proper article. *See United States v. Brewster*, 32 M.J. 591 (A.C.M.R. 1991), *pet. denied*, 34 M.J. 1 (C.A.A.F. 1991). In *Brewster*, the appellant was charged with solicitation to commit rape in violation of Article 82, UCMJ. *Id.* Pretrial, the military judge allowed the government to redesignate the charge as a violation of Article 134, UCMJ, because solicitation to commit rape was not an offense under Article 82, UCMJ. *Id.* The military judge also allowed the government to insert the word "wrongfully" in the specification before the word "solicit." *Id.* The court held these were minor changes because the redesignation of an article under the UCMJ is not a major change if the specification, as originally drafted, alleged an offense. *Id.* at 593 (citing *United States v. Lovejoy*, 20 U.S.C.M.A. 18, 20, 42 C.M.A. 210 (C.M.A. 1970)).

The critical distinction between appellant's case and *Brewster* is that Specification 1 of Charge I, as originally drafted, does not allege an offense under the UCMJ. Specification 1 of Charge I alleges appellant raped BR by penetrating her anus with his penis in violation of Article 120, UCMJ. However, the version of Article 120, UCMJ, in effect at the time of the charged offense did not criminalize the penetration of the anus by the penis.[11] Additionally, Specification 1 of Charge I uses the exact language "sexual act." "Sexual act" is a term of art specifically defined under the statue as "[c]ontact between the penis and the vulva . . . ."[12] In other words, the government drafted Specification 1 of Charge I to allege appellant

[11] *See* 10 U.S.C. § 920 (2006 Ed. & Supp. IV 2011).

[12] *See* 10 U.S.C. § 920(t)(1)(A) (2006 Ed. & Supp. IV 2011).

"engag[ed] in sexual acts [contact between the penis and the vulva], to wit: penetration of [BR's] anus with his penis." Thus, as originally drafted, it was unclear whether appellant was charged with vaginally or anally penetrating BR, or perhaps even both. *See United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) ("[t]he requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against . . . .").

Further, we are not confident the government originally intended for Specification 1 of Charge I to allege a violation of Article 125, UCMJ. *See United States v. Watford*, 2017 CCA LEXIS 68, *4 (Army Ct. Crim. App. 30 Jan. 2017). In *Watford*, the government charged the appellant with one specification of sexual exploitation of a minor, in violation of Article 134, UCMJ, citing to 18 U.S.C. § 2251A. *Id*. at *2-3. However, section 2251A prohibits the *buying or selling of children* for sexual exploitation; the government should have charged section 2251(a) which criminalizes *enticing or persuading a minor to engage in sexually explicit conduct*. *Id*. at *3 (emphasis added). Our court in *Watford* found that although the disputed specification "[c]ited the incorrect statute . . . [it] alleged, expressly or by necessary implication, each element necessary to state an offense under 18 U.S.C. § 2251(a)." *Id*. at *4. Our court also recognized that, at arraignment, the government described the specification as "enticing or persuading a minor to engage in sexually explicit conduct . . . ." *Id*.

Unlike *Watford*, the record here creates doubt as to whether the government intended to charge appellant with a violation of Article 125, UCMJ, in Specification 1 of Charge I. At arraignment in appellant's case, the government announced the general nature of the charges as follows:

> The general nature of The Charges in this case [is] one charge containing one specification of rape of a child and one specification of indecent liberty with a child, in violation of Article 120, UCMJ; one charge containing three specifications of rape of a child, two specifications of sexual assault of a child, and seven specifications of sexual abuse of a child, in violation of Article 120b, UCMJ; and one charge containing one specification of obstructing justice, in violation of Article 134, UCMJ.

Notably missing from the description of the general nature of the charges at appellant's arraignment is the word "sodomy." The muddled Specification 1 of Charge I, combined with the government's description of the general nature of the charges, were insufficient to put appellant on notice as to what offense and under what legal theory he must defend. *See, e.g., United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012), *cert. denied* 567 U.S. 937 (2012). In *Ballan*, the appellant pleaded not guilty to rape of a child in violation of Article 120, UCMJ, but guilty to the

lesser included offense of indecent acts with a child in violation of Article 134, UCMJ. *Id*. at 31. On appeal, the CAAF held that the Article 134 offense was not a lesser included offense of Article 120, and the change from Article 120 to Article 134 was a major change. *Id*. at 32. Ultimately, however, the CAAF found no prejudice because the appellant himself proposed the major change, pleaded guilty to it, explained to the military judge why he was guilty, and benefited from the change. *Id*.

We heed the CAAF's warning in *Ballan*—that a similar major change in a contested case may implicate a Fifth Amendment due process violation and a violation of an accused's Sixth Amendment right to "be informed of the nature and cause of the accusation." *Id*. at 35-36. The change to Specification 1 of Charge I changed a non-offense into an offense, sodomy. Appellant was not arraigned on a sodomy charge, nor did he consent to this major change that resulted in him facing a sodomy charge at trial. Therefore, the court-martial did not have jurisdiction over the amended charge created in The Specification of Charge IV, and we set aside and dismiss appellant's conviction for that charge and specification in our decretal paragraph.

B. Ineffective Assistance of Counsel

Next, we review appellant's claim of ineffective assistance of counsel de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015); *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). The test for ineffective assistance of counsel requires appellant to prove his counsel's performance was deficient and the deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Under the first *Strickland* prong, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. To decide this issue, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. The presumption of counsel's competence is rebutted by "a showing of specific errors made by defense counsel" that were "unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

First, appellant claims his counsel were deficient for failing to elicit evidence he was not at Fort Hood, Texas for the time period charged in Specification 1 of Charge II, 28 June 2012 through 10 September 2012. Appellant contends he could not have raped BR during that time period because he was away from his family attending SLC in South Carolina from 16 July 2012 until 24 August 2012. Appellant's trial defense counsel agree they were aware of appellant's attendance at SLC during that time period. However, counsel aptly point out that appellant was at

or near Fort Hood, Texas with his family for a period of the time charged in Specification 1 of Charge II. Specifically, from 28 June 2012 through 15 July 2012, and from 25 August 2012 through 10 September 2012, appellant was at or near Fort Hood, Texas. Appellant does not dispute that. Therefore, appellant was at or near Fort Hood, Texas with his family during some of the period charged in Specification 1 of Charge II.

Appellant also highlights BR's testimony at trial that all of the rapes that occurred in Texas took place in *her house*. Appellant claims that during the period charged in Specification 1 of Charge II, his family did not live in their home. Appellant claims they moved out of their home prior to 28 June 2012, but does not indicate where they temporarily lived prior to him attending SLC. Upon returning from SLC, appellant claims the family lived in a mobile home. Appellant asserts evidence the family lived in a mobile home after SLC would have contradicted BR's testimony that the rape occurred "in her house."[13]

In essence, appellant requests we find his counsel were deficient for failing to elicit evidence that appellant was only located at the charged location for several days during a seventy-five day period as charged, and BR's "house" at the time she was approximately six years old was technically a "mobile home." In reviewing the record, appellant's affidavit, and his counsels' affidavits, two things are abundantly clear and undisputed: (1) appellant was located at Fort Hood, Texas for a period of time charged in Specification 1 of Charge II; and (2) appellant lived with his family in some sort of "home" for the period of time charged. We need not decide whether counsels' performance was deficient for not eliciting evidence appellant attended SLC or the family lived in a mobile home because we find that even if this evidence were presented, appellant has not met his burden in demonstrating that the result of the proceedings would have been different. *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) ("[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

Lastly, we address appellant's broad-based assertion his counsel were deficient for failing to interview fifteen to eighteen witnesses who would present

[13] We note defense counsels' affidavits state appellant never mentioned living in a mobile home. To the extent appellant's affidavit conflicts with his counsels' affidavits, we determine a post-trial fact-finding hearing is unnecessary under the first *Ginn* factor. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (post-trial evidentiary hearing is unnecessary "if the facts alleged in the affidavit would not result in relief even if any factual dispute were resolved in appellant's favor").

evidence of appellant's "after-work home life." Captain RD does not dispute she received this list. Appellant states in his *Grostefon* matters, not in a sworn affidavit, that "[to his] knowledge, none of these witnesses were contacted by trial defense counsel." Captain RD's sworn affidavit states in detail the significant effort she made to track down these witnesses for whom appellant provided no contact information. Of appellant's witnesses CPT RD was able to interview, none provided appellant any helpful information. In fact, one of the witnesses was harmful and stated appellant had integrity issues. In light of appellant's very weak and unspecific proffer of expected testimony of these witnesses, we find no prejudice to appellant.

Accordingly, appellant falls far short of meeting his evidentiary burden to establish a claim of ineffective assistance of counsel. *See United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004).

C. Sentence Reassessment

In light of our determination the military judge erred in allowing the government to make a major change, in violation of R.C.M. 603, to Specification 1 of Charge I (Renumbered The Specification of Charge IV), we now turn to appellant's sentence. We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of the circumstances presented by appellant's case and in accordance with the principles articulated by our Superior Court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

In conducting a sentence reassessment, a Court of Criminal Appeals must "assure that the sentence is appropriate in relation to the affirmed findings of guilty, [and] that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *Sales*, 22 M.J. at 307-08 (quoting *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985)). "[I]f the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error . . . ." *Sales*, 22 M.J. at 308.

Pursuant to *Winckelmann*, we use four factors to guide our determination whether to reassess a sentence when applying them to appellant's case.

First, we consider whether there is a dramatic change in in the penalty landscape and exposure. The dismissal of The Specification of Charge IV does not impact appellant's exposure to confinement. Appellant's maximum punishment remains confinement for life without eligibility for parole. We find this does not constitute a dramatic change in the penalty landscape.

Second, we consider whether appellant chose sentencing by members or a military judge alone. In this case, appellant was sentenced by officer members. While we are "more likely to be certain of what a military judge would have done as opposed to members," we are similarly certain of what this officer panel would have done in light of the other factors. *Winckelmann*, 73 M.J. at 16. We acknowledge our Superior Court has stated this factor "could become more relevant where charges address . . . conduct unbecoming," but this consideration does not change our overall conclusion in this particular case. *Id*.

Third, we consider whether the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses and, in a related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses. This factor weighs heavily in our determination that we may confidently reassess appellant's sentence. Appellant stands properly convicted of three specifications of rape of a child, one specification of sexual assault of a child, four specifications of sexual abuse of a child, and one specification of obstructing justice. We find these offenses clearly capture the gravamen of the criminal conduct—appellant's repeated rape and sexual abuse of his biological daughter when she was between the ages of seven and twelve. These offenses involve the most significant and aggravating circumstances addressed at the court-martial.

Fourth, we consider whether the remaining offenses are of the type that this court has experience and familiarity with to reliably determine what sentence would have been imposed at trial. This factor also strongly supports reassessing the sentence, as this court has ample experience with similar facts and cases. Our experience informs us that we can reliably determine what sentence would have been imposed at trial.

In sum, considering the facts of appellant's case and the totality of the circumstances, we find we are able to determine to our satisfaction that, "absent any error, the sentence adjudged would have been of at least a certain severity . . ." *Sales*, 22 M.J. at 308. To this extent, we affirm appellant's sentence of a dishonorable discharge, confinement for thirty years, and reduction to the grade of E-1.

CONCLUSION

The findings of guilty of The Specification of Charge IV and Charge IV are SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED. The sentence is AFFIRMED.

All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored. *See* UCMJ arts. 58b(c), 75(a).

Chief Judge (IMA) KRIMBILL and Judge WALKER concur.

FOR THE COURT:

[redacted]

MALCOLM H. SQUIRES, JR.
Clerk of Court