

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
WALKER, EWING, and PARKER  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Sergeant GENE N. WILLIAMS**  
**United States Army, Appellant**

ARMY 20130582

Headquarters, Fort Bragg  
Karin G. Tackaberry, Military Judge (arraignment and pretrial motions)  
Tara A. Osborne, Military Judge (pretrial motions)  
Stephen E. Castlen, Military Judge (trial)  
Christopher Martin, Military Judge (rehearing)  
Colonel Paul S. Wilson, Staff Judge Advocate (pretrial)  
Colonel Michael O. Lacey, Staff Judge Advocate (recommendation)  
Lieutenant Colonel Jerrett W. Dunlap, Jr., Staff Judge Advocate (addendum)  
Lieutenant Colonel Jeffrey S. Thurnher, Staff Judge Advocate (rehearing)

For Appellant: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Captain Thomas J. Travers, JA; Captain Alexander N. Hess, JA (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Samantha E. Katz, JA (on brief).

10 June 2022

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MEMORANDUM OPINION ON FURTHER REVIEW  
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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

PARKER, Judge:

Appellant raises multiple assignments of error, one of which warrants discussion and relief. We find the statute of limitations had expired for the child

sodomy offense in the Specification of Additional Charge II, and we grant relief in our decretal paragraph.<sup>1</sup>

### BACKGROUND

To understand the charging history of the child sodomy offense, it is necessary to provide a brief procedural history of appellant's case. In 2013, appellant was tried before a mixed panel of officer and enlisted members at a general court-martial located at Fort Bragg, North Carolina. Contrary to his pleas, appellant was convicted of one specification of rape, four specifications of forcible sodomy, and five specifications of assault consummated by battery, in violation of Articles 120, 125, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925 and 928 [UCMJ]. He was sentenced to a dishonorable discharge, confinement for twenty years, total forfeitures of pay and allowances, and reduction to E-1. While appellant had originally been charged with aggravated sexual contact of a child and child sodomy,<sup>2</sup> the prosecution dismissed those charges without prejudice.<sup>3</sup>

On appeal, this court affirmed the findings and sentence, and then the Court of Appeals for the Armed Forces (CAAF) remanded the case for reconsideration by this court in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). This court affirmed the findings and sentence on remand. In 2018, the CAAF set aside the rape

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<sup>1</sup> We have given full and fair consideration to appellant's other assigned errors, as well as those personally asserted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they warrant neither discussion nor relief. We also acknowledge both parties' responses to our order concerning COL (retired) Steven P. Haight's participation in this case first as a former appellate judge with this court and later as the Chief of Government Appellate Division. After full and fair consideration of the issue and submissions by the parties, we find it warrants no relief. See *United States v. Williams*, ARMY 20130582 (Army Ct. Crim. App. 17 May 2022) (order).

<sup>2</sup> Charge Sheet: In that Sergeant Gene N. Williams, U.S. Army, did, at or near Eschenbach, Germany and Trabit, Germany, on divers occasions between on or about 1 April 2009 and on or about 30 April 2009, engage in sexual contact, to wit: touching the buttocks of Ms. [REDACTED], a child who had not attained the age of 12 years; and, In that Sergeant Gene N. Williams, U.S. Army, did, at or near Trabit, Germany, between on or about 1 April 2009 and on or about 30 April 2009, commit sodomy with Ms. [REDACTED] a child under the age of 12 years.

<sup>3</sup> The government dismissed these offenses after arraignment but prior to introduction of evidence.

specification, three specifications of the forcible sodomy, and the sentence, and affirmed one specification of forcible sodomy by exceptions and substitutions and the five specifications of assault consummated by battery. The CAAF authorized a rehearing on those offenses that were set aside and the sentence. *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018).

In 2019, appellant was tried at a combined rehearing before a military judge at a general court-martial located at Fort Leavenworth, Kansas. The rehearing offenses consisted of the three specifications of forcible sodomy set aside by the CAAF, and two additional charges: one specification of aggravated sexual contact with a child and one specification of sodomy of a child under twelve, in violation of Articles 120 and 125, UCMJ. These two charges were the same charges dismissed without prejudice in appellant's first trial. One specification of rape, for which appellant was found guilty at his original trial, and which was set aside by the CAAF and authorized for rehearing, was dismissed by the government without prejudice. The two additional charges were preferred on 30 August 2018, and were received by the summary court-martial convening authority (SCMCA) on 12 September 2018. Contrary to his pleas, appellant was found guilty of the three specifications of forcible sodomy<sup>4</sup> and one specification of child sodomy.<sup>5</sup> His sentence for these offenses, along with the resentencing for the five specifications of assault consummated by battery, was a dishonorable discharge, confinement for thirty-five years, total forfeitures of pay and allowances and reduction to E-1.<sup>6</sup>

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<sup>4</sup> Appellant was found guilty of one of the specifications of forcible sodomy by exceptions and substitutions, on one occasion in lieu of divers occasions.

<sup>5</sup> Charge Sheet: In that Sergeant Gene N. Williams, U.S. Army, did, at or near Trabit, Germany, between on or about 1 April 2009 and 30 April 2009, commit sodomy with Ms. ■■■, a child under the age of 12 years. Appellant was found not guilty of sexual contact with a child.

<sup>6</sup> Although we find no error or prejudice, we note that in the convening authority Action dated 6 August 2020, the convening authority states that "Specification 1 of Charge II, Specifications 2, 3, and 5 of Charge III, and the sentence . . . were set aside on 7 August 2018, by the U.S. Court of Appeals of the Armed Forces." We note that the CAAF set aside Specifications 2, 4, and 5 of Charge III (although it was referred to as Charge II in the CAAF opinion based on the renumbering of charges prior to the rehearing). See *Williams*, 77 M.J. at 464. We find the reference to Specification 3 in the Action to be a scrivener's error and that the Action was intended to state Specifications 2, 4, and 5 were set aside by the CAAF. We also note that Specification 3 of Charge III was dismissed by the military judge.

## LAW AND DISCUSSION

### *A. Statute of Limitations*

This court conducts a de novo review of statute of limitations issues. *United States v. McPherson*, 81 M.J. 372, 376 (C.A.A.F. 2021) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)). Akin to the facts of *McPherson*, appellant did not raise the statute of limitations defense at trial nor did the military judge instruct appellant of it as a possible defense. Appellant will have forfeited any statute of limitations defense by failing to raise the issue at trial unless he can establish plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). This requires appellant to show: “(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.” *United States v. Briggs*, 78 M.J. 289, 295 (C.A.A.F. 2019) (citation omitted). “Plain error is assessed at the time of appeal.” *Id.* (citation omitted). Using the reasoning from our higher court in *McPherson*, we conclude appellant has a statute of limitations defense and it is plain and obvious error not to apply it. We likewise conclude this error resulted in a material prejudice to appellant’s substantial right because had *McPherson* been decided at the time of appellant’s trial or rehearing, “it requires no speculation to believe that Appellant would have sought dismissal.” *Briggs*, 78 M.J. at 296.

First, to understand how *McPherson* applies to the child sodomy offense under Article 125, UCMJ, of which appellant was convicted, we must determine the statute of limitations for this particular offense in this case. For this, we look to the version of Article 43, UCMJ, that was in effect at the time charges were received by the SCMCA. The Specification of Additional Charge II alleges the child sodomy of ■ occurred between on or about 1 April 2009 and on or about 30 April 2009, in violation of Article 125, UCMJ. While appellant was initially charged at his first trial in 2011 with this offense, the prosecution dismissed this charge without prejudice. Appellant was again charged at his rehearing with this offense when the government re-preferred the child sodomy on 30 August 2018. The SCMCA received this charge on 12 September 2018. On 12 September 2018, ■ was approximately 17 years old. The Article 43(b), UCMJ, in effect at this time was codified at 10 U.S.C. § 843(b) (Supp. IV 2016). Although this version states child abuse offenses can be tried by court-martial during either the life of the child or within ten years of the offense being committed (whichever is longer), Congress failed to classify Article 125, UCMJ, as a child abuse offense. Because of this omission, the applicable period of limitations for appellant’s Article 125, UCMJ, offense defaults to a five-year statute of limitations. *See* Article 43(b)(1); *United States v. McPherson*, 81 M.J. 372, 383 (C.A.A.F. 2021) (affirming this court’s decision to dismiss charges due to the expiration of the statute of limitations enacted by Congress in the 2016 update to Article 43, UCMJ). Therefore, and in accordance with the CAAF’s opinion in *United States v. McPherson*, the Specification of Additional Charge II for child sodomy was statutorily time-barred.

After finding there was plain error in this case, we grant appellant relief in our decretal paragraph by setting aside and dismissing the child sodomy specification.

*B. Sentence Reassessment*

With our determination that we must set aside the child sodomy offense, we now address whether we are able to reassess appellant's sentence. Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013).

We also have the certainty of knowing from the record what appellant was sentenced to in his first trial, which did not include a conviction for the child sodomy offense. A comparison of appellant's convictions at his first trial and his rehearing provide some context for our current sentence reassessment. At appellant's first trial, he was sentenced to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for twenty years, and a dishonorable discharge, for his guilty findings to the following offenses:<sup>7</sup>

Specification 1 of Charge II, <sup>8</sup> Article 120 (rape of [REDACTED])
Specification 1 of Charge III, <sup>9</sup> Article 125 (sodomy of [REDACTED] Fort Lewis, WA)
Specification 2 of Charge III, Article 125 (sodomy of [REDACTED] Trabitze Germany)
Specification 4 of Charge III, Article 125 (sodomy of [REDACTED] Oerlenbach Germany)
Specification 5 of Charge III, Article 125 (sodomy of [REDACTED] Sanford, NC)
Specification 1 of Charge IV, Article 128 (assault consummated by battery)
Specification 2 of Charge IV, Article 128 (assault consummated by battery)
Specification 3 of Charge IV, Article 128 (assault consummated by battery)
Specification 5 of Charge IV, Article 128 (assault consummated by battery)
Specification 6 of Charge IV, Article 128 (assault consummated by battery)

<sup>7</sup> To prevent confusion we refer to the charges and specifications as they appeared on the promulgating order from appellant's original trial.

<sup>8</sup> Set aside by the CAAF in *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018); not retried.

<sup>9</sup> Affirmed by the CAAF by excepting "on divers occasions" language and "substituting therefor, on or about 21 November 2007," thereby affirming only one sodomy offense involving [REDACTED] at Fort Lewis, WA. *Williams*, 77 M.J. at 464 (internal quotation marks omitted).

At appellant's rehearing, he was sentenced to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for thirty-five years, and a dishonorable discharge, for his guilty findings to the following offenses:<sup>10</sup>

Specification 1 of Charge III, <sup>11</sup> Article 125 (sodomy of [REDACTED] Fort Lewis, WA)
Specification 2 of Charge III, Article 125 (sodomy of [REDACTED] Trabitze Germany)
Specification 4 of Charge III, Article 125 (sodomy of [REDACTED] Oerlenbach Germany)
Specification 5 of Charge III, Article 125 (sodomy of [REDACTED] Sanford, NC)
Specification 1 of Charge IV, <sup>12</sup> Article 128 (assault consummated by battery)
Specification 2 of Charge IV, <sup>13</sup> Article 128 (assault consummated by battery)
Specification 3 of Charge IV, <sup>14</sup> Article 128 (assault consummated by battery)
Specification 5 of Charge IV, <sup>15</sup> Article 128 (assault consummated by battery)
Specification 6 of Charge IV, <sup>16</sup> Article 128 (assault consummated by battery)
Additional Charge II, Article 125 (sodomy of a child under the age of 12)

There are four relevant differences between appellant's convictions at his original trial and his rehearing. One, at appellant's original trial he was found guilty of one specification of rape which was later set aside by the CAAF and not retried. Two, at the rehearing appellant was found guilty of one specification of sodomy of a child under the age of 12, which this court is now setting aside. Three, in the specification involving sodomy of [REDACTED] at or near Fort Lewis, Washington, the CAAF affirmed only one occurrence of sodomy by excepting out the language of "divers occasions." And four, in the specification involving sodomy of [REDACTED] at or near Trabitze, Germany, the military judge, by way of exceptions and substitutions, found appellant guilty of only one occurrence of sodomy, as opposed to "divers

<sup>10</sup> We refer to the charges and specifications of appellant's rehearing as they appear on the charge sheet and rehearing promulgating order.

<sup>11</sup> Affirmed by the CAAF. *Williams*, 77 M.J. at 464.

<sup>12</sup> Affirmed by the CAAF, *Williams*, 77 M.J. at 464.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

occasions.”<sup>17</sup> All other findings of guilty remain the same. With our setting aside of the sodomy of a child under the age of 12, appellant remains convicted of the same offenses approved by the convening authority from the original trial with the exception of one specification of rape that the CAAF set aside and the government elected to dismiss at the rehearing, and the two sodomy specifications that are no longer divers occasions but one occasion. A comparison of appellant’s convictions is relevant to understand this court’s sentence reassessment analysis, and sentence reassessment limitations.

This court’s sentence reassessment must begin with referencing Rule for Courts-Martial [R.C.M.] 810(d), which provides guidance on sentence limitations for rehearings, new trials, other trials and remands. R.C.M 810(d) states, in part:

[T]he new adjudged sentence for offenses on which a rehearing, new trial, or other trial has been ordered shall not exceed or be more severe than the original sentence as set forth in the judgement under R.C.M. 1111. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be imposed shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited in this rule, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty.

In accordance with the rule set out in RCM 810(d), this court is limited in our sentence reassessment to no greater than appellant’s twenty years of confinement that was approved by the convening authority at his original trial.

Additionally, Article 63, UCMJ, mirrors our sentence reassessment limitation imposed by R.C.M. 810(d). Article 63(a), UCMJ, dictates that “no sentence in excess of or more severe than the original sentence may be adjudged, unless the sentence is based upon a finding of guilty of an offense not considered upon the merit in the original proceedings . . . .” Appellant’s adjudged confinement of thirty-five years at his rehearing appeared to comply with Article 63(a), UCMJ, in that he was found guilty of a child sodomy offense that was not considered on the merits at his original trial. However, with the child sodomy offense being set aside by this court, that is no longer the case and appellant is no longer found guilty of an offense

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<sup>17</sup> For Specification 2 of Charge III at appellant’s rehearing, the military judge found appellant “Guilty, except the words ‘on divers occasions between on or about 8 April 2008 and on or about 21 March 2009’ substituting therefore the words, ‘on or about 4 July 2008.’”

that was not considered at his original trial. The setting aside of the child sodomy offense negates the basis on which the thirty-five years of confinement was a permissible sentence. Thus, this court must begin appellant's sentence reassessment with a sentence limitation of no greater than twenty years of confinement, as limited by his original trial.

Prior to our sentence reassessment we must also acknowledge that appellant is no longer convicted of sodomy on divers occasions for the two specifications involving [REDACTED] at or near Fort Lewis, Washington and Trabitz, Germany, of which he was convicted at his original trial, and was included in the twenty-year sentence. We begin our sentence reassessment with that change in sentencing landscape also noted and with the limitation of confinement remaining at twenty years.

In *United States v. Gonzalez*, our superior court held the permissible actions our court can take after setting aside a specification includes dismissing the set aside specification and reassessing the sentence. 79 MJ. 466, 470 (C.A.A.F. 2020). The sentence landscape in this case is unique in that we have the benefit of knowing appellant's confinement sentence at his first trial, twenty years, which was without the conviction for child sodomy but with a conviction for rape, and appellant's confinement sentence at the rehearing, thirty-five years, with the conviction for child sodomy but not rape. Additionally, we find the totality of the *Winckelmann* factors to favor reassessment. 73 M.J. at 14–15. First, we find no dramatic changes in the penalty landscape and exposure, as appellant still faces a maximum punishment of confinement for life without eligibility for parole for the remaining offenses, not including the child sodomy. Second, appellant chose sentencing by a military judge which favors reassessment. *Id.* Third, we find the remaining offenses captures the gravamen of criminal conduct in this case, in light of the offenses for which appellant was convicted in his original trial. The gravamen of criminal conduct in the original trial centered around [REDACTED] and formed the basis of a significant number of the charges and specifications that spanned a variety of dates and locations, compared to one specification involving [REDACTED] on one date and in one location. The gravamen of the criminal conduct appellant was charged with remains in the charges and specifications involving [REDACTED], along with the child sodomy charges which we have already addressed. Finally, to account for the rape charge that was set aside by the CAAF at appellant's first trial, we find that, based on our experiences as judges on this court, we are familiar with the offense of rape such that we may reliably determine what sentence would have likely been imposed had appellant not been convicted. Our close review of the record of trial and our experience, in conjunction with the knowledge that appellant was sentenced to twenty years of confinement at his first trial where he was not convicted of child sodomy, and that he was sentenced to thirty-five years at his rehearing where he was



convicted of an additional offense of child sodomy, allows us to reassess and affirm only so much of appellant's sentence as provides for a dishonorable discharge and confinement for nineteen years, total forfeitures, and reduction to the grade of E-1.<sup>18</sup>

### CONCLUSION

On consideration of the entire record, the finding of guilty to the Specification of Additional Charge II is SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED. Only so much of the sentence as provides for a dishonorable discharge, confinement for nineteen years, total forfeitures, and reduction to the grade of E-1 is AFFIRMED.

Senior Judge WALKER and Judge EWING concur.

FOR THE COURT:



JOSEPH P. TALBERT  
Assistant Deputy Clerk of Court

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<sup>18</sup> The fifteen-year confinement difference between the first trial and rehearing, based off of the child sodomy conviction, provides us some insight that appellant likely received significant additional confinement specifically for the child sodomy conviction that we are now setting aside.